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# EMERGENCE OF STATUTORY ERA: PROPRIETARY RIGHTS OF FEMALE UNDER HINDU LAW

## And

# A STUDY ON THE INDIAN SUCCESSION ACT, 1925


Compiled by :

**Judicial Academy Jharkhand**

Dhurwa, Ranchi, Jharkhand

# Emergence of Statutory Era:
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# PREFACE

This study material is divided into three distinct sections. The first section provides a comprehensive analysis of the development of proprietary rights bestowed to women under Hindu statutory law, tracing the progression from the ancient concepts of '*stridhan*' and 'women's estate' to the important amendments introduced by the Hindu Succession (Amendment) Act, 2005, which significantly revised the Hindu Succession Act, 1956. This amendment travels into the fields of Hindu law beyond the law of succession. The Amendment Act (i) confers right by birth on the daughter of a coparcener governed by the Mitakshara School equal to that of a son; (ii) abolishes completely succession by survivorship; (iii) amends the law of partition; (iv) renders unenforceable the pious obligation of a son towards his father; (v) removes restriction on right of a female heir to claim partition of a family dwelling house, wholly occupied by the members of family, until the make members elect to divide it; and (vi) includes four more heirs on Class I than before.

The second section delves into the legal framework surrounding 'Wills' under the Indian Succession Act, 1925. This study material aims to address the complexities and queries that frequently arise in court proceedings related to the enforcement of Wills. It elucidates the necessity of probate or letters of administration with a will annexed, highlighting the significance of this process in establishing the validity of a Will. It is noteworthy that the probate proceeding is not merely *inter-partes* proceeding but leads to judgement *in rem* and, therefore, even when no one contests, it does mot *ipso facto* lead to grant of probate. The probate is granted only on proof of will as also on removal of suspicious circumstances, if there be any, to the final satisfaction of the conscience of the court.

The third section compiles a collection of landmark judgments delivered by the Hon'ble Supreme Court and various High Courts, providing valuable insights into the interpretation and application of the Hindu Succession Act, 1956, and the Indian Succession Act, 1925. These landmark rulings serve as a rich resource for understanding the legal nuances and precedents shaping the landscape of succession law in India.

It is hoped that the study material will serve as a valuable resource for judges adjudicating cases related to this specific branch of law, and indeed, provide useful insights for a broader audience in the judiciary, contributing to a deeper understanding and application of these legal principles.

**Ranchi, Date: 20th July, 2024** **Judicial Academy, Jharkhand**

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# EMERGENCE OF STATUTORY ERA:

# PROPRIETARY RIGHTS OF FEMALE UNDER HINDU LAW

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## 1. HISTORICAL BACKGROUND:

Since ancient times, Indian culture has imposed limitations on the legal entitlement of Hindu women to inherit property, perpetuating a longstanding gender bias in inheritance laws. The Sanskrit saying "*Na stri swatantramarhati-'Swatantram Na Kachit Stiyah*"[1] meant that women were unfit for any independent existence and was the rule of ancient Hindu Society. In the ancient text *Manusmriti*, *Manu* writes: *"Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence."*

A woman was considered less than fully human, an object to be preserved by her male guardians. Even though the Puranas, the mythological stories passed on from the time of *Krishna*, described Goddesses as *Shakti* (Goddess of universal power), *Mahalakhshmi* (Goddess of wealth), and *Mahasaraswati*, (Goddess of knowledge), mortal women were placed below the status of *Sudra*, the lowest *varna* of Hindu society.[2]

The ancient legal texts do not provide for property rights for unmarried women. However, marriage conferred a limited property right known as '*stridhan*', encompassing movable assets like jewelry, clothing, and utensils, which were bestowed upon her at the time of marriage. In rare instances, immovable property might also form part of *stridhan*. Nonetheless, a woman's title to *stridhan* was not absolute, as it was subject to the control and ownership of her husband, as stipulated in the *Manusmriti*.

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[1] A. M. Bhattacharjee, "Hindu Law and Constitution", (2nd ed., E. L. House 1994)

[2] Debarati Halder and K. Jaishankar, "Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India" (Journal of Law and Religion, Vol. 24, No. 2, 2008-2009, Cambridge University Press), *Available at:* https://www.jstor.org/stable/25654333

In India, as far as personal laws (i.e. laws relating to marriage, divorce and succession etc.) are concerned, the Hindus were governed by *Shastric* and Customary laws which varied from region to region. This brought multiple laws of diversified nature to govern Hindus which were prevalent in different schools and sub-schools like Mitakshara and Dayabhaga etc. These schools, based on different interpretations of *Yagnavalkya Smriti*, established rules for marriage and inheritance which makes the source of Hindu Law. Both schools differ mainly on two accounts - the law of inheritance and Joint Family System.

Mitakhshara, followed in most of India, except the eastern region, emphasizes blood relationships, restricts coparceners' shares in joint family property, and distinguishes between male and female heirs. Its four sub-schools - Dravida, Maharashtra, Banaras, and Mithila - reflect regional variations. The Mitakshara School recognizes two modes of devolution of the property namely, survivorship and succession. The rule of survivorship applies to joint family property and the rule of succession applies to the property held by the last owner.

The Mitakhshara School claimed that a coparcener's share in joint family property is not absolute and constantly fluctuates due to the birth or death of other coparceners. Coparceners therefore do not have absolute right to transfer their shares. It also believed that a woman could never become a coparcener and the widow of a deceased coparcener could not enforce partition of her husband's share against his brothers. Even a wife, though she is entitled to maintenance out of her husband's property, and has, to that extent a right in his property, is not her husband's coparcener. A mother is not a coparcener with her son. There can be no coparcenary between a mother and daughter. Property rights for Hindu women were severely restricted, then, by this school of interpretation.

The second most prominent school of law after Mitakshara School was the Dayabhaga School, was primarily followed in the eastern part of India, particularly in the provinces of Bengal and Assam, and had no sub schools. It differed significantly from the Mitakhshara School in its principles of inheritance and the rights of women as heirs. The Dayabhaga School recognizes only one mode of devolution of the property, that is succession.

According to the Dayabhaga School, the right to inheritance arises from spiritual offerings to ancestors, and the right to Hindu joint family property devolves on the death of the father, not by birth. Each brother has the right to sell their share of the joint property, and widows can inherit and enforce partition if there are no male descendants. However, women's ownership rights were limited, and they could only sell property for specific legal necessities.

Moreover, property inherited from male ancestors passed to the nearest male heir on the woman's death. The Dayabhaga School also categorizes women into five priority groups for inheritance purposes: wife, daughter, mother, father's mother, and father's father's mother.

Hindu law has evolved through various sources, including custom, equity, justice, and conscience, as well as judicial decisions that filled legal gaps. As the law was not static, codification became necessary, particularly to address women's rights and remove anomalies. Post-independence, constitutional imperatives drove amendments to achieve equality, with the latest being the Hindu Succession Act amendment granting daughters equal coparcenary rights as sons in Mitakshara coparcenary, making them equal inheritors.

## 2. COPARCENARY AND JOINT HINDU FAMILY:

In Mitakshara Law the property that was recognized was of two kinds – (i) Joint Family Property and (2) Separate Property. A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. However, a Hindu coparcenary is a much narrower body than the joint family and includes only the persons, who acquire by birth an interest in the coparcenary property. They are the sons, grandsons and great grandsons. The cardinal doctrine of the Mitakshara school is that the property inherited by a Hindu from his father, father's father, or father's father's father is ancestral property that means unobstructed heritage as regards his male issues. A property inherited by a Hindu from other relations is his separate property.

The Supreme Court has discussed about joint Hindu family and Hindu coparcenary in length in the landmark case of ***Vineeta Sharma* v. *Rakesh Sharma***.[3] The Court has observed that a joint Hindu family is a larger body which encompasses a Hindu coparcenary. Hence, a Hindu coparcenary is a much narrower body.

The court observed that a **joint Hindu family** consists of all persons lineally descended from a common ancestor including their wives and unmarried daughters, who shares common faith and jointly owned assets. However, when the family assets are divided, the joint family status ceases to exist. Nevertheless, as ruled in ***Raghunadha Anunga Bhima Deo***

[3] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

***Kesari* v. *Brozo Kishoro Patta Deo***,[4] "*mere severance in food and worship is not treated as a separation*".

The Supreme Court in ***Vineeta Sharma***[5] clarified that a **Hindu Coparcenary** comprises the ancestral property holder (propositus) and their three generations of linear descendants, i.e., sons, grandsons, and great-grandsons. The rights of further descendants would only become applicable as coparceners after the death of the joint property holder, and not during their lifetime.

The right of the **coparcener heirs** generates by birth. Another method to be a coparcener is by way of adoption. As earlier, a woman could not be a coparcener, but she could still be a joint family member.

The Court stated that:

"25. …*Coparcenary is the creation of law. Only a coparcener has a right to demand partition. Test is if a person can demand a partition, he is a coparcener not otherwise. Great-great-grandson cannot demand a partition as he is not a coparcener. In a case out of three male descendants, one or other has died, the last holder, even a fifth descendant, can claim partition. In case they are alive, he is excluded*."

The concept of coparcenary is based upon common ownership by coparceners of the **coparcenary property**. The coparcenary property in question is the one which is inherited by a Hindu from his three lineal ascendants i.e., his father, grandfather and great-grandfather. When it remains undivided, the share of the coparcener is not certain. Nobody can claim with precision the extent of his right in the undivided property. Coparcener cannot claim any precise share as the interest in the coparcenary property is dynamic, fluctuating with the birth or death of family members, increasing or decreasing accordingly. However, property inherited from sources other than these three lineal ascendants is considered separate and does not form part of the coparcenary.

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[4] Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo, 1876 SCC OnLine PC 6 : (1875-76) 3 IA 154 : ILR (1876-82) 1 Mad 69

[5] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

## 3. EVOLUTION OF THE CONCEPT OF *STRIDHAN:*

As discussed above, the most important point of the coparcenary under Mitakshara law is that a female cannot be coparcener. The position of a female member in a Hindu family was minimal. She had no independent rights. The school denied women inheritance rights from their husbands' families, limiting their property rights to *stridhan*. It can be described as a property which was given to women at the time of marriage and a gift. *Stridhan* is the absolute property of a woman and she may dispose it of as she wants. The School expanded the technical and legal meanings of *stridhan* to include the following nine types:

(1) gifts and bequests from relations;
(2) gifts and bequests from strangers;
(3) property acquired by self-exertion and mechanical arts;
(4) property purchased with *stridhan*;
(5) property acquired by compromise;
(6) property obtained by adverse possession;
(7) property obtained in lieu of maintenance;
(8) property obtained by inheritance; and
(9) share obtained by partition.

The Mitakhshara School considered all these nine types of succession as *Stridhan*. But, the Privy Council differed from the ancient school of thought regarding the characteristics of the inherited property. It was decided that when the property is inherited by females from males[6] and also by females from females,[7] it no longer retains the characteristics of "*Stridhan*," but becomes women's estate.

The Bombay School differs with the English judgment on Stridhan, categorizing women's inheritance into three groups:

(a) inheritance of property by woman from female,
(b) inheritance of property by a woman from a male in whose family the woman in born, such as daughters, sisters, brothers' daughter, etc., and

[6] Bhagwandeen v. Maya Baee, 11 M.I.A. 487 (1867).
[7] Sheo Shankar v. Devi Sana, 25 All. 468 (1903).

(c) inheritance of property by a woman from a male, where the woman in question is introduced to the father's gotra or lineage by marriage, such as intestate's widow, mother, etc.

The Bombay School certifies that the first two groups of property qualify the characteristics of Stridhan whereas the third kind of property is not Stridhan but women's estate.[8] Despite differing views on characteristics of Stridhan, all Hindu law schools agree that a woman's share obtained through partition is not Stridhan, but women's estate.[9]

Therefore, the concept of Stridhan developed into two distinct categories of rights over the property, the one being full ownership, including the right to alienation and the other being limited, excluding the right to alienate. This age old confusion of women's limited rights over certain types of property was finally put to rest by the Privy Council in ***Devi Prasad* v. *Mahadeo***,[10]. It coined the property with limited rights as "women's estate" whereby the female owner takes it as a limited owner.

Hence, throughout the entire history of Hindu law, two types of property were recognized which a woman could hold- '*Stridhan'* and 'Women's Estate'. Among these two stridhan was considered to be the absolute property of a female Hindu. In terms of stridhan she enjoyed full powers to alienate, sell, gift, mortgage, lease or exchange during her maidenhood and widowhood, but certain restrictions were imposed on her power, if she was married. On her death, all types of stridhan passed on to her own heirs.

In respect of a woman's estate or widow's estate, *vis a vis* property, the Hindu female owner had limited power of disposal i.e. she could not ordinarily alienate the corpus except for legal necessity, benefit of estate and for religious duties. On her death, the women's estate devolved upon the heir of the last full owner known as reversioners who could be males.

Therefore, the two main characteristics which make women's estate different from *Stridhan* are:

(a) she cannot ordinarily alienate the corpus, and

(b) on her death it goes to the next heir of the last full owner, i.e., the male owner from whom the woman had inherited.[11]

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[8] Kaseerbai v. Hunsraj, 30 Bom. 431 (1906).
[9] Devi Prasad v. Mahadeo, 39 LA. 121 (1912).
[10] Devi Prasad v. Mahadeo, 39 LA. 121 (1912).
[11] Bijay v. Krishna, 44 I. A. 87 (1907).

In ***Janki* v. *Narayansami*,**[12] the Privy Council aptly observed, "*her right is of the nature of right of property, her position is that of the owner, her powers in that character are, however limited… So long as she is alive, no one has vested interest in the succession*."

The medieval period saw a further erosion of Hindu women's succession rights under the shadow of male dominance, exacerbated by the Muslim invasion and the introduction of *Shariat* rules. *Stridhan*, once a symbol of women's property, was reduced to mere jewellery and movable gifts, transformed into a status symbol for dowry and matrimonial gifts, known as *Vara dakhshina*.

The concept of women's estate gained favourable recognition in Hindu society at this time due to socio-cultural reasons. When a woman received landed property either:

1) by inheritance specially from the male members of the family such as the husband or the father-in-law or

2) by share obtained by partition of the property,

she was made the owner subject to two limitations: first, she could not ordinarily alienate the corpus and, second, on her death it devolved upon the next heir of the last full owner, also known as a reversioner. This was established by the Privy Council in the case of ***Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi.***[13]

The customary laws, however, gave three options in which a woman could alienate her estate by herself:

1. legal necessity (that is, for her own need and for the need of the dependants of the last owner);
2. for the benefit of estate; and
3. for the discharge of indispensable duties (marriage of daughters, funeral rites of her husband, his shraddha and gifts to Brahmans for the salvation of his soul; that is, she can alienate her estate for the spiritual benefit of the last owner, but not for her own spiritual benefit).

In other words, in the traditional Hindu joint family system under Mitakshara law, a woman's role was limited to being a caretaker of the property for the benefit of male family members. Despite being a member of the joint family, she had only a right to sustenance and

[12] Janki v. Narayansami, 43 I.A. 207(1916).
[13] Bijoy Gopal Mukherji v. Krishna Mahishi Debi, 34 LA. 87(1907).

not to ownership or control of property. The doctrine of son's birth right was followed, concomitant to the principle of devolution by survivorship of the joint family property to a group called coparceners which comprised of son, grand-son and great grand-son. Thus no Hindu female was a member of the coparcenary in Mitakshara law and she was excluded from inheritance.

The late seventeenth century saw the emergence of the socio-religious issue of dowry, which led to stridhan being treated as a gift to the groom, rather than a woman's rightful property. For centuries, bridegrooms demanded stridhan as part of the dowry, a practice considered unethical by ancient scholars. Although colonial rule introduced laws modelled after British succession rights, these laws failed to adequately protect Hindu women's rights, as they were generally less wealthy than their British counterparts. In the pre-independence period, legislations such as Hindu Women's Right to Property Act, 1937 were passed to make an improvement over the Hindu women's position.

## 4. INTRODUCTION OF COLONIAL LAWS: HINDU WOMEN'S RIGHT TO PROPERTY ACT (1937):

Despite British colonization, Hindu customary laws and traditions continued to be practiced. While the British introduced uniform laws for crime and commerce in the 18th and 19th centuries, they acknowledged and respected distinct Hindu family laws for different religious and cultural groups. Hence, the inheritance laws continued to be governed by the Mitakhshara and Dayabhaga schools until the early 20th century.[14]

Before the enactment of the **Hindu Women's Right to Property Act 1937**, women were not entitled to a share in the joint family property, and succession was governed by survivorship. This meant that when a member of a joint family died, their share of the property would automatically pass to the remaining male family members who were the only coparceners, leaving women with no legal rights or inheritance. Thus, prior to 1937, there were no codified laws to deal specifically with the Hindu woman's right to property and disputes were resolved through customary practices rather than specific legislation.

[14] Debarati Halder and K. Jaishankar, "Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India", *Supra at :* 2

The 1937 Act was the first attempt to make a uniform law of succession for Hindu women which emphasized women's estates. This Act finally put an end to the controversial debate over what to be included in stridhan, and it established Hindu women's rights over landed properties inherited from male.[15] It introduced important changes in the law of succession by conferring new rights of succession on certain females.

The 1937 Act recognized three types of widows:

1) intestate man's widow;
2) widow of a pre-deceased son; and
3) widow of a pre-deceased grandson who is the son of a predeceased father.

The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. It also gave them a very high rank in the line of heirs that they are permitted to share the inheritance along with the widow of the predeceased sons, grandsons and great grandsons of the deceased superseding even his daughter and granddaughter's sons.

But, the widow did not become a coparcener even though she possessed a right similar to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition as a male owner. Unlike before the enactment of the 1937 Act, the widow of a deceased husband was now entitled to the full beneficial enjoyment of the estate. The property was not divided among the surviving coparceners by the doctrine of survivorship, now it was the widow who had the sole right to such property. However, she could not alienate the property unless it was for legal necessity or for the benefit of the estate.

The Act applied only when a Hindu male died intestate either partially or wholly. It did not apply where he had disposed off all his property. The Act mainly intended to on improving the status and condition of a widow in the family. It came as a huge protection for widows who were left with nothing after the death of their husbands and could survive only on the mercy of the surviving coparceners. The said law was made applicable to all schools of Hindu law, including Dayabhaga and Mitakshara.

[15] *Id.*

To understand the devolution of the property under the 1937 Act, it is important to refer to Section 3 of the Act. Section 3 lays down as follows:

"***3. Devolution of property:***

*(1) When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:*

*Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:*

*Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.*

*(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.*

*(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a made owner.*

*(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.*"[16]

Though the 1937 Act established limited rights for Hindu women in their intestate husband's property, its biggest flaw was that it could never guarantee any rights to women successors when the deceased had disposed of his property by will. Neither did the Act mention anything about the shares of women in agricultural lands or properties situated in foreign countries.

[16] Section 3, The Hindu Women's Right to Property Act, 1937 (Act No. XVIII of 1937) *repealed*.

Despite this enactment having brought important changes in the law of succession by conferring new rights of succession on certain females, it was still found to be incoherent and defective in many respects and gave rise to a number of anomalies and did not address the basic inequalities faced by women in the era. A daughter had virtually no inheritance rights under the Act of 1937. The Act did not relate to succession to property but only defined rights of a widow to property. The rights of the daughter, whatever they were during the period prior to the enactment, were not interfered with by this Act as it did not deal with the daughter's right to property.[17]

## 5. POST-INDEPENDENCE DEVELOPMENTS:

With the dawn of independence, the framers of the Constitution took note of the inequality which had been perpetuated against women depriving them of social and economic justice as envisaged in the Preamble to the Constitution of India, Fundamental Rights in Part III (Articles 14, 15, 16), Directive Principles of State Policy in Part IV (Articles 38, 39, 39A, 44) and Fundamental Duties in Part IVA [Article 51 A (e)]. Despite these constitutional mandates, women continued to be subjugated and deprived of her rights including property rights. Consequently, amidst strong resistance from orthodox Hindu sections, the Hindu Succession Act was enacted in 1956 and came into force on 17th June 1956.[18]

## 6. THE HINDU SUCCESSION ACT, 1956:

### 6.1. General Introduction of the Hindu Succession Act, 1956:

In the eyes of law, succession implies the transmission or passing of rights from one to another. The noted author Mulla states, "*the law of inheritance comprises of rules which govern devolution of property, on the death of the person, upon other persons solely on account of their relationship with the former.*"

[17] Dr. R. Sathiya Bama and Dr. N. Neela, "Hindu Women's Right to Property Act 1937 - A Study" (ISSN: 2321-788X, Vol. 1, No. 4, April 2014)
[18] Dr. Alok Kumar, Asst.Prof.Himachal Pradesh National Law University Shimla, "Women's Right to succession and Inheritance in Hindu Law"

The Hindu Succession Act, 1956 (Act No. 30 of 1956) was enacted to amend and codify the law relating to intestate succession among Hindus. By Section 31 of the Hindu Succession Act, 1956, the aforesaid Hindu Women's rights to property Act, 1937 was repealed. However, in view of Section 6 of the General Clauses Act X of 1897, rights acquired and liabilities incurred under the Hindu Women's Rights to Property Act, 1937 were not affected.

The Act has drastically changed the old Hindu law of inheritance. The modern law is applicable to all Hindus, they belong to Mitakshara or Dayabhaga school. No longer are the schools and sub-schools of Hindu law relevant in respect of the law of succession.

Section 4 relates to the Act's overriding effect. It repeals all pre-Act laws, which are inconsistent with the provisions of the Act. Any scriptural rule and interpretation in force prior to the coming of force of this Act are abrogated so far as they are inconsistent with the Act.

## 6.2. Repeal of the Hindu Women Right to Property Act, 1937 and effect of Section 14 of the Hindu Succession Act, 1956:

Hindu Succession Act, 1956 was made applicable to all Hindus including Buddhists, Jains and Sikhs and lays down a uniform and comprehensive system of inheritance and applies to those governed by Mitakshara and Dayabhaga schools as well as other schools.

It tried to remove the existing inequality between male and female with respect to rights to property in the joint family property and also brought revolutionary changes so as to recognize the right of inheritance of Hindu females at par with males.

Section 14 of Hindu Succession Act, 1956 conferred upon Hindu women absolute and full ownership of property instead of limited rights to property. Section 14(1) of the act provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this act, shall be held by her as a full owner thereof and not as a limited owner.

For easy reference we would like to reproduce section 14 of 1956 Act.

