Supreme Court of India
G.Sekar vs Geetha & Ors on 15 April, 2009
Author: S.B. Sinha
Bench: S.B. Sinha, Mukundakam Sharma

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2535 OF 2009
[Arising out of SLP (Civil) No. 9221 of 2007]

G. Sekar ...Appellant

Versus

Geetha & Ors. ...Respondents

JUDGMENT

S.B. SINHA, J :

1. Leave granted.

2. Effect of the amendment in the Hindu Succession Act, 1956 (for short "the Act") by reason of the Hindu Succession (Amendment) Act, 2005 (for short "the 2005 Act") insofar as therein Section 23 has been omitted is the question involved herein.

3. The said question arises in the following factual matrix.

The property in suit was owned by one Govinda Singh. He purported to have executed a Will in favour of his son, the appellant herein on 29.11.1995. His wife Sakunthala Bai predeceased him. The said Govinda Singh died on 9.01.1996 leaving behind the appellant (original defendant No. 1) and four daughters, viz., Geetha and Vijaya (plaintiffs) and Shanthi and Uma (original defendant Nos. 2 and 3).

Indisputably, the parties to the suit were residing in the premises in suit. Govinda Singh was also a government contractor. He was running a business of transport. His daughters were also partners in the firm. Inter alia on the premise that Govinda Singh died intestate and as disputes and differences arose between the plaintiffs and the defendants as regards enjoyment of the property, a suit for partition was filed on 11.03.1996 (marked as C.S. No. 153 of 1996) in the High Court of Judicature at Madras. The suit property inter alia consisted of residential premises being No. 36, First Cross Street, West C.I.T. Nagar, Madras - 600 035 as also some movable properties.

4. Defendant No. 4 Ramesh filed an application for impleadment in the said suit alleging that Govinda Singh had married one `Saroja' who was, thus, his second wife and through her he had two daughters and one son, viz., Jothi, Maya and himself. It was on the aforementioned premise, Ramesh was impleaded as a party in the said suit.

Appellant in his written statement inter alia contended:

(i) In terms of the aforementioned Will dated 29.11.1995, the suit property, having been bequeathed in his favour, has vested in him absolutely.

(ii) In any event, having regard to the provisions of Section 23 of the Act, the suit for partition was not maintainable.

5. Defendant No. 4 also filed a written statement alleging that the Will was not a genuine one and was prepared subsequent to 10.12.1995.

In the said suit, the following issues were framed:

> "(1) Whether the deceased Mr. M.K. Govinda Singh died intestate?
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> (2) Whether the suit for partition by the daughters of the deceased M.K. Govinda Singh, who died intestate, is maintainable or not? (3) Whether the alleged will dated 29.11.1995 said to have been executed is genuine one and, if so, who are the beneficiaries?"

6. On or about 7.01.1999, an additional issue was framed, which reads as under:

"Whether the D-4 is entitled to have any share in the schedule property? If so what is his share?

7. Indisputably, the appellant also initiated a testamentary proceedings for grant of Letters of Administration with a copy of the Will annexed thereto, which was marked as O.P. NO. 329 of 1996. The plaintiffs of the suit No. 153 of 1996 entered caveat in the said proceeding; it was marked as T.O.S. No. 4 of 1998.

The issue framed in the said testamentary proceedings was:

"(1) Whether the Will of Late M.K. Govinda Singh is true, valid and genuine?"

8. The learned Single Judge held that the appellant could not prove due execution of the Will as several suspicious circumstances surrounded the same.

It was furthermore held that having regard to the omission of Section 23 of the Act and in view of the fact that even the Defendant No. 4 in his written statement asked for partition of the property, Section 23 of the Act would not stand in the way of plaintiffs' suit for partition. It was directed:

> "28. In the result, T.O.S. No. 4 of 1998 is dismissed with cost of the defendants. In C.S. No. 153 of 1996, there shall be a preliminary decree for partition of the suit property into eight equal shares and allotment of two shares together to the plaintiffs. C.S. No. 153 of 1996 shall stand adjourned sine die."

9. Two intra-court appeals were preferred against the said judgment and decree, which were marked as O.S.A. Nos. 196 and 197 of 2001. By reason of the impugned judgment, the said appeals have been dismissed.

