VERDICTUM.IN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.119 OF 2025

1. Vishwambhar s/o Namdev Nikam,
Age 56 years, Occu. Agril.,

2. Anant s/o Namdev Nikam,
Age 52 years, Occu. Agril.,
Both R/o Kasarjavla,
Tq. and Dist. Latur. … **Applicants.**
(Ori. Def. Nos.6 & 7)

Versus

1. Sow. Sunanda w/o Maheshankar Suryawanshi,
Age 45 years, Occu. Household,
R/o. Prakash Nagar, Latur.

2. Prabhavati w/o Sopan Salunke,
Age-70 years, Occu. Household,
R/o. Khuntegaon, Tq. Ausa, Dist. Latur.

3. Rajabai w/o Babru Khedkar,
Age 67 years, Occu. Household,
R/o. Takli (B.), Tq. and Dist. Latur.

4. Sagarbai w/o Uddhav Gavhane,
Age 60 years, Occu. Household,
R/o Palashi, Tq. Renapur. Dist. Latur.

5. Jalasabai w/o Namdev Nikam,
Age 90 years, Occu. Household,
R/o Kasarjavla, Tq, and Dist. Latur.

6. Digambar @ Baburao S/o. Namdev Nikam (died),
Deceased though L.Rs. namely;

6/1) Rajabai w/o Digambar Baburao,
Age-50 years, Occu. Household,

6/2) Vilas S/o. Digambar Baburao,
Age: 23 years, Occu, Education,

VERDICTUM.IN

6/3) Sow. Reshma Digambar Baburao,
Age: 45 years, Occu. Household,
R/o. As above.

6/4) Sow. Swati Digambar Baburao,
Age: 42 years, Occu. Household,
(6/1 to 6/4) R/o. Takli, Tq. and Dist. Latur.

7. Pawan s/o Anant Nikam,
Age: 20 years, Occu. Education,
R/o Kasarjavla, Tq. and Dist. Latur.

8. Gunvant S/o. Namdev Nikam (died),
Deceased though L.Rs.,

8/1) Yash s/o Gunvant Nikam,
Age: 19 years, Occu. Education,
R/o Kasarjavla, Tq. and Dist. Latur.

9. Shalubai w/o. Yuvraj Dhok,
Age: 48 years, Occu. Household,
R/o. Saman Darga, Tq. Ausa, Dist. Latur.

10. Sachin s/o Vishwambhar Nikam,
Age: 18 years, Occu. Household,
R/o Kasarjavla, Tq. and Dist. Latur.

11. Nitin s/o Vishwambhar Nikam,
Age: 20 years, Occu. Household,
R/o Kasarjavla, Tq. and Dist. Latur.

12. Murlidhar s/o Jotiba Nikam,
Age: 38 years, Occu. Agri..
R/o Kasarjavla, Tq. and Dist. Latur.

13. Sugrive s/o Jotiba Nikam,
Age: 35 years, Occu. Agri.,
R/o Kasarjavla, Tq. and Dist. Latur. … **Respondents.**

(Res. No. 1 is ori. Pl. &
R.Nos.2 to 13 ori. Def.)

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Advocate for Applicants : Mr. Sushant V. Dixit.
Advocate for Respondents : Mr. Swapnil A. Deshmukh.

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VERDICTUM.IN

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 25.08.2025
PRONOUNCED ON : 03.09.2025.

JUDGMENT :-

1. Present revision is directed against an order dated 28.02.2023 below Exh.31, refusing to reject plaint under Order 7 Rule 11 of CPC in R.C.S.No.224 of 2022. Applicants are original defendant Nos.6 and 7. Respondent No.1 is original plaintiff. Respondent No.2 is her mother who is defendant No.1. The parties are referred by their original status in the suit.

2. Respondent No.1/plaintiff has filed R.C.S.No.224 of 2022 for declaration, partition, possession, perpetual injunction and mesne profit. Namdev Nikam was maternal grandfather of the plaintiff. Namdev had four daughters and four sons. His one of the daughters is defendant No.1 Prabhavati, mother of the plaintiff. Namdev and his wife Jalasabai are no more. The suit lands are undivided joint family properties of his sons and four daughters. The children are entitled to 1/8th share. It is contended that plaintiff's maternal uncles stopped giving agriculture yield to her mother

VERDICTUM.IN

and her 1/8th share is denied. This is the cause of action to file suit.

