

PAPER FOR FIRST WORKSHOP FOR THE JUDICIAL OFFICERS, TO BE HELD ON 22.11.2014.

SUMMARY

Sub Topic - Devolution of interest in coparcenary property with special reference to amended Section 6 of Hindu Succession (Amendment Act), 2005.

1)- Before looking to the amended provisions of section 6 of Hindu Succession Act it will be useful to see the meaning of " coparcenary, coparcenary property and coparceners."

Coparcenary : A Hindu coparcenary is a narrower body than the joint family, only males who acquire by birth an interest in the coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grand-sons and great-grand sons constitute a coparcenary.

Coparcenary property : Means the property which consists of ancestral property or of joint acquisitions, or of property thrown in the common stock and accretion to such property.

Coparcener : One who share (equally) with others' inheritance in the estate of a common ancestor.

Hindu Succession Act, 1956 (position before 09.09.2005)

2)- Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956 to lay down uniform and comprehensive system of inheritance. It applies to all the Hindus including Buddhists, Jains and Sikhs. The Act reformed Hindu personal law and gave woman greater property rights allowing her ownership rights instead of limited rights in property.

3)- Section 6 provides for devolution of interest in coparcenary property. It did not in any way interferes with the Mitakshara mode of devolution of joint family by survivorship, however, confers some rights on certain female in joint family property on the demise of a coparcenar. It lays down that the Mitakshara joint family property will continue to devolve by survivorship but if a Mitakshara coparcenar dies leaving behind a female heir or male heir claiming through female, then his interest will devolve by succession and not by survivorship. It also provides a device of notional partition to

determine share of legal heirs of the deceased coparceners. However, the Act did not provide any right to daughter in respect of the partition of the property or any right to demand partition of the property or even claim a share in coparcenary property. Though the Act has given ownership rights to women but she was not given birth right in joint family property like a son which amounts to discrimination and violative of the equal rights of women guaranteed by Constitution in relation to property rights.

4)- Again as per Section 23 of the Act married daughter is denied right to residence in the paternal home unless widowed, deserted or separated from her husband and female heirs have been disentitled to ask for partition in respect of dwelling house occupied by members of joint family until the male heirs choose to divide their respective shares therein. Another restriction is the establishment of the right to will the property. A man has full testamentary power over his property including his interest in the coparcenary property.

5) Object of amendment to section 6 :

The parliament felt that the non-inclusion of daughters in the Mitakshara Coparcenary property was

causing discrimination to the daughters on the ground of gender and was therefore breach of fundamental rights of equality provided in the constitution and hence the law was changed.

Section 6 of Hindu Succession Act after amendment (Amendment Act), 2005.

6) The Hindu Succession Act came into force on 17th June, 1956. Fundamental changes have been brought about in the Hindu Succession Act, 1956 by amending it recently in 2005. The basic change is that Section 6 has been substituted by a new section. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as a son. The daughter would hold property to which she is entitled as a coparcener with all the incidents, rights and liabilities of coparcenary property and would be construed as property being capable of being disposed off by her by either a will or any other testamentary disposition. These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability to which a daughter was subjected.

7) The implications of this fundamental change are wide. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenary property. Where under the old law, since a female could not act as Karta of the joint family, as a result of the new provision, she could also become Karta of the joint Hindu family.

8) Sub section (2) stipulates that any property to which a female Hindu becomes entitled, under sub section (1), would be held by her with all the incidents of coparcenary ownership.

9) Sub section (3) stipulates that on the death of such coparcener, there shall be a deemed division of the property to which such coparcener is entitled, as if a partition had taken place. A notional partition and division has been introduced by way of a deeming fiction. This section is limited to the interest of a coparcener in property of a joint Hindu family, governed by Mitakshara law.

10) Sub section (4) relates to pious obligation. The new sub section states that, after the commencement of the

amendment, no court shall recognize the right of a creditor to proceed against the son, grandson or great-grandson of a debtor, for debts contracted by the father, grand-father or great-grandfather solely on the ground of pious obligation. The doctrine of pious obligation thus stands abrogated to the extent that the specified heirs are not liable to satisfy such debts solely on the ground of pious obligation.