As regards the issue of the validity and/ or genuineness of the Will, the Division Bench held:

> "21. It is no doubt true that P.W.4 belongs to a noble profession and ordinarily great weight is to be attached to such evidence. However, apart from the fact that several contradictions are available from the evidence, P.W.4 cannot be characterized as an independent witness as it is she who had given the reply notice Ex. D-3 on behalf of the propounder of the Will. At the time when she gave the reply, there is no whisper in such reply that in fact she had drafted the will and attested the same. These are many of the aspects appearing from the evidence of P.Ws. 1 to 4 which create sufficient doubt regarding the due execution of the Will. It is of course true that many of the contradictions may appear to be innocuous in isolation. But, when all these contradictions are considered together along with the fact that thumb impression was given by the executant, even though he was obviously signing the document, and the fact that in the typed will line-spacing in different pages appear to be irregular, they create sufficient doubt regarding the due execution and genuineness of the will."
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> As regards application of Section 23 of the Act, it was opined:
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> "...It is no doubt true that such amendment has come into force during pendency of the appeal. However, even assuming that there was any embargo at the time of filing the suit or passing the judgment by the learned Single Judge as contemplated under Section 23 of the Act as it stood, in view of the amendment and deletion of such provision, it is obvious that there is no such embargo after 9.9.2005. In other words, after 9.9.2005 any female heir can seek for partition even in respect of a dwelling house. This subsequent event arising out of change in law is obviously to be applied and, therefore, the question of applying bar under Section 23 of the Act no longer arises for consideration."
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> 10. Mr. K.V. Viswanathan, learned counsel would, in support of the appeal, raise the following contentions:
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> (i) The High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the amendment carried out in the Act by reason of the 2005 Act is only prospective in nature, as would be evident from the report of the Law Commission as also the Statement of Objects and Reasons

thereof and, thus, the impugned judgment is liable to be set aside.

(ii) The 2005 Act, on a plain reading, cannot be held to have retrospective effect and, thus, rights and obligations of the parties should have been determined as were obtaining on the date of institution of the suit.

(iii) If Section 23 of the Act is given retrospective effect, Section 6 of the Act will also stand amended with retrospective effect.

(iv) In view of the fact that execution of the said Will had been proved and all purported suspicious circumstances had been explained, the High Court committed a serious error in opining that the Will dated 25.11.1995 had not duly been proved.

11. Mr. K. Ramamoorthy, learned senior counsel appearing on behalf of the respondents, on the other hand, would support the impugned judgment.

12. Before adverting to the rival contentions raised herein, we may place on record that the High Court by reason of the impugned judgment has set aside that part of the order of the learned single judge whereby Govinda Singh was held to have married Saroja and had begotten Ramesh and two other daughters, viz., Jothi and Maya. Ramesh has accepted the said finding as no appeal has been preferred therefrom.

13. The Act brought about revolutionary changes in the old Hindu Law. It was enacted to amend and codify the law relating to intestate succession amongst Hindus. By reason of the Act, all female heirs were conferred equal right in the matter of succession and inheritance with that of the male heirs.

Section 8 of the Act reads as under:

"8 - General rules of succession in the case of males The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter--

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased."

The Schedule appended to the Act specifies the persons who would be the relations of Class I, viz.:

> "Class I : Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre- deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre- deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre- deceased son..."

14. By reason of Section 14 of the Act, a woman who had limited interest in the property but was possessed of the same was to become absolute owner. Section 6 of the Act, however, makes an exception to the aforementioned rule by providing the manner in which the interest in the coparcenary property shall devolve upon the heirs stating that the rule of survivorship would operate in respect thereof. The right, title and interest of an heir, whether male or female, thus, are governed by the provisions of the Act.

15. The property in the hands of Govinda Singh was not a coparcenary property. It was his self-acquired property. The parties hereto, therefore, obtained equal shares being the relatives specified in Class-I of the Schedule. Plaintiffs - Respondents, therefore, became owners to the extent of 1/5th share of the said property. The title to the aforementioned extent of each co-sharer, having devolved upon them by reason of operation of statute, was absolute.

