VERDICTUM.IN

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 28534 OF 2020

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Yagnaseni Patel ..... Petitioner

-Versus-

The General Manager, Mahanadi Coalfields Ltd. and others ..... Opp. Parties

For Petitioner : M/s P.K. Mohapatra, S.K. Jethy, S. Mohanty and A. Mohapatra, Advocates

For Opp. Parties : M/s D. Mohanty, A. Mishra, B.P. Panda and D. Behera, Advocates [O.P.No.1]

Mr. A. Khandal, Advocate [O.Ps.No.4 to 6]

Mr. S.K. Mishra, Advocate [O.Ps.No.7 and 8]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE M.S. RAMAN

Date of hearing and judgment: 22.06.2023

VERDICTUM.IN

DR. B.R. SARANGI, J. The petitioner, by way of this writ petition, seeks to quash the order dated 04.01.2020 passed by opposite party no.2-Claims Commission in Claim Case No.227 of 2019 under Annexure-4 and to issue direction to the opposite parties no.1 to 3 to treat the petitioner as well as proforma opposite parties as co-sharers and co-parceners and make a declaration that they are entitled to equal share as that of the sons, i.e., opposite parties no.4, 5 and 6 in the ancestral property of late Kulamani Patel.

2. The factual matrix of the case, in a nutshell, is that the property pertaining to Khata No.24 of Mouza-Tumulia stood recorded in the name of the father of the petitioner Late Kulamani Patel, who died on 19.03.2005. After the death of the father of the petitioner, her three brothers, namely, Harihar Patel, Dambarudhar Patel and Durjan Patel got the property mutated in their names under Section 19(1)(c) of the Odisha Land Reforms Act, 1960 (for short "OLR Act, 1960") which was challenged by the petitioner and her two sisters, namely, Bedamati Patel and Bhagabati Patel, vide Mutation Appeal No. 9 of 2014 before the Sub-Collector, Sundargarh. By order dated

VERDICTUM.IN

07.12.2016, the Sub-Collector, Sundargarh directed the Tahasildar to record the names of the daughters in the RoR along with three sons of late Kulamani Patel. Accordingly, fresh RoR was issued incorporating the names of three daughters and three sons. Thereby, the petitioner, being the daughter of Late Kulamani Patel, claimed equal share in the said property. Relying on the provisions of Section 6 of the Hindu Succession (Amendment) Act, 2005 and the decision of the apex Court rendered in the case of ***Danamma @ Suman Surpur and another v. Amar and others***, Civil Appeal No. 188-189 of 2018 [SLP (C) No. 10638-10639 of 2013] decided on 01.02.2018, it was urged before the Claims Commission that the petitioner, being a daughter of a coparcener by her birth in the ancestral property of her father, is entitled to get equal share as that of her brothers irrespective of the date of death of her father Kulamani Patel. But the same was disputed by the private opposite parties stating that in view of the judgments of the apex Court in the cases of ***Prakash and others v. Phulabati and others***, 2015 (II) CLR (SC) 1146 and also

VERDICTUM.IN

Mangammal @ Thulasi and another v. T.B. Raju and others, Civil Appeal No. 1933 of 2009 decided on 19.04.2008, daughters are not entitled to get the benefit being not the co-sharer. As a consequence thereof, the Claims Commission decided the matter against the petitioner, vide order dated 04.01.2020 under Annexure-4, which is the subject matter of challenge before this Court in the present writ petition, by holding that the amended provision of Section 6 of the Hindu Succession (Amendment) Act, 2005 has no application to the petitioner.

3. Mr. P.K. Mohapatra, learned counsel appearing for the petitioner vehemently contended that the judgment, basing upon which the Claims Commission decided the matter, had been referred to the Larger Bench and the Larger Bench decided the same in the case of ***Vineeta Sharma v. Rakesh Sharma and others***, 2020 (II) OLR (SC) 569, which was in favour of the petitioner. Therefore, the decision of the Claims Commission, ignoring the decision of the Larger Bench and deciding the matter in favour of the private opposite parties, cannot be

VERDICTUM.IN

sustained in the eye of law. Consequentially, quashing of the order of the Claims Commission is sought for.

4. Mr. A. Mishra, learned counsel appearing for opposite party no.1 vehemently contended that since the parties approached the Claims Commission for adjudication of the matter and the same was decided on the basis of the law applicable at the relevant point of time, the relief sought in the present writ petition cannot be granted to the petitioner. Consequentially, dismissal of the writ petition is sought for.

