AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 95 of 2015

Judgment Reserved on 20.12.2021

Judgment Delivered on 28.02.2022

1. Smt. Sonia Bai Wd/o Late Sita Ram Sahu, Aged About 60 Years, R/o Chingrajpara, Ganesh Chowk, Bilaspur, District Bilaspur, Chhattisgarh,
2. Smt. Munni Bai Wd/o Late Mohan Sahu Aged, About 53 Years, R/o Tikrapara, Shiv Talkies Chowk, Bilaspur, Chhattisgarh,
3. Smt. Pushpa Bai Wd/o Late Shri Raju Sahu, Aged About 45 Years, R/o Katiapara, Juna Bilaspur, District Bilaspur, Chhattisgarh,

---- Appellant/defendants

Versus

1. Dashrath Sahu S/o Late Shri Jethu Ram Sahu, Aged About 55 Years, R/o Post Sakri, Tahsil Takhatpur, District Bilaspur, Chhattisgarh,
2. The State of Chhattisgarh Through The Collector Bilaspuir, Chhattisgarh,
3. Shri Hemant Kumar Jaiswal, S/o Shri Sanat Jaiswal, Aged About 25 Years Caste Kalar, R/o Ward No. 7, Damdama Para, Padampur, Tehsil and District Mungeli, Chhattisgarh,

---- Respondents /plaintiffs

For the Applicants	:	Mr. Aman Sharma, Advocate
For the Respondent No.1	:	Mr. Dhirendra Mishra, Advocate
For the State	:	Mr. Sameer Sharma, Dy. GA
For the Respondent No.4.	:	Mr. Dashrath Prajapati, Advocate

Hon'ble Shri Justice Narendra Kumar Vyas

CAV Judgment

1. This First Appeal under Section 96 of Civil Procedure Code, has been filed by the appellants/defendants against the judgment and decree dated 18.03.2015 passed by 5th Additional District Judge, Bilaspur District Bilaspur in Civil Suit No. 124-A/2014, whereby learned trial Court has decreed the suit filed by plaintiff/respondent No.1, dismissed the

counter claim filed by appellants/defendants No.1 to 3. Learned trial Court in its impugned judgment on the basis of Will executed on 28.10.2010 by testatrix Late Kachra Bai, who was mother of plaintiff and defendants No. 1 to 3 has held that plaintiff /respondent No 1. Dashrath Sahu is the owner of lands bearing khasra Nos. 61/14,291/1, B/2, 291/1, M/2, 291/4 total khasra Nos. 4 area 0.457 hectare and khasra Nos. 291/1, T/3, area 0.101 hectares, 2.31 acrea.

2. For the sake of convenience, the parties shall be referred to in terms of their status in Civil Suit No. 124 A/2014 which was filed for declaration of title and grant of permanent injunction.

3. The plaint averments in brief are that defendants Smt. Sonia Bai, Smt. Munni Bai and Smt. Pushpa Bai all are residents of Bilaspur. The suit land already described by this Court in the above paragraph is the self-acquired property of Smt. Kachra Bai, mother of defendants No.1 to 3 and plaintiff. The name of Smt. Kachra Bai was recorded as title holder of the suit land. It has been further pleaded that plaintiff has taken care of his mother till his lifetime, all the last rituals have been performed by him and due to care taken by him Smt. Kachra Bai bequeathed a Will in favour of the plaintiff on 28.10.2010 and since then plaintiff is in possession of the suit land. The defendants are neither in possession nor title holder of the suit land. After death of Smt. Kachra Bai, plaintiff has moved an application for mutation of the suit land in his name being successor per Will dated 28.10.2010 executed by Smt. Kachra Bai. The name of plaintiff has been mutated in the revenue record as the land owner on 10.09.2013. The defendants No. 1 to 3 had preferred an appeal wherein they have raised an objection that the plaintiff is not only successor of Smt. Kachra Bai and they are also the successor of Smt. Kachra Bai, as such their names should also been recorded in the revenue record.

4. The defendants No. 1 to 3 are illegally interfering in the title and ownership of the suit land which is owned by the plaintiff, this has necessitated the plaintiff to file present suit for declaration and for grant of permanent injunction.