"***14. Property of a female Hindu to be her absolute property: -***

*(1) Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*

*Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.*

*(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."*

In view of sub-section (1) of Section 14 of the Hindu Succession Act, 1956, the interest of her deceased husband / coparcener which the widow got in coparcenary property as Hindu women's limited estate by virtue of sub-section (3) of section 3 of the Hindu Women's Rights to Property Act, 1937, would become her absolute property irrespective of whether such interest was for partitioned by the widow before the commencement of the Hindu Succession Act, 1956, or not.

The object of Section 14 is two-fold:

(a) to remove disability of a female to acquire and hold property as an absolute owner.
(b) to convert any estate already held by a woman on the date of the commencement of the Act as a limited owner into an absolute estate.

Where a Hindu female, after the commencement of this Act, is given any property with certain limitations, she would hold that the property is subject to those limitations and cannot acquire those properties as an absolute owner.

Section 14(2) is an exception to Section 14 (1) and it enacts as well established principle of law that if grant is given subject to certain restrictions, the grantee will take the grant subject to those restrictions. Thus, in the absence of any provision in will, gift decree, order of civil court, award or any other instrument prescribing any restricted estate on a Hindu female, she would take an absolute estate. Section 14(2) applies to instruments, gifts, decrees, awards, etc. which create an independent right or any title in favour of the Hindu female for the first time and not in recognition of pre-existing rights. As per sub-section (2) of Section 14, where a testator has bequeathed only a life estate in favour of his daughter and not an absolute estate,

such estate could not be enlarged into an absolute estate. (AIR 1994 SC. 1202). It is in nature of the proviso and has a field of its own, without interfering with the operation of Section 14(1). (AIR 1998 SC 2401)

Section 14 does not relate to succession but provides that any property possessed by a female Hindu, acquired by her prior or subsequent to the Act's commencement shall be held by her as a full, and not limited, owner: ***Sundari* v. *Laxmi,*** A.I.R. 1980 SC 198.

## 6.3. Section 6, Hindu Succession Act, 1956 (Before The Amendment Act, 2005)[19]:

Before the Amendment Act, 2005, Section 6, Hindu Succession Act, 1956 provided as under:

"***6. Devolution of interest in coparcenary property. —***

*When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:*

*Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.*

*Explanation 1. —For the purposes of this 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.*

*Explanation 2. —Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.*"

[19] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).

Section 8 of the Hindu Succession Act, 1956 deals with General Rules of succession in the case of Hindu males. Section 8 is reproduced below:

"***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.*"

Section 9 of the Hindu Succession Act, 1956 deals with order of succession among heirs in the Schedule, and reads as under:

"***9. Order of succession among heirs in the Schedule. —***

*Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession."*

Section 10 of the Hindu Succession Act, 1956 deals with distribution of property among heirs in Class I of the Schedule:

*"**10. Distribution of property among heirs in Class I of the Schedule. —***

*The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:*

*Rule 1. —The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.*

*Rule 2. —The surviving sons and daughters and the mother of the intestate shall each take one share.*

*Rule 3. —The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.*

*Rule 4.—The distribution of the share referred to in Rule 3—*

*(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;*

*(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions*."

The Schedule to the Hindu Succession Act, 1956, prior to the Amendment Act, 2005, insofar as is relevant, provided as under:

"*THE SCHEDULE*

*(See Section 8)*

*HEIRS IN CLASS I AND CLASS II*

*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 predeceased 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.*

*Class II*

*……..*"

An analysis of Section 6 of the Hindu Succession Act, 1956, as it existed prior to the Amendment Act, 2005, shows the following:

(1) Main Section 6 read as follows: "*When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :*" Therefore, according to this provision, if a male Hindu died after the commencement of the Hindu Succession Act, 1956 and he had an interest in a Mitakshara coparcenary property at the time of his death, then his interest in such

coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Hindu Succession Act, 1956.

It will thus be seen that even after the commencement of the Hindu Succession Act, 1956, the traditional concept of Mitakshara coparcenary consisting of males only continued to be recognised. Further, the principle of survivorship also continued to be recognised. Therefore, on the death of a male coparcener, his interest in coparcenary property would go to surviving coparceners according to the principle of survivorship, and not according to the rules of intestate succession laid down in the Hindu Succession Act, 1956.

(2) Proviso to Section 6, Hindu Succession Act, 1956 laid down an exception to the above general rule laid down in the main Section 6. The said Proviso read as follows: "*Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.*"

Accordingly, if male coparcener mentioned in the main Section 6 died after the commencement of the Hindu Succession Act, 1956 leaving him surviving a female relative specified in Class I of the Schedule to the Hindu Succession Act, 1956 or a male relative specified in that class who claimed through such female relative, then the interest of such deceased coparcener in the Mitakshara coparcenary property would devolve by testamentary or intestate succession, as the case may be, under the Hindu Succession Act, 1956.and not by survivorship.

Therefore, if the deceased male coparcener had left him surviving a female relative of Class I of the Schedule or a male relative mentioned in that Class claiming through such female relative, then the interest of such deceased coparcener in the Mitakshara coparcenary property would not devolve by survivorship on surviving coparceners, but would devolve by testamentary or intestate succession, as the case may be, under the Hindu Succession Act, 1956. Hence, in a situation falling in the Proviso, the rule of survivorship would stand superseded.

Thus, if a male coparcener died after the commencement of the Hindu Succession Act, 1956 leaving behind female heir of Class I of the Schedule (namely, daughter; widow; mother) or male heir claiming through such female heir (namely, son of a pre-deceased daughter), then Mitakshara coparcenary interest of the deceased would not go by survivorship to surviving coparceners, but would go by testamentary or intestate succession.

It is pertinent to note here that Section 30 of the Hindu Succession Act, 1956 read with Explanation thereto gave right to a male Hindu to dispose of his interest in Mitakshara coparcenary property by Will *"notwithstanding anything contained in this Act or in any other law for the time being in force.*"

Consequently, if a Hindu coparcener died after the commencement of the Hindu Succession Act, 1956 without leaving any Will in respect of his interest in Mitakshara coparcenary property, then the provisions of intestate succession would come into play, and such succession would be according to the provisions of Sections 8, 9 and 10 of the Hindu Succession Act, 1956.

Hence, if a male coparcener died intestate after the commencement of the Hindu Succession Act, 1956 leaving behind female heir of Class I of the Schedule (namely, daughter; widow; mother) or male heir claiming through such female heir (namely, son of a predeceased daughter), then the provisions of intestate succession would come into play, and such succession would be according to the provisions of Sections 8, 9 and 10 of the Hindu Succession Act, 1956.

Let us appreciate the above position by taking illustrations.

Suppose a coparcenary consisted of father F and his two sons S1 and S2. F died intestate in 1960 leaving behind only his two sons S1 and S2. In such a case, undivided coparcenary share of F would go by survivorship to S1 and S2. Proviso to Section 6 would not come into play.

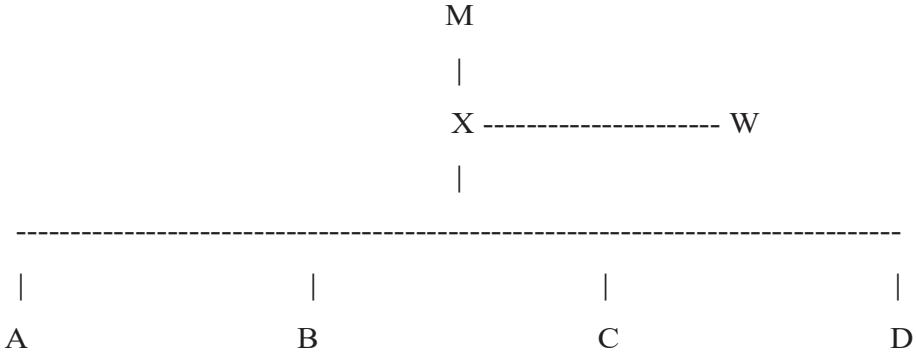
Let us take another illustration. Father F had two sons S1 and S2 and one daughter D. Coparcenary consisted of males only, i.e., F, S1 and S2. F died intestate in 1960 leaving behind his two sons S1 and S2 and daughter D. As daughter D is female heir of Class I of the Schedule, Proviso to Section 6 would apply, and coparcenary share of F would not go by survivorship to S1 and S2, but would by intestate succession to heirs of F according to Sections 8, 9 and 10 of the Hindu Succession Act, 1956. Accordingly, S1, S2 and D being Class I heirs of F would inherit coparcenary interest of F in equal shares, i.e., 1/3rd each.

(3) As noted earlier, the interest of a coparcener in coparcenary property is fluctuating and is not fixed. Question arises as to how to determine the interest of a male deceased coparcener in coparcenary property for the purposes of Section 6. Answer is provided by Explanation I to Section 6 which reads as under:

"*Explanation 1.—For the purposes of this 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.*"

Thus a deeming provision was made for determining the interest of the deceased Hindu Mitakshara coparcener for the purposes of Section 6. Accordingly, for determining the interest of the deceased Hindu Mitakshara coparcener in coparcenary property for the purposes of Section 6, it would be assumed that a notional partition of coparcenary property had taken place immediately before his death, and the share which would have been allotted to such deceased coparcener at such notional partition would be his interest in coparcenary property for the purposes of Section 6.

To appreciate the above principles, let us take an illustration:




X died intestate in 1960 leaving behind his widowed mother M, his wife W, his three sons A, B and C, and his daughter D. Thus, prior to death of X, coparcenary consisted of X, A, B and C, i.e., males only. D, M and W were not coparceners.

On the death of X, his share in coparcenary property would be determined by assuming a notional partition in coparcenary immediately before the death of X. A partition would thus be assumed between father X and his sons A, B and C immediately before the death of X. In such deemed partition, widowed mother M of X, and wife W of X would also get share with X, A, B and C, in view of the principles discussed earlier.

Therefore, the share of X in notional partition immediately before his death would be 1/6, while M, W, A, B and C would get 1/6 share each.

Now as X left behind M, W and D, i.e., female heirs of Class I, 1/6 share of X would go by intestate succession (as X did not leave any Will) in view of the Proviso to Section 6.

Such intestate succession would be according to the provisions of Sections 8, 9 and 10 of the Hindu Succession Act, 1956 as under:

A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) would be one share each in 1/6 share of X. Therefore, each would get 1/6 of 1/6, i.e., 1/36 share.

As noted above, in the notional partition, M, W, A, B and C got 1/6 share each. Hence,

Total share of M = 1/36 + 1/6 = 7/36.

Total share of W = 1/36 + 1/6 = 7/36.

Total share of A = 1/36 + 1/6 = 7/36.

Total share of B = 1/36 + 1/6 = 7/36.

Total share of C = 1/36 + 1/6 = 7/36.

Total share of D = 1/36.

**6.4. Whether notional partition contemplated under Explanation I to Section 6 resulted in complete disruption of Hindu Undivided Family, OR notional partition was for the purpose of ascertainment of the share of the deceased coparcener but would not result in complete disruption of Hindu Undivided Family[20]:**

In ***Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, AIR 1978 SC 1239:(1978) 3 SCC 383**, it was held that the deeming provision referring to partition of property immediately before the death of the coparcener was to be given due and full effect in view of settled principle of interpretation that a provision incorporating legal fiction must be given full effect and taken to its logical conclusion. It was observed:

"*What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable…….. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the*

[20] *Ibid.*

*basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased.*"

Therefore, in view of the above decision in ***Gurupad case***[21], on the death of a coparcener in a situation contemplated in the Proviso to Section 6, his coparceners including heirs of Class I would get the following:

(a) Respective share of each allocated as a result of deemed partition immediately before the death of the coparcener.

(b) Share which each would inherit in the share of the deceased as determined on the basis of deemed partition.

After getting the aforesaid (a) and (b), each coparcener as well as each heir of the deceased coparcener would stand separated, and Hindu Coparcenary would cease to exist. In other words, there would be complete disruption of Hindu Undivided Family.

This would be clear from the above illustration where X died intestate in 1960 leaving behind his widowed mother M, his wife W, his three sons A, B and C, and his daughter D.

As noted above, in notional partition immediately before death of X, the share of X would be 1/6, while M, W, A, B and C would get 1/6 share each.

As per intestate succession in respect of share of X, A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) each would get one share in 1/6 share of X.

Therefore, each would get 1/6 of 1/6, i.e., 1/36 share.

Hence, total share of M = 1/36 + 1/6 = 7/36.

Total share of W = 1/36 + 1/6 = 7/36.

Total share of A = 1/36 + 1/6 = 7/36.

Total share of B = 1/36 + 1/6 = 7/36.

Total share of C = 1/36 + 1/6 = 7/36.

Total share of D = 1/36.

[21] Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum, AIR 1978 SC 1239:(1978) 3 SCC 383.

According to ***Gurupad case,***[22] each of M, W, A, B, C and D would get his/her total share as mentioned above, and there would be complete separation, and Hindu Undivided Family would stand disrupted.

The above view taken in ***Gurupad case***[23]**,** was followed in ***Shayma Devi*** **v.** ***Manju Shukla,*** **(1994) 6 SCC 342** and in ***Anar Devi*** **v.** ***Parmeshwari Devi,*** **AIR 2006 SC 3332: (2006) 8 SCC 656.**

However, it is relevant to note that in ***State of Maharashtra*** **v.** ***Narayan Rao Sham Rao Deshmukh and Others,*** **AIR 1985 SC 716: (1985) 2 SCC 321**, the Supreme Court explained the above decision in ***Gurupad case***[24] and observed that the decision in ***Gurupad case***[25] "*has to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs. To illustrate, if what is being asserted is accepted as correct it may result in the wife automatically being separated from her husband when one of her sons dies leaving her behind as his heir. Such a result does not follow the language of the statute. In such an event she should have the option to separate herself or to continue in the family as long as she wishes as its member though she has acquired an indefeasible interest in a specific share of the family property which would remain undiminished whatever may be the subsequent changes in the composition of the membership of the family. ……There was no action taken by either of the two females concerned in the*

[22] Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum, AIR 1978 SC 1239:(1978) 3 SCC 383
[23] *Id.*
[24] *Id.*
[25] *Id.*

*case to become divided from the remaining members of the family. It should, therefore, be held that notwithstanding the death of Sham Rao the remaining members of the family continued to hold the family properties together though the individual interest of the female members thereof in the family properties had become fixed.*"

From the above decision in ***State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh and Others***[26], it followed that:

(i) Share of the deceased coparcener would be determined on the basis of notional partition giving respective shares to surviving coparceners as well as female members of the Hindu Undivided Family (namely, widowed mother and widow of the deceased coparcener) who would be entitled to share in case of partition between father and sons.

(ii) Share of deceased coparcener so determined would be inherited by Class I heirs of the deceased coparcener (including coparceners who fall under Class I) as per the provisions of Sections 8, 9 and 10 of the Hindu Succession Act, 1956. Respective shares so inherited by Class I heirs of the deceased coparcener (including coparceners who fall under Class I) would become definite, indefeasible and fixed, and would no longer be subject to fluctuations. Further, respective shares allocated to female members of Hindu Undivided Family (namely, widowed mother and widow of the deceased coparcener) would also become definite, indefeasible and fixed, and would no longer be subject to fluctuations.

(iii) Hindu Undivided Family would not be disrupted, and would continue with all the surviving coparceners as well as Class I heirs of the deceased coparceners including widowed mother and widow. Hindu Coparcenary would continue to exist with the rider that the shares which had become definite and fixed under (ii) above, would no longer be subject to fluctuations on account of subsequent events in the family.

To appreciate the above position, let us revert to the illustration referred to above where X died intestate in 1960 leaving behind his widowed mother M, his wife W, his three sons A, B and C, and his daughter D.

As noted above, in notional partition immediately before death of X, the share of X would be 1/6, while M, W, A, B and C would get 1/6 share each.

[26] State of Maharashtra v. Narayan Rao Sham Rao Deshmukh and Others, AIR 1985 SC 716: (1985) 2 SCC 321.

As per intestate succession in respect of share of X, A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) each would get one share in 1/6 share of X.

Therefore, each would get 1/6 of 1/6, i.e., 1/36 share.

This 1/36 share of each of A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) would become definite, indefeasible and fixed, and would not be subject to fluctuation by subsequent events.

Further, 1/6 share allocated to M and 1/6 share allocated to W on notional partition would also become definite, indefeasible and fixed, and would not be subject to fluctuation by subsequent events in the family.

Hence,

Share of A……1/36 (by inheritance).

Share of B…….1/36 (by inheritance).

Share of C…….1/36 (by inheritance).

Share of M…1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of W....1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of D……...1/36 (by inheritance).

As noted above, the afore-mentioned respective shares of A, B, C, M, W and D would become definite, indefeasible and fixed, and would not be subject to fluctuations by subsequent events in the family.

However, Hindu Undivided Family would not be disrupted, and would continue with all the surviving coparceners as well as Class I heirs of the deceased coparceners including widowed mother and widow. Hindu Coparcenary would continue to exist with the rider that the shares which had become definite and fixed as mentioned in the above illustration, would no longer be subject to fluctuations on account of subsequent events in the family.

As will be seen in the subsequent part of this article, the above view expressed in ***State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh and Others*, AIR 1985 SC 716: (1985) 2 SCC 321**, has been followed by the Supreme Court in ***Vineeta Sharma v. Rakesh***

***Sharma & Others,* AIR 2020 SC 3717*(supra)***. In ***Vineeta Sharma case***[27] (Paragraph 101 of the said AIR), it has been observed:

"*101. When the proviso to unamended section 6 of the Act of 1956 came into operation and the share of the deceased coparcener was required to be ascertained, a deemed partition was assumed in the lifetime of the deceased immediately before his death. Such a concept of notional partition was employed so as to give effect to Explanation to section 6. The fiction of notional partition was meant for an aforesaid specific purpose. It was not to bring about the real partition……..*"

It has also been observed in ***Vineeta Sharma case***[28] (paragraph 66 of the said AIR):

"*As per the Mitakshara law, no coparcener has any fixed share. It keeps on fluctuating by birth or by death. It is the said principle of administration of Mitakshara coparcenary carried forward in statutory provisions of section 6. Even if a coparcener had left behind female heir of Class I or a male claiming through such female Class I heir, there is no disruption of coparcenary by statutory fiction of partition. Fiction is only for ascertaining the share of a deceased coparcener, which would be allotted to him as and when actual partition takes place. The deemed fiction of partition is for that limited purpose. The classic Shastric Hindu law excluded the daughter from being coparcener, which injustice has now been done away with by amending the provisions in consonance with the spirit of the Constitution.*"

## 7. THE HINDU SUCCESSION (AMENDMENT) ACT, 2005 AND ITS EFFECT:

Hindu Succession (Amendment) Act, 2005 was enacted to amend the Hindu Succession Act, 1956. The bill received the assent of the President on 5th September, 2005, and came into force on 9th September, 2005.

By Section 3 of Amendment Act, 2005, section 6 of Hindu Succession Act, 1956 was substituted. For better understanding, let us analyse the substituted Section 6.

[27] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641.
[28] Id.

**7.1. Sub-section (1) of substituted section 6[29]:**

***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 :*

Under the traditional concept of Mitakshara Hindu Coparcenary as well as under the pre-amendment Section 6 of the Hindu Succession Act, 1956, only males could be coparceners, and Coparcenary consisted of common ancestor, son, grand-son and great grand-son.

Sub-section (1) of substituted Section 6 makes a drastic departure from the said concept.

According to sub-section (1), on and from the commencement of the Hindu Succession (Amendment) Act, 2005, such 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.

In view of clause A and B daughter of a coparcener in Hindu undivided family governed by Mitakshara Law shall by birth become a coparcener in her own right in the same manner as the same and daughter of a coparcener would get an interest in the coparcenary property by birth like son and also have consequential right accordingly.

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[29] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).

Clause **(C),** lays down that daughter of a coparcener in Hindu undivided family governed by Mitakshara Law shall be subject to the same liabilities in respect of said coparcenary property as that of a son.

### 7.2. Proviso to sub-section (1) of substituted Section 6[30]:

These rights conferred and liabilities imposed on daughter of a coparcener on and from the commencement of the Hindu Succession (Amendment) Act, 2005 could have impact on disposition or alienation including partition or testamentary disposition of coparcenary property already made, and this would have led to chaos and confusion.

In order to avoid such consequences, Proviso to sub-section (1) has been made. It may be mentioned that the Hindu Succession (Amendment) Bill was introduced in Rajya Sabha on 20th December, 2004.

Therefore, if any disposition or alienation including any partition or testamentary disposition in respect of coparcenary property had taken place before the 20th December, 2004 (i.e., date of introduction of Bill in Rajya Shabha), then nothing contained in subsection (1) shall affect or invalidate the same.

### 7.3. Sub-section (2) of substituted Section 6[31]:

Sub-section (2) provides that 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.

Sub-section (2) further provides that such property shall be regarded as property capable of being disposed by her by testamentary disposition. This will be so "*notwithstanding anything contained in this Act, or any other law for the time being in force*."

As noted earlier, Section 30 of the Hindu Succession Act, 1956 read with Explanation thereto, prior to the Amendment Act, 2005, gave right to a male Hindu to dispose of his interest

[30] *Ibid.*
[31] *Ibid.*

in Mitakshara coparcenary property by Will "*notwithstanding anything contained in this Act or in any other law for the time being in force*."

By Section 6 of the Amendment Act, 2005, Section 30 of the Hindu Succession Act, 1956 has been amended as under:

"*In Section 30 of the principal Act, for the words "disposed of by him", the words "disposed of by him or by her" shall be substituted*."

This amendment in Section 30 of the Hindu Succession Act, 1956 has been necessitated as sub-section (2) of the substituted Section 6 gives power of testamentary disposition to female in respect of coparcenary property.

**7.4. Sub-section (3) of substituted Section 6[32]:**

Unamended Section 6 of the Hindu Succession Act recognised the principle of survivorship. Deviation from the principle of survivorship occurred when the deceased coparcener had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claimed through such female relative. In such a situation, the interest of the deceased in the Mitakshara coparcenary property used to devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Sub-section (3) of the substituted Section 6 completely abolishes the principle of survivorship, and provides that "*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,..*".

It is to be noted that sub-section (3) of the substituted Section 6 applies where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005. In such a case, 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 the Hindu Succession Act, 1956, and not by survivorship.

[32] *Ibid.*

(B) Explanation to sub-section (3) of substituted Section 6 lays down as to how interest of deceased Hindu coparcener in the property of a Joint Hindu family governed by Mitakshara law (i.e. coparcenary property) is to be determined for the purposes of sub-section (3). Explanation to sub-section (3) reads as follows: "*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.*"

The above Explanation is similar to Explanation I of the unamended Section 6 which has been discussed in detail above.

Thus for the purposes of sub-section (3) of substituted Section 6, 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.