5. Mr. A. Khandal, learned counsel appearing for opposite parties no.4 to 6 contended that the daughters cannot be treated as co-sharers and, as such, the Claims Commission is well justified in passing the order impugned, which does not require any interference of this Court. Accordingly, he seeks for dismissal of the writ petition.

6. Mr. S.K. Mishra, learned counsel appearing for the proforma opposite parties no.7 and 8 contended that they, being daughters of Late Kulamani Patel, stand on

VERDICTUM.IN

the same footing with that of the sons, i.e., opposite parties no.4 to 6, who are sons of Late Kulamani Patel and also have the equal share in the property.

7. This Court heard Mr. P.K. Mohapatra, learned counsel appearing for the petitioner; Mr. A. Mishra, learned counsel appearing for opposite party no.1; Mr. A. Khandal, learned counsel appearing for opposite parties no.4 to 6; and Mr. S.K. Mishra, learned counsel appearing for the proforma opposite parties no.7 and 8 in hybrid mode and perused the record. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

8. Before delving into the core issue, it is necessary to decide who are the coparceners. There is disagreement on the question of this issue so far as Mitakshara and Dayabhaga Schools of law are concerned. According to Mitakshara School, as propounded by Vijnanesvara in his running commentary on the Yajnavalkya Smriti, all those members of the joint family

VERDICTUM.IN

who get an interest by birth in the joint family property are the members of the coparcenary. Mitakshara entitles a son to a right equal to his father in the joint family property by birth. Under the Hindu law the word "son" has a technical meaning. Son includes the son, the son's son and the son's son's son. In other words, all the male descendants of a Hindu in the male line up to the fourth degree of generation are his sons. The adopted child also gets a right equal to the right of his adoptive father in the joint family property from the date of adoption. The daughter is not given a right by birth in the joint family property. But in the States of Andhra Pradesh, Tamil Nadu and Maharashtra, the law is amended by inserting Sections 29-A, 29-B and 29-C and in Karnataka by inserting Section 6-A in the Hindu Succession Act, 1956. The Parliament, being inspired by the line of these four States, passed The Hindu Succession (Amendment) Act, 2005 for the whole of India. The amendment is that even in a joint family governed by the Mitakshara law the daughter of a coparcener is made as good a coparcener as a son. She has the same rights in the coparcenary

VERDICTUM.IN

property as she would have had if she had been a son. She has a right to agitate in respect of her share in the joint family property. She carries the same liabilities and disabilities as a son does. As such, the coparceners have right to alienate for consideration, to demand partition, to joint possession and usufruct, to maintenance, to make Will of one's interest, to restrain unauthorized disposal, to surrender one's interest and to survivorship. Similarly, every coparcener is liable to repay the loans which were raised for the purposes of the family. This obligation exists to the extent of his own interest in the joint family property. His personal or separate property is not bound by this obligation.

9. As it reveals from the order impugned, the Claims Commission taking into consideration the judgment passed by the apex Court in the cases of ***Prakash and others v. Phulavati and others***, 2015 (II) CLR (SC) 1146 : (2016) 2 SCC 36 and also ***Mangammal @ Thulasi and another v. T.B. Raju and others***, Civil Appeal No. 1933 of 2009 decided on 19.04.2018 reported at (2018) 15 SCC 662 came to a finding that the

VERDICTUM.IN

daughters are not entitled to get the benefit of equal share being co-sharers in the ancestral property.

10. Therefore, taking into account the aforesaid provision in ***Prakash*** and ***Mangammal*** (supra), the finding of the apex Court that daughters are not entitled to get the benefit of equal share being co-sharers in the ancestral property, no more remains *res integra* in view of the Larger Bench judgment of the apex Court in the case of ***Vineeta Sharma v. Rakesh Sharma and others***, 2020 (II) OLR (SC) 569 : (2020) 9 SCC 1 wherein Sub-section (1) of Section-6 of the Hindu Succession (Amendment) Act, 2005 was under consideration and consequentially a question was framed "does the Hindu Succession (Amendment) Act, 2005, which gave equal right to daughters in ancestral property, have a retrospective effect". The apex Court, in answering the same in affirmative, held that daughter shall remain as coparcener (one who shares equally with others in inheritance of an undivided joint family property) throughout life, regardless of the question as to whether her father was alive when the law was amended in 2005