5. Defendants Nos. 1 to 3 have filed their written statement denying the averments made in the plaint contending that the Will dated 28.10.2010 is forged one, as such, on the basis of forged document, order of mutation is illegal and against the provisions of law, therefore, order dated 10.09.2013 is not binding upon them. Defendants No. 1 to 3 have not been arrayed as parties in mutation proceedings, the Will is forged one and against the Hindu Succession Act as well as Indian Evidence Act and on the basis of forged Will the plaintiff cannot acquire any right over the property. It has been further averred that the plaintiff has submitted an affidavit before the Revenue authority stating that he is the sole son of his parents and except him no other child was born from the wedlock of his parents and on the basis of the affidavit filed by the plaintiff, his name has been recorded in the revenue record which is illegal and would pray for rejection of the civil suit. The defendants have filed their counter claim, claiming that the plaintiff has no right to succeed in the property as per Mitakshara Branch of Hindu Law, the daughters are also entitled to get share in the property. Defendants No. 1 to 3 have submitted that the suit land is an ancestral property as such they are also coparcener in the suit land, therefore, order passed by the Revenue authority ignoring the provisions of law is illegal and deserves to be set aside by the trial Court.

6. That on the pleadings of the parties, trial Court has framed as many as eight issues. Issue No. 1, 2, 3,5 and 6 are relevant for adjudicating the present controvery raised in the instant appeal, therefore, they are being extracted below:-

(I) Whether suit land bearing khasra Nos. 61/14,291/1, B/2, 291/1, M/2, 291/4 total khasra Nos. 4 area 0.457 hectare and khasra Nos. 291/1, T/3, area 0.101 hectares, 2.31 acrea is self acquired property of deceased late Kachra Bai?

(ii) Whether deceased Kachra Bai executed will in the name of plaintiff?

(iii) Whether the plaintiff on the basis of will is entitled to get decree of declaration and grant of permanent injunction with regard to suit land?

(iv) Whether the will executed in favour of the plaintiff is forged one and what is its effect?.

(v) Whether the plaintiff and respondents are jointly entitled to grant of relief of declaration with regard to the suit property?

7. The plaintiff examined himself as (PW-1), Amarnath Sahu (PW-2) attesting witness of will, Tribhuvan Sahu (PW-3) subscriber of the will, Dalluram Sahu (PW-4) attesting witness no. 2, Bhagat Sahu (PW-5), attesting witness no.3, Ramchandra Sahu (PW-6) attesting witness no.5, exhibited document DW-1 Will dated 28.10.2020, Order sheet of Revenue Case (Ex.P-2), order dated 10.09.2013 (Ex.P-3) passed by Tahsildar. The defendants examined Smt. Sonia Bai and exhibited document mutation application (Ex.D-1), panchnama (Ex.D-2), family tree (Ex.D-3), physical enquiry report declaration (Ex.D-4), affidavit of Dashrath Sahu (Ex.D-5), affidavit of Bhagat (Ex.D-6), order sheet of Revenue Case (Ex.D-7), order of Tahsildar dated 08.03.2013 (Ex.D-8),affidavit executed by plaintiff dated 30.01.2013 (Ex.D-9), affidavit executed by 28.06.2013 (Ex.D-10).

8. Learned trial court considering the evidence, material on record decreed the suit filed by the plaintiff declaring the plaintiff to be title holder of the suit land, restraining the defendants from interfering with peaceful possession of the plaintiff. Learned trial Court has rejected the counter claim of the defendants for partition of the suit land vide its judgment and decree dated 18.03.2015; which is being challenged by the defendants in the First Appeal under Section 96 CPC.

9. Learned counsel for the defendants would submit that learned trial Court has not appreciated the evidence, material on record and law with regard to proving of Will. The defendants have raised suspicion over the will and the plaintiff has failed to remove the clouds. The trial Court should have considered that the Smt. Kachra Bai has executed will on 28.10.2010 and she expired on 24.11.2010 within short span of time, this creates doubt whether Smt. Kachra Bai was medical and physical fit to put her thumb impression and it is doubtful that she had executed the will. The daughter of the testator was not aware of the execution of the will till September 2013, when order of mutation was passed and will (Ex.P-1) has not seen the light of the day for nearly three years. Learned

counsel for the defendants would submit that finding with regard to execution of will is perverse and liable to be quashed by this Court. He would further submit that the trial Court has committed illegality in not granting the share to the defendants who are coparcener of the property and would pray for setting aside the judgment and decree passed by the trial Court.