3. The plaintiff has claimed following reliefs :

> *"1. That the plaintiff may kindly be declare as a owner and possessor the suit land property of awarded 1/2nd share in 1/8th share of her mother legal share in the suit property.*
>
> *2. That, the plaintiff is entitle to receive mesne profit up to be extent of her 1/8th share legal share of date festival Gudipadva of 2021 to till this date.*
>
> *3. The decree be sent to the collector u/s 54 C.P.C. for partition and possession.*
>
> *4. That, the passing of the decree of perpetual injunction the defendants their servant and anybody through them kindly be restrain permanently from creating any third party interest of the suit property till disposal of the suit.*
>
> *5. That, Any other just and equitable relief may kindly be granted in favour of plaintiff, for which she is entitle to."*

4. Applicants and other defendants submitted application Exh.31 under Order 7 Rule 11 contending that plaintiff being granddaughter is not entitled to maintain a suit for partition and claim any share when her mother defendant No.1 is alive and she is not claiming any partition. The plaintiff has also not

VERDICTUM.IN

challenged the alienation made by the defendants. Such a suit is not maintainable. Plaintiff did not file say to the application. By impugned order, application Exh.31 was rejected.

5. Learned counsel would submit that plaintiff is not a coparcener having any birth right. It's a case of obstructed heritage and therefore such a suit would not lie. It is further submitted that defendant No.1 has not claimed any share or partition. The suit is premature and cannot be entertained. It is further submitted that there is no cause of action and whichever is shown is illusory. It is submitted that learned Trial Judge committed patent illegality in holding that unless there is a full-fledged trial, the issue raised by the present applicants cannot be decided and serious injustice would be caused.

6. Per contra, learned counsel Mr. Swapnil Deshmukh supports impugned order. It is submitted that as per Section 6, the plaintiff is the coparcener. He would submit that if all prayers in the plaint are considered then suit is maintainable. It is further submitted that the defendants are not giving share to plaintiff's mother and creating third party interest is sufficient to institute the suit.

VERDICTUM.IN

7. I have considered rival submissions of the parties. I have gone through plaint which is the only document pressed into service by both the parties to decide application filed under Order 7 Rule 11. Undisputedly, suit lands are ancestral properties of Namdev who was having four daughters and four sons. Plaintiff's mother Prabhavati is one of the daughters who is alive and who is shown to be defendant No.1. Plaintiff is claiming half share in 1/8th share allottable to her mother. The prayers of mesne profit and separate possession of the share are consequential. The prayer of perpetual injunction is coached in a fashion of interlocutory prayer.

8. Plaintiff is claiming share in the joint family property of her maternal side. The suit lands are joint family properties of her maternal grandfather, mother, maternal side aunts and uncles. It is necessary to examine as to whether the plaintiff is member of coparcenary and the suit lands are coparcenary properties. As per amended Section 6 of The Hindu Succession Act, 1956, a daughter is given a birth right and she is at par with son. In the present matter, plaintiff's mother Prabhavati can be said to have a birth right, but she has not filed suit for partition and separate possession. She has not made any

VERDICTUM.IN

grievance that she has been denied her share in the joint family property.

9. It is necessary to consider Section 6 (1)

> *"**6. Devolution of interest in coparcenary property.**—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—*
>
> *(a) by birth become a coparcener in her own right the same manner as the son;*
>
> *(b) have the same rights in the coparcenery property as she would have had if she had been a son;*
>
> *(c) be subject to the same liabilities in respect of the said coparcenery property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener."*

10. As per Section 6(1)(a), a daughter only can become a coparcener in her own right in the same manner as the son. Plaintiff is the granddaughter and she is not placed at par with daughter. As per clause (b), a daughter is given same right in the coparcenary property. The concept of coparcenary is made clear by many decisions and lastly by the authoritative pronouncement in the matter of ***Vineeta Sharma Vs. Rakesh Sharma ; (2020) 9 SCC 1***. Following extracts are relevant.