VERDICTUM.IN

or not, stressing that the law has a retrospective effect. The apex Court further held that the purpose behind the amendment in 2005 is to give equal rights of inheritance. Therefore, a woman will have an equal share in undivided family property. Sons and daughters of a coparcener become coparceners by virtue of birth. A female heir or male relative of such female heir have same rights and liabilities. Thereby, analyzing the amended Section 6 of the Hindu Succession Act, 1956, it was held that since the right is given by birth, it is an antecedent event and the provisions concerning the rights operate on and from the date of commencement of the Amendment Act, 2005. As a consequence thereof, the judgments in ***Prakash and others v. Phulabati and others***, 2015 (II) CLR (SC) 1146 : (2016) 2 SCC 36, ***Mangammal @ Thulasi and another v. T.B. Raju and others***, Civil Appeal No. 1933 of 2009 decided on 19.04.2018, reported at (2018) 15 SCC 662 and ***Danamma @ Suman Surpur and another v. Amar and others***, 2018 (I) OLR (SC) 494 : (2018) 3 SCC 343, have been overruled.

VERDICTUM.IN

11. In the above view of the matter, this Court is of the considered view that the Claims Commission has committed error apparent on the face of the record by passing the order impugned denying benefit to the daughter relying upon ***Prakash*** and ***Mangammal*** (supra). But fact remains, the Claims Commission passed the order impugned on 04.01.2020, by which time the judgment of the Larger Bench in the case of ***Vineeta Sharma*** (supra) had not seen the light of the day, which was decided on 11th August, 2020. Since the judgment, basing upon which the Larger Bench has passed the order impugned, has no effect at this point of time, in view of the fact that the Amendment Act, 2005 has already come into force and, as such, the interpretation thereof has to be given effect to. As such, the daughter has a right to get the property of her father from the date the Amendment Act came into force, i.e., in 2005.

12. At this stage, it is profitable to quote paragraphs 60, 68 and 69 of the judgment of the Larger Bench of the apex Court in the case of ***Vineeta Sharma***

VERDICTUM.IN

v. Rakesh Sharma and others, 2020 (II) OLR (SC) 569 : (2020) 9 SCC 1:-

> *"60. Section 6(2) provides when the female Hindu shall hold the property to which she becomes entitled under section 6(1), she will be bound to follow rigors of coparcenary ownership, and can dispose of the property by testamentary mode.*
>
> *68. 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.*
>
> *69. The argument raised that if the father or any other coparcener died before the Amendment Act, 2005, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and there was no coparcener alive from whom the daughter would succeed. We are unable to accept the submission because it is not by the death of the father or other coparcener that rights accrue. It is by the factum of birth. It is only when a female of Class I heir is left, or in case of her death, male relative is left, the share of the deceased coparcener is fixed to be distributed by a deemed partition, in the event of an actual partition, as and when it takes place as per the proviso to unamended section 6. The share of the surviving coparcener may undergo change till the actual partition is made. The proviso to section 6 does not come in the way of formation of a coparcenary, and*

VERDICTUM.IN

> *who can be a coparcener. The proviso to section 6 as originally stood, contained an exception to the survivorship right. The right conferred under substituted section 6(1) is not by survivorship but by birth. The death of every coparcener is inevitable. How the property passes on death is not relevant for interpreting the provisions of section 6(1). Significant is how right of a coparcener is acquired under Mitakshara coparcenary. It cannot be inferred that the daughter is conferred with the right only on the death of a living coparcener, by declaration contained in section 6, she has been made a coparcener. The precise declaration made in section 6 (1) has to be taken to its logical end; otherwise, it would amount to a denial of the very right to a daughter expressly conferred by the legislature. Survivorship as a mode of succession of property of a Mitakshara coparcener, has been abrogated with effect from 9.9.2005 by section 6(3).”*

13. Taking into consideration the aforesaid facts and law, this Court is of the considered view that the order dated 04.01.2020 passed by opposite party no.2-Claims Commission in Claim Case No.227 of 2019 under Annexure-4 cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed. The matter is remitted back to the Claims Commission for its re-adjudication by giving opportunity of hearing to all the parties.

VERDICTUM.IN

14. In the result, the writ petition is allowed. However, there shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

M.S. RAMAN, J. I agree.

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M.S. RAMAN,
JUDGE

Orissa High Court, Cuttack
The 22nd June, 2023, Ashok

HIGH COURT ORISSA सत्यमेव जयते