10. On the other hand, learned counsel for the plaintiff would submit that the judgment and decree passed by the learned trial Court is legal, justified and not liable to interfere by this Court. The will has been proved in accordance with law and the appeal is liable to be dismissed by this Court with heavy cost.

11. I have heard learned counsel for the parties, perused the document with utmost satisfaction.

12. From the above stated factual matrix two issues have to be determined by this Court (i) whether the will has been proved as per the provisions of section 68 of the Evidence Act and Section 63 (c) of the Indian Succession Act. (ii) Whether the defendants are entitled to get equal share of the suit land being coparcener as per Hindu Succession (Amendment) Act, 2005.

13. For better understanding issue no. 1 it is expedient for this Court to extract the provisions of section 68 of the Evidence Act and Section 63 (c) of the Indian Succession Act which are as under;-

Section 68 of the Evidence Act 1872 provides as under

" 68. Proof of execution of document required by law to be attested**-** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in

accordance with the provisons of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Section 63 (c) of the Indian Succession Act, 1925-

The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will,in the presence and by the direction of the testator, or has received from the testator a personal acknowldgment of his signature or mark, or the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witnesses be present at the same time, and no particular from of attestation shall be necessary.

14. Smt. Kachra Bai W/o. Late Jethuram Sahu has executed the Will on 28.10.2010 relevant portion of the will is extracted below;-

वसीयतनामा

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मन के मै कचरा बाई बेवा स्व श्री जेठू राम साहु उम्र 82 वर्ष साकिन सकरी तहसील तखतपुर जिला बिलासपुर का निवासी हूँ । जो कि मेरी उम्र अत्यअधिक हो जाने के कारण मै अपनी हक की जमींन जो ग्राम मौजा स्थित है उसे अपने जीते जी एक भाग लड़का दशरथ साहु पिता जेठू साहु उम्र 55 वर्ष ग्राम मौजा सकरी को इस शर्त पर बसीयत कर रही हूँ ।

1. मेरी उम्र अधिक हो चुकि है । फिर भी मैं पूर्ण स्वस्थ हूँ । व अपने जीवन काल में बसीयत कर रही हूँ
2. यह कि मृत्युपर्यन्त सेवा करेगा । तथा मृत्यु पर दाह संस्कार कर, सामाजिक भोज, एवं पिण्डदान करेगा
3. यह कि मेरे नाम पर ग्राम मौजा सकरी स्थित पटवारी अभिलेख में समस्त दर्ज कास्त भूमी जो छः डोली वो एक किता खपरैल मकान को वसीयत करती हूँ ।
4. यह कि मेरी मृत्यु पश्चात समस्त कास्त भूमी पर काबिज होगा वो अपना नाम पटवारी अभिलेख में दर्ज करा लेवेगा ।
5. यह कि मेरी कास्त जमींन पर मृत्यु पश्चात अंय कोई रिश्तेदार का हक वो दावा नहीं कर सकेगा अगर दावा-हक करेगा उस परिस्थिति में झुठा व नजायज होगा

अतः उक्त वसीयतनामा दो गवाहों के समक्ष अपनी राजी-खुशी, होशोहवास में रहकर वसीयत नामा लिखा दिया, को अपना आगुंठा निशान लगा दिया

त्रिभुवन साहु
28/10/2010

सही/-नि.अ.
कचराबाई

15. Learned counsel for the defendants has adumbrated on the following suspicious circumstances in the execution of the Will from evidence recorded during the trial and material placed on record. They can be succinctly stated as under;-

(I) Date of the Will and date of death of the testator being too close throws a doubt on the sound disposing state of mind of the testator as the testatrix expired on 24.11.2010 and the Will has been executed on 28.10.2010.

(ii) Attestor being known to the first plaintiff, the propounder of the will, but not the deceased testator.

(iii) That the will dated 28.10.2010 (Ex.P-1) was executed by Smt. Kachra Bai in favour of Dashrat Sahu, who was beneficiary of the Will and in the cross examination the Plaintiff has admitted that defendants No. 1 to 3 are his real sister but he has not disclosed about his sisters in the mutation proceedings.