16. Section 23 of the Act, however, curtails the rights of the daughters to obtain a decree for partition in respect of dwelling houses, stating:

> "23. Special provision respecting dwelling houses.-- Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:
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> Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The proviso appended to Section 23 of the Act confers right of the daughter who is separate from her husband and giving the right to the widow in spite of the fact that her husband has left a dwelling house. The right of a female heir to claim partition of the family dwelling house although restricted so long as the male heirs do not choose to affect partition of the same but it expressly recognizes her right to reside therein.

17. The said property belonging to Govinda Singh, therefore, having devolved upon all his heirs in equal share on his death, it would not be correct to contend that the right, title and interest in the property itself was subjected to the restrictive right contained in Section 23 of the Act. The title by reason of Section 8 of the Act devolved absolutely upon the daughters as well as the sons of Govinda

Singh. They had, thus, a right to maintain a suit for partition.

Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who has died intestate is equal to her brother.

18. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognizes the right of residence in respect of the class of females who come within the purview of proviso thereof. Such a right of residence does not depend upon the date on which the suit has been instituted but can also be subsequently enforced by a female, if she comes within the purview of proviso appended to Section 23 of the Act.

19. We have been taken through the 174th Report of the Law Commission which recommended omission of Section 23 of the Act in view of amendment in Section 6 of the Act.

Report of the Law Commission although may be looked into for the purpose of construction of a statute but, it is trite that the same would not prevail over a clear and umambiguous provision contained therein. We may, however, notice Clause 3.2.9 of the Report of the Law Commission, to which our attention has been drawn to, reads as under:

> "3.2.9 It is further felt that once a daughter is made a coparcener on the same footing as a son then her right as a coparcener should be real in spirit and content. In that event section 23 of the HSA should be deleted. Section 23 provides that on the death of a Hindu intestate, in case of a dwelling house wholly occupied by members of the joint family, a female heir is not entitled to demand partition unless the male heirs choose to do so; it further curtails the right of residence of a daughter unless she is unmarried or has been deserted by or has separated from her husband or is a widow. Section 23 of HSA needs to be deleted altogether and there is great support for this from various sections of society while replying to the questionnaire."

The last sentence of the said paragraph clearly shows that it was thought necessary to delete the said provision as there was a great support therefor from various sections of the society. Indisputably, the amending Act was not enacted in total consonance of the recommendations of the Law Commission.

20. We may in the aforementioned backdrop notice the relevant portion of the Statement of Objects and Reasons of the 2005 Act, which reads as under:

> "3. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the same section so as to remove the disability on female heirs

contained in that section."

21. It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

22. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparacenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto. Restrictions imposed on a right must be construed strictly. In the context of the restrictive right as contained in Section 23 of the Act, it must be held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds, as grant of a preliminary decree would be dependant on the right of a co-sharer in the joint property. Concededly a preliminary decree could be passed declaring each co-sharer to be entitled to 1/5th share therein in terms of the provisions contained in Section 8 of the Act. 1/5th share in each co-sharer upon death of the predecessor-in-interest of the parties is absolute. They cannot be divested of the said right as the restriction in enjoyment of right by seeking partition by metes and bounds is removed by reason of Section 3 of the 2005 Act. We may notice Sub- section (5) of the 2005 Act, which reads as under:

> "(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 or partition effected by a decree of a court."

Thus, where a partition has not taken place, the said provision shall apply.

Reliance has also been placed by Mr. Viswanathan on Eramma v. Verrupanna & ors. [(1966) 2 SCR 626], wherein it was held:

> "It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of s. 8 must be construed in the context of s. 6 of the Act. We accordingly hold that the provisions of s. 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e., where succession opened before the Act, s. 8 of the Act will have no application."

In the factual matrix obtaining in Eramma (supra), Section 8 was construed in the light of Section 6 of the Act, as one of the questions raised therein was as to whether the property was a coparcenery property or not.

Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place.

23. The operation of the said statute is no doubt prospective in nature.

The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it is not retrospective in nature, its application is prospective.

24. It is now a well settled principle of law that the question as to whether a statute having prospective operation will affect the pending proceeding would depend upon the nature as also text and context of the statute. Whether a litigant has obtained a vested right as on the date of institution of the suit which is sought to be taken away by operation of a subsequent statute will be a question which must be posed and answered.