Accordingly, for determining the interest of the deceased Hindu Mitakshara coparcener in coparcenary property for the purposes of subsection (3) of substituted Section 6, it would be assumed that a notional partition of coparcenary property had taken place immediately before his death, and the share which would have been allotted to such deceased coparcener at such notional partition would be his interest in coparcenary property for the purposes of sub-section (3) of substituted Section 6.

(C) Sub-section (3) in its main part further provides as under: "*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 predeceased 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.*"

The words "*the coparcenary property shall be deemed to have been divided as if a partition had taken place*" indicate that this portion of sub-section (3) is in the context of Explanation to sub-section (3) noted above.

Clauses (a), (b) and (c) have been incorporated in order to allot shares in notional partition to such persons who were not allotted such shares prior to the Amendment Act of 2005.

Thus, in notional partition as contemplated in Explanation I to unamended Section 6 of the Hindu Succession Act, 1956, daughter was not allotted any share in the notional partition. However, as the Amendment Act of 2005 confers status of coparcener on a daughter, the above Clause (a) provides that in such notional partition, the daughter would allotted the same share as is allotted to a son.

As regards the above Clauses (b) and (c ), it is necessary to refer to the amendment made in Class I of the Schedule to the Hindu Succession Act, 1956 by the Amendment Act of 2005.

By Section 7 of the Amendment Act of 2005, Schedule to the Hindu Succession Act, 1956 was amended as under:

"*Amendment of Schedule.—In the Schedule to the principal Act, under the sub-heading "Class 1", after the words "widow of a predeceased son of a pre-deceased son", the words "son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a predeceased son" shall be added.*"

Consequently, Class I of Schedule to the Hindu Succession Act, 1956, as amended by the Amendment Act of 2005, reads as under:

"*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 [son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-*

*deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a predeceased daughter of a pre-deceased son]*."

Thus, the Amendment Act, 2005 has expanded the field Class I heirs by including certain other persons as Class I heirs.

Accordingly, Clauses (b) and (c) have been incorporated in sub-section (3) of substituted Section 6 allotting shares in the notional partition to persons mentioned therein.

Thus, Clause (b) provides that "*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*."

Similarly, Clause (c) provides that "*the share of the predeceased 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*."

(D) As noted above, Explanation to sub-section (3) of the substituted Section 6 contemplates notional partition for determining the share of the deceased coparcener. The said Explanation is similar to Explanation I to unamended Section 6.

The Supreme Court in ***Vineeta Sharma v. Rakesh Sharma & Others*** **(AIR 2020 SC 3717**) held that the notional partition, as contemplated in Explanation to Section 6(3), aims to determine the share of the deceased coparcener. Once determined, this share is inherited by the deceased's heirs according to the Hindu Succession Act, 1956, if deceased has not left any Will. The inherited shares become fixed and definite, but the Hindu Undivided Family continues, with the rider that the inherited shares of heirs would not be subject to fluctuations.

## 7.5. Sub-section (4) of substituted Section 6[33]:

In order to appreciate the above-quoted provisions of subsection (4) of substituted Section 6, it is necessary to refer to the traditional concept of "Debts" prevailing in Mitakshara School of Hindu Law which has been as under:

[33] *Ibid.*

(1) Where the son (which expression throughout includes son's sons and son's son's sons) are joint with their father, and debts have been contracted by the father in his capacity of manager and head of the family for family purpose, the sons are bound to pay the debts to the extent of their interest in the coparcenary property.

Where the debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for an illegal or immoral purpose. The liability to pay the debts contracted by the father, though for his own benefit, arise from an obligation of religion and piety (pious obligation) which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality.

Their liability, however, is confined to their interest in the coparcenary property; it is not personal liability so that a creditor of the ancestor cannot proceed against the person or against the separate property of the sons, grandsons or great-grandsons.

(2) The pious obligation of sons, grandsons, great-grandsons to pay the ancestor's debts to the extent of their interest in the joint family property was not abrogated by the Hindu Succession Act, 1956.

However, reverting to sub-section (4) of substituted Section 6, the said sub-section abolishes the doctrine of the pious obligation, and lays down that 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. Therefore, after the commencement of the Amendment Act, 2005, no court shall recognise the doctrine of pious obligation.

Proviso to sub-section (4) of substituted Section 6, however, saves the debts contracted prior to the commencement of the Amendment Act, 2005, and such debts would continue to be governed by the traditional law of Mitakshara School of Hindu Law pertaining to the doctrine of pious obligation.

**7.6. Sub-section (5) of substituted Section 6[34]:**

Sub-section (5) provides that nothing contained in substituted Section 6 shall apply to a partition, which has been effected before 20th December, 2004 (i.e., date on which the Bill corresponding to the Amendment Act, 2005 was presented in Rajya Sabha). Explanation to substituted Section 6 provides that for the purposes of Section 6 "partition" means (i) any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908), or (ii) any partition effected by a decree of a court.

## 8. DECISION IN VINEETA SHARMA V. RAKESH SHARMA & OTHERS, AIR 2020 SC 3717[35]:

On account of conflicting opinions of two Division Benches of the Supreme Court, the question concerning the interpretation of the Section 6 of the Hindu Succession Act, 1956 as substituted by the Amendment Act, 2005, the matter was referred to a larger Bench in ***Vineeta Sharma* v. *Rakesh Sharma & Others,* AIR 2020 SC 3717** (Supra).

Following main questions, amongst others, were considered by the Supreme Court :

**(I) Whether substituted Section 6 of the Hindu Succession Act, 1956 would apply to cases where male coparcener had already died prior to the commencement of the Amendment Act, 2005?**

This question would be relevant for the purposes of interpreting sub-sections (1), (2) and (3) of substituted Section 6 of the Hindu Succession Act, 1956.

**(II) Liability of daughter for the debts contracted by the deceased coparcener.**

This aspect would be relevant for the purposes of interpreting sub-section (4) of substituted Section 6 of the Hindu Succession Act, 1956.

**(III) What is the interpretation, scope and impact of sub-section (5) of substituted Section 6 of the Hindu Succession Act, 1956?**

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[34] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).
[35] *Id.*

Let us now consider the decision of the Supreme Court on the above questions.

**8.1. Whether substituted Section 6 of the Hindu Succession Act, 1956 would apply to cases where male coparcener had already died prior to the commencement of the Amendment Act, 2005?**[36]

There were two conflicting views on the above question One view was that substituted Section 6 of the Hindu Succession Act, 1956 would apply to cases where male coparcener dies after the commencement of the Amendment Act, 2005 (i.e., 9.9.2005). Other view was that substituted Section 6 of the Hindu Succession Act, 1956 would also apply to cases where male coparcener had already died prior to the commencement of the Amendment Act, 2005.

In ***Vineeta Sharma***[37], (paras 55, 63, 64 and 129), the Supreme Court held has that for the applicability of substituted Section 6 of the Hindu Succession Act, 1956, it is not necessary that male coparcener must be alive on the date of commencement of the Amendment Act, 2005 ( i.e., 9.9.2005). Hence, it follows that substituted Section 6 of the Hindu Succession Act, 1956 is not confined to cases where male coparcener dies after the commencement of the Amendment Act, 2005. Substituted Section 6 also applies to cases where male coparcener had already died prior to the commencement of the Amendment Act, 2005.

Interpreting sub-section (1) of substituted Section 6 of the Hindu Succession Act, 1956, the Supreme Court has opined as under (paragraph 55 of the said AIR):

"*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. Section 6(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, with effect from 9.9.2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara*

[36] *Ibid.*
[37] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

*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*."

It has further been observed by the Supreme Court as follows (paragraph 63 of the said AIR):

"*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) (b). 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).*"

The Supreme Court has further observed (paragraph 64 of the said AIR):

*"…… 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).*"

Explaining sub-section (3) of substituted Section 6, the Supreme Court has observed (paragraph 61 of the said AIR):

"*With respect to a Hindu who dies after the commencement of the Amendment Act, 2005, as provided in section 6(3) his interest shall pass by testamentary or intestate succession and not by survivorship, and there is a deemed partition of the coparcenary property in order to ascertain the shares which would have been allotted to his heirs had there been a partition. The daughter is to be allotted the same share as a son; even surviving child of predeceased daughter or son are given a share in case child has also died then surviving child of such predeceased child of a predeceased son or predeceased daughter would be allotted the same share, had they been alive at the time of deemed partition. Thus, there is a seachange in substituted section 6. In case of death of coparcener after 9.9.2005, succession is not by survivorship but in accordance with section 6(3)(1). The Explanation to section 6(3) is the same as Explanation I to section 6 as originally enacted……..*"

Following propositions, amongst others, follow from the above quoted paragraphs of the Supreme Court decision:

(A) Sub-section (1) of the substituted Section 6 of the Hindu Succession Act, 1956 recognises a joint Hindu family governed by Mitakshara law.

(B) The coparcenary must exist on 9.9.2005, i.e., the date of commencement of the Amendment Act, 2005.

(C) The daughter has been recognised and treated as a coparcener by birth, with equal rights and liabilities as of that of a son.

(D) It is not necessary that a coparcener whose daughter is conferred with the rights is alive or not on the date of commencement of the Amendment Act, 2005. The daughter would step into the coparcenary as that of a son by birth.

(E) Though the daughter would step into the coparcenary as that of a son by birth whether the daughter is born before the commencement of the Amendment Act, 2005 or after the commencement of the Amendment Act, 2005, but the daughter born before the commencement of the Amendment Act, 2005 can claim coparcenary 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).

(F) In case a coparcener living on the date of commencement of the Amendment Act, 2005 (i.e., 9.9.2005) dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted Section 6(3).

## 8.2. Liability of daughter for the debts contracted by the deceased coparcener[38]:

As noted earlier, in view of sub-section (4) of substituted Section 6 of the Hindu Succession Act, 1956, the doctrine of pious obligation of sons, grandsons and great grandsons to discharge the debts of their ancestor's debts, where debts are not tainted with immorality, has been abolished. However, the doctrine of pious obligation continues to remain operative in respect of debts contracted by the ancestor prior to the commencement of the Amendment Act, 2005. Question is whether daughter, grand-daughter and great grand-daughter can be held liable for the debts contracted prior to the commencement of the Amendment Act, 2005 on the basis of doctrine of pious obligation. In ***Vineeta Sharma case***[39], the Supreme Court has held that the daughter, grand-daughter or great grand-daughter, as the case may be, would be bound to discharge any such debt on the basis of doctrine of pious obligation.

It has been observed by the Supreme Court (paragraph 60 of the said AIR):

"*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*."

The Supreme Court has further observed (paragraph 61 of the said AIR):

"……. *Section 6(4) makes a daughter liable in the same manner as that of a son. The daughter, granddaughter, or great granddaughter, as the case may be, is equally bound to follow the pious obligation under the Hindu Law to discharge any such debt. The proviso saves the right of the creditor with respect to the debt contracted before the commencement of Amendment Act, 2005. The provisions contained in section 6(4) also make it clear that provisions of section 6 are not retrospective as the rights and liabilities are both from the commencement of the Amendment Act."*

[38] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).
[39] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

**8.3. What is the interpretation, scope and impact of sub-section (5) of substituted Section 6 of the Hindu Succession Act, 1956?**[40]

As noted earlier, sub-section (5) of substituted Section 6 of the Hindu Succession Act, 1956 provides that nothing contained in substituted Section 6 shall apply to a partition, which has been effected before 20th December, 2004 (i.e., date on which the Bill corresponding to the Amendment Act, 2005 was presented in Rajya Sabha). Explanation to substituted Section 6 provides that for the purposes of Section 6 "partition" means (i) any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908), or (ii) any partition effected by a decree of a court. Interpreting sub-section (5) of substituted Section 6 and Explanation to substituted Section 6, the Supreme Court in ***Vineeta Sharma case***[41], has observed as under (paragraph 62 of the said AIR):

"*The proviso to section 6(1) and section 6(5) saves any partition effected before 20.12.2004. However, Explanation to section 6(5) recognises partition effected by execution of a deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. Other forms of partition have not been recognised under the definition of 'partition' in the Explanation.*"

It is pertinent to note various aspects dealt with by the Supreme Court in ***Vineeta Sharma case***[42], in regard to sub-section (5) of substituted Section 6 and Explanation to substituted Section 6:

(A) It has been held that the daughter has now become entitled to claim partition of coparcenary with effect from 9.9.2005 like a son. The Supreme Court has observed (paragraph 79 of the said AIR):

"*The right to claim partition is a significant basic feature of the coparcenary, and a coparcener is one who can claim partition. The daughter has now become entitled to claim partition of coparcenary w.e.f. 9.9.2005, which is a vital change brought about by the statute. A coparcener enjoys the right to seek severance of status. Under section 6(1) and 6(2), the rights of a daughter are pari passu with a son. In the eventuality of a partition, apart from sons*

[40] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).
[41] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641
[42] Id.

*and daughters, the wife of the coparcener is also entitled to an equal share. The right of the wife of a coparcener to claim her right in property is in no way taken away*."

(B) As noted earlier, under the law pertaining to partition as existing prior to the Amendment Act, 2005, if there would be a partition of coparcenary property between father (F) and sons (S1 and S2) then the wife (W) of father (F) as well as widowed mother (M') of father (F) would get one share equal share to that of a son (S1 or S2). This position continues to exist as is evident from the observation made in the last portion of the above-quoted paragraph 79 of the Supreme Court decision. Hence, if there is a partition of coparcenary property between father and sons (and now also daughters), then wife of father as well as widowed mother of father would get one share equal share to that of a son (or a daughter).

(C) Under Mitakshara School of Hindu Law, a member of a joint Hindu Family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. Thus, the institution of a suit for partition by a member of a joint family is a clear intimation of his intention to separate, and there was consequential severance of the status of jointness. Question before the Supreme Court in ***Vineeta Sharma case***[43] was: in case during the pendency of partition suit or during the period between the passing of preliminary decree and final decree in the partition suit, any legislative amendment or any subsequent event takes place which results in enlargement or diminution of the shares of the parties or alteration of their rights, whether such legislative amendment or subsequent event can be into consideration and given effect to while passing final decree in the partition suit. The Supreme Court has held that even though filing of partition suit brings about severance of status of jointness, such legislative amendment or subsequent event will have to be taken into consideration and given effect to in passing final decree in the partition suit. This is because, the partition suit can be regarded as fully and completely decided only when the final decree is passed. It is by a final decree that partition of property of joint Hindu Family takes place by metes and bounds. (See paragraphs 83 to 95, and paragraphs 98, 106, 125 and 128 of the said AIR).

The Supreme Court has observed (paragraph 99 of the said AIR):

"Once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition. The shares will have to be determined in changed

[43] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

scenario. The severance of status cannot come in the way to give effect to statutory provision and change by subsequent event. The statutory fiction of partition is far short of actual partition, it does not bring about the disruption of the joint family or that of coparcenary is a settled proposition of law. For the reasons mentioned above, we are also of the opinion that mere severance of status by way of filing a suit does not bring about the partition and till the date of the final decree, change in law, and changes due to the subsequent event can be taken into consideration."

(D) Prior to the Amendment Act, 2005, partition in joint Hindu Family could be made by oral partition or oral family settlement/family arrangement. If subsequently terms of such oral partition or oral family settlement/family arrangement could be recorded in a Memorandum. Such Memorandum was not required to be registered. [See paragraphs 107, 108, 111, 112, 113, 117 and 122)].

As noted above, Explanation to substituted Section 6 provides that for the purposes of Section 6 "partition" means (i) any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908), or (ii) any partition effected by a decree of a court.

The Supreme Court in ***Vineeta Sharma***[44] has considered the impact of the aforesaid Explanation on the oral partition or oral family settlement/family arrangement made prior to 20th December, 2004.

The Supreme Court has opined (paragraph 116 of the said AIR):

"*The intendment of amended Section 6 is to ensure that daughters are not deprived of their rights of obtaining share on becoming coparcener and claiming a partition of the coparcenary property by setting up the frivolous defence of oral partition and/or recorded in the unregistered memorandum of partition. The Court has to keep in mind the possibility that a plea of oral partition may be set up, fraudulently or in collusion, or based on unregistered memorandum of partition which may also be created at any point of time. Such a partition is not recognized under Section 6(5).*"

*The Supreme Court has further held (paragraph 127 of the said AIR):*

[44] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

*"A special definition of partition has been carved out in the explanation. The intendment of the provisions is not to jeopardise the interest of the daughter and to take care of sham or frivolous transaction set up in defence unjustly to deprive the daughter of her right as coparcener and prevent nullifying the benefit flowing from the provisions as substituted. The statutory provisions made in section 6(5) change the entire complexion as to partition. However, under the law that prevailed earlier, an oral partition was recognised. In view of change of provisions of section 6, the intendment of legislature is clear and such a plea of oral partition is not to be readily accepted. The provisions of section 6(5) are required to be interpreted to cast a heavy burden of proof upon proponent of oral partition before it is accepted such as separate occupation of portions, appropriation of the income, and consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence, may be accepted most reluctantly while exercising all safeguards. The intendment of Section 6 of the Act is only to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defence and only oral ipse dixit is to be rejected outrightly. The object of preventing, setting up of false or frivolous defence to set at naught the benefit emanating from amended provisions, has to be given full effect. Otherwise, it would become very easy to deprive the daughter of her rights as a coparcener. When such a defence is taken, the Court has to be very extremely careful in accepting the same, and only if very cogent, impeccable, and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained, not otherwise. We reiterate that the plea of an oral partition or memorandum of partition, unregistered one can be manufactured at any point in time, without any contemporaneous public document needs rejection at all costs. We say so for exceptionally good cases where partition is proved conclusively and we caution the courts that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigor of very heavy burden of proof which meet intendment of Explanation to Section 6(5). It has to be remembered that courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The exception is carved out by us as earlier execution of a registered document for partition was not necessary, and the Court was rarely approached for the sake of family prestige. It was approached as a last resort when parties were not able to settle their family dispute amicably. We take note of the fact that even before 1956, partition in other modes than envisaged under Section 6(5) had taken place."*

## 9. ANSWER GIVEN BY THE SUPREME COURT TO REFERENCE IN *VINEETA SHARMA* V. *RAKESH SHARMA & OTHERS*, AIR 2020 SC 3717:[45]

The Supreme Court has answered the Reference in ***Vineeta Sharma case***[46] as under (paragraph 129 of the said AIR):

"Resultantly, we answer the reference as under:

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v)In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had

[45] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).
[46] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly."

## 10. CONSEQUENCES:[47]

It will be interesting to examine certain consequences of the substitution of Section 6, Hindu Succession Act, 1956 by the Amendment Act, 2005, and the interpretation of the substituted Section 6 by the Supreme Court in ***Vineeta Sharma***[48]:

(I) In order to appreciate the effect of the substituted Section 6, Hindu Succession Act, 1956 on allocation of shares in the event of death of a coparcener, let us consider certain illustrations:

**Illustration (i):**

X died intestate in the year 2006 leaving behind his widowed mother M, his wife W, his three sons A, B and C, and his daughter D.

**Now position prior to the Amendment Act, 2005**

Prior to the Amendment Act, 2005, D would not be coparcener.

In notional partition immediately before death of X, the share of X would be 1/6, while M, W, A, B and C would get 1/6 share each.

As per intestate succession in respect of share of X, A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) each would get one share in 1/6 share of X by inheritance. Therefore, each would get 1/6 of 1/6, i.e., 1/36 share.

This 1/36 share of each of A, B, C (Sons), M (Widowed Mother), W (Widow) and D (Daughter) would become definite, indefeasible and fixed, and would not be subject to fluctuation by subsequent events.

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[47] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).

[48] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 : 2020 SCC OnLine SC 641

Further, 1/6 share allocated to M and 1/6 share allocated to W on notional partition would also become definite, indefeasible and fixed, and would not be subject to fluctuation by subsequent events in the family.

Hence,

Share of A……1/36 (by inheritance).

Share of B…….1/36 (by inheritance).

Share of C…….1/36 (by inheritance).

Share of M…1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of W....1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of D……...1/36 (by inheritance).

As noted above, the afore-mentioned respective shares of A, B, C, M, W and D would become definite, indefeasible and fixed, and would not be subject to fluctuations by subsequent events in the family.

However, Hindu Undivided Family would not be disrupted, and would continue with all the surviving coparceners as well as Class I heirs of the deceased coparceners including widowed mother and widow. Hindu Coparcenary would continue to exist with the rider that the shares which had become definite and fixed as mentioned in the above illustration, would no longer be subject to fluctuations on account of subsequent events in the family.

**Position after the Amendment Act, 2005**

As a result of the Amendment Act, 2005, daughter D would be coparcener by birth along with sons A, B and C.

Therefore, in the above illustration, share of X in case of assumed partition immediately before his death would be determined as under:

X, A, B, C and D as coparceners would get one share each. Further, M and W would also get one share each along with A, B, C and D.

Therefore, share of X would be 1/7.

This 1/7 share of X would go by intestate succession (as X died intestate) according to Sections 8, 9 and 10, Hindu Succession Act, 1956 as under:

A, B, C (Sons), M (Mother), W (Widow) and D (Daughter) would get one share each.

Therefore, each would get 1/6 of 1/7, i.e., 1/42 share.

Hence,

Share of A……1/42 (by inheritance).

Share of B…….1/42 (by inheritance).

Share of C…….1/42 (by inheritance).

Share of M…1/42 (by inheritance) + 1/7 (by notional partition) = 7/42, i.e., 1/6.

Share of W....1/42 (by inheritance) + 1/7 (by notional partition) = 7/42, i.e., 1/6.

Share of D……...1/42 (by inheritance).

As noted above, the afore-mentioned respective shares of A, B, C, M, W and D would become definite, indefeasible and fixed, and would not be subject to fluctuations by subsequent events in the family.

Hence,

Share of A……1/36 (by inheritance).

Share of B…….1/36 (by inheritance).

Share of C…….1/36 (by inheritance).

Share of M…1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of W....1/36 (by inheritance) + 1/6 (by notional partition) = 7/36.

Share of D……...1/36 (by inheritance).