(iv) He has also admitted that in the family tree (Ex.D-2) he has not mentioned about his sisters.

(v) He has nowhere stated at the time of execution of will, that his mother was healthy and sound mind. Attesting witness Amarnath Sahu (PW-2) has also not stated that Kachra Bai was healthy and sound mind and she was capable of executing the will. This witness was cross examined wherein he has stated that Dashrath Sahu is not his real relative but due to resident of same village he was treated him as nephew. This witness has voluntarily stated in his cross-examination that Kachra Bai herself told him that she had given some portion of the property to her daughters and she has executed the Will in favour of Dashrath Sahu only. This witness has also admitted in the cross examination that plaintiff has three sisters but has not explained why he has not disclosed this fact in the statement recorded before

the Revenue Court, Sakri.

(vi) Tribhuvan Sahu (PW-3) subscriber of the will has nowhere stated that the draft of will has been written on the instruction of Smt. Kachra Bai executant of the will.

(vii) Dalluram Sahu (PW-4) son-in-law of plaintiff, attesting witness no.2, has admitted in the cross examination that in the panchanama (Ex.D-2) he has put his signature but he has denied that in the (Ex.D-2) there was no mentioning about particulars of the sisters of plaintiff is incorrect.

(viii) Bhagat Sahu (PW-5) attesting witness, was uncle of Dashrath Sahu has nowhere stated that deceased being illiterate lady asked the subscriber to write the Will and has nowhere stated that Smt. Kachra Bai was hale and healthy, and was mentally sound to execute the will, she was capable of understanding the contents of the will. These facts and circumstances create heavy cloud on the Will which the plaintiff has not cleared the doubts, as such it is suspicious circumstances of execution of will.

16. Learned counsel for the defendants would submit that the testatrix died on 24.11.2010 and the will (Ex.P-1) is said to have been written on 28.10.2010 but execution of will was not disclosed to the sisters till the names of the plaintiff has been mutated in the revenue record. This creates suspicion over the Will and the plaintiff should clear the doubt which he miserably failed to do. Learned counsel for the appellant would further submit that Smt. Sonia Bai, who is defendant No.1 has clearly stated in examination-in-chief that the plaintiff has mutated the suit land in his name concealing the fact that from the wedlock of testatrix Smt. Kachra Bai and Jethuram Sahu three daughters were also born. The plaintiff has concealed this fact in the mutation proceedings itself creates doubt by not mentioning the names of other children. Extensive cross-examination has been done but no question with regard to the

genuineness of the will has been put to defendants.

17. On the other hand, learned counsel for the plaintiff would submit that the Will has been proved as per the provisions of law, all the attesting witnesses, subscriber of the will have been examined and no evidence has been brought on record to disbelieve the existence of the Will as such finding recorded by the trial Court is neither perverse nor contrary to the record which warrants interference by this Court.

18. From the above analysis of the evidence and considering the evidence of Amarnath Sahu (PW-2) and Tribhuvan Sahu (PW-3), they have nowhere stated that will has been written as per the direction of the testatrix and also considering the fact that the witnesses have nowhere stated in their evidence that the testatrix has put her signature on the will in their presence. It is pertinent to mention here that from the statement of Tribhuvan Sahu (PW-3) and Dalluram Sahu (PW-4) it is quite vivid that subscriber of the will has nowhere endorsed that the will has been written on the instruction of testatrix, therefore, doubtful circumstances establish with regard to existence of will. It is clear that (Ex.D-1), application which was filed before Revenue Court for mutation wherein the defendants have not made party despite aware of the facts that sisters are still surviving, it certainly creates doubt over genuineness of the will.

19. The trial Court while recording the evidence that the will is not forged one has taken into consideration the fact that the defendants have examined only one witness Smt. Sonia Bai in their support wherein she has stated that the daughters have not been arrayed as party in the mutation proceedings which cannot be ground for declaring that will is forged one and has answered the issue in favour of plaintiff. This is incorrect application of law as it is for the propounder had to show that will was signed by the testator and the testator was in sound and disposing state of mind at the relevant time. It is for the propounder to establish that testator had understood nature and effect of disposition and put his signature/ thumb impression on his own free will. In absence of such evidence brought on record by the plaintiff it cannot be said that

the plaintiff has cleared doubt over the will.