VERDICTUM.IN

*"**24.** Coparcenary property is the one which is inherited by a Hindu from his father, grandfather, or great grandfather. Property inherited from others is held in his rights and cannot be treated as forming part of the coparcenary. The property in coparcenary is held as joint owners.*

***25.** Coparcener heirs get right by birth. Another method to be a coparcener is by way of adoption. As earlier, a woman could not be a coparcener, but she could still be a joint family member. By substituted section 6 with effect from 9.9.2005 daughters are recognised as coparceners in their rights, by birth in the family like a son. Coparcenary is the creation of law. Only a coparcener has a right to demand partition. Test is if a person can demand a partition, he is a coparcener not otherwise. Great great-grandson cannot demand a partition as he is not a coparcener. In a case out of three male descendants, one or other has died, the last holder, even a fifth descendant, can claim partition. In case they are alive, he is excluded.*

***26.** For interpreting the provision of section 6, it is necessary to ponder how coparcenary is formed. The basic concept of coparcenary is based upon common ownership by coparceners. When it remains undivided, the share of the coparcener is not certain. Nobody can claim with precision the extent of his right in the undivided property. Coparcener cannot claim any precise share as the interest in coparcenary is fluctuating. It increases and diminishes by death and birth in the family.*

***27.** In Sunil Kumar & Anr. v. Ram Parkash & Ors., (1988) 2 SCC 77, the Court discussed essential features of coparcenary of birth and sapindaship thus:*

VERDICTUM.IN

> *"17. Those who are of individualistic attitude and separate ownership may find it hard to understand the significance of a Hindu joint family and joint property. But it is there from the ancient time perhaps, as a social necessity. A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. They are bound together by the fundamental principle of sapindaship or family relationship, which is the essential feature of the institution. The cord that knits the members of the family is not property but the relationship of one another.*
>
> *18. The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like. It is a narrower body than a joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenership is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degrees can offer spiritual ministration to an ancestor. Only males can be coparceners.*

11. Thus, in the present matter, suit lands cannot be said to be coparcenary property of the plaintiff. Those are coparcenary property of her mother defendant No.1. But mother is not coming forward claiming partition. Therefore, learned counsel Mr. Dixit is right in contending that plaintiff cannot claim partition. She is not coparcener and suit lands are not the coparcenary properties.

12. My attention is also adverted to concept of unobstructed and obstructed heritage which are again explained by Supreme Court in *Vineeta Sharma's* judgment. Relevant extract is paragraph No.48.

VERDICTUM.IN

*"**48.** In Mitakshara coparcenary, there is unobstructed heritage i.e. apratibandha daya and obstructed heritage i.e. sapratibandha daya. When right is created by birth, it is called unobstructed heritage. At the same time, the birthright is acquired in the property of the father, grandfather, or great-grandfather. In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue, it is called obstructed heritage. It is obstructed because the accrual of right to it is obstructed by the owner's existence. It is only on his death that obstructed heritage takes place. Mulla on Hindu Law has discussed the concept thus:*

> *"216. Obstructed and unobstructed heritage. Mitakshara divides property into two classes, namely, apratibandha daya or unobstructed heritage, and sapratibandha daya or obstructed heritage.*
>
> *(1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner.*
>
> *Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather, is unobstructed heritage as regards his own male issue i.e. his son, grandson, and great-grandson.61 His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.*
>
> *Property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue, is called obstructed heritage. It is called*

VERDICTUM.IN

obstructed, because the accrual of right to it is obstructed by the existence of the owner.

Thus, property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere spes successionis, or a bare chance of succession to the property, contingent upon their surviving the owner.

(2) Unobstructed heritage devolves by survivorship: obstructed heritage, by succession. There are, however, some cases in which obstructed heritage is also passed by survivorship."

13. The plaintiff has not acquired any birth right. Therefore, there is no unobstructed heritage. She is not lineal descendant of paternal ancestor. She is claiming partition of the lands of maternal grandfather. It's a case of obstructed heritage.

14. The reliance is placed on the judgment of privy council in the matter of ***Muhammad Husain Khan and others Vs. Kishva Nandan Sahai ; AIR 1937 PC 233***. In that case, one Ganesh Prasad was the propositus. He was owner of landed properties and he was survived by son Bindeshri Prasad and daughter-in-law Giri Bala. Bindeshri Prasad had suffered money decree at the instance of creditor and the properties attached were sold in auction. He died and was survived by his

VERDICTUM.IN

wife. The sale was challenged by Giri Bala. A defence was taken that she became owner being legatee under a Will executed by Ganesh Prasad during his lifetime. The question was as to whether the Will was valid or not. It was challenged on the ground that testator had no authority to dispose of the property because the suit properties were inherited by testator from his maternal grandfather Jadu Ram. The following are the relevant paragraph.