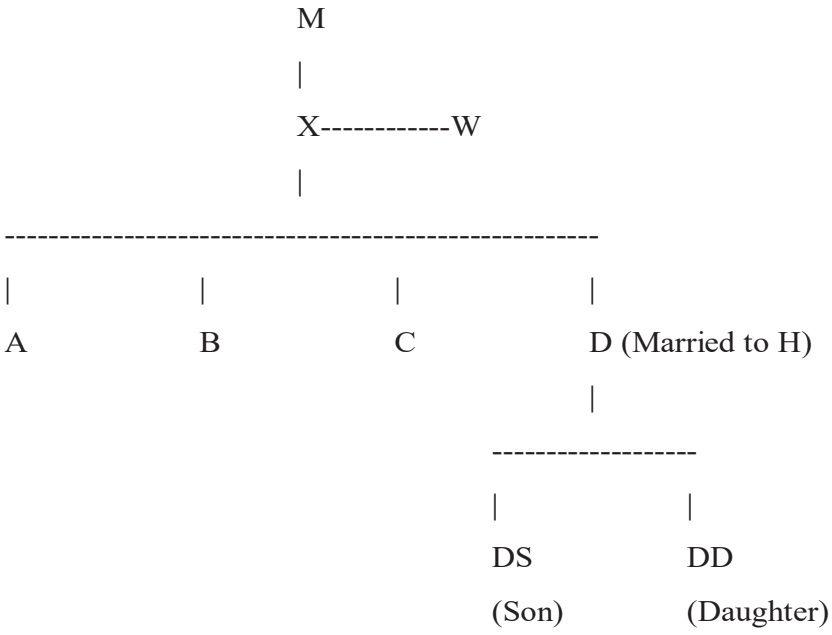
As noted above, the afore-mentioned respective shares of A, B, C, M, W and D would become definite, indefeasible and fixed, and would not be subject to fluctuations by subsequent events in the family.

However, Hindu Undivided Family would not be disrupted, and would continue with all the surviving coparceners as well as Class I heirs of the deceased coparceners including widowed mother and widow. Hindu Coparcenary would continue to exist with the rider that the shares which had become definite and fixed as mentioned in the above illustration, would no longer be subject to fluctuations on account of subsequent events in the family.

**Illustration (ii):**

X has three sons A, B and C. W is wife of X. M is widowed mother of X. D is married daughter of X. D is married to H who belongs to another Joint Hindu Family.

Now married daughter D dies intestate leaving her husband H and children (Son DS and Daughter DD).




It is relevant to note that in case of death of a female Hindu, intestate succession is governed by Sections 15 and 16 of the Hindu Succession Act, 1956.

## 11. SECTION 15 AND 16 OF THE HINDU SUCCESSION ACT, 1956:[49]

***"15. General rules of succession in the case of female Hindus.—****(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,—*

*(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;*

*(b) secondly, upon the heirs of the husband;*

[49] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).

*(c) thirdly, upon the mother and father;*

*(d) fourthly, upon the heirs of the father; and*

*(e) lastly, upon the heirs of the mother.*

*(2) Notwithstanding anything contained in sub-section (1),—*

*(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and*

*(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband*."

**" *16. Order of succession and manner of distribution among heirs of a female Hindu.—The order of succession among the heirs referred to in Section 15 shall be, and the distribution of the intestate's property among those heirs shall take place, according to the following rules, namely :***

*Rule 1.—Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.*

*Rule 2.—If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.*

*Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of Section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death*."

Let us now revert to the illustration under consideration.

**Position prior to the Amendment Act, 2005**

Prior to the Amendment Act, 2005, only X and his three sons A, B and C were coparceners. D, i.e., married daughter of X was not a coparcener.

As D was not coparcener, there was no question of any share of D in coparcenary property. Therefore, her son (DS), daughter (DD and husband (H) would not get any thing in coparcenary property.

**Position after the Amendment Act, 2005**

A reading of clause (b) and (c) of sub-section (3) of substituted Section 6 of the Hindu Succession Act, 1956 shows that married daughter would also become coparcener.

Therefore, in the above illustration, married daughter D would be coparcener along with X and his sons A, B and C.

Now share of D in coparcenary on the basis of assumed partition immediately before her death would be as under:

X, A, B, C and D as coparcener would get one share each. Further, mother M and wife W of X would get one share each.

Therefore, share of D in coparcenary would be 1/7.

Now this 1/7 share of D would go by intestate succession (as there is no Will). Such intestate succession, as noted above, would be according to Sections 15 and 16 of the Hindu Succession Act, 1956.

Accordingly, son SS, daughter DD and husband H would inherit 1/7 share of D.

Therefore, each would get 1/3 x 1/7 = 1/21.

**Hence, consequences would be:**

**(ci)' Husband H of D, though belongs to another family, would get 1/21 share in coparcenary of his wife D.**

**(cii)' A reading of clauses (b) and (c) of sub-section (3) of substituted Section6 of Hindu Succession Act, 1956shows that children of D (i.e., son DS and daughter DD) would become coparceners in coparcenary of X. This is because, death of D would not disrupt**

**the Joint Hindu Family of X. However, shares of heirs of D, as inherited, would become definite in coparcenary of X and would not fluctuate.**

**(ciii)' Son DS of daughter D would become coparcener in coparcenary in Joint Hindu Family of X. Further, son DS as son of husband H of D would also be a member of coparcenary in Joint Hindu Family of husband H.**

**Therefore, son DS would simultaneously be member of two distinct coparcenaries in two different Joint Hindu Families.**

**Similar will be the position of daughter DD of D and H.**

**Illustration (iii):**

**A died intestate in the year 2003 leaving behind his widow W, two sons S1 and S2 and two daughters D1 and D2.**

A----------W

|

---

| | | |

S1 S2 D1 D2

**Position prior to the Amendment Act, 2005**

As A died leaving female heirs of Class I, his share in coparcenary would go by intestate succession (as A did not leave any Will).

Share of A would be determined on the basis of assumed partition immediately before his death in the year 2003.

Widow would be allocated one share equal to son or daughter.

Therefore, share of A = 1/6.

This 1/6 share would go by intestate succession as under:

W = 1/5 of 1/6 = 1/30.

S1 = 1/5 of 1/6 = 1/30.

S2 = 1/5 of 1/6 = 1/30.

D1 = 1/5 of 1/6 = 1/30.

D2 = 1/5 of 1/6 = 1/30.

Further, W would also get her allocated share on assumed partition, i.e., 1/6.

Therefore, share of W = 1/30 + 1/6 = 6/30 = 1/5.

Now, these shares (i.e., W = 1/5; S1 = 1/30; S2 = 1/30; D1 = 1/30; D2 = 1/30) would become fixed, indefeasible and definite—These would not be subject to fluctuations.

Hindu Undivided Family would not be disrupted, and would continue with W, S1, S2, D1 and D2. However, coparcenary would consist of S1 and S2.

Coparcenary property would consist of

1 – [1/5 + 1/30 + 1/30 + 1/30 + 1/30]

= 1 – [10/30]

= 1 – 1/3

= 2/3.

**Position after the Amendment Act, 2005**

X died intestate in the year 2003, as seen above.

As regards shares obtained by W, S1, S2, D1 and D2 on the death of A in the year 2003, these would be determined on the basis of position existing prior to the Amendment Act, 2005, as mentioned above.

Therefore,

W would get 1/5.

S1 would get 1/30.

S2 would get 1/30.

D1 would get 1/30.

D2 would get 1/30.

These shares of W, S1, S2, D1 and D2 would become fixed, indefeasible and definite, and would not be subject to fluctuations.

Hindu Undivided Family would continue with W, S1, S2, D1 and D2.

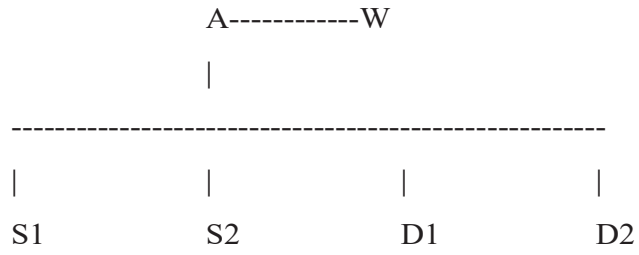
Now in view of substituted Section 6, Hindu Succession Act, 1956, daughters D1 and D2 would become coparceners by birth.

However, their becoming coparceners by birth would not affect the shares of W, S1, S2, D1 and D2 which became vested in them on death of X in the year 2003. [See: Proviso to sub-section (1) of substituted Section 6, read with sub-section (5) of substituted Section 6 of Hindu Succession Act, 1956].

Therefore, D1 and D2 would become coparceners with S1 and S2, and coparcenary property would consist of 2/3 which would remain subject to fluctuations.

(II) A is Karta of Joint Hindu Family which is basically located in Kanpur (Uttar Pradesh).

A dies intestate leaving behind his widow W, two sons S1 and S2 and two married daughters D1 and D2. D1 is married to H1, and resides in Bangalore (Karnataka). D2 is married to H2, and resides in Amritsar (Punjab).




Now in view of sub-section (1) of substituted Section 6, Hindu Succession Act, 1956, 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,

**Thus, while giving the same rights in the coparcenary property as a son, the daughter has been subjected to the same liabilities in respect of the said coparcenary property as that of a son. A married daughter, such as D1 or D2 in the above illustration, who is residing in a far off place with her husband, may find it difficult to discharge her liabilities as a coparcener on a regular basis.**

(III) A is Karta of Joint Hindu Family basically located in Kanpur (Uttar Pradesh). A dies leaving behind eldest married daughter D and three younger sons S1, S2 and S3. D is married to H, and resides with her husband in Bangalore (Karnataka).


After death of A, his married daughter D, being eldest, would become Karta of Joint Hindu Family.

**Now such married daughter D, who is residing at far off place, may find it difficult to discharge the responsibilities as Karta of Joint Hindu Family.**

(IV) As noticed earlier, according to traditional concept of Hindu Law, **Ancestral property (also known as Coparcenary property)** means a property inherited by a male Hindu from his three immediate lineal male ascendants, i.e., his father (F), grand-father (FF) and great grand-father (FFF).

Even though the rule of survivorship has been abolished by substituted Section 6 Hindu Succession Act, 1956, but the traditional concept of Ancestral property has not been affected.

However, it is submitted that an analysis of substituted Section 6, Hindu Succession Act, 1956 and its interpretation in ***Vineeta Sharma* v. *Rakesh Sharma & Others*, AIR 2020 SC 3717, the concept of ancestral property would 94 stand expanded and would now include property inherited from females also**. This is because, the daughter is now coparcener by birth. A married daughter, who is a coparcener, would in due course become mother with the birth of child (male or female), then grandmother with the birth of grand-child (male or female), and then great grandmother with the birth of great grand-child (male or female). Married daughter with her child, grand-child and great grand-child would constitute

coparcenary. Property inherited by child, grand-child or great grand-child from such married daughter would be ancestral property in the hands of such child, grand-child or great grand-child, respectively.

(V) From various consequences noticed above, it will be seen that substituted Section 6, Hindu Succession Act, 1956 would lead to gradual dilution of cohesion of Joint Hindu Family.

## 12. THE REPEALING AND AMENDING ACT, 2015 (NO. 17 OF 2015) AND ITS EFFECT:[50]

The aforesaid Repealing and Amending Act, 2015 (No. 17 of 95 2015) was enacted by the Parliament to repeal certain enactments and to amend certain other amendments.

Section 2 of the aforesaid Act No. 17 of 2015 provides that "the enactments specified in the First Schedule are hereby repealed to the extent mentioned in the fourth column thereof". **Reading the said Section 2 with the entries in the First Schedule shows that by the aforesaid Act No. 17 of 2015, the whole of the Hindu Succession (Amendment) Act, 2005 has been repealed**.

### 12.1. Question arises as to whether repeal of the Hindu Succession (Amendment) Act, 2005 by the aforesaid Act No. 17 of 2015 would result in revival of the unamended Hindu Succession Act, 1956 including unamended Section 6 thereof. Answer is evidently in the negative for the following reasons:

(A) **Statement of Objects and Reasons** accompanying the Bill which has been passed as the Repealing and Amending Act, 2015, states as under:

> ***"Statement of Objects and Reasons.-*** *This Bill is one of those periodical measures by which enactments which have ceased to be in force or have become obsolete or the retention whereof as separate Acts is unnecessary are repealed or by which the formal defects in enactments are corrected.*
>
> *2. The notes which follow explain the reasons for the amendments suggested in such of those items of the Bill in respect whereof some detailed explanation is necessary.*

[50] Satya Poot Mehrotra,, Senior Advocate, Supreme Court of India and Former Judge, Allahabad High Court, "Changing Dimensions of Hindu Coparcenary and Section 6, Hindu Succession Act, 1956" (Published in AIR 2021 Journal Section 241).

*3. Clause 4 of the Bill contains a precautionary provision which it is usual to include in the Bill of this kind."*

(B) Section 4 of the aforesaid Act No. 17 of 2015 provides as follows:

*"The repeal by this Act of any enactment shall not affect any Act in which such enactment has been applied, incorporated or referred to;*

*and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;*

*nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;*

*nor shall the repeal by this Act of any enactment provide or restore any jurisdiction, office or custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force."*

The wide language of the above-quoted Section 4 of the Act No. 17 of 2015 shows that repeal of the Hindu Succession (Amendment) Act, 2005 by the Act No. 17 of 2015 would not result in revival of the unamended Hindu Succession Act, 1956 including unamended Section 6 thereof.

(C) **In Regular First Appeal No. 58 of 2014; *Lokamani & Others v/s Mahadevamma & Others*; Decided On, 07 September 2015,** a Division Bench of the Karnataka High Court repelled the contention that the repeal of the Hindu Succession (Amendment) Act, 2005 by the Repealing and Amending Act No. 17 of 2015 would revive the unamended Hindu Succession Act, 1956 including unamended Section 6 thereof. The Division Bench held as under:

"27. *The Repealing and Amending Act, 2015 does not disclose any intention on the part of the Parliament to take away the status of a co parcener conferred on a daughter giving equal rights with the son in the co-parcenary property. Similarly, no such intention can be gathered with regard to restoration of Section 23 and 24 of the Principal Act which were repealed by the Hindu Succession (Amendment) Act, 2005 .*

*On the contrary, by virtue of the Repealing and Amending Act, 2015, the amendments made to Hindu Succession Act in the year 2005, became part of the Act and the same is given retrospective effect from the day the Principal Act came into force in the year 1956, as if the said amended provision was in operation at that time.*

28. *The main object of a Repealing and Amending Act is only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind. In other words, the Repealing and Amending Act is enacted not to bring in any change in law, but to remove enactments which have become unnecessary. Thus, the Repealing and Amending Act, 2015 only expurgates the Hindu Succession (Amendment) Act, 2005 (Act No. 39/2005) along with similar Acts, which had served the purpose.*

*29. The repeal of an amending Act, therefore, has no repercussion on the parent Act which together with the amendments remains unaffected . The general object of a repealing and amending Act is stated in Halsbury's Laws of England, 2nd Edition, Vol.31, at p.563, thus:*

*'A statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary. It invariably contains elaborate provisos.'*

*30. In **KHUDA BUX V. MANAGER, CALEDONIAN PRESS, A.I.R. 1954 CAL. 484** CHAKRAVARTTI, C.J., neatly brings out the purpose and scope of such Acts. The learned Chief Justice says at p. 486 as 100 under: - Such Acts have no Legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence. At times, inconsistencies are also removed by repealing and amending Acts. The only object of such Acts, which in England are called Statute Law Revision Acts, is legislative spring-cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care,.....'.*

*31. This view has been affirmed by the Supreme Court in the case of **JETHANAND BETAB vs THE STATE OF DELHI [AIR 1960 SC 89]**.*

*32. The Repealing and Amending Act, 2015 which repeals the Hindu Succession (Amendment) Act, 2005 in whole, therefore, does not wipe out the amendment to Section 6 from the Hindu Succession Act. existence of the Hindu Succession (Amendment) Act,*

*2005 since The became superfluous and did not serve any purpose and might lead to* confusion, *the Parliament in its wisdom thought of repealing the said Amendment Act. It is only a case of legislative spring-cleaning, and not intended to make any change in law.*

*33. The amended Section 6 has already been substituted in the Hindu Succession Act, 1956 as if it was in the enactment from its inception. When the amending provision takes the place of the earlier provision, the object of the Amendment Act is fulfilled and thereafter the Amendment Act serves no purpose. Therefore, such an Amendment Act requires to be repealed and that is what has been precisely done by Act No. 17/2015. Accordingly, Point No. 1 is answered in the negative."*

It may be mentioned that against the aforesaid decision of the Karnataka High Court, S.L.P. (C) No. 684 of 2016 ***(Lokmani & Ors. v. Mahadevamma & Ors.)*** was filed before the Supreme Court. The said S.L.P. was included in the matters referred to the larger Bench in ***Vineeta Sharma v. Rakesh Sharma & Others,*** **AIR 2020 SC 3717** (See paragraph 2 of the said AIR). Conclusions drawn by the Supreme Court in ***Vineeta Sharma case***[51], as discussed in detail above, show that the view of the Karnataka High Court stood upheld by the Supreme Court.

[51] Vineeta Sharma v. Rakesh Sharma & Others, AIR 2020 SC 3717.

# THE INDIAN SUCCESSION ACT, 1925

*By – **Sudhanshu Kumar Shashi**, Director, Judicial Academy, Jharkhand*

## 1. LEGAL HISTORY OF INDIAN SUCCESSION ACT, 1925:

During the period up to 1865, Hindu and Muslims were governed by their personal law and persons belonging to other groups were, in general, left to be governed by English law. The position was however, obscure in relation to other persons for example, Anglo Indians, Parsis, J, Jews, Americans, Christians and others. The English law was applied in presidency town, but the position as regards the moffussil was not very clear.

In 1835, the first law commission recommended that the English laws should be declared to be the law applicable to such persons, but the recommendation was not Accepted.

In 1853, second law commission did not favour the introduction of English law, but it considered it desirable to assimilate the law prevalent throughout the country.

By the third law commission report, Indian succession act, 1865 was enacted. One of the objects of this act was to regulate the position regarding relating to inheritance of property after death in regards to person other than Hindu and Muslims.

The act 1865 dealt with succession, both testamentary and Test state. However, the act exempted Hindus and Muslim from its scope. It's utility in the codification of law of succession. As regards other persons the draft will prepared in England by third law commission as stated was well received in India.

The period of consolidation of testamentary law of succession in India that begins in 1925.

The various enactments consolidated by the Indian Succession Act, 1925, were:-

(1) The Succession (Property Protection) Act, 1841 (Act 19 of 1841).

(2) The Indian Succession Act, 1865 (Act 10 of 1865).

(3) The Parsi Intestate Succession Act, 1865 (Act 21 of 1865).

(4) The Hindu Wills Act, 1870 (Act 21 of 1870).

(5) The Married Women's Property Act, 1874 (Act 3 of 1874), section 2.

(6) The Probate and Administration Act, 1881 (Act 5 of 1881).

(7) The District Delegates Act, 1881 (Act 6 of 1881).

(8) The Probate and Administration Act, 1889 (Act 6 of 1889).

(9) The Succession Certificate Act, 1889 (Act 7 of 1889).

(10) The Probate and Administration Act, 1890 (Act 2 of 1890).

(11) The Native Christians Administration of Estates Act, 1901 (Act 7 of 1901).

(12) The Probate and Administration Act, 1903, (Act 8 of 1903).

The amendments made from time to time in the Indian Succession Act of 1925 can be said to represent the period of reforms. This reform has been rather slow in its pace and therefore not perceptible. The reasons behind this slow reform are following:

(i) The law of intestate succession applicable to the two important communities in India, which are Hindus and Muslims fall outside the ambit of the Indian Succession Act.

(ii) The practice of executing Wills (a topic which forms the bulk of the subject-matter of the Act), has only recently become widely prevalent in the Mofussil.

(iii) No systematic attempt at a review of the Act in all its aspects has been undertaken since 1925.

## 2. INTRODUCTION TO THE CONCEPT OF WILL:

Succession is a transfer of rights and the liabilities of the deceased to his heirs. It can best be understood as a transmission of rights and obligations of a deceased to his heirs and it includes both intestate and testamentary succession.

A 'Will' is an instrument by which a person makes a disposition of his property to take effect after his death and which is in its own nature revocable during his life. A Will is an obstruction in the line of succession. Alternatively, 'Will' may be defined as a continuous act of gift up to the moment of death. In civil law, 'Will' is also known as 'Testament'.

The expression 'Will' is defined in Section 2(h) of the Indian Succession Act, 1925 as follows: "Will means the legal declaration of the intention of the Testator with respect to his property which he desires to be carried into effect after his death."

It is advisable at this stage itself to understand the meaning of the expression "Codicil". This expression is defined to mean "an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to be part of the Will".

Under General Clauses Act, "Will" includes a Codicil and every writing/ making a voluntary posthumous disposition of property.

In the case of ***Meena Pradhan and Ors.* v. *Kamla Pradhan and Ors.*, 2023/INSC/847** 'will' has been defined as following:

*"9. A Will is an instrument of testamentary disposition of property. It is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. It speaks from the death of the testator."*

## 2.1. Scope and Ambit of Will:

A Will is an instrument by which a person makes a disposition of his/her property to take effect after his/her death and this Act itself by its own measure ambulatory and revocable during his/her lifetime. A Will is an obstruction in the line of succession. When a petition for probate is under consideration in a Court of law, the conscience of the Court must be cleared by the propounder by adducing cogent and reliable evidence. In the case in hand, it is clearly visible that the propounder himself had taken a prominent part in the execution of the Will, which confers a substantial benefit to him. If the propounder has taken a prominent part in the execution of the Will and is to receive substantial benefit under it, that itself must be treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. The mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it.

## 2.2. Essential Characteristics of a Will:

It may be stated that any document to qualify for classification as a Will must satisfy the following three criteria.

- There must be a legal declaration;
- The declaration must be with respect to the property of the Testator; and
- The declaration must be to the effect that it is to operate after the death of the Testator, i.e. it should be revocable during the life of the Testator.

The expression "Legal Declaration" means that the document purporting to be a Will must be legal, i.e. in conformity with the provisions as regards the execution and attestation as provided in Section 63 of the Indian Succession Act, 1925 and must be by a person competent to make it. In other words, by a person who is not a minor and is of sound mind.

Further, the declaration should relate to the property of the Testator which he wants to dispose of. If the declaration contains no reference to the disposal of the property but merely provides for a successor or appoints a manager to the property it is not a Will. The expression "Property" is not defined in any enactment. Hence, one has to go by the general meaning of that expression. Broadly, it can be stated that any asset in respect of which the Testator has acquired title can be covered by the expression his property.

The declaration in relation to disposal of the property of the Testator must be intended to take effect after his death. If the declaration is to carry into effect his intention immediately, then, it is not a Will. The essence of Will is that it must be revocable during the lifetime of the Testator.

## 3. COMPETENCY TO MAKE A WILL:

Every person of sound mind, who is not minor, may dispose of his property by Will under Section 59 of the Indian Succession Act, 1925. This Section has four explanations, which provide as follows:

- A married woman may dispose by Will any property, which she could alienate by her own act during her life;

- A person who is deaf/dumb/blind can make a Will, if he/she is able to understand what he/she is doing; and
- An insane person can make a Will during the period when he is of sound mind; and
- Any person who is not capable of knowing what he/ she is doing by reason of illness/intoxication/ any other reason, cannot make a Will.