20. Learned counsel for the appellants/defendants has placed reliance in the case **Kavita Kanwar v. Mrs. Pamela Mehta 2020 SCC online SC 464** has held as under :-

> 29.2. In the given set-up, a basic question immediately crops up as to what could be the reason for the testatrix being desirous of providing unequal distribution of her assets by giving major share to the appellant in preference to her other two children. The appellant has suggested that the parents had special affection towards her. Even if this suggestion is taken on its face value, it is difficult to assume that the alleged special affection towards one child should necessarily correspond to repugnance towards the other children by the same mother. Even if the parents had special liking and affection towards the appellant, as could be argued with reference to the gift made by the father in her favour of the ground floor of the property in question, it would be too far stretched and unnatural to assume that by the reason of such special affection towards appellant, the mother drifted far away from the other children, including the widowed daughter who was residing on the upper floor of the same house and who was taking her care. In the ordinary and natural course, a person could be expected to be more inclined towards the child taking his/her care; and it would be too unrealistic to assume that special love and affection towards one, maybe blue-eyed, child would also result in a person leaving the serving and needy child in lurch. As noticed, an unfair disposition of property or an unjust exclusion of the legal heirs, particularly the dependants, is regarded as a suspicious circumstance. The appellant has failed to assign even a wee bit reason for which the testatrix would have thought it proper to leave her widowed daughter in the heap of uncertainty as emanating from the Will in question. Equally, the suggestion about want of thickness of relations between the testatrix and her son (respondent No.2) is not supported by the evidence on record. The facts about the testatrix sending good wishes on birthday to her son and joining family functions with him, even if not establishing a very great bond between the mother and her son, they at least belie the suggestion about any strain in their relations. Be that as it may, even if the matter relating to the son of testatrix is not expanded further, it remains inexplicable as to why the testatrix would not have been interested in making adequate and concrete provision for the purpose of

her widowed daughter (respondent No.1).

29.3. The aforesaid factor of unexplained unequal distribution of the property is confounded by two major factors related with making of the Will in question: one, the active role played by the appellant in the process; and second, the virtual exclusion of the other children of testatrix in the process. As noticed, an active or leading part in making of the Will by the beneficiary thereunder has always been regarded as a circumstance giving rise to suspicion but, like any other circumstance, it could well be explained by the propounder and/or beneficiary. In the present case, it is not in dispute that out of the three children of testatrix, the appellant alone was present at the time of execution of the Will in question on 20.05.2003. As noticed, at the relevant point of time, the appellant was admittedly living away and in a different locality for about 20-22 years, whereas testatrix was residing at the ground floor of the building and the respondent No.1 was at the first floor. Even if we leave aside the case of the respondent No.2 who was living in Shimla, there was no reason that in the normal and ordinary course, the testatrix would not have included the respondent No.1 in execution of the Will in question, particularly when she was purportedly making adequate arrangements towards the welfare of respondent No.1. In other words, if the Will in question was being made without causing any prejudice to the respondent No.1, there was no reason to keep her away from this 16process. Admittedly, the Will in question was not divulged for about three years. Therefore, the added feature surrounding the execution of the Will had been of unexplained exclusion of the respondent No.1 from the process.

21. Hon'ble Supreme Court in the case of **Murthy vs C. Saradambal** decided on 10 December, 2021 in Civil Appeal No. 4270 of 2010 has held as under:-

(a) The date of the will (Ex-P1) is 04th January, 1978. The testator E. Srinivasa Pillai died on 19th January, 1978, within a period of fifteen days from the date of execution of the will. Even on reading of the will, it is noted that the testator himself has stated that he was sick and getting weak even then he is stated to have “written” the will himself which is not believable. It has been deposed by PW2, one of the attestors of the will, that the will could not be registered as the testator was unwell and in fact, he was bedridden. It has also come in evidence that the testator had suffered a paralytic stroke which had affected his speech,

mobility of his right arm and right leg. He was bedridden for a period of ten months prior to his death. Taking the aforesaid two circumstances into consideration, a doubt is created as to whether the testator was in a sound and disposing state of mind at the time of making of the testament which was fifteen days prior to his death.