25. It is trite that although omission of a provision operates as an amendment to the statute but then Section 6 of the General Clauses Act, whereupon reliance has been placed by Mr. Viswanathan, could have been applied provided it takes away somebody's vested right. Restrictive right contained in Section 23 of the Act, in view of our aforementioned discussions, cannot be held to remain continuing despite the 2005 Act.

Reliance has been placed by Mr. Viswanathan on The State of Orissa v. Bhupendra Kumar Bose & ors. [AIR 1962 SC 945] wherein the effect of a lapsing of the ordinance vis-`-vis non applicability of Section 6 of the General Clauses Act to such a situation was examined by this Court to hold that even in the case of right created by a temporary statute if the right is of an enduring character and has vested in the person that right cannot be taken away because the statute by which it was created has expired. We are not faced with such a situation.

We may notice that a Constitution Bench of this Court in Kolhapur Canesugar Works Ltd. & Anr. v. Union of India & Ors. [(2000) 2 SCC 536] considered the effect of omission of the Rules in a subordinate legislation, holding:

> "34... It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. It is our considered view that in such a case the Court is to look to the provisions in the rule which has

> been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceeding shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceeding was initiated being deleted/omitted. It is relevant to note here that in the present case the question of divesting the Revenue of a vested right does not arise since no order directing refund of the amount had been passed on the date when Rule 10 was omitted."

The observations made therein instead of advancing the cause of the appellant goes against his contentions.

We are not oblivious of the fact that correctness of the said decision was doubted in S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India & Anr. [(2006) 2 SCC 740] wherein omission of Section 16(1)(d) of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952, which gave infancy protection, was held not to take away the right of parties existing on that date, opining that the right to infancy protection accrued prior to that date held continue to survive for the balance infancy period.

The said decision has no application in the fact of the present case. We may, however, notice that in Brihan Maharashtra Sugar Syndicate Ltd. v. Janardan Ramchandra Kulkarni & ors. [AIR 1960 SC 794], while dealing with the scope of Section 6 of the General Clauses Act, this Court held:

> "5. Now it has been held by this Court in State of Punjab v. Mohar Singh (AIR 1955 SC 84), that S. 6 applies even where the repealing Act contains fresh legislation on the same subject but in such a case one would have to look to the provisions of the new Act for the purposes of determining whether they indicate a different intention. The Act of 1956 not only repeals the Act of 1913 but contains other fresh legislation on the matters enacted by the Act of 1913. It was further observed in State of Punjab v. Mohar Singh (AIR 1955 SC 84), that in trying to ascertain whether there is a contrary intention in the new legislation, "the line of enquiry would be not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them.""

It was furthermore observed:

> "9. We are unable to accept these contentions. Section 10 of the Act of 1956 deals only with the jurisdiction of courts. It shows that the District Courts can no longer be empowered to deal with applications under the Act of 1956 in respect of matters contemplated by s. 153-C of the Act of 1913. This does not indicate that the rights

> created by s. 153-C of the Act of 1913 were intended to be destroyed. As we have earlier pointed out from State of Punjab v. Mohar Singh (AIR 1955 SC
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> 84), the contrary intention in the repealing Act must show that the rights under the old Act were intended to be destroyed in order to prevent the application of s. 6 of the General Clauses Act. But it is said that s. 24 of the General Clauses Act puts an end to the notification giving power to the District Judge, Poona to hear the application under s. 153-C of the Act of 1913 as that notification is inconsistent with s. 10 of the Act of 1956 and the District Judge cannot, therefore, continue to deal with the application. Section 24 does not however purport to put an end to any notification. It is not intended to terminate any notification; all it does is to continue a notification in force in the stated circumstances after the Act under which it was issued, is repealed. Section 24 therefore does not cancel the notification empowering the District Judge of Poona to exercise jurisdiction under the Act of 1913. It seems to us that since under s. 6 of the General Clauses Act the proceeding in respect of the application under s. 153-C of the Act of 1913 may be continued after the repeal of that Act, it follows that the District Judge of Poona continues to have jurisdiction to entertain it. If it were not so, then s. 6 would become infructuous."