It is important that a person making the Will and thereby disposing the property must be of sound mind. In legalistic language, it is stated that a person must have "Sound Testamentary Capacity". In order to satisfy the criteria of "Sound Testamentary Capacity", three conditions must exist simultaneously. They are

(i) the Testator must understand that he/ she is giving his property to one or more objects of his/ her regard

(ii) he/she must understand and recollect the extent of his/her property; and

(iii) he/ she must also understand the nature and extent of claims upon him/ her both of those whom he/ she is including in his/her Will and those whom he/ she is excluding from the Will.

It is desirable to note here that in terms of Section 61 of Indian Succession Act, 1925, a Will or any part of a Will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the Testator, is void.

## 4. INDIAN SUCCESSION ACT, 1925:

The Indian Succession Act, 1925 is divided into 11 parts, with some of the parts sub-divided into several chapters. Part VI of the Act comprising of 23 Chapters, contains exhaustive provisions relating to "Testamentary Succession". **Sections 57 to 191** of the Act are included in this Part.

**Part IX** of the Act contains **Sections 217 to 369**. divided into 13 chapters**. Chapter IV of Part IX** contains provisions governing *"the practice in granting and revoking probates and letters of administration."* **Sections 264 to 302** are found in this Chapter. The procedure for

making an application for probate or for letters of administration with the Will annexed, is provided in Section 276.

The District Judge is conferred with the jurisdiction to grant and revoke probates and letters of administration in all cases within his District, under Section 264 of the Act. **Section 264** reads as follows:-

> *"**Section 264. Jurisdiction of District Judge in granting and revoking probates, etc. -** (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.*
>
> *(2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the Official Gazette, authorised it so to do."*

It may be seen from Sub-section (2) of Section 264, that it imposes a bar upon the Courts in any local area beyond the limits of the towns of Calcutta. Madras and Bombay, from receiving applications for probate or letters of administration, until the State Government, by a notification in the Official Gazette, authorized them so to do, wherever the deceased is a Hindu. Muhammadan. Buddhist, Sikh or Jaina or an exempted person. But the bar under Sub-section (2) has no application to cases, to which Section 57 applies.

**Section 57** of the Act reads as follows:

> *"**Section 57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.-**The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-*
>
> *(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and*

*(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits: [and*

*(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, towhich those provisions are not applied by clauses (a) and (b):]*

*Provided that marriage shall not revoke any such Will or codicil."*

**Schedule III** of the Act contains a list of provisions which are applicable, subject to certain restrictions and modifications, to all the Wills described in clauses (a), (b) and (c) of Section 57.

The jurisdiction conferred upon the District Judge in Chapter IV of Part IX, is also exercisable by the High Court, by virtue of the concurrent jurisdiction conferred under Section 300. **Section 300** reads as follows:

***"Section 300. Concurrent jurisdiction of High Court.-***

*(1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.*

*(2) Except in cases to which section 57 applies, no High Court. in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay shall, where the deceased is a Hindu, Muhammadan, Buddhist. Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the Official Gazette, authorised it so to do."*

The bar under sub-Section (2) of Section 264 is found also in sub-Section (2) of Section 300.

**Part VIII** of the Act which is perhaps the smallest among the several parts of the Act. contains two important provisions in **Sections 212 and 213**. They read as follows:

***Section 212. Right to intestate's property.-*** *(1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.*

*(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist. Sikh, Jaina. (Indian Christian or Pars].*

***Section 213. Right as executor or legatee when established.-***

*(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in [India] has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.*

*(2) This section shall not apply in the case of Wills made by Muhammadans [or Indian Christians], or and shall only apply -*

*(i) in the case of Wills made by any Hindu, Buddhist. Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and*

*(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act. 1962 (16 of 1962), where such Wills are made within the local limits of the [ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immoveable property situated within those limits.]"*

While Section 212 deals with the right to intestate's property. Section 213 deals with the establishment of the right as executor or legatee under a Will. In simple terms these two Rules can be stated as follows:

**(i)** without first obtaining letters of administration from a Court of competent jurisdiction, no right to any property of a person other than a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi, who has died intestate, can be established in any court of justice;

**(ii)** no right as executor or legatee under a Will (other than a Will made by a Muhammadan or Indian Christian) can be established in any Court of justice unless probate of the Will or letters of administration with the Will annexed, has been granted by a court of competent jurisdiction.

But the second Rule stated above which is found in Section 213, is applicable only:

**(i)** in the case of Wills made by any Hindu, Buddhist. Sikh or Jaina, if those Wills are of the classes specified in Clauses (a) and (b) of Section 57; and

**(ii)** in the case of Wills made by any Parsi dying after the commencement of the Amendment Act 16 of 1962, if such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta. Madras and Bombay and in case such Wills have been made outside those limits, in so far as they relate to immovable property situate within those limits.

A cumulative reading of **Sections 57, 213 and 264** would show:

**(i)** that a person claiming to be an executor or legatee under a Will cannot rely upon the Will, in any proceeding before a Court of justice, unless he has obtained probate (if an executor has been appointed) or letters of administration with the Will annexed, if such a Will has been executed by certain classes of persons; and

**(ii)** that the jurisdiction to grant probate or letters of administration vests only in courts located within the towns of Calcutta, Madras or Bombay and the Courts in any local area notified by the State Government in the Official Gazette.

Therefore, what follows is that:

**(i)** unless the testator belongs to any of the classes of persons specified in the Act; and

**(ii)** unless the Will is made or some of the properties covered by the Will are located, within the local limits of a notified area, there is no necessity for an executor or a legatee under a Will to seek probate or letters of administration. In fact, the decision in **Balbir Singh Wasu** (supra) did not take note of the bar under Section 264(2) when it opined in general terms in Paragraph 5 of the judgment that "*We do not read Section 213 as prohibiting the executor for applying for probate as a matter of prudence or convenience* ***to the courts in other parts of the country not covered by Section 213***".

By virtue of Section 213(2)(i) read with Clauses (a) and (b) of Section 57, the mandatory requirement to seek probate or letters of administration for establishing a right as executor or legatee under a Will, is applicable only to Wills made by a Hindu. Buddhist, Sikh or Jaina **within the local limits of the ordinary original civil jurisdiction of certain High Courts** and to Wills made outside those territories, to the extent they cover immovable property situate within those territories. Therefore, there is no prohibition for a person whose case falls outside the purview of these provisions, from producing, relying upon and claiming a right under a

Will, in any proceeding instituted by others including the other legal heirs for partition or other reliefs.

## 5. WHY PROBATE OF WILL OR LETTER OF ADMINISTRATION WITH WILL ANNEXED IS NECESSARY?

The necessity of probate of will or letter of administration for the execution of will has been discussed by the Supreme Court in the case of ***Ravinder Nath Agarwal v. Yogender Nath Agarwal & Ors.***, *2021/INSC/86 : MANU/SC/0076/2021*. The relevant paragraphs have ben cited below:

> *"33. While Section 212 deals with the right to intestate's property, Section 213 deals with the establishment of the right as executor or legatee under a Will. In simple terms these two Rules can be stated as follows: (i) without first obtaining letters of administration from a Court of competent jurisdiction, no right to any property of a person other than a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi, who has died intestate, can be established in any court of justice: (ii) no right as executor or legatee under a Will (other than a Will made by a Muhammadan or Indian Christian) can be established in any Court of justice unless probate of the Will or letters of administration with the Will annexed, has been granted by a court of competent jurisdiction.*
>
> *...*
>
> *35. A cumulative reading of Sections 57, 213 and 264 would show: (i) that a person claiming to be an executor or legatee under a Will cannot rely upon the Will, in any proceeding before a Court of justice, unless he has obtained probate (if an executor has been appointed) or letters of administration with the Will annexed, if such a Will has been executed by certain classes of persons..."*

Again in the case of ***Smt. Vatsala Srinivasan Vs. Narisimha Raghunathana and anr.***, *AIR 2011 Bom. 76*, Section 213 and Section 232 of the Indian Succession Act, 1925 have been discussed elaborately:

> *"8. Section 213 of the Indian Succession Act 1925 provides that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed*

*or has granted letters of administration with the will or an authenticated copy annexed. Section 220 provides that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. The effect of a probate under Section 227 is that probate when granted establishes a will from the death of the testator and renders valid all intermediate acts of the executor as such. Under Section 222 a probate can be granted only to an executor appointed by the will. When probate has been granted to several executors and one of them dies, Section 226 stipulates that the entire representation of the testator accrues to the surviving executor or executors.…"*

Probate is the legal process that verifies and confirms the genuineness of the deceased person's will. Although, probate of will is not mandatory but in effect as per Section 213 of the Indian Succession Act, 1925, one cannot claim right on the basis of unprobated will. Therefore, it becomes necessary.

## 6. ROLES AND DUTIES OF AN EXECUTOR:

The High Court of Chhattisgarh in the case of ***Awadesh Pratap Singh v. Ashok Upadhyay and Ors.***, *2016 (168) AIC 367*, the court discussed about the nature of the duties of an executor in the following paragraph:

*"8…. It is not necessary that the executor in all cases must be the legatee. Sometimes, persons who are not beneficiaries under the Will are also appointed and can be appointed as executors. The work which the executor is to do is to deal with the estate of the deceased in such a manner that the last wish of the testator as expressed in his/her Will is given effect to in letter and spirit. Even when there is one legatee, the testator may leave behind debts. It is the duty of the executor to discharge such debts and then make payment of the remaining property of the deceased to the sole beneficiary under the Will. Once the testator has appointed an executor, it is neither for the Court nor for any other person to say that the executor has not been appointed or that appointment of the executor is meaningless."*

## 7. DIFFERENCE BETWEEN PROBATE OF WILL AND LETTER OF ADMINISTRATION:

Section 222 of the Indian Succession Act, 1925 specifies the persons to whom probate can be granted. It states as under:

**S. 222. Probate only to appointed executor-**

(a) Probate shall be granted only to an executor appointed by the Will.

(b) The appointment may be expressed or by necessary implication.

The above provision in unambiguous terms lays down that probate could be granted only to an executor appointed by the Will either expressly or by necessary implication. It is now well settled that the right of an executor to apply for probate of the Will is personal to the executor. Though the executor may renounce probate, but in view of the above provision, no discretion is left with the Court to grant probate to any person other than the executor. Even an universal or residuary legatee is not entitled for grant of probate. This position becomes clear from the reading Section 232 of the Act, which is extracted here below:

**S. 232. Grant of administration to universal or residuary legatees** – When -

(a) the deceased has made a Will, but has not appointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or

(c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole state, or of so much thereof as may be unadministered.

In the case of ***Laxman v. Basavanni and Ors.***, *2018 (183) AIC 810*, the Karnataka High Court after reading Section 222 together with Section 232 came to the conclusion that:

*"7. ...*

*A conjoint reading of Sections 222 and 232 of the Act, makes it abundantly clear that probate could be granted only to an executor appointed under the Will either expressly or by implication. All other persons who claim under the Will as legatees or beneficiaries including an universal legatee or residuary legatee are entitled*

*only for grant of Letters of Administration with Will annexed. ... But in the absence of any express or implied appointment of a person as executor, merely on the basis of the bequests made in their favour as legatees or beneficiaries, they do not derive a right to grant of probate..."*

## 8. WHEN EXECUTOR DOES NOT FULFIL HIS DUTIES:

Section 232 deals with three identified situations:

- The first is where no executor has been named in the will executed by the deceased.
- The second is where though an executor has been appointed by the deceased in the will the executor (i) is legally incapable; or (ii) refuses to act; or (iii) has died before the testator; or (iv) had died before he has proved the will.
- The third situation deals with a case where the executor after having proved the will has died but before the estate of the deceased has been administered.

In either of these situations Section 232 provides that:

- a universal or a residuary legatee may be admitted to prove the will; and
- letters of administration with the will annexed may be granted to him of the whole estate or of such part of the estate as remains to be administered.

The law does not postulate a vacuum in the administration of the estate of a deceased testator. Hence in the several situations to which a reference has been made in Section 232, the Act contemplates that the universal or a residuary legatee may be admitted to prove the will with a consequential issuance of letters of administration with the will annexed.

***Smt. Vatsala Srinivasan v. Narisimha Raghunathana and anr.***, *AIR 2011 Bom. 76*,

"18. Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the will annexed is initiated for protecting the interest of the legatees under the will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the will. Having regard to these fundamental similarities in both the proceedings there is no conceivable reason as to why the law must be regarded as prohibiting a beneficiary from seeking to continue the proceedings upon the death

of the sole executor and as incidental thereto for seeking formal conversion of the proceeding from one for the grant of a probate to one for the issuance of letters of administration…."

In the case of ***Shirin Baman Faramarzi of Bombay Zoroastrian Iranian Inhabitant v. Zubin Boman Faramarzi and Ors.***, *2014 (3) ALLMR 579,* the executors who were alleged to have been appointed by the deceased in the Will in question had not come forward to act as an executor. Thus, the court allowed the petition for probate to be converted into a petition for letter of administration. The relevant paragraph has been cited below:

*"17. On perusal of the record produced by parties, in my view both the executors who were alleged to have been appointed by the said deceased in the Will in question have not come forward to act as an executors. … Since Mr. Himanshu Kode has not come forward to act as an executor though served with notice and proceedings and since Mr. Diniar Mehta has refused to act an executor in respect of the Will in the form in which it is produced by the petitioner, in my view in this situation, the beneficiary would have been entitled to file a petition for Letters of Administration with Will annexed. It is the case of the petitioner that since none of the executors had come forward to act as executors and in view of the erstwhile advocate filing a petition for probate instead of filing petition for Letters of Administration, petitioner had filed such proceedings. In my view, no prejudice would be caused to the caveator if the petition filed for probate is allowed to be converted into the petition for Letters of Administration in the circumstances referred to above."*

## 9. RELEVANT LEGAL PROVISIONS FOR EXECUTION OF WILL:

### 9.1. Indian Succession Act, 1925:

**Section 63.** Execution of unprivileged Wills.-Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) 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 acknowledgement 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 witness by present at the same time, and no particular form of attestation shall be necessary.

## 9.2. Indian Evidence Act 1872

***Section 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 not 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 provisions 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 71. Proof when attesting witness denies the execution****.-If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.*

As would be evident from the contents of Section 63 of the Act that to execute the Will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as Will. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the Will in the presence of the testator. It is, however, clarified that

it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

In the evidentiary context Section 68 of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but has been registered in accordance with the provisions of the Indian Registration Act 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied.

These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of Court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a Will, if the same has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a Will. The proof of a Will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the Court concerned and is capable of giving evidence.

Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinize the evidence adduced by the parties.

## 10. PROOF OF EXECUTION OF WILL:

There is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to Whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances.

(i) The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature;

(ii) The condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator;

(iii) The dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances;

(iv) The will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind.

In such cases the court would naturally except that all legitimate suspicions should be completely removed before the document is accepted as the las will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any legitimate doubts in the matter.

The requirement of proof of a Will is the same as any other document, except that the evidence tendered for proving a will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. The following principles are required to be proved:

i. The testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction.
ii. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect the writing as Will.
iii. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the Will in the presence of the testator.
iv. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

In the case of ***Jagdish Chand Sharma v. Narain Singh Saini and Ors.,*** *AIR 2015 SC 2149*, it was further added that:

> *"15.1 In the evidentiary context Section 68 of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless*

*one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but has been registered in accordance with the provisions of the Indian Registration Act 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied.*

*15.2 These statutory provisions, thus, make it incumbent for a document required by Jaw to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of Court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a Will, if the same has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view or the matter, however, the relaxation extended by the proviso is of no avail qua a Will. The proof of a Will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily neer proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the Court concerned and is capable of giving evidence."*

"What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59

and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

The Supreme Court in the case of ***Kavita Kanwar v. Mrs. Pamela Mehta and Ors***, AIR 2020 SC 2614 referred to the decision of the Supreme Court in Civil Appeal No. 6076 of 2009: ***Shivakumar and Ors. v. Sharanabasppa and Ors.,*** decided on 24.04.2020, where the Court after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a Will as follows:-

1. *Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.*
2. *Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.*
3. *The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing*

*about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.*

4. *The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.*
5. *If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.*
6. *A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be 'real, germane and valid' and not merely the 'fantasy of the doubting mind."*
7. *As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator, an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means*

*exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.*

8. *The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?*
9. *In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will.*"

## 11. HOW TO PROVE THE GENUINENESS OF A WILL IF ALL ATTESTING WITNESSES ARE DEAD OR REFUSES OR IS INCAPABLE TO BE EXAMINED BEFORE THE COURT OR DOES NOT RECOLLECT THE EXECUTION OF WILL?

A Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must

be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

However, in the case where the attesting witness denies or does not recollect the execution of the Will, the execution of such will can be proved by other evidences as per Section 71 of the Indian Evidence Act. In the case of ***Janki Narayan Bhoir v. Narayan Namdeo Kadam,*** *(2003) 2 SCC 91*, Section 71 of 1872 Act, was held to be in the form of a safeguard to the mandatory provision of Section 68 of the Indian Succession Act, to cater to a situation where it is not possible to prove the execution of the Will by calling the attesting witnesses though alive i.e. if the witnesses either deny or do not recollect the execution of the Will. Only in these contingencies by the aid of Section 71, other evidence can be furnished. It was further clarified that Section 71 of Act 1872 would have no application to a case where one attesting witness who alone had been summoned fails to prove the execution of the Will and the other attesting witness though available to prove the execution of the same, for reasons best known, is not summoned before the Court.

It was thus held in ***Jagdish Chand Sharma v. Narain Singh Saini and Ors.,*** *AIR 2015 SC 2149,* that:

> *"45.1 Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of 1872 Act. The distinction between failure on the part of a attesting witness to prove the execution and attestation of a Will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the*

*execution of the document or authenticate real forgetfulness of such fact…. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of Act 1872 cannot be invoked to bail him (propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63 (c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour."*

Nevertheless, in cases where the attesting witnesses are not available, as in the case of death or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligence search, the Will may be proved in the manner provided in Section 69 of the Act of 1872. Under such circumstances Section 69 of the Indian Evidence Act requires that signature and handwriting of at least one attesting witness must be proved. In relation to Section 69 of the Indian Evidence Act, the Hon'ble Supreme Court in the case of ***Babu Singh and Ors. v. Ram Sahai***, *AIR 2008 SC 2485* has held:

*"14. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others."*

Thus, in a case where many years have elapsed and both the attesting witnesses have died, thus Section 69 comes into play and the execution of the Will deed is required to be proved according to Section 69 by at least proving that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the Will is in the handwriting of that person.

It is to be noted that, it is only in case where plaintiffs come up with a case that the attesting witnesses of the Will have died or not available to prove the execution of the Will as required under Section 68, then the alleged Will deed is required to be proved by the handwriting of one of the witnesses of attesting witnesses and the executant under Section 69.

## 12. SUSPICIOUS CIRCUMSTANCES CONCERNING THE WILL IN QUESTION:

The Supreme Court in the case of ***Indu Bala Bose and Ors. v. Manindra Chandra Bose and Ors.***, AIR 1982 SC 133 discussed elaborately on when the circumstances should be considered 'suspicious'. The Court says:

> *"8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.*
>
> *Learned Counsel relied on the decision of this Court in the case of **Rani Purnima Devi and Anr. v. Kumar Khagendra Narayan Dev and Anr**. MANU/SC/0020/1961: [1962]3SCR195. In this case the will in question gave the entire property by the testator to a distant relation of his to the exclusion of the testator's widow, sister and his other relations, and even his daughter, who would be his natural heirs, but subject, of course, to the condition that the legatee would maintain the widow and the sister of the testator. The testator's signatures were not his usual signatures, nor in the same ink as the rest of the will; the testator used to sign blank papers for use in his cases in court and he used to send them to his lawyer through his servants; the testator did not appear before the Sub-Registrar for the purpose of registration of the will but the Sub- Registrar sent only his clerk to the residence of the testator for the purpose of registration; there were 16 attesting witnesses who attested the will, but of them, only 4 interested witnesses were examined to the execution of disinterested witnesses. The above are undoubtedly suspicious circumstances, circumstances creating doubt in the mind of the Court. In spite of these circumstances, it was held by the Trial Court that the will was duty executed and attested. On appeal, the High Court affirmed the order of the Trial Court. On further appeal, this Court held that the circumstances were suspicious and were not satisfactorily explained and hence held that "the due execution and attestation of the will were not proved."*

*10. Keeping the above principles of law in view let us now turn to the facts of the present case. Learned Counsel for the appellant has enumerated the following 11 'suspicious' circumstances*

i. *Attempt on the part of the propounder to conceal the real nature of testator's illness.*
ii. *The propounder failed to tell the date when the testator went to his lawyer (P.W. 3s) house or when the draft was given by the lawyer to the testator.*
iii. *The draft has not been produced and no explanation has come forth as to what happened to the draft.*
iv. *No date has been mentioned when the testator sent for his lawyer trough Banqshidhar for corrections in the draft.*
v. *The diary of P.W. 3 has not been produced.*
vi. *The senior lawyer (Sudhanshu Babu) has not been examined. The lawyer examined, namely P.W.3, is a partisan witness.*
vii. *Bangshidhar has not been examined as a witness although he was attending court during the trial of the suit.*
viii. *The statement of the propounder, Manindra, that he knew about the will only three or four days after its execution cannot be accepted as true when one of the attesting witnesses, namely P.W. 5, had been told of it a month earlier.*
ix. *No body knows what alterations were made in the draft.*
x. *The scribe and one of the attesting witnesses are employees, another witness (P.W.4) is a friend and the other attesting witness (P.W.5) is a relation.*
xi. *The evidence of the propounder, Manindra, is partly false; he disavows all knowledge of the will.*

*A careful perusal of the above circumstances shows that they are by no means suspicious circumstances and stand self-explained. Circumstances Nos. (ii) and (iv) are really test of memory. It may be remembered that the witnesses were deposing thirteen years after the execution of the will. It will be difficult for any witness after such a long lapse of time to give the dates when the testator went to the house of his lawyer or when the draft was given by the lawyer to the testator or when the testator sent for the lawyer through Bangshidhar for correction of the draft. With regard to circumstance No. (iii) there is no evidence to show that there was any invariable practice that the*