11)-- Sub section (5) states that nothing contained in this section shall apply to a partition affected before 20 December, 2004. The Explanation to the sub-section stipulates that partition refers to any partition made by the execution of a deed of partition duly registered under the Registration Act or partitions affected by a decree of a court. This section is prospective and any partition before the specified date has been left unaffected. It is thus, only a partition that takes place after the specified date that is governed by the provisions of this section. This is, since any partition that is effected after the amendment has to be in conformity with the new provision. The explanation to the section states that for the purpose of the section, a partition takes within its sweep any partition that

has been effected by execution of a deed of partition which must be registered under the Registration Act and also covers within its scope a partition by a decree of a court.

12)- Citations on the sub topic :

(i)-- Preliminary decree of partition can be revised :

The Hon'ble Supreme Court in the case of "Ganduri Koteswaramma and another V/s Chakiri Yanadi and another", reported in **2012 (1) Mh.L.J. 613** held that preliminary decree can be revised due to amendment in section 6 of Hindu Succession Act, if the final decree was not passed before commencement of the amended section.

(ii)-- Alienation of suit properties after 9.09.2005 not protected :

The Hon'ble Bombay High Court in the case of "Babu Dagadu Awari -Vs- Baby Namdev Lagad and others", reported in **2014 (4) Mh.L.J. 608**, held that alienation of coparcenary properties by sale-deed executed after 9.09.2005 is not protected by law and transaction is null and void.

iii)-- Suit for partition by daughter :

Relying upon the judgment of Hon'ble Supreme Court in the case of "Ganduri Koteswaramma and anr. -Vs- Chakiri

Yanadi and anr.", reported in **2012 (1) Mh.L.J. (SC) 613** and S. Sai Reddy -Vs- S. Narayana Reddy, reported in **1991 AIR SCW 488**, the Hon'ble Bombay High Court in the case of "**Babu -Vs- Baby**", reported in **2014 (4) Mh. L.J. 608** held that the daughter has right to file suit for relief of partition in respect of coparcenary property though she was born prior to 9.09.2005 and her father was alive.

Scope & Applicability as observed in the recent judgment.

13)-- In the recent judgment of our Hon'ble High Court (Full Bench), in the case of "Badrinarayan -Vs- Omprakash" (**2014 (5) Mh.L.J. 434**), discussed scope and applicability of amended Section 6.

14)-- Amended section 6 applies to daughters born prior to 17th June, 1956 or thereafter (between 17th June, 1956 and 8th September, 2005), provided they are alive on 9th September, 2005 i.e. on the date when the Amendment Act of 2005 came into force. Admittedly, amended section 6 applies to daughters born on or after 9th September, 2005.

15)- It is held that a bare perusal of sub-section (1) of section 6 of Hindu Succession Act, 1956 would, clearly show that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 9th September, 2005 will become a coparcener by birth, but the legislative intent in enacting clause (b) and (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force. Hence, if a daughter of a coparcenar had died before 9th September, 2005, since she would not have acquired any rights in the coparcenary property, her heirs would have no right in the coparcenary property. Since section 6(1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act, heirs of such a deceased daughter cannot claim benefits of the Amendment.

**Preliminary issue with reference to Sec.9-A and
Order XIV Rule 2 of the Code of Civil Procedure.**

16)- Sec.9-A is inserted in the Code of Civil Procedure by Maharashtra Amendment with effect from 19.12.1977. It lays

down that where an objection to the jurisdiction of civil court to entertain a suit and to pass interim orders therein is raised, the court should decide the question of jurisdiction in the first instance. Sub-section (2), however empowers the court to grant any such interim relief as it may consider necessary till issue of jurisdiction is decided.

17)- The essence of Sec.9-A is that the issue of jurisdiction should not only be decided at the interlocutory stage, but at the threshold before the court proceeds with the matter on any other issue. For if it has no jurisdiction to try and entertain the suit as presented then obviously it should not dwell upon any other manner at all. Only exception is provided by sub-section (2) to grant at interim relief pending determination of preliminary issue of jurisdiction.