(b) No evidence of the doctor who was treating the testator has been placed on record so as to prove that the testator was in a sound and disposing state at the time of the execution of the will.

(c) The fact that the testator died within a period of fifteen days from the date of the execution of the will, casts a doubt on the thinking capacity and the physical and mental faculties of the testator. The said suspicion in the mind of the Court has not been removed by the propounder of the will i.e. first plaintiff by producing any contra medical evidence or the evidence of the doctor who was treating the testator prior to his death.

(d) In this context, it would be useful to place reliance on Section 63 of the Indian Succession Act, 1925 which categorically states that the testator has to sign on the will and the signature of the testator must be such that it would “intend” thereby to give effect to the writing of a will. Hence, the genuineness of the will must be proved by proving the intention of the testator to make the testament and for that, all steps which are required to be taken for making a valid testament must be proved by placing concrete evidence before the Court. In the instant case, there is no evidence as to whom the testator gave instructions to, to write the will. The scribe has also not been examined. It is also not known as to whether the assistance of an advocate or any other trustworthy person was taken by the testator in order to make the testament and bequeath the property to only the son of the testator.

(e) Apart from that, Section 63(c) of the Indian Succession Act, 1925, firstly states that the will has to be attested by two or more witnesses/attestators, each of whom should have seen the testator sign on the will in his presence, or has received from the testator, a personal acknowledgment of his signature on the will. Secondly, each of the witnesses shall sign on the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation is necessary. The aforesaid two mandatory requirements have to be complied with for a testament to be valid from the point of view of its execution. In the instant case, there are two attestors

namely, PW2-Varadan and Dakshinmurthy and the latter had died. The evidence on record has to be as per Section 68 of the Indian Evidence Act, 1872 which deals with proof of documents which mandate attestation. In order to prove the execution of the document such as a testament, at least one of the attesting witnesses who had attested the same must be called to give evidence for the purpose of proof of its execution. Since one of the attestors, namely, Dakshinmurthy had died, PW2, Varadan had given his evidence as one of the attestors of the will. However, the deposition of PW2 is such that it is fatal to the case of the plaintiffs.

22. In light of the aforesaid discussion, considering the law on the subject, it is crystal clear, that the validity of Will (Ex.P-1) is not proved in accordance with the provisions of the law and suspicious circumstances are available on record which have not been cleared by the plaintiff by placing material on record, therefore, judgment and decree so far as holding that the plaintiff is the owner of the suit land bearing khasra Nos. 61/14,291/1, B/2, 291/1, M/2, 291/4 total khasra Nos. 4 area 0.457 hectare and khasra Nos. 291/1, T/3, area 0.101 hectares, 2.31 acrea is set aside.

23. For deciding issue No. 2, it is expedient for this Court to extract provisions of section 6 of Hindu Succession Act, 1956 as amended in 2005 which is as under;-

6 Devolution of interest in coparcenary property

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—
(a) by birth become a coparcener in her own right in the same manner as the son;
(b) have the same rights in the coparcenary property as she would have had if she had been a son;
(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.
(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in

force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005*, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005*, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005*, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. —For the purposes of clause (a), the expression “son”, “grandson” or “great-grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005*.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation. —For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration

Act, 1908 (16 of 1908) or partition effected by a decree of a court.]

24. The present defendants have also filed counter claim before the trial Court for their share being coparcener in the property inherited by their mother late Kachra Bai. Learned trial Court has held that the will is valid and negated the counter claim of the defendants. Since this Court after appreciating the evidence has held that Will has not been proved in accordance with the law, this Court is also examining the counter claim filed by the defendants. It is pertinent to mention here that the defendants have also challenged rejection of counter claim by way of amendment made on 12.11.2021.

25. Learned counsel for the defendants would submit that the learned trial Court without assigning any reason has rejected the counter claim. This Court in foregoing paragraph has already set aside the judgment and decree passed by the trial Court to the extent that it has declared the Will dated 28.10.2010 is proved as per the provisions of law, therefore, on the basis of the will right which has been accrued in favour of the plaintiff deserves to be set aside and accordingly it is set aside.