*draft of a will had to be preserved. No question was put in cross-examination to the scribe (P.W. 1) who perhaps might have been able to say what he had done with it. Similar is the position with regard to the diary of P.W. 3. P.W. 3 who deposed that his diary would show that he had drafted the will was not asked in cross-examination as to whether he at all preserved in 1965 the diary of 1952 or whether he could produce it. With regard to grievances Nos. (vi) and (vii) we do not see any necessity of calling the testator's employee Banqshidhar, as witnesses in the case. So far as Sudhangshu Babu was concerned, Manindra was not asked as to why he had not been called as a witness; possibly he had died as P.W. 3 spoke of him as "my late senior". With regard to circumstance No. (ix), it may he said that there was no necessity of knowing what alterations had been made in the draft. With regard to the circumstance that the scribe and the attesting witnesses were either employees, or friend or relation of the propounders' group, the answer is simple. No body would normally invite a stranger or a foe to be a scribe or a witness of a document executed by or in his favour; normally a known and reliable person, a friend or a relation is called for the purpose. The same argument applies to P.W.3 who is said to be a partisan witness for the reason that he was the testator's advocate. But there is nothing to show that he was not telling the truth in his deposition. With regard to the circumstances Nos. (viii) and (x) that Narendra was not telling the whole truth, when he said that he had come to know of the will three or four days after its execution the complaint may be correct, although it was not impossible that he had not been taken into confidence in the matter of the will in his favour, although P.W. 5 had been. Another possibility is that Manindra deposed so in order to avoid cross-examination. In any case this does not appear to be a suspicious circumstance surrounding the execution of the will.*

*11. With regard to circumstance No. (1), the submission is that the testator, according to the medical evidence, was at the time of the execution of the will suffering from high blood pressure, diabetes, acidosis, kidney trouble and that he had no food for two days before 8.11.1952. The evidence of P.W.2 Naresh C. Das Gupta who is a medical practitioner is that "Ranen Babu was not taking his meals and usual food", which means, he was taking sick diet*

*with 'hydro-protein' prescribed by him. But P.W. 2 deposes in cross-examination that "the patient was not in coma....The patient had talks with me on the last day" which was eight days after the execution of the will when the testator "suddenly" died of coronary thrombosis in the lap of his employee, Banqshidhar. There is no evidence that Ranendra did not have the mental capacity to execute the will. Even D.W. 2 Sailendra Bose who visited Ranendra during his illness, and D.W. 1, Dr. Aural Chakravorty who deposed by perusing the prescriptions, did not depose that Ranendra was in coma or had lost his mental faculty.*

*12. On the contrary the following circumstances lend strong support to the plaintiff's case of genuineness and valid execution of the will. (1) Gopendra, one of the brothers, who has not been given anything under the will had filed a written statement stating that he "has no objection to the grant of probate inasmuch as the will is executed and attested according to law." (2) The disposition under the will is quite fair and there are no suspicious circumstances in it at all. (3) As there were litigations between the two groups of the brothers, the will was the natural outcome to avoid further future litigation.*

## 13. WHEN THE RIGHT OF THE TESTATRIX OVER THE PROPERTY GIVEN IN WILL IS IN QUESTION:

The Supreme Court in the case of ***Kavita Kanwar v. Mrs. Pamela Mehta and Ors.***, AIR 2020 SC 2614, discussed on the above mentioned issue in the following paras:

*"30.6. It remains trite that no one can convey a better title than what he had; as expressed in the maxim: "Nemo dat quod non habet. The testatrix never had any right over the property belonging to the appellant and could not have conveyed to the respondent No.1 any property which was of the ownership of the appellant or which might be acquired or raised by the appellant in future by her own funds. On this ground alone, the Will in question is required to be*

*considered void as per Section 89 of the Succession Act, when the principal bequeathing stipulation in the Will suffers from uncertainty to the hilt.*

*10. See, for example, Narinder Singh Rao v Air Vice-Marshal Mahinder Singh Rao and Ors.: (2013) 9 SCC 425: (AIR 2013 SC 1476): (2013 AIR SCW 1896), where the testatrix had bequeathed property in excess to her share and this Court held that the bequest has to be treated only to the extent of the share held by the testatrix."*

## 14. WHEN THE TESTATOR EXPIRES BEFORE THE EXECUTION OF THE WILL:

The Supreme Court in the case of ***Jagdish Chand Sharma v. Narain Singh Saini*** and Ors., AIR 2015 SC 2149, referred to the case of ***Pentakota Satyanarayan and Ors v. Pentakota Seetharatnam and Ors.***, (2005) 8 SCC 67 to discuss on the issue abovementioned:

*"39. In Pentakota Satyanarayan and Ors. (supra) the testator P. Mr. Ram Murthi had admitted the execution of the Will involved. He, however, expired while the suit was pending. The Will was registered and the signature of the testator was identified by two witnesses whereupon the Sub Registrar had signed the document. In this textual premise, it was held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement did amount to sufficient attestation within the meaning of the Act. It was held as well that the endorsement of the Sub Registrar that the executant had acknowledged before him the execution, did also amount to attestation. The facts revealed that the Will was executed before the Sub Registrar on which the signature of the testator as well as signature and the thumb impression of the identifying witnesses were taken by the said authority, whereafter the letter signed the deed. In general terms, it was observed that registration of the Will per se did not dispense with the need of proving its execution and the attestation in the manner as provided in Section 68 of the 1872 Act. It was enunciated as well that execution consisted*

*of signing a document, reading it over and understanding and completion of all formalities necessary for the validity of the act involved."*

# *Judgement Section*

***(Hindu Succession Act, 1956 and***
***Indian Succession Act, 1925)***

## (1978) 3 Supreme Court Cases 383 : (1981) 129 ITR 440

(BEFORE Y.V. CHANDRACHUD, C.J. AND P.N. SHINGHAL AND V.D. TULZAPURKAR, JJ.)

GURUPAD KHANDAPPA MAGDUM . . Appellant;

*Versus*

HIRABAI KHANDAPPA MAGDUM AND OTHERS . . Respondents.

Civil Appeal No. 1828 of 1975[†], decided on April 27, 1978

**Hindu Succession Act, 1956 — Section 6, proviso and Explanation I — Hindu Mitakshara Coparcenary — Coparcener dying after 1956 — Share of his widow how ascertained**

**(Paras 11 to 13)**

**Interpretation of Statutes — Fiction — Scope and operation of**

**(Para 12)**

**Interpretation of Statutes — Two interpretations possible — That which furthers legislative intent should be preferred**

**(Para 14)**

Section 6 of the Hindu Succession Act, 1956 provides : When a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act; provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Explanation I to the section provides : For the purposes of this 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.

The husband of the plaintiff died in 1960 leaving his wife (the plaintiff), two sons and three daughters. The plaintiff filed the suit claiming 7/24th share of the property of the family on the basis that under Section 6 and its Explanation, if a partition took place during husband's life term she would have got a 1/4th share and her husband's 1/4th share, after his death, would devolve on 6 shares, that is, she would have got 1/24th share and adding her 1/4th share to the 1/24th she would be entitled to 7/24th. The trial court limited her share only to 1/24th but the High Court, on appeal, decreed her claim to 7/24th share.

Dismissing the appeal by one of the sons, the Supreme Court

*Held* :

(1) There is no justification for limiting the plaintiff's share to 1/24th ignoring the 1/4th share she would have obtained had there been a partition during the husband's life time. In order to ascertain the shares of the heirs in the property of a deceased coparcener, the first step is to ascertain the share of the deceased in the coparcenary property. The Explanation provides a fictional expedient namely that his share shall be deemed to be the share in the



property that would have been allotted to him if a partition had taken place immediately before his death. It is therefore assumed that a partition had in fact taken place between the deceased and his coparceners immediately before his death. The assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on the assumption and ascertain the shares of the heirs without reference to it. All the consequences which flow from a real partition have to be logically worked out, which means that the shares of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life-time of the deceased. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

(Paras 11, 12 and 13)

*CIT* v. *S. Teja Singh*, AIR 1959 SC 352 : (1959) Supp 1 SCR 394, *followed*

*East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*, (1952) AC 109, 132 : (1951) 2 All ER 587, *relied on*

(2) This interpretation of Section 6, its proviso and Explanation I furthers the legislative intent of enlarging the shares of female heirs qualitatively and quantitatively. To accept the contrary interpretation would be putting clock of social reform back. Therefore, even if two interpretations of Explanation I are possible, that which furthers the legislative intent should be preferred.

(Para 14)

*Shiramabai* v. *Kalgonda*, AIR 1964 Bom 263 : (1964) 66 Bom LR 351, held, *overruled*

*Rangubai Lalji* v. *Laxman Lalji*, (1966) 68 Bom LR 74 : AIR 1966 Bom 169; *Sushilabai* v. *Narayanrao*, AIR 1975 Bom 257 (FB); *Vidyaben* v. *Jagdishchandra*, AIR 1974 Guj 23; and *Ananda* v. *Haribandhu*, AIR 1967 Ori 194, *approved*

VPS/3903/C

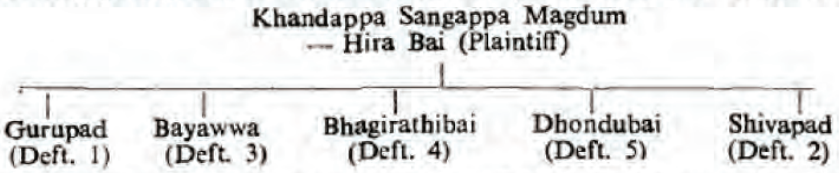
Advocates who appeared in this case :

R.B. Datar, Advocate, for the Appellant;

V.N. Ganpule and V.D. Khanna, Advocates, for the Respondent.

The Judgment of the Court was delivered by

**Y.V. CHANDRACHUD, C.J.**— It will be easier, with the help of the following pedigree, to understand the point involved in this appeal:




**2.** Khandappa died on June 27, 1960 leaving him surviving his wife Hirabai, who is the plaintiff, two sons Gurupad and Shivapad, who are Defendants 1 and 2 respectively, and three daughters, Defendants 3 to 5. On



November 6, 1962 Hirabai filed Special Civil Suit No. 26 of 1963 in the Court of the Joint Civil Judge, Senior Division, Sangli for partition and separate possession of a 7/24th share in two houses, a land, two shops and movables on the basis that these properties belonged to the joint family consisting of her husband, herself and their two sons. If a partition were to take place during Khandappa's lifetime between himself and his two sons, the plaintiff would have got a 1/4th share in the joint family properties, the other three getting a 1/4th share each. Khandappa's 1/4th share would devolve upon his death on six sharers: the plaintiff and her five children, each having a 1/24th share therein. Adding 1/4th and 1/24th, the plaintiff claims a 7/24th share in the joint family properties. That, in short, is the plaintiff's case.

**2-A.** Defendants 2 to 5 admitted the plaintiff's claim, the suit having been contested by Defendant 1, Gurupad, only. He contended that the suit properties did not belong to the joint family, that they were Khandappa's self-acquisitions and that, on the date of Khandappa's death in 1960 there was no joint family in existence. He alleged that Khandappa had effected a partition of the suit properties between himself and his two sons in December 1952 and December 1954 and that, by a family arrangement dated March 31, 1955 he had given directions for disposal of the share which was reserved by him for himself in the earlier partitions. There was, therefore, no question of a fresh partition. That, in short, is the case of Defendant 1.

**3.** The trial court by its judgment dated July 13, 1965 rejected defendant 1's case that the properties were Khandappa's self-acquisitions and that he had partitioned them during his lifetime. Upon that finding the plaintiff became indisputably entitled to a share in the joint family properties but, following the judgment of the Bombay High Court in *Shiramabai Bhimgonda* v. *Kalgonda*[1] the learned trial Judge limited that share to 1/24th, refusing to add 1/4th and 1/24th together. As against that decree, Defendant 1 filed First Appeal No. 524 of 1966 in the Bombay High Court, while the plaintiff filed cross-objections. By a judgment dated March 19, 1975 a Division Bench of the High Court dismissed Defendant 1's appeal and allowed the plaintiff's cross-objections by holding that the suit properties belonged to the joint family, that there was no prior partition and that the plaintiff is entitled to a 7/24th share. Defendant 1 has filed this appeal against the High Court's judgment by special leave.

**4.** Another Division Bench of the Bombay High Court in *Rangubai Lalji* v. *Laxman Lalji*[2] had already reconsidered and dissented from the earlier Division Bench judgment in *Shiramabai Bhimgonda*. In these two cases, the judgment of the Bench was delivered by the same learned Judge, Patel J. On further consideration the learned Judge felt that *Shiramabai* was not fully argued and was incorrectly decided and that on a true view of law, the widow's



share must be ascertained by adding the share to which she is entitled at a notional partition during her husband's lifetime and the share which she would get in her husband's interest upon his death. In the judgment under appeal, the High Court has based itself on the judgment in *Rangubai Lalji* endorsing indirectly the view that *Shiramabai* was incorrectly decided.

**5.** Since the view of the High Court that the suit properties belonged to the joint family and that there was no prior partition is well-founded and is not seriously disputed, the decision of this appeal rests on the interpretation of Explanation 1 to Section 6 of the Hindu Succession Act, (30 of 1956). That section reads thus:

> "6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female

relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

*Explanation* 1.—For the purposes of this 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.

*Explanation* 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

**6.** The Hindu Succession Act came into force on June 17, 1956. Khandappa having died after the commencement of that Act, to wit in 1960, and since he had at the time of his death an interest in Mitakshara coparcenary property, the pre-conditions of Section 6 are satisfied and that section is squarely attracted. By the application of the normal rule prescribed by that section, Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. But, since the widow and daughter are amongst the female relatives specified in class I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to Section 6 comes into play and the normal rule is excluded. Khandappa's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship. Testamentary succession is out of question as the deceased had not made a testamentary disposition though, under the explanation to Section 30 of the Act, the interest of a male Hindu



in Mitakshara coparcenary property is capable of being disposed of by a will or other testamentary disposition.

**7.** There is thus no dispute that the normal rule provided for by Section 6 does not apply, that the proviso to that section is attracted and that the decision of the appeal must turn on the meaning to be given to Explanation 1 of Section 6. The interpretation of that Explanation is the subject-matter of acute controversy between the

parties.

**8.** Before considering the implications of Explanation 1, it is necessary to remember that what Section 6 deals with is devolution of the interest which a male Hindu has in a Mitakshara coparcenary property at the time of his death. Since Explanation 1 is intended to be explanatory of the provisions contained in the section, what the Explanation provides has to be co-related to the subject-matter which the section itself deals with. In the instant case the plaintiff's suit, based as it is on the provisions of Section 6, is essentially a claim to obtain a share in the interest which her husband had at the time of his death in the coparcenary property. Two things become necessary to determine for the purpose of giving relief to the plaintiff: One, her share in her husband's share and two, her husband's own share in the coparcenary pro-property. The proviso to Section 6 contains the formula for fixing the share of the claimant while Explanation 1 contains a formula for deducing the share of the deceased. The plaintiff's share, by the application of the proviso, has to be determined according to the terms of the testamentary instrument, if any, made by the deceased and since there is none in the instant case, by the application of the rules of intestate succession contained in Sections 8, 9 and 10 of the Hindu Succession Act. The deceased Khandappa died leaving behind him two sons, three daughters and a widow. The son, daughter and widow are mentioned as heirs in class I of the Schedule and therefore, by reason of the provisions of Section 8(*a*) read with the 1st clause of Section 9, they take simultaneously and to the exclusion of other heirs. As between them the two sons, the three daughters and the widow will take equally, each having one share in the deceased's property under Section 10 read with Rules 1 and 2 of that section. Thus, whatever be the share of the deceased in the coparcenary property, since there are six sharers in that property each having an equal share, the plaintiff's share therein will be 1/6th.

**9.** The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that 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. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between

him and other members of the coparcenary. Though the plaintiff, not being a coparcener, was not entitled to demand partition yet if a partition were to take place between her husband and his two sons she would be entitled to receive a share equal to that of a son. (See *Mulla's Hindu Law*, 14th Edn. p. 403, para 315). In a partition between Khandappa and his two sons there would be four sharers in the coparcenary property the fourth being Khandappa's wife, the plaintiff. Khandappa would have therefore got a 1/4th share in the coparcenary property on the hypothesis of a partition between himself and his sons.

**10.** Two things are thus clear: One, that in a partition of the coparcenary property Khandappa would have obtained a 1/4th share and two, that the share of the plaintiff in the 1/4th share is 1/6th, that is to say, 1/24th. So far there is no difficulty. The question which poses a somewhat difficult problem is whether the plaintiff's share in the coparcenary property is only 1/24th or whether it is 1/4th *plus* 1/24th, that is to say, 7/24th. The learned trial Judges relying upon the decision in *Shiramabai* which was later overruled by the Bombay High Court, accepted the former contention while the High Court accepted the latter. The question is which of these two views is to be preferred.

**11.** We see no justification for limiting the plaintiff's share to 1/24th by ignoring the 1/4th share which she would have obtained had there been a partition during her husband's lifetime between him and his two sons. We think that in overlooking that 1/4th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was *in fact* no partition between the plaintiff's husband and his sons. Whether a partition had actually taken place between the plaintiff's husband and his sons is beside the point for the purposes of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

**12.** The fiction created by Explanation 1 has to be given its due and full effect as the fiction created by Section 18-A(9)(*b*) of the Indian Income Tax Act, 1922, was given by this Court in *CIT* v. *S. Teja Singh*[3]. It was held in that case that the fiction that the failure to send an estimate of tax on income under Section 18-A(3) is to be deemed to be a failure to send a return, necessarily involves the fiction that a notice had been issued to the assessee under Section 22 and that he had failed to comply with it. In an important aspect, the case before us is stronger in the matter of working out the fiction because in *Teja Singh case*, a missing step had to be supplied which was not provided for by

Section 18-A(9)(*b*), namely, the issuance of a notice under Section 22 and the failure to comply with that notice. Section 18-A(9)(*b*) stopped at creating the fiction that when a person fails to send an estimate of tax on his income under Section 18-A(3) he shall be deemed to



have failed to furnish a return of his income. The section did not provide further that in the circumstances therein stated, a notice under Section 22 shall be deemed to have been issued and the notice shall be deemed not to have been complied with. These latter assumptions in regard to the issuance of the notice under Section 22 and its non-compliance had to be made for the purpose of giving due and full effect to the fiction created by Section 18-A(9)(*b*). In our case it is not necessary, for the purposes of working out the fiction, to assume and supply a missing link which is really what was meant by Lord Asquith in his famous passage in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*[4]. He said:

> "If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it; and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

**13.** In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that 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 that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made

that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot



generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, *in addition to* the share which he or she received or must be deemed to have received in the notional partition.

**14.** The interpretation which we are placing upon the provisions of Section 6, its proviso and Explanation 1 thereto will further the legislative intent in regard to the enlargement of the share of female heirs, qualitatively and quantitatively. The Hindu Law of Inheritance (Amendment) Act, 1929 conferred heirship rights on the son's daughter, daughter's daughter and sister in all areas where the Mitakshara law prevailed. Section 3 of the Hindu Women's Rights to Property Act, 1937, speaking broadly, conferred upon the Hindu widow the right to a share in the joint family property as also a right to demand partition like any male member of the family. The Hindu Succession Act, 1956 provides by Section 14(1) that any property processed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as a full owner thereof and not as a limited owner. By restricting the operation of the fiction created by Explanation I in the manner suggested by the appellant, we shall be taking a retrograde step, putting back as it were the clock of social reform which has enabled the Hindu woman to acquire an equal status with males in matters of property. Even assuming that two interpretations of Explanation I are reasonably possible, we must prefer that interpretation which will further the intention of the legislature and

remedy the injustice from which the Hindu women have suffered over the years.

**15.** We are happy to find that the view which we have taken above has also been taken by the Bombay High Court in *Rangubai Lalji* v. *Laxman Lalji* in which Patel, J., very fairly, pronounced his own earlier judgment to the contrary in *Shiramabai Bhimgonda* v. *Kalgonda* as incorrect. Recently, a Full Bench of that High Court in *Sushilabai Ramachandra Kulkarni* v. *Narayanrao Gopalrao Deshpande*[5] the Gujarat High Court in *Vidyaben* v. *Jagdischandra N. Bhatt*[6] and the High Court of Orissa in *Ananda* v. *Haribandhu*[7] have taken the same view. The Full Bench of the Bombay High Court in *Sushilabai* has considered exhaustively the various decisions bearing on the point and we endorse the analysis contained in the judgment of Kantawala, C.J., who has spoken for the Bench.

**16.** For these reasons we confirm the judgment of the High Court and dismiss the appeal with costs.

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† Appeal by Special Leave from the Judgment and Order dated March 19, 1975 of the Bombay High Court in First Appeal No. 524 of 1966 from original decree

[1] AIR 1974 Bom 263 : (1964) 66 Bom LR 351

[2] AIR 1966 Bom 169 : (1966) 68 Bom LR 74

[3] AIR 1959 SC 352 : 1959 Supp 1 SCR 394 : 1959 SCJ 425

[4] 1952 AC 109, 132 : (1951) 2 All ER 587

[5] AIR 1975 Bom 257

[6] AIR 1974 Guj 23

[7] AIR 1967 Ori 194

## (1985) 2 Supreme Court Cases 321

(BEFORE O. CHINNAPPA REDDY, E.S. VENKATARAMIAH AND R.B. MISRA, JJ.)

STATE OF MAHARASHTRA . . Appellant;

*Versus*

NARAYAN RAO SHAM RAO DESHMUKH AND OTHERS . . Respondents.

Civil Appeal No. 1441 of 1971[†], decided on March 19, 1985

**Ceiling on Land — Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Sections 2(11), (20), (22), 3, 4 and 6 — Family member — Concept of — Female member of a joint Hindu family would continue to remain such a member even though her individual interest gets fixed on her inheriting interest of a deceased male member of the family — She would cease to be a member of the family only when she would choose to become**



separate by partition — Proviso to Section 6 does not effect any change in this position

**Hindu Law — Joint family — Mitakshara School — Individual interest of a female member of joint family getting fixed on her inheriting coparcenary interest of a deceased male member of the family — Held, she would not cease to become member of the family thereby unless she chooses to become separate by partition — Hindu Succession Act, 1956, Section 6**

**Hindu Law — Joint family and coparcenary — Relevant features of**

One 'S', his son, his wife and his mother were members of a joint Hindu family governed by Mitakshara School. 'S' died after coming into force of the Hindu Succession Act, 1956. Consequently, his interest in the coparcenary property devolved in equal shares on his son, wife and mother. They, however, continued to live together enjoying family properties as before. After commencement of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, the son of 'S' filed a declaration. He claimed that by virtue of the proviso to Section 6 of the Act read with Explanation I thereto, which required assuming that a notional partition had taken place in the family prior to the death of the deceased, the female heirs of such deceased Hindu became divided or separated from the family on the death of the deceased and therefore, each of them was entitled to be allowed to retain one unit of the ceiling area under the Ceiling Act. The High Court upheld this plea. Allowing the appeal Supreme Court

*Held* :

The ownership of a definite share in the family property by a person need not be treated as a factor which would militate against his being a member of a family. The proviso to Section 6 of the Ceiling Act was confined to the purpose of increasing the ceiling area as provided in Section 6. It cannot be construed as laying down that wherever a member of a family had his separate property he or she should be regarded as not a member of a family and that he or she would be entitled to a separate unit of ceiling area.