> *"The rule of Hindu law is well settled that the property which a man Inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquhes jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by this appeal is whether the son acquires by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather. Now, Vijnanesvara, the author of Mitakshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th sloka of the first section of the first chapter of Mitakshara, which deals with inheritance, is as follows: "It is a settled point that property in the paternal or ancestral estate is by birth." But Colebrooke apparently used the word "ancestral" to denote grand-paternal, and did not intend to mean that in the estate which devolves upon a*

VERDICTUM.IN

person from his male ancestor in the maternal line his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnanesvara, which has been translated by Colebrooke as "ancestral", is paitamaha which means belonging to pitamaha. Now, pitamaha ordinarily means father's father, and, though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of, his father. For instance, In the 5th sloka of the fifth section of the first chapter, it is laid down that in the property "which was acquired by the paternal grandfather the ownership of father and son is notorious; and, therefore, partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share. Now, this is the translation of the sloka by Colebrooke himself, and it is significant that the Sanskrit word, which is translated by him as "paternal grandfather", is pitamaha. There can, therefore, be no doubt that the expression "ancestral estate" used by Colebrooke in translating the 27th sloka of the first section of the first chapter was intended to mean grand-paternal estate. The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the

VERDICTUM.IN

male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

The estate which was inherited by Ganesh Prasad from his maternal grandfather cannot, in their Lordships' opinion, be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kalinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title.

For the reasons above stated, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal should be dismissed with costs. They-will humbly advise His Majesty accordingly."

15. It is held that the estate was inherited from maternal grandfather and that was not ancestral property in which Bindeshri Prasad could have any interest jointly. It is clear from the above observations that if the property is inherited from the paternal side then and then only it can be treated to be ancestral property giving birth right to son or daughter. The same ratio can be made applicable in the present case. It is

VERDICTUM.IN

rightly submitted by learned counsel Mr. Dixit that plaintiff does not have any interest as long as her mother is alive and she does not claim any partition or share in the property of her father.

16. Learned counsel for the respondents relied on the judgment of ***Uttam Vs. Saubhag Singh and others ; (2016) 4 Supreme Court Cases 68***. My attention is adverted to paragraph No.14. The facts are distinguishable. It was not a case of the property of the maternal grandfather, rather property of propositus Jagannath Singh is ancestral property on paternal side. No reliance can be placed on the judgment.

17. The cause of action shown in the plaint is denial of share to plaintiff's mother and plaintiff herself. Her mother is not the plaintiff. During lifetime of mother, plaintiff cannot claim any partition. It is incomprehensible as to why her mother is unable to file suit for partition and possession. Therefore, it's a case of no cause of action. Plaintiff has no locus standi to file suit. The cause of action shown in the plaint especially in paragraph Nos.5, 6 and 7 is illusory. It's a fit case to exercise power under Order 7 Rule 11 of CPC. The suit is likely to consume time of the Court. The bar of law is camouflaged by devious and clever

VERDICTUM.IN

drafting of a plaint. I am of the considered view that learned Trial Judge committed grave error of jurisdiction in rejecting the suit.

18. Another facet of the matter is that by implication of Section 14 of the Act, the plaintiff's mother defendant No.1 will become absolute owner of the property once she is allotted a share in the property. Being absolute owner, the share or estate will be at her disposal. If she dies intestate then only plaintiff will have half share in her estate. Due to Section 14, the plaintiff cannot be said to have any vested right or interest in the property or share allottable to her mother. In such circumstances, permitting the Trial Court to proceed with the suit would be exercise in futility.

19. The Trial Judge has not dealt with the above aspects of the matter and failed to exercise jurisdiction vested with it. Impugned order is unsustainable. I, therefore, pass following order :

ORDER

(i) Civil Revision Application is allowed and order dated 28.02.2023 passed by 6th Joint Civil Judge Junior

VERDICTUM.IN

Division, Latur below Exh.31 in R.C.S. No.224 of 2022 is quashed and set aside.

(ii) Application Exh.31 stands allowed and plaint in R.C.S. No.224 of 2022 stands rejected.

(SHAILESH P. BRAHME, J.)

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vmk/-