Yet again in Raja Narayanlal Bansilal v. Maneck Phiroz Mistry [AIR 1961 SC 29] this Court, while interpreting the provisions of Section 645 of the Companies Act, opined:

> "The effect of this section is clear. If an inspector has been appointed under the relevant section of the old Act, on repeal of the old Act and on coming into force of the new Act, his appointment shall have effect as if it was made under or in pursuance of the new Act. Indeed it is common ground that if s. 645 had stood alone and had not been followed by s. 646 there would have been no difficulty in holding that the inspector appointed under the old Act could exercise his powers and authority under the relevant provisions of the new Act, and the impugned notices would then be perfectly valid. Incidentally we may refer to the provisions of s. 652 in this connection. Under this section any person appointed to that office under or by virtue of any previous company law shall be deemed to have been appointed to that office under this Act."

In State of Punjab & Ors. v. Bhajan Kaur & Ors. [2008 (8) SCALE 475], while dealing with the question as to whether the quantum of no fault liability enhanced from Rs.15,000/- to Rs.50,000/- could be awarded, it was held:

> "13. No reason has been assigned as to why the 1988 Act should be held to be retrospective in character. The rights and liabilities of the parties are determined when cause of action for filing the claim petition arises. As indicated hereinbefore, the liability under the Act is a statutory liability. The liability could, thus, be made retrospective only by reason of a statute or statutory rules. It was required to be so stated expressly by the Parliament.

> Applying the principles of interpretation of statute, the 1988 Act cannot be given retrospective effect, more particularly, when it came into force on or about 1.07.1989.
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> 14. Reference to Section 6 of the General Clauses Act, in our opinion, is misplaced. Section 217 of the 1988 Act contains the repeal and saving clause. Section 140 of the 1988 Act does not find place in various clauses contained in Sub-section (2) of Section 217 of the 1988 Act. Sub-section (4) of Section 217 of the 1988 Act reads, thus:
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> "(4) The mention of particular matters in this section shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals.""
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> 26. Indisputably, the question as to whether an amendment is prospective or retrospective in nature, will depend upon its construction.

It is merely a disabling provision. Such a right could be enforced if a cause of action therefor arose subsequently. A right of the son to keep the right of the daughters of the last male owner to seek for partition of a dwelling house being a right of the male owner to keep the same in abeyance till the division takes place is not a right of enduring in nature. It cannot be said to be an accrued right or a vested right. Such a right indisputably can be taken away by operation of the statute and/or by removing the disablement clause.

In Bhajan Kaur (supra), it was held:

> "16. Section 6 of the General Clauses Act, therefore, inter alia saves a right accrued and/ or a liability incurred. It does not create a right. When Section 6 applies only an existing right is saved thereby. The existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. If a new Act confers a right, it does so with prospective effect when it comes into force, unless expressly stated otherwise."

In Vishwant Kumar v. Madan Lal Sharma & Anr. [(2004) 4 SCC 1], a three judge Bench of this Court repelled a similar contention that Section 9 of the Delhi Rent Control Act providing for the exclusion of operation thereof in the following words:

> "...There is a difference between a mere right and what is right acquired or accrued. We have to examine the question herein with reference to Sections 4, 6 and 9 of the Act. It is correct that under Section 4 of the Rent Act, the tenant is not bound to pay rent in excess of the standard rent, whereas under Section 9 he has a right to get the standard rent fixed. Such a right is the right to take advantage of an enactment and it is not an accrued right."
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> It was furthermore opined:

> "What is unaffected by repeal is a right acquired or accrued under the Act. That till the decree is passed, there is no accrued right. The mere right existing on date of repeal to take advantage of the repealed provisions is not a right accrued within Section 6(c) of the General Clauses Act. Further, there is a vast difference between rights of a tenant under the Rent Act and the rights of the landlord. The right of a statutory tenant to pay rent not exceeding standard rent or the right to get standard rent fixed are protective rights and not vested rights. On the other hand, the landlord has rights recognised under the law of Contract and Transfer of Property Act which are vested rights and which are suspended by the provisions of the Rent Act but the day the Rent Act is withdrawn, the suspended rights of the land lord revive."
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> A similar question came up for consideration recently in Subodh S.