18)- The objection as to jurisdiction can be with respect to the subject matter of the suit, the pecuniary value or the place of suing.

19)- In the case of "Meher Sing V/s Deepak Sawhny" reported in **1998(3) Mh.LJ 940 = 1999(1) Bom. CR 107**, the

question that referred to the Division Bench for its consideration was whether while deciding the preliminary issue of jurisdiction as contemplated under Section 9-A of the Code of Civil Procedure (Maharashtra Amendment) Act, 1977 the parties are required to be given opportunity to lead evidence. It observed that;

20)- In the result we hold that if section 9-A is not added, then at interim stage, the court is not required to decide the issue of jurisdiction finally and the court by referring to the averments made in the plaint, would ordinarily determine whether or not the court has jurisdiction to try the suit. However, it is apparent that section 9-A is added with a specific object to see that objection with regard to jurisdiction of the court is decided as a preliminary issue. According to the Legislature, the practice of granting injunctions without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after

proper adjudication. Adjudication would require giving of opportunity to the parties to lead evidence, if required.

Order XIV Rule 2 :

21)- Sub-rule (1) of Rule 2 of Order XIV provides that the suit must be tried as a whole and not piecemeal unless it involves question of jurisdiction or bar created by any law. Sub-rule (2) provides limited exception to the ordinary rule of trial contained in sub-rule (1) and empowers the court to frame preliminary issue regarding jurisdiction of the court and bar to a suit created by any law, when such issue can be disposed of as issue of law only.

22)- The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit. The Code confers no jurisdiction upon

the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

**Stages of operation of Section 9-A & Order 14,
Rule 2.**

23)- In the case of "Satpuda Tapi Parisar Sahkari Sakhar Karkhana Ltd V/s Jagruti Industries and anr." (2008(4) **Mh.LJ 471**), it is observed that an application for framing of issue relating to jurisdiction of the court can be filed at any stage of the proceedings in the suit. The provisions of Sec.9-A of the Code are attracted only when the conditions stated in that provision are satisfied at the time when question of jurisdiction is raised before the court. Once the stage contemplated under Section 9-A of the Code is over (i.e. the application for interim orders has been decided), then these provisions lose their mandatory character and significance. Thereafter the application for framing an issue relating to jurisdiction and its determination in accordance with law would be controlled by the provisions of Order 14, Rule 2 of the Code. However, if an

application for grant or vacation of reliefs specified under Section 9-A of the Code has already been decided by the Court of competent jurisdiction, in that event, the proceedings in the suit would be controlled by the provisions of Order 14, Rule 2 of the Code. The formation of opinion and exercise of discretion by the Court cannot be regulated by any straight jacket formula and essentially it must be left in the discretion of the Court, depending on the facts and circumstances of a given case. The Court will obviously exercise such jurisdiction applying the well accepted canons of civil jurisprudence. In other words and construed objectively, the provisions of Section 9-A are not mandatory and subject to what has been stated above, it may not be necessary for the Court to decide the issue at the threshold. If the application for interim relief is pending, Section 9-A of the Code will operate with all its rigour and irrespective of the stage of such application.

24)- Thus, Section 9-A operates at a particular stage of the proceedings of the suit while provisions of Order 14 Rule 2 are attracted at any stage of the suit.

Rejection of plaint (Order 7 Rule 11).

25)- Order 7 Rule 11 empowers a court to reject the plaint where the plaint does not disclose cause of action, where relief claimed is undervalued and plaintiff failed to correct the valuation within time limit, where the plaintiff failed to pay deficit court fees within time frame or where suit is barred by any law. Amendment of 1999 and 2002 added two more grounds; i.e. the plaint can be rejected if it is not filed in duplicate or where the provisions of Order 7 Rule 9 are not complied with.