(Paras 10 and 11)

The Ceiling Act was applicable not only to Hindus governed by the Mitakshara Hindu law which recognised an undivided Hindu family but to all other communities amongst whom the concept of an undivided family owning joint property in which the members of the undivided family had community of interest was unknown. The Ceiling Act intended that even amongst such non-Hindu communities, a family should not be permitted to hold agricultural land in excess of the ceiling. It is with this object a wider definition of the expression "family" was given in Section 2(11) of the Ceiling Act.

(Para 5)

The right of a female heir to the interest inherited by her in the family property gets fixed on the

death of a male member under Section 6 of the Hindu Succession Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results.

(Para 10)

The joint and undivided family is the normal condition of a Hindu society. An undivided Hindu family is ordinarily joint not only in estate but in food and worship but it is not necessary that a joint family should own joint family property. There can be a joint family without a joint family property.

(Para 7)



A joint family may consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters. The property of a joint family does not cease to belong to a family merely because there is only a single male member in the family.

(Para 8)

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

(Para 8)

*Gowli Buddanna* v. *CIT*, AIR 1966 SC 1523 : (1966) 3 SCR 224 : (1966) 60 ITR 293; *Sitabai* v. *Ram Chandra*, (1969) 2 SCC 544 : AIR 1970 SC 343 : (1970) 2 SCR 1 and *N.V. Narendranath* v. *CWT*, (1969) 1 SCC 748 : AIR 1970 SC 14 : (1969) 3 SCR 882 : (1969) 74 ITR 190, *relied on*

While under the Mitakshara Hindu Law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law, every coparcener takes a defined share in the property and he is the owner of that share. But there is unity of possession. The share does not fluctuate by births and deaths. Thus as regards the Dayabhaga law also the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family.

(Para 8)

*Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383 : AIR 1978 SC 1239 : (1978) 3 SCR 761 : (1981) 129 ITR 440, *distinguished*

[Ed.: In *Vengdasalam Pillai* v. *Union Territory of Chandigarh*, (1985) 2 SCC 91, the Court in the context of Section 2 (10) of the Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 has more particularly emphasised that the definition of family was not confined to any particular religion, community etc. However, the definition of family under Section 2(10) of the Maharashtra Ceiling Act is different from that under the Pondicherry Ceiling Act inasmuch as while under the former provision "family" includes Hindu undivided family apart from "other persons", the later provision is as follows: "Family in relation to a person means the person, the wife or husband, as the case may be, of such person and his or her minor sons and unmarried daughters."]

R-M/6900/C

Advocates who appeared in this case :

Y.S. Desai, Senior Advocate (M.N. Shroff, Advocate, with him) for the Appellant;

U.R. Lalit, Senior Advocate (A.G. Ratnaparkhi, Advocate, with him) for the Respondents.

The Judgment of the Court was delivered by

**E.S. VENKATARAMIAH, J.**— Sham Rao Bhagwant Rao Deshmukh and his son, Narayan Rao were members of a joint Hindu family governed by the Mitakshara School of law. His wife Sulochanabai and his mother Gangabai alias Taibai were also the members of that family. The said family owned extensive properties which included agricultural

lands situated in fourteen villages. Sham Rao died on June 15, 1957 after the coming into force of the Hindu Succession Act,1956 (hereinafter referred to as "the Act") and on his death his interest in the coparcenary property devolved on his son, wife and mother in equal shares under Section 6 of the Act, such interest being the share that would have been allotted to him if a partition of the family property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not. According to the law governing the above family which was governed by the Bombay School under which the mother also was entitled to a share at a partition between her husband and her son equal to that of her son one-third share in the family property could have been allotted to the share of Sham Rao immediately before his death had a partition taken place. That one-third share devolved in equal shares on Narayan Rao, Sulochanabai and Gangabai alias Taibai each inheriting one-ninth share of the family property. They, however, continued to live together enjoying the family properties as before. On January 26, 1962 the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (hereinafter referred to as "the Ceiling Act") came into force. As required by the Ceiling Act, Narayan Rao filed a declaration on behalf of himself, his mother Sulochanabai and his grandmother Gangabai alias Taibai before the Sub-Divisional Officer, Saoner stating that they held in all 305.49 acres of agricultural land and that under a family arrangement entered into on March 30, 1957 they were holding the lands in distinct and separate shares, Narayan Rao holding one-half share and the other two holding one-fourth share each and that each of them was entitled to retain 96 acres which was the maximum extent of land which a person in that area could hold after the Ceiling Act came into force. The Sub-Divisional Officer after enquiry held that the alleged family settlement was not true. Narayan Rao, his mother and his grandmother were joint in estate and constituted a family within the meaning of that expression as defined in Section 2(11) of the Ceiling Act and the family could not hold agricultural land in excess of one unit of the ceiling area. The Sub-Divisional Officer came to the conclusion that the total area held by the said family on the appointed day was 313.57 acres, and as the said lands were situated in different villages and the ceiling area in all the villages except in Chanakpur village was 96 acres and in Chanakpur village the ceiling area was 108 acres, the total land held by the family was to be converted into 304.57 acres for purposes of the Ceiling Act. He further held that the family was entitled to 96 acres of land out of the said 304.57 acres on appointed day and as the family had alienated after August 4, 1959 about 44 acres of land in contravention of Section 10(1) of the Ceiling Act, it could retain only 51.16 acres. The remaining extent of



land measuring in all 222.32 acres was declared as surplus land which had to be surrendered under the Ceiling Act. Aggrieved by the decision of the Sub-Divisional Officer, Narayan Rao, his mother and grandmother filed an appeal before the Maharashtra Revenue Tribunal questioning the correctness of the said decision and that appeal was dismissed. Against the decision of the Tribunal, they filed a petition before the High Court of Bombay under Article 227 of the Constitution. Before the High Court the case of family settlement was not pressed but it was contended that since the one-third interest in the family property which could have been allotted to the share of Sham Rao had he demanded a partition immediately before his death had devolved in equal shares on his heirs i.e. his wife, mother and son, the surviving

members of the family ceased to hold the family property as members of a family and, therefore, each of them was entitled to be allowed to retain one unit of the ceiling area under the Ceiling Act. The High Court upheld the above plea. It held that since the one-ninth share of Gangabai alias Taibai, the mother of Sham Rao did not exceed the ceiling area, she could retain all the land belonging to her. It further held that Narayan Rao and Sulochanabai were each entitled to four-ninth share of the property and each of them was entitled to retain for himself or herself, as the case may be, one unit of ceiling area out of his or her four-ninth share in the family property and only the surplus was liable to be surrendered. The High Court directed the Sub-Divisional Officer to pass fresh orders accordingly in the light of its decision. The State Government has filed this appeal by special leave against the decision of the High Court.

**2.** In order to examine the correctness of the contentions urged in this appeal, it is necessary to refer briefly first to the relevant provisions of the Ceiling Act, as they stood on the appointed day i.e. the date on which the said Act came into force. The Ceiling Act came into force on January 26, 1962 as per notification issued by the State Government under Section 1(3) thereof. The Ceiling Act as its long title indicates was enacted for the purpose of imposing a maximum limit (or ceiling) on the holding of agricultural land in the State of Maharashtra to provide for the acquisition and distribution of land held in excess of such ceiling and for making provisions regarding matters connected with the purposes aforesaid. The imposition of ceiling on the holding of agricultural land was found to be necessary in the interests of the agrarian economy of the State. The Ceiling Act also made provisions for the distribution of surplus land acquired from persons who were holding in excess of the ceiling amongst the landless and other persons. Sections 3 and 4 of the Ceiling Act provided as follows:



> "In order to provide for the more equitable distribution of agricultural land amongst the peasantry of the State of Maharashtra (and in particular, to provide that landless persons are given land for personal cultivation) on the commencement of this Act, there shall be imposed to the extent, and in the manner hereinafter provided, a maximum limit (or ceiling) on the holding of agricultural land throughout the State.
>
> 4(1) Subject to the provisions of this Act, no person shall hold land in excess of the ceiling area, as determined in the manner hereinafter provided.
>
> *Explanation.*—A person may hold exempted land to any extent.
>
> (2) Subject to the provisions of this Act, all land held by a person in excess of the ceiling area, shall be deemed to be surplus land, and shall be dealt with in the manner hereinafter provided for surplus land."

**3.** The ceiling area was prescribed by Section 5 of the Ceiling Act. Section 2(22) of the Ceiling Act defined the expression "person" as including a family. Section 2(11) of the Ceiling Act read as follows:

> "2(11) "family" includes, a Hindu undivided family, and in the case of other persons, a group or unit the members of which by custom or usage, are joint in estate or possession or residence."

**4.** Section 2(20) of the Ceiling Act stated:

"2(20) 'member of a family' means a father, mother, spouse, brother, son, grandson, or dependent sister or daughter, and in the case of a Hindu undivided family a member thereof and also a divorced and dependent daughter."

**5.** The Ceiling Act was applicable not only to Hindus governed by the Mitakshara Hindu law which recognised an undivided Hindu family but to all other communities amongst whom the concept of an undivided family owning joint property in which the members of the undivided family had community of interest was unknown. The Ceiling Act intended that even amongst such non-Hindu communities, a family should not be permitted to hold agricultural land in excess of the ceiling. It is with this object a wider definition of the expression "family" was given in Section 2(11) of the Ceiling Act as including not only a Hindu undivided family but other families too whose members could belong to any of the classes mentioned in Section 2(20) of the Ceiling Act. In the case of families other than a Hindu undivided family, a father, mother, spouse, brother, son, grandson



or dependent sister or daughter constituted a family and by virtue of Section 2(22) were treated together as a person and in the case of a Hindu undivided family every member thereof was treated as a member of the family. A divorced and dependent daughter also could be a member of the family.

**6.** The contention urged before us is that by reason of the death of Sham Rao, the family became disrupted or divided and that Narayan Rao, his mother and his grandmother ceased to be members of a joint Hindu family. Elaborating the said contention the learned Counsel for the respondents herein argued that by virtue of the proviso to Section 6 of the Act read with Explanation I thereto which for purposes of quantifying the interest in the joint family property that devolved on the heirs of a deceased male Hindu required that it should be assumed that a notional partition had taken place in the family immediately prior to the death of the deceased, the female heirs of such deceased Hindu became divided or separated from the family on the death of the deceased. In order to examine the validity of this submission it is necessary to refer to some of the relevant features of a Hindu undivided family and to consider the effect of the provisions of Section 6 of the Act on such family.

**7.** As observed in *Mayne on Hindu Law and Usage* (1953 Edn.) the joint and undivided family is the normal condition of a Hindu society. An undivided Hindu family is ordinarily joint not only in estate but in food and worship but it is not necessary that a joint family should own joint family property. There can be a joint family without a joint family property. At para 264 of the above treatise it is observed thus:

"264. It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu coparcenary is a much narrower body... For, coparcenary in the Mitakshara law is not identical with coparcenary as understood in English law: when a member of a joint family dies, 'his right accresces to the other members by survivorship, but if a coparcener dies, his or her right does not accresce to the other coparceners, but goes to his or her own heirs'. When we speak of a Hindu joint family as constituting a coparcenary, we refer not to the entire number of persons who can trace descent from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons who, by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect

of it, to burden it with their debts, and at their pleasure to enforce its partition. Outside this body, there is a fringe of persons possessing only inferior rights such as that of maintenance, which however tend to diminish as the result of reforms in Hindu law by legislation."

**8.** A Hindu coparcenary is, however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary, A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener. A joint family, however, may consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters. The property of a joint family does not cease to belong to the family merely because there is only a single male member in the family. (See *Gowli Buddanna* v. *CIT*[1] and *Sitabai* v. *Ram Chandra*[2].) A joint family may consist of a single male member and his wife and daughters. It is not necessary that there should be two male members to constitute a joint family. (See *N.V. Narendranath* v. *CWT*[3]) While under the Mitakshara Hindu law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law, there is no unity of ownership of coparcenary property with the members thereof. Every coparcener takes a defined share in the property and he is the owner of that share. But there is, however, unity of possession. The share does not fluctuate by births and deaths. Thus it is seen that the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family in the Dayabhaga law.

**9.** We have earlier seen that females can be the members of a Hindu joint family. The question now is whether a female who inherits a share in a joint family property by reason of the death of a male member of the family ceases to be a member of the family. It was very forcefully pressed upon us by the learned counsel for the respondents relying upon the decision of this Court in *Gurupad Khandappa*



*Magdum* v. *Hirabai Khandappa Magdum*[4] that there was a disruption of the family in question on the death of Sham Rao as for the purpose of determining the interest inherited by Gangabai alias Taibai and Sulochanabai it was necessary to assume that a notional partition had taken place immediately before the death of Sham Rao and carried to its logical end as observed in the above decision, Gangabai alias Taibai and Sulochanabai should be deemed to have become separated from the family. The facts of the above said case were these. One Khandappa died leaving behind his wife Hirabai, two sons and three daughters after the coming into force of the Act. Hirabai filed a suit for partition and separate possession of 7/24th share in the joint family property on the basis of Section 6 of the Act. She claimed that if a partition had taken place between her husband and her two sons immediately before the death of her

husband Khandappa, she, her husband and two sons would have each been allotted a one-fourth share in the family property and on the death of her husband the one-fourth share which would have been allotted in his favour had devolved in equal shares on her, her two sons and three daughters. Thus she claimed the one-fourth share which had to be allotted in her favour on the notional partition and 1/24th share (which was one-sixth of the one-fourth share of her husband) i.e. in all 7/24th share. It was contended on behalf of the contesting defendant that she could not get the one -fourth share since actually no partition had taken place. Chandrachud, C.J. rejected the said contention with the following observations at p. 768: (SCC pp. 389-90, para 13)

> "In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that 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 that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the



statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, *in addition to* the share which he or she received or must be deemed to have received in the notional partition."

**10.** We have carefully considered the above decision and we feel that this case has to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which would have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the

death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under Section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs. To illustrate, if what is being asserted is accepted as correct it may result in the wife automatically being separated from her husband when one of her sons dies leaving her behind as his



heir. Such a result does not follow from the language of the statute. In such an event she should have the option to separate herself or to continue in the family as long as she wishes as its member though she has acquired an indefeasible interest in a specific share of the family property which would remain undiminished whatever may be the subsequent changes in the composition of the membership of the family. As already observed the ownership of a definite share in the family property by a person need not be treated as a factor which would militate against his being a member of a family. We have already noticed that in the case of a Dayabhaga family, which recognises unity of possession but not community of interest in the family properties amongst its members, the members thereof do constitute a family. That might also be the case of families of persons who are not Hindus. In the instant case the theory that there was a family settlement is not pressed before us. There was no action taken by either of the two females concerned in the case to become divided from the remaining members of the family. It should, therefore, be held that notwithstanding the death of Sham Rao the remaining members of the family continued to hold the family properties together though the individual interest of the female members thereof in the family properties had become fixed.

**11.** We have already seen that a "person" includes a "family" for purposes of the Ceiling Act and the members of a family cannot hold more than one unit of ceiling area. The respondents cannot derive any assistance from the proviso to Section 6 of the Ceiling Act. Section 6 of the Ceiling Act provided that where a family consisted of members which exceeded five in number, the family would be entitled to hold land exceeding the ceiling area to the extent of one-sixth of the ceiling area for each member in excess of five, subject to the condition that the total holding did not exceed twice the ceiling area. The proviso to Section 6 of the Ceiling Act provided that for the purposes of increasing the holding of the family in excess of the ceiling area as stated above if any member thereof held any land separately he would not be regarded as a member of the family for that purpose. This proviso was intended to qualify what was stated in Section 6 and was limited in its operation. It was confined to the purpose of increasing the ceiling area as provided in Section 6 of the Ceiling Act. It cannot be construed as laying down that wherever a member of a family had his separate property he or she should be regarded as not a member of a family and that he or she would be entitled to a separate unit of ceiling area.

**12.** The High Court having held that after the death of Sham Rao the joint family of Narayan Rao, Sulochanabai and Gangabai continued and that there was nothing to show that Narayan Rao,

Sulochanabai and Gangabai separated in residence after the death of Sham Rao erred in holding that each of them was entitled to a separate unit of ceiling area in the circumstances of this case. Its construction of the proviso to Section 6 of the Ceiling Act is also erroneous. Its conclusion that "even though, therefore, ordinarily a person may be a member of a Hindu joint family for the purposes of the Ceiling Act, he would not be held to be a member if he holds land separately" for all purposes is again erroneous for the reasons already given above.

**13.** In the circumstances of the case, we are of the view that Narayan Rao, Sulochanabai and Gangabai alias Taibai were together entitled to retain only one unit of ceiling area. In the result the judgment of the High Court is set aside and the order passed by the Sub-Divisional Officer which was affirmed by the Tribunal is restored.

**14.** For the foregoing reasons the appeal is accordingly allowed. There shall be no order as to costs.

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† From the Judgment and Order dated April 28, 1970 of the Bombay High Court in Special Civil Application No. 163 of 1967

[1] (1966) 3 SCR 224 : AIR 1966 SC 1523 : (1966) 60 ITR 293

[2] (1969) 2 SCC 544 : AIR 1970 SC 343 : (1970) 2 SCR 1

[3] (1969) 1 SCC 748 : AIR 1970 SC 14 : (1969) 3 SCR 882 : (1969) 74 ITR 190

[4] (1978) 3 SCC 383 : AIR 1978 SC 1239 : (1978) 3 SCR 761 : (1981) 129 ITR 440

# (2008) 3 Supreme Court Cases 87 : (2008) 1 Supreme Court Cases (Civ) 779 : 2008 SCC OnLine SC 264

(BEFORE S.B. SINHA AND V.S. SIRPURKAR, JJ.)

BHANWAR SINGH . . Appellant;

*Versus*

PURAN AND OTHERS . . Respondents.

Civil Appeal No. 1233 of 2008[†], decided on February 12, 2008

**A. Hindu Succession Act, 1956 — S. 6 — Provision in, regarding devolution of property in coparcenary property — Applicability — Held, not applicable when the surviving members of the coparcenary had already partitioned their properties and become owners to the extent of their share**

**B. Hindu Succession Act, 1956 — Ss. 8, 19 and 4 — Discontinuance of coparcenary — Nature of interest of succeeding heirs — In such**



circumstances, held, the property ceases to be joint family property — All the succeeding heirs succeed to their respective shares not as joint tenants but as tenants-in-common — The property devolves upon them not per stirpes but per capita with the right to alienate the share, particularly when the property has been partitioned and entries made in the revenue record of rights

One B was the owner of the property. He died leaving behind his son S and three daughters. The properties in suit were then partitioned between S and his sisters. Their names were mutated in the revenue records of rights and their shares were shown to be ¼th each. Thereafter, the appellant, who was the son of S, was born. Subsequently, S transferred a part of the properties firstly by way of mortgage and thereafter by sale in favour of the respondents. On the premise that the properties of B were joint family properties, the appellant filed a suit for setting aside the said alienations on the ground, inter alia, that the said transaction was done without any legal necessity therefor. The trial court decreed the suit but the appellate court set aside the decree and held that upon the death of B, S became a co-sharer in the property and the property lost the character of ancestral property in terms of Section 8 of the Hindu Succession Act. A second appeal filed by the appellant was dismissed by the High Court. The appellant then filed the present appeal by special leave.

Dismissing the appeal, the Supreme Court

*Held* :

B left behind S and three daughters. In terms of Section 8 of the Hindu Succession Act, 1956 ("the Act"), therefore, the properties of B devolved upon S and his three sisters. Each had ¼th share in the property. Apart from the legal position, factually the same was also reflected in the record-of-rights. A partition had taken place amongst the heirs of B.

(Para 14)

The first appellate court rightly held that Section 6 of the Hindu Succession Act was not attracted to the facts of the case as S and his sisters having partitioned their properties became owners to the extent of 1/4th share each, he had the requisite right to transfer the lands falling within his share.

(Paras 15 and 24)

It was rightly held that having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of B would succeed to his interest as tenants-in-common and not as joint tenants. Therefore, the properties devolved upon them per capita and not per stirpes, each one of them was entitled to alienate their share, particularly when different properties were allotted in their favour. In a case of this nature, the joint coparcenary did not continue.

(Paras 15 and 25)

*CWT* v. *Chander Sen*, (1986) 3 SCC 567 : 1986 SCC (Tax) 641; *Yudhishter* v. *Ashok Kumar*, (1987) 1 SCC 204; *CIT* v. *P.L. Karuppan Chettiar*, 1993 Supp (1) SCC 580; *CIT* v. *M. Karthikeyan*, 1994 Supp (2) SCC 112, *followed*

*Sunderdas Thackersay & Bros.* v. *CIT*, (1982) 137 ITR 646 (Cal), *approved*

*CIT* v. *Dr. Babubhai Mansukhbhai*, (1977) 108 ITR 417 (Guj), held, *overruled*

*Sheela Devi* v. *Lal Chand*, (2006) 8 SCC 581, *distinguished*

*C. Krishna Prasad* v. *CIT*, (1975) 1 SCC 160 : 1975 SCC (Tax) 16, *referred to*

F.D. Mulla : *Commentary on Hindu Law*, 15th Edn., pp. 924-26; Mayne : *Hindu Law*, 12th Edn., pp. 918-19, *referred to*

H-D/37354/C



Advocates who appeared in this case:
Gagan Gupta, Advocate, for the Appellant;
Manoj Swarup and Rohit Sohgaura, Advocates, for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

1. (2006) 8 SCC 581, *Sheela Devi* v. *Lal Chand* — 92*f*, 93*g-h*
2. 1994 Supp (2) SCC 112, *CIT* v. *M. Karthikeyan* — 92*c-d*
3. 1993 Supp (1) SCC 580, *CIT* v. *P.L. Karuppan Chettiar* — 92*c-d*
4. (1987) 1 SCC 204 : (1987) 1 SCR 516, *Yudhishter* v. *Ashok Kumar* — 92*c-d*, 92*d*, 93*d-e*
5. (1986) 3 SCC 567 : 1986 SCC (Tax) 641 : (1986) 3 SCR 254, *CWT* v. *Chander Sen* — 91*c-d*, 92*c-d*, 92*d*
6. (1982) 137 ITR 646 (Cal), *Sunderdas Thackersay & Bros.* v. *CIT* — 92*c-d*
7. (1977) 108 ITR 417 (Guj), *CIT* v. *Dr. Babubhai Mansukhbhai* **(held, overruled)** — 92*b-c*
8. (1975) 1 SCC 160 : 1975 SCC (Tax) 16, *C. Krishna Prasad* v. *CIT* — 93*f*

The Judgment of the Court was delivered by

**S.B. SINHA, J.**— Leave granted.

**2.** Applicability of Section 8 of the Hindu Succession Act, 1956 (the Act) to the facts of the present case is in question in this appeal which arises out of a judgment and order dated 14-11-2006 passed by a learned Single Judge of the Punjab and Haryana High Court whereby and whereunder the second appeal preferred by the appellant herein was dismissed.