Salaskar v. Jayprakash M. Shah & Anr. [2008 (11) SCALE 42], wherein it was noticed:

"25. In Madishetti Bala Ramul (Dead) By LRs.

v. Land Acquisition Officer [(2007) 9 SCC 650], this Court held as under:

"18. It is not the case of the appellants that the total amount of compensation stands reduced. If it had not been, we fail to understand as to how Section 25 will have any application in the instant case.

Furthermore, Section 25 being a substantive provision will have no retrospective effect. The original award was passed on 8-2-1981: Section 25, as it stands now, may, therefore, not have any application in the instant case."

The question is now covered by a judgment of this Court in Anil Kumar Goel v. Kishan Chand Kaura [2008 AIR SCW 295] holding:

> "8. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors., AIR 1984 SC
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> 87).

> 9. There is nothing in the amendment made to Section 142(b) by the Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28.11.1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted.""

In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio & ors. [(2007) 5 SCC 447], it was held:

> "...The expression "privilege" has a wider meaning than right. A right may be a vested right or an accrued right or an acquired right. Nature of such a right would depend upon and also vary from statute to statute."

Strong reliance has been placed by Mr. Viswanathan on Atma Ram Mittal v. Ishwar Singh Punia [[(1988) 4 SCC 284], wherein it was held:

> "8. It is well-settled that no man should suffer because of the fault of the Court or delay in the procedure. Broom has stated the maxim "actus curiam neminem gravabit"-an act of Court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the 10 years exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within 10 years and even then within that time it may not be disposed of. That will make the 10 years holidays from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else."
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> Yet again, reliance has been placed on M/s Kesho Ram & Co. & ors.

etc. v. Union of India & Ors. [(1989) 3 SCC 151], wherein it was held:

> "13. Learned Counsel urged that the impugned Notification enlarged the period of exemption for an indefinite period and it tends to amend Section 13 of the Act and it is contrary to the object and purpose of the Act. Developing the argument it was submitted that the Notification granted exemption to newly constructed buildings in the urban area of Chandigarh for a period of five years only from the operation of Section 13 of the Act, therefore, no exemption could be available to newly constructed buildings after the expiry of five years. A suit if instituted during the period of exemption could not be decreed, nor such decree could be executed after the expiry of five years period but the last portion of the Notification which states that Section 13 of the Act shall not apply to decree of civil courts whether such decree was passed

> during the period of exemption or "at any time thereafter" enlarged the period of exemption for an indefinite period of time, and it seeks to amend Section 13 of the Act. We do not find merit in the submission. As noticed earlier Section 13(1) imposes a complete ban against the eviction of a tenant in execution of a decree passed by a civil court before or after the commencement of the Act and it further lays down that a tenant in possession of a building or rented land shall not be evicted except in accordance with the provisions of Section 13 or an order made in pursuance of the provisions of the Act. Sub-Section (2) of Section 13 sets out statutory grounds on which the Controller, an authority constituted under the Act has power to pass order of eviction against a tenant. Section 13 takes away the jurisdiction of civil court to pass a decree of eviction or execution thereof against a tenant in respect of a building which is subject to the provisions of the Act The impugned Notification grants immunity to newly constructed buildings from the shackles of Section 13 of the Act for a period of five years.

While doing so, the Notification has taken care to make the exemption effective by providing that the exemption shall be available to the building even if the decree is passed after the expiry of the period of five years provided the suit is instituted during the period of exemption. The emphasis is on the institution of the suit within the period of exemption of five years. Once the landlord institutes a suit before the expiry of the period of exemption, the decree even if passed after the period of five years will not be subject to the provisions of Section 13 of the Act. This is the true meaning of the Notification The Notification does not enlarge the period of exemption instead it safeguards the rights of the parties which crystalise on the date of institution of the suit. The aforementioned decisions for the reasons stated supra are not applicable in the instant case.

As indicated hereinbefore, the institution of a suit is not barred. What is barred is actual partition by metes and bounds.