26. Since the plaintiff and defendants are coparcener of the joint Hindu family property, as per Hindu Succession Act as amended in 2005, the daughters are also entitled for getting equal share in the property inherited by their parents. The suit land is inherited by deceased Kachra Bai, as such defendants and plaintiff are entitled to get equal share in the property as per Section 6 of the Hindu Succession Act as amended in 2005.

27. The Hon’ble Supreme Court in the case of **Vinita Sharma v. Rakesh Sharma and others 2020 (9) SCC 1** Hon'ble Supreme Court has held in paras 60, 68, 69, 73, 75 and 80 as under:-

> 60. The amended provisions of section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right.Section 6(1) (a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son." Section 6(1) (a) contains the concept of the

unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section6(1) (b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 9.9.2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20.12.2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

68. Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. The expression used in section 6 is that she becomes coparcener in the same manner as a son. By adoption also, the status of coparcener can be conferred. The concept of uncodified Hindu law of unobstructed heritage has been given a concrete shape under the provisions of section 6(1)(a) and 6(1). Coparcener right is by birth. Thus, it is not at all necessary that the father of the daughter should be living as on the date of the amendment, as she has not been conferred the rights of a coparcener

by obstructed heritage. According to the Mitakshara coparcenary Hindu law, as administered which is recognised in section 6(1), it is not necessary that there should be a living, coparcener or father as on the date of the amendment to whom the daughter would succeed. The daughter would step into the coparcenary as that of a son by taking birth before or after the Act. However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).

69. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

73. It is by birth that interest in the property is acquired. Devolution on the death of a coparcener before 1956 used to be only by survivorship. After 1956, women could also inherit in exigencies, mentioned in the proviso to unamended section 6. Now by legal fiction, daughters are treated as coparceners. No one is made a coparcener by devolution of interest. It is by virtue of birth or by

way of adoption obviously within the permissible degrees; a person is to be treated as coparcener and not otherwise.

75. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20.12.2004. A daughter can assert the right on and from 9.9.2005, and the proviso saves from invalidation above transactions.

80. A finding has been recorded in Prakash v. Phulavati that the rights under the substituted section 6 accrue to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters are born. We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. Hence, we respectfully find ourselves unable to agree with the concept of "living coparcener", as laid down in Prakash v. Phulavati. In our opinion, the daughters should be living on 9.9.2005. In substituted section 6, the expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1) (a) to the daughter by birth. Declaration of right based on the past event was made on 9.9.2005

and as provided in section 6 (1) (b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1) (c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part.

In view of above stated legal position the plaintiff and defendants are entitled to get ¼ shares in the suit property.

28. Learned counsel for the appellants/defendants has also filed application under Order 41 Rule 27 Read with Section 151 of the CPC for taking additional document on record by stating that during pendency of the appeal, the appellants/ defendants have filed an application under Order 1 Rule 10(2) CPC by which the respondent No.1 has sold total 10 decimal of the land in favour of Hemant Kumar Jaiswal, therefore, he was arrayed as party to the case. This Court vide order dated 28.01.2020 had issued notice to the proposed respondent No.3 Hemant Kumar Jaiswal and in pursuance of the notice, learned counsel has entered appearance on behalf of respondent No.2, this Court has allowed the application on 11.11.2021 Hemant Kumar Jaiswal has been arrayed as respondent No.3. While allowing the said application, this Court has held that the sale of land bearing khasra No. 291/1 and 9523/2 shall also be subject to the decision of this appeal. This fact has been denied by the plaintiff but from bare perusal of the sale deed it is evident that land out of khasra no. 291/1 and 9523/2 measuring about .040 hectare has been sold to the respondent no.3. The land which has already been sold to respondent no. 3, if it is part of suit land then .040 hectare land will be adjusted/ reduced from the share of plaintiff.

29. Considering the facts and law on the subject counter claim filed by the defendants is allowed and it is held that defendant No.1 to 3 Smt. Sonia

Bai, Smt. Munni Bai, Smt. Pushpa Bai and plaintiff Dashrath Sahu are entitled to get equal share in the property as per Hindu Succession Act, as amended in 2005. Accordingly, the appeal filed by the defendants is allowed and the judgment and decree dated 18.03.2015 passed by the trial court is set aside.

30. A decree be drawn-up accordingly.

Sd/-

(Narendra Kumar Vyas)
Judge

Santosh