26)- While deciding the application under Order 7 Rule 11, it is not necessary to call for the written statement. It may be decided merely by going through the averments made in the plaint. Order 7 Rule 11 of the Code cast duty on the court to reject the plaint for non-disclosure of cause of action. Irrespective of any objection taken by the defendant, it is the duty of the court to see if the plaint really discloses any cause of action or if the plaint is barred under the provisions of any law. Disputed question cannot be decided at the time of considering an application under Order 7 Rule 11. While considering an application under Order 7 Rule 11, the court cannot reject a

particular portion of the plaint. It can reject the entire plaint, for the reason that in such eventuality, the provisions of Order 6 Rule 16 are applicable.

27)- In the case of "Kamlesh & Ors V/s Lajpat Rai Sharma & Ors" (2008) 12 SCC 577, the Apex Court held that it is the duty of the court to frame issue regarding limitation and if it comes to the conclusion that the plaint is time barred, it must reject the plaint.

Conclusion :-

28)- Sec.9-A of C.P.C. requires the court to determine objection to the jurisdiction of the court as a preliminary issue, it applies when plaintiff has filed any application for interim relief.

29)- Order 14 Rule 2 provides that the court has discretion to dispose of the case or any part of it relates to either jurisdiction of the court or bar to the suit created by any law for the time in force. Except in the situation covered by sub-rule (2) court must dispose of a suit as a whole, try all issues of law and fact together, and accordingly pronounce judgment on all such issues.

30)- Order 7 Rule 11 clause (d) provides that where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force, the court should reject the plaint.

**Obstruction to execution with reference to
Order XXI Rule 97 to 106 of the Code of
Civil Procedure.**

Introduction :

31)- Order XXI Rule 97 to 106 are related to resistance or obstruction to the delivery of possession to decree holder or purchaser. Rule 97 is permissive and not mandatory and does not compel the decree-holder or auction purchaser to apply this rule. The basic purpose to introduce Order XXI Rule 97 of CPC is to ensure that an objection raised by stranger to the decree claiming title over the suit property, the claim should be heard and decided by the executing court itself. Rule 104 of Order XXI lays down that every order made under Rule 101 or 103 shall be subject to the result of any suit that may be pending on the date of the commencement of the proceedings.

A conjoint reading of Order 21 Rules, 97, 98, 99 and 101 C.P.C. projects the following picture :

32)- If a decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order 21 Rule 35, then the decree-holder has to move an application under Order 21, Rule 97, for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order 21 Rule 97, sub-rule (2), read with Order 21 Rule 98. It is obvious that after such adjudication, if it is found that the resistance or obstruction was occasioned without just cause by the judgment-debtor or by some other person at his instigation or on his behalf, then such obstruction or resistance would be removed as per Order 21, Rule 98, sub-rule (2) and the decree-holder would be permitted to put in possession. Even in such an eventuality the order passed would be treated as a decree under Order 21 Rule 101, and no separate suit would lie against such order meaning thereby, the only remedy would be to prefer an appeal before the appropriate appellate Court against such deemed

decree.

33)- If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot of account of his absence from the place or for any other valid reason, then his remedy would lie in filing an application under Order 21, Rule 99, C.P.C. claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication then as enjoined by Order 21 Rule 98, sub-rule (1), C.P.C., the Executing Court can direct the stranger applicant under Order 21, Rule 99, to be put in possession of the property or if his application is found to be without substance, it has to be dismissed. Such an order passed by the Executing Court disposing of the application one way or the other under Order 21, Rule 98, sub-rule (1) would be deemed to be a decree as laid down by Order 21 Rule 103, and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order 21, rule 101.

34)- The relevant provisions would indicate that it is for the decree holder to take proceedings against the judgment debtor or any other person claiming right under him who obstructs delivery of immovable property. Rule 97 enables the decree holder to file an application and after adjudication, the Court may allow the application directing him to be put in possession if the obstruction is found unreasonable or dismiss the petition if it turns out to be an unsustainable one. In so far as Rule 99 is concerned, if any person other than this judgment-debtor is dispossessed from a immovable property by the decree-holder or the property has been sold in execution of a decree, if the dispossession is caused by the Court auction purchaser, then person dispossessed may prefer a petition to the executing court complaining of such dispossession.