Reliance has also been placed on Sheela Devi & ors. v. Lal Chand & Anr. [(2006) 8 SCC 581]. The question which arose therein was vesting of right of a coparcener of a mitakshra family under the old Hindu Law vis-`- vis Hindu Succession Act, 1956. The contention raised therein that the provisions of the Amendment Act, 2005 will have no application as the succession had opened in 1989 was negatived, holding:

> "21. The Act indisputably would prevail over the old Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005 would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, proviso appended to Sub-section (1) of Section 6 of the Act creates an exception. First son of Babu Lal, viz., Lal Chand, was, thus, a coparcener. Section 6 is exception to the general rules. It was, therefore, obligatory on the part of the

> Plaintiffs-Respondents to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the Second son Sohan Lal is concerned, no evidence has been brought on records to show that he was born prior to coming into force of Hindu Succession Act, 1956. Thus, it was the half share in the property of Babu Ram, which would devolve upon all his heirs and legal representatives as at least one of his sons was born prior to coming into force of the Act."

The said decision, thus, cannot be said to have any application whatsoever in this case.

Reliance has also been placed by Mr. Viswanathan in Shyam Sunder & Ors. v. Ram Kumar & Anr. [(2001) 8 SCC 24], wherein it was held that ordinarily a statute should be construed to have prospective operation. In that case, a right of pre-emption was sought to be taken away by Section 15 of the Punjab Pre-emption Act, 1913 as substituted by Haryana Act 10 of 1995 and it was on that premise, held:

> "28. From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation such legislation does not effect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not effect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statue and further a statute is not to be construed t have a greater retrospective operation than its language renders necessary, but an amending act which affects the procedure is presumed to be retrospective, unless amending act provides otherwise."

27. Mr. Viswanathan also placed strong reliance upon a decision of this Court in Narashimaha Murthy v. Susheelabai (Smt) and Others [(1996) 3 SCC 644]. The principal question which arose for consideration therein was as to whether the premises which are tenanted ones would come within the definition of `dwelling house' so as to attract the rigours of Section 23 of the Act. This Court clearly held that the succession cannot be postponed and Section 23 has been engrafted "respecting tradition of preserving family dwelling house to effectuate family unity and prevent its fragmentation or disintegration by dividing it by metes and bounds". It was furthermore held that "the prohibition gets lifted when male heirs have chosen to partition it".

28. Thus, a right in terms of Section 23 of the Act to obtain a decree for partition of the dwelling house is one whereby the right to claim partition by the family is kept in abeyance. Once, the said

right becomes enforceable, the restriction must be held to have been removed. Indisputably, when there are two male heirs, at the option of one, partition of a dwelling house is also permissible.

29. Another aspect of the matter must also be borne in mind.

In terms of Articles 14 and 15 of the Constitution of India, the female heirs, subject to the statutory rule operating in that field, are required to be treated equally to that of the male heirs. Gender equality is recognized by the world community in general in the human rights regime.

It is of some significance to notice that the South African Constitutional Court in Bhe & Ors. v. The Magistrate, Khayelisha & Ors. [(2004) 18 BHRC 52] declared the Black Administration Act, 1927 (South Africa) and the Regulations of the Administration and Distribution of the Estates of Deceased Blacks (South Africa) ultra vires as in terms whereof the customary law of succession where principle of male primogeniture was central to customary law of succession was provided for.

It was held by the majority that the rule of male primogeniture as it applied in customary law to the inheritance of property was inconsistent with the constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. The rules of succession in customary law had not been given the space to adapt and to keep pace with changing societal conditions and values. Instead, they had over time become increasingly out of step with the real values and circumstances of the societies they were meant to serve. The application of the customary law rules of succession in circumstances vastly different from their traditional setting caused much hardship. Thus the official rules of customary law of succession were no longer universally observed. The exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination.

The said view of the Constitutional Court of South Africa has been noticed by this Court in Anuj Garg & Ors. v. Hotel Association of India & ors. [AIR 2008 SC 663].

Even otherwise, it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India as the fact remains that Section 23 of the Hindu Succession Act as it stood was to be applicable on the date of the institution of the suit. Respondents may file a new suit and obtain a decree for partition.