35)-- When any petition filed by the decree-holder under Rule 97 or by the person dispossessed as described under Rule 99 of Order 21 of the Code, it shall be adjudicated by the executing court and filing of separate suit is specifically barred under Rule 101 of Order 21. The words “all questions arising between the parties to a proceeding on an application under

Rule 97” would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties e.g. if the obstructionist admits that he is a transferee pendente lite, it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97 (2) of the Code, executing court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would

be the result of an adjudication contemplated in the subsection. It is clear that executing court can decide whether the resistor or obstructor is a person bound by the decree and he refused to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97 (2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination, if the Court deems it necessary.

36)- The Hon'ble Apex Court in "Bramhadeo Choudhary - Vs- Rishikesh Prasad Jaiswal, reported in **1997 (1) Mh.L.J. (SC) 817**" while dealing with Order XXI Rule 97, 101, and 35 of C.P.C. held as under :

“That it was not in dispute that the obstructionist was prima facie a stranger to a decree. When an application under Order XXI Rule 97 is moved by a decree holder who complains about resistance or obstruction offered by any person to the decree holder in his attempt at obtaining

possession and who wants such obstruction or resistance to be removed, a lis arises between the decree holder under Order XXI Rule 97 on one hand and the obstructionist or resisting party on the other. When such lis arises, it has to be adjudicated upon as enjoined by Order XXI Rule 97 (2) C.P.C.. The D.H. can not bypass such obstruction and insist on re-issuance of warrant for possession under Order XXI Rule 35 with the help of the police force as that would amount to bypassing and circumventing the procedure laid down under Order XXI Rule 97 in connection with the removal of obstruction of purported stranger to the decree. The executing Court cannot tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI Rule 99 C.P.C. and pray for the restoration of possession. The High Court had totally ignored the scheme of Order XXI Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree holder in the execution proceedings.”

37)-- In “Silverline Forum (P) Ltd. -Vs- Rajiv Trust, **AIR 1998, SC, 1754**” it was observed that when a decree-holder complains of resistance to execution of decree, executing Court is enjoined to adjudicate upon it. It was, however, observed that the words “all questions arising between the parties to a proceeding” would envelope only those questions as would legally arise for determination between them. Hence, the executing court is not obliged to determine a question merely because the resister or obstructionist raises it. The questions which the court must determine under Rule 101 must possess two adjuncts :

- (i) Such questions must have legally arises; and
- (ii) They must be relevant for consideration and determination between the parties or their representatives; i.e. between resister or obstruction and the decree-holder or auction-purchaser.

38)-- In case of “P.Janrdhana Rao -Vs- Kannan & others, reported in **2004 (11) SCC 511**” in para No.9 it is discussed as under :

“9. Adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the

court or miscarriage of justice. The object of law is to mete out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviors and succour for the sustenance or the rule of law. Any weakening like in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almanac (sic) for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interregnum based on factual situation. Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the

immovable property under execution.”

Conclusion :

The aforesaid authorities clearly spell-out that the Court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained Code enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing Court. Under XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 101 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree.

Submitted with respects.

**LIST OF SELECTED JUDGMENTS
TO BE DISCUSSED IN THE WORK SHOP.**

- 1)- Mathai Mathai -Vs- Joseph Mary,
AIR 2014 S.C. 2277.
- 2)- Ranikuntla Rajamma -Vs- K. Sarwanamma,
AIR 2014 S.C. 2906
- 3)-- Rasheed Khan -Vs- Mohd. Ayyub,
2014 (5) Mh.L.J. 585.
- 4)- Vasant Tukaram Prabhu -Vs- Xalinibai Borkar,
2014 (5) Mh.L.J. 382.
- 5)- Conception Fernandes -Vs- Tasneem Shaikh,
2014 (5) Mh.L.J. 494.
- 6)- Sameer Singh -Vs- Ab. Rab,
C.A. No.9699/14 (S.C.).