30. The question as to whether the Will was validly executed or not is essentially a question of fact. Both the learned Single Judge as also the Division Bench pointed out a large number of prevailing suspicious circumstances to opine that the same had not been validly executed.

Let us now briefly consider the question as to whether the execution of the Will has duly been proved.

Appellant stated in his evidence that one Ms. Radhai, Advocate (PW-

4) prepared the Will and that the testator gave instructions in the morning of 29.11.1995 therefor. He further stated that at the time his father gave instructions for preparation of the Will, their neighbour Vishwanathan (PW-

3) and Mrs. Radhai, Advocate were present. He further stated:

> "I do not know where exactly the Will was typewritten".

However, in Ex. D-3, it has not been mentioned that Ms. Radhai prepared the Will and had attested the same.

PW-3 Vishwanathan deposed that "at the instance of Govinda Singh, Radhai brought the typedwritten Will". However, in cross examination, he stated: "I do now know where the Will was typed". He furthermore stated:

> "I was present when Govinda Singh gave instructions to Mrs. Radhai for preparation of the Will. None else were present. Govinda Singh gave instructions to Mrs. Radhai by 10.00 A.M. She brought the typed Will by 2.00 P.M., I was not present throughout in the hospital."
>
> PW-4 Ms. Radhai in her examination in chief stated:
>
> "On 29.11.1995 at 10.00 a.m. I went to Devaki Hospital. I met Govinda Singh, PW-2 and PW-3 were present in the hospital. PW-2 going here and there in the hospital. The testator gave instructions to me to draft the Will. I noted the instructions in a piece of paper, came to High Court and got the Will typed. The Will was typed by a typist who was available in the corridors. The typist was s. Teresa. At about 2.00 P.M. I went to the hospital on the same day, read the contents of the Will to the testator, then he affixed his left thumb impression...then I signed the Will. Thereafter PW-3 signed the Will."

However, in the cross-examination, she stated:

> "On 29.11.95 at about 8.00 a.m. in the morning Vishwanathan came to my house and told that the testator wanted me to meet him...I do not know the mother-tongue of the testator. I did not retain the note of instructions given by the testator for drafting the Will. Teresa was the regular typist. Because the testator used to talk to me in Tamil, I drafted the Will in Tamil. The testator had not instructed me that the Will should be in Tamil only. I was not by the side of Teresa when she typed the Will. I only gave instructions to her. Teresa had not drafted the Will. I drafted the Will in writing and gave it to her for typing. I do not have the manuscript. I did not compare the typed Will with the manuscript."

Appellant filed an affidavit in support of his case, which was attested and drafted by PW-4 Ms. Radhai in English. Appellant did not speak of this affidavit. PW-3 Vishwanathan in the cross-examination admitted:

> "I do not know whether Govinda Singh signed any other paper apart from Ex. P.1".
>
> PW-4 Ms. Radhai in the cross-examination stated:
>
> "I have notarized the affidavit of Govinda Singh few days after attesting the Will."
>
> However, she admitted:
>
> "I do not remember whether the testator signed any other affidavit on 29.11.95 apart from the Will."
>
> On further cross-examination, she deposed:
>
> "Ex. P.2 is an affidavit which I have attested on 29.11.95. I have attested P-2 in my office. I have drafted the affidavit. I supplied the stamp paper for drafting the affidavit. Because the attestator wanted an affidavit to confirm the Will, Ex. P.2 was drafted. I purchased the stamp papers for drafting the affidavit."
>
> However, it has been brought to our notice that the stamp paper had been purchased by PW-4 on 11.10.1995 in the name of M.K. Govinda Singh from a place called Thiriuviyaru in Thanjore District which is 200 miles away from Chennai. She further deposed:
>
> "I do not remember where I purchased the stamp papers for drafting Ex. P.2. There is no particular reason as to why the affidavit was drafted in English".
>
> 31. Both the courts below have considered all the essential ingredients of proof of Will, viz., preparation of the Will, attestation thereof as also suspicious circumstances surrounding the same. They have arrived at a concurrent finding that the Will was not validly proved. We do not find any reason to differ therewith.

32. For the reasons aforementioned, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.

[S.B. Sinha] .....J.

[Dr. Mukundakam Sharma] New Delhi;

April 15, 2009