**3.** One Bhima was the owner of the property. He died in the year 1972 leaving behind his son, Sant Ram and three daughters, Shanti, Manti and Shakuntala. The appellant, who is son of Sant Ram was born in the year 1977. He attained majority in the year 1995. The properties in suit were partitioned between Sant Ram and his sisters. Their names were mutated in the revenue records of rights. Their shares in the properties of the deceased Bhima were shown to be 1/4th each in the revenue records of 1973-1974.

**4.** Inter alia, on the premise that the properties of Bhima were joint family properties and the same were transferred by Sant Ram, firstly by way of mortgage and thereafter by sale in favour of the respondents herein in the year 1985, the appellant filed a suit for setting aside the said alienations. It was contended that the consideration for the said transaction being a meagre sum of Rs 12,000 and furthermore being not for legal necessity, the same should be set aside.

**5.** The said suit was decreed by the learned trial Judge holding that the property was joint family one and Sant Ram being the "karta", could not have transferred the same, save and except by way of legal necessity. The learned first appellate court, however, reversed the same findings, inter alia, holding that upon the death of Bhima, Sant Ram became a co-sharer of the property and having regard to the entries of the jamabandi for the year 1973-1974, it had been established that he, along with his sisters, having inherited the same in equal shares, the property lost the character of ancestral property in terms of Section 8 of the Hindu Succession Act.



**6.** It was furthermore opined that even if the property was a joint property, the interest of Sant Ram being 1/4th in the half-share therein and the other half of Bhima having been inherited by Sant Ram and his sisters, the disputed property ceased to be a Hindu Undivided Family property. In any event, the deed of sale executed by Sant Ram having been executed for legal necessity as the suit property had already been mortgaged, the deeds of sale could not have been cancelled.

**7.** A limited notice was issued by this Court as to whether the father of the petitioner had inherited the property from his forefathers.

**8.** Mr Gagan Gupta, learned counsel appearing on behalf of the appellant, would submit that the appellate court as also the High Court committed a serious error insofar as they failed to take into consideration the well-settled principles of Hindu Law that transfer made by the father after the birth of the son would be held to be illegal unless legal necessity therefor is proved, as such transactions could be entered into by the manager or karta of the family only for legal necessity and for no other. The appellate court, it was contended, committed a serious error insofar as it proceeded to hold that the property in question became separate property at the hands of Sant Ram, but, despite the same, it proceeded to determine the question of legal necessity also. It was furthermore submitted that only because some entries have been made in the record-of-rights, the same by itself would not lead to deprivation of the title in the

property in the appellant.

**9.** Mr Manoj Swarup, learned counsel appearing on behalf of the respondents, on the other hand, would submit that in view of Section 8 of the Hindu Succession Act, as the son of Bhima and his daughters inherited his property and not the appellant as a grandson, the impugned judgment is unassailable.

**10.** The fact that the property at one point of time was a joint family property stands admitted.

**11.** The only question which arises for consideration is as to whether the appellant had acquired any interest therein by his birth in the year 1977; Bhima having died in 1972.

**12.** The Act brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non obstante provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided.

**13.** Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of



succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

**14.** Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record-of-rights. A partition had taken place amongst the heirs of Bhima.

**15.** Although the learned first appellate court proceeded to consider the effect of Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants-in-common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue.

**16.** Interpretation of Section 8 of the Hindu Succession Act came up for consideration before this Court in *CWT* v. *Chander Sen*[1]. Mukherjee, J. (as the learned Chief Justice then was) upon considering the changes effected by the Hindu Succession Act as also the implication thereof and upon taking into consideration the decisions of the Calcutta High Court, the Madhya Pradesh High Court, the Andhra Pradesh High Court as also the Madras High Court on the one hand and the Gujarat High Court on the other, opined : (SCC pp. 577-78, paras 22-24)

> "*22*. In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of

a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu Law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu Law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son, etc.



*23*. Before we conclude we may state that we have noted the observations of Mulla's *Commentary on Hindu Law*, 15th Edn., dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as Mayne's on *Hindu Law*, 12th Edn., pp. 918-19.

*24*. The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored."

**17.** The Gujarat High Court in *CIT* v. *Dr. Babubhai Mansukhbhai*[2], however, it may be noticed, had taken the view that in the case of the Hindus governed by Mitakshara Law, where a son inherited the self-acquired property of his father, he took it as a joint family property of himself and his son and not as his separate property. The said view, as indicated hereinbefore was not accepted by this Court.

**18.** The principle evolved in *Chander Sen*[1] was reiterated by this Court in *Yudhishter* v. *Ashok Kumar*[3], SCR at 523; *Sunderdas Thackersay & Bros.* v. *CIT*[4]; *CIT* v. *P.L. Karuppan Chettiar*[5]; and *CIT* v. *M. Karthikeyan*[6].

**19.** In *Yudhishter*[3] this Court observed : (SCC pp. 210-11, para 10)

"*10*. This question has been considered by this Court in *CWT* v. *Chander Sen*[1] where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him."

**20.** Moreover, recently in *Sheela Devi* v. *Lal Chand*[7] a Bench of this Court of which one of us was a member, held:

"*21*. The Act indisputably would prevail over the old Hindu Law. We may notice that Parliament, with a view to confer right upon the female heirs, even in relation

to the joint family property, enacted the 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 the 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, the 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 an exception to the general rules. It was, therefore, obligatory on the part of the respondent-plaintiffs 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 record to show that he was born prior to coming into force of the Hindu Succession Act, 1956."

**21.** In that case, the properties in question were joint family properties. They were coparceners. After the death of Tulsi Ram, Babu Ram, whose heirs were the appellants therein, inherited 1/5th share in the property. The relationship between the parties was not in dispute. Tulsi Ram was the owner of the property. He died in the year 1889 leaving behind five sons, namely, Waliwati, Babu Ram, Charanji Lal, Hukam Chand and Uggar Sain. On the death of Uggar Sain 1/20th share of Tulsi Ram was also devolved on him. The High Court arrived at a finding of fact that the properties were coparcenary and ancestral property. It was held that the law which was applicable in the case would be the one which was prevailing before coming into force of the Hindu Succession Act and the parties would be governed thereby under the provisions thereof. It was in the aforementioned situation and having regard to the fact that the succession of the property was governed in terms of Section 6 of the Act, it was held : (*Sheela Devi*[7], SCC pp. 585-86, para 12)

> "*12*. The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property, and thus such a person would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten (see *C. Krishna Prasad* v. *CIT*[8]). But once a son is born, it becomes a coparcenary property and he would acquire an interest therein."

**22.** In that case, as noticed hereinbefore, Babu Ram had no son in the year 1922 but a son, Lal Chand, was born to him in the year 1938 and another son, Sohan Lal, was born in 1956. It was in the aforementioned situation, this Court held that a joint family revived on the birth of Lal Chand. This Court, in that view of the matter also opined that as there was no proof as to whether the second son was born after the coming into force of the Hindu Succession Act, it was held that his heirs were not entitled to take the benefit of the coparcenary interest.

**23.** *Sheela Devi*[7], therefore, is not applicable to the fact of the present case.



**24.** It is true that the first court of appeal also entered into the question of legal

necessity for Sant Ram to alienate the property in favour of the contesting respondents but the said issue was considered in the alternative to the principal issue. If the first appellate court was correct in its opinion and we do not see any reason to differ therewith that Section 6 of the Hindu Succession Act was not attracted to the facts of this case in view of the fact that Sant Ram and his sisters having partitioned their properties became owners to the extent of 1/4th share each, he had the requisite right to transfer the lands falling within his share.

**25.** Furthermore, in terms of Section 19 of the Act, as Sant Ram and his sisters became tenants-in-common and took the properties devolved upon them per capita and not per stirpes, each one of them was entitled to alienate their share, particularly when different properties were allotted in their favour. It is, therefore, not correct to contend that the court of first appeal arrived at a self-contradictory or inconsistent finding, as was submitted by Mr Gupta.

**26.** For the reasons aforementioned, there is no infirmity in the impugned judgment. There is no merit in the case. It is dismissed accordingly. In the facts and circumstances of the case, however, there shall be no order as to costs.

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† Arising out of SLP (C) No. 9503 of 2007. From the Judgment and Final Order dated 14-11-2006 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 3924 of 2006

[1] (1986) 3 SCC 567 : 1986 SCC (Tax) 641 : (1986) 3 SCR 254

[2] (1977) 108 ITR 417 (Guj)

[3] (1987) 1 SCC 204 : (1987) 1 SCR 516

[4] (1982) 137 ITR 646 (Cal)

[5] 1993 Supp (1) SCC 580

[6] 1994 Supp (2) SCC 112

[7] (2006) 8 SCC 581

[8] (1975) 1 SCC 160 : 1975 SCC (Tax) 16

**(2016) 4 Supreme Court Cases 68 : (2016) 2 Supreme Court Cases (Civ) 545 : 2016 SCC OnLine SC 212**

**In the Supreme Court of India**

(BEFORE KURIAN JOSEPH AND R.F. NARIMAN, JJ.)

UTTAM . . Appellant;

*Versus*

SAUBHAG SINGH AND OTHERS . . Respondents.

Civil Appeal No. 2360 of 2016[‡], decided on March 2, 2016

**Family and Personal Laws — Hindu Succession Act, 1956 — Ss. 6 proviso (as it stood prior to amendment in 2005), 8, 4, 19 and 30 — Succession to joint family property prior to 2005 amendment — Principles summarised — When male Hindu, having interest in Mitakshara coparcenary property, died intestate after commencement of HSA, leaving behind a Class I female heir (his widow in present case) and sons, then by operation of proviso to S. 6 deceased's interest in coparcenary property would devolve by intestate succession under S. 8 and not by survivorship under S. 6 — After devolution of joint family property as per S. 8 HSA upon death of male Hindu intestate, property would cease to be joint family property and said female heir and other coparceners succeeding to the same would hold their respective share in property as tenants-in-common and not as joint tenants — Therefore, grandson born after death of the male Hindu cannot maintain suit for partition claiming his share by division of alleged joint family property**

One *J*, having interest in an ancestral Mitakshara joint family property along with other coparceners, died in 1973 leaving behind his widow *M* and sons. The appellant-plaintiff was the grandson of *J* who was born in 1977 i.e. after his grandfather's death. He filed a suit for partition of the joint family property in 1998 in which the first four defendants were his father (D-3) and his father's three brothers (D-1, D-2 and D-4). He claimed a 1/8th share in the suit property on the footing that the suit property was ancestral property, and that, being a coparcener, he had a right by birth in the said property in accordance with the Mitakshara law.

The trial court in 2000 decreed the suit holding that the property was ancestral and that on the evidence there was no earlier partition of the property as pleaded by the defendants in their written statement. The first appellate court, while confirming the trial court's findings regarding the property being ancestral and there being no earlier partition, held that after death of the plaintiff's grandfather *J* his widow being alive, *J*'s share would have to be distributed in accordance with Section 8 HSA as if *J* died had intestate and as such the joint family property had to be divided in accordance with rules of intestacy and not survivorship. Accordingly, no joint family property remained to be divided when the suit for partition was filed by the plaintiff, and that since the plaintiff had no right while his father was alive, the father alone being a Class I heir (and consequently the plaintiff not being a Class I heir), the plaintiff had no right to sue for partition, and therefore the suit was



dismissed and consequently the first appeal was allowed. The High Court dismissed the second appeal of the plaintiff following the same line of reasoning.

Dismissing the appeal, the Supreme Court

*Held* :

The law insofar as it applies to succession to joint family property governed by the Mitakshara School, prior to the amendment of 2005, can be summarised as follows:

(*i*) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6 HSA).

(*ii*) To proposition (*i*), an exception is contained in Section 30 Explanation HSA, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary

property is property that can be disposed of by him by will or other testamentary disposition.

(*iii*) A second exception engrafted on proposition (*i*) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(*iv*) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso HSA, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindus widow get a share in the joint family property.

(*v*) On the application of Section 8 HSA, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso HSA, such property would devolve only by intestacy and not survivorship.

(*vi*) On a conjoint reading of Sections 4, 8 and 19 HSA, after joint family property has been distributed in accordance with Section 8 HSA on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants-in-common and not as joint tenants.

(Para 18)

*CWT* v. *Chander Sen*, (1986) 3 SCC 567 : 1986 SCC (Tax) 641; *Bhanwar Singh* v. *Puran*, (2008) 3 SCC 87 : (2008) 1 SCC (Civ) 779; *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383; *State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh*, (1985) 2 SCC 321; *Shyama Devi* v. *Manju Shukla*, (1994) 6 SCC 342; *Yudhishter* v. *Ashok Kumar*, (1987) 1 SCC 204, *relied on*

*CIT* v. *Ram Rakshpal Ashok Kumar*, 1966 SCC OnLine All 429 : (1968) 67 ITR 164; *CIT* v. *P.L. Karuppan Chettiar*, 1978 SCC OnLine Mad 30 : (1978) 114 ITR 523; *Shrivallabhdas Modani* v. *CIT*, (1982) 138 ITR 673 (MP); *CWT* v. *Mukundgirji*, 1983 SCC OnLine AP 288 : (1983) 144 ITR 18; *CIT* v. *Babubhai Mansukhbhai*, 1975 SCC OnLine Guj 77 : (1977) 108 ITR 417, *cited*

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In the present case, on the death of *J* in 1973, the proviso to Section 6 HSA would apply inasmuch as *J* had left behind his widow, who was a Class I female heir. Equally, upon the application of Explanation 1 to Section 6 HSA, a partition must be said to have been effected by operation of law immediately before his death. This being the case, it is clear that the plaintiff would be entitled to a share on this partition taking place in 1973. However, since the plaintiff was born after his grandfather's death, no such share could be allotted to him. Also, his case in the suit filed by him is not that he is entitled to this share but that he is entitled to a 1/8th share on dividing the joint family property between 8 co-sharers in 1998. Applying the law stated above to the facts of this case, it is clear that on the death of *J*, the joint family which was ancestral property in the hands of *J* and the other coparceners, devolved by succession under Section 8 HSA. This being the case, the ancestral property ceased to be joint family property on the date of death of *J*, and the other coparceners and his widow held the property as tenants-in-common and not as joint tenants. Therefore, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable.

(Para 19)

*Uttam* v. *Saubhag Singh*, 2013 SCC OnLine MP 10873, *affirmed*

*Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*, (1988) 2 SCC 126; *Sheela Devi* v. *Lal Chand*, (2006) 8 SCC 581; *Rohit Chauhan* v. *Surinder Singh*, (2013) 9 SCC 419 : (2013) 4 SCC (Civ) 377, *distinguished*

R-D/56588/CV

Advocates who appeared in this case:

Sushil Kr. Jain, Senior Advocate [Abhinav Gupta and Manu Maheshwari (for Ms Pratibha Jain), Advocates] for the Appellant;

Niraj Sharma and Sumit Kr. Sharma, Advocates, for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

The Judgment of the Court was delivered by

**R.F. Nariman, J.**— Leave granted. The present appeal is by the plaintiff who filed a suit for partition, being Suit No. 5-A of 1999 before the Second Civil Judge, Class II, Devas, Madhya Pradesh, dated 28-12-1998, in which the first four defendants happened to be his father (Defendant 3), and his father's three brothers i.e. Defendants 1, 2 and 4. He claimed a 1/8th share in the suit property on the footing that the suit property was ancestral property, and that, being a coparcener, he had a right by birth in the said property in accordance with the Mitakshara law. A joint written statement was filed by all four brothers, including the plaintiff's father, claiming that the suit property was not ancestral property, and that an earlier partition had taken place by which the plaintiff's father had become separate. The trial court, by its order dated 20-12-2000 decreed the plaintiff's suit holding that it was admitted by DW 1, Mangilal that the property was indeed ancestral property, and that, on the evidence, there was no earlier partition of the said property, as pleaded by the defendants in their written statements.

**2.** The first appellate court, by its judgment dated 12-1-2005, confirmed the finding that the property was ancestral and that no earlier partition between the brothers had in fact taken place. However, it held that the plaintiff's grandfather, one Jagannath Singh having died in 1973, his widow Mainabai being alive at the time of his death, the said Jagannath Singh's share would have to be distributed in accordance with Section 8 of the Hindu Succession Act, 1956 as if the said Jagannath Singh had died intestate, and that being the case, once Section 8 steps in, the joint family property has to be divided in accordance with rules of intestacy and not survivorship. This being so, no joint family property remained to be divided when the suit for partition was filed by the plaintiff, and that since the plaintiff had no right while his father was alive, the father alone being a Class I heir (and consequently the plaintiff not being a Class I heir), the plaintiff had no right to sue for partition, and therefore the suit was dismissed and consequently the first appeal was allowed.

**3.** Following the same line of reasoning and several judgments of this Court, the High Court in the second appeal dismissed[1] the said appeal, holding : (*Uttam case*[1], SCC OnLine MP paras 16-18)

> "*16*. Thus in view of the provisions contained in Sections 4, 6, 8 and Schedule to the Act as well as the law settled by the aforesaid judgments, it is clear that after coming into force of the Act grandson has no birth right in the properties of grandfather and he cannot claim partition during lifetime of his father.
>
> *17*. In the present case, it is undisputed that Jagannath had died in the year 1973, leaving behind Respondents 1 to 4 i.e. his four sons covered by Class I heirs of the Schedule therefore, the properties had devolved upon them when succession had opened on the death of Jagannath. It has also been found proved that no partition had taken place between Respondents 1



to 4. The appellant who is the grandson of Jagannath is not entitled to claim partition during the lifetime of his father Mohan Singh in the properties left behind by Jagannath since the appellant has no birth right in the suit properties.

> *18*. In view of the aforesaid, the substantial questions of law are answered against the appellant by holding that the first appellate court has committed no error in dismissing the suit for partition filed by the appellant referring to Section 8 of the Act and holding that during the lifetime of Mohan Singh, the appellant has no right to get the suit property partitioned."

It is this judgment that has been challenged before us in appeal.

**4.** Shri Sushil Kumar Jain, learned Senior Advocate appearing on behalf of the appellant, took us through various provisions of the Hindu Succession Act, and through several judgments of this Court, and contended that Section 6, prior to its amendment in 2005, would govern the facts of this case. He conceded that as Jagannath Singh's widow was alive in 1973 at the time of his death, the case would be governed by the proviso to Section 6, and that therefore the interest of the deceased in the Mitakshara coparcenary property would devolve by intestate succession under Section 8 of the said Act. However, he argued that it is only the interest of the deceased in such coparcenary property that would devolve by intestate succession, leaving the joint family property otherwise intact. This being the case, the plaintiff had every right to sue for partition while his father was still alive, inasmuch as, being a coparcener and having a right of partition in the joint family property, which continued to subsist as such after the death of Jagannath Singh, the plaintiff's right to sue had not been taken away. He went on to argue that Section 8 of the Act would not bar such a suit as it would apply only at the time of the death of Jagannath Singh i.e. the grandfather of the plaintiff in 1973 and not thereafter to non-suit the plaintiff, who as a living coparcener of joint family property, was entitled to a partition before any other death in the joint family occurred. He also argued that the Hindu Succession Act only abrogated the Hindu law to the extent indicated, and that Sections 6 and 8 have to be read harmoniously, as a result of which the status of joint family property which is recognised under Section 6 cannot be said to be taken away upon the application of Section 8 on the death of the plaintiff's grandfather in 1973.

**5.** Shri Niraj Sharma, learned counsel appearing on behalf of the respondents, countered these submissions, and also referred to various provisions of the Hindu Succession Act and various judgments of this Court to buttress his submission that once Section 8 gets applied by reason of the application of the proviso to Section 6, the joint family property ceases to be joint family property thereafter, and can only be succeeded to by application of either Section 30 or Section 8, Section 30 applying in case a will had been made and Section 8 applying in case a member of the joint family dies intestate. He, therefore, supported the judgment of the High Court and strongly relied



upon two judgments in particular, namely, *CWT* v. *Chander Sen*[2] and *Bhanwar Singh* v. *Puran*[3], to buttress his submission that once Section 8 is applied to the facts of a given case, the property thereafter ceases to be joint family property, and this being the case, no right to partition a property which is no longer joint family property continues to subsist in any member of the coparcenary.

**6.** Having heard the learned counsel for the parties, it is necessary to set out the relevant provisions of the Hindu Succession Act, 1956. The Act, as its long title states, is an Act to amend and codify the law relating to intestate succession among Hindus. Section 4 overrides the Hindu law in force immediately before the commencement of this Act insofar as it refers to any matter for which provision is made by the Act. Section 4 reads as follows:

> "**4. *Overriding effect of Act***.—Save as otherwise expressly provided in this Act—
>
> (*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act."

Section 6 prior to its amendment in 2005 reads as follows:

> "**6. *Devolution of interest in coparcenary property***.—When a male Hindu dies

after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

*Explanation 1*.—For the purposes of this 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.

*Explanation 2*.—Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."



**7.** It is common ground between the parties that since the present suit was filed only in 1998 and the decree in the said suit was passed on 20-12-2000, that the amendment to Section 6, made in 2005, would not govern the rights of the parties in the present case. This becomes clear from a reading of the proviso (*i*) to Section 6 of the amended provision which states as follows:

"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."

The Explanation to this Section also states thus:

"*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."

From a reading of the aforesaid provision it becomes clear that a partition having been effected by a court decree of 20-12-2000, which is prior to 9-9-2005, (which is the date of commencement of the amending Act), would not be affected.

**8.** The next important section from our point of view is Section 8, which reads as follows:

"**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

*Class I*

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter

of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son; son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter; daughter of a predeceased daughter of a predeceased son."

**9.** Also of some importance are Sections 19 and 30 of the said Act which read as follows:

"**19.** ***Mode of succession of two or more heirs***.—If two or more heirs succeed together to the property of an intestate, they shall take the property—



(*a*) save as otherwise expressly provided in this Act, per capita and not per stirpes; and

(*b*) as tenants-in-common and not as joint tenants.

* * *

**30.** ***Testamentary succession***.—Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

*Explanation*.—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act, or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

**10.** Before analysing the provisions of the Act, it is necessary to refer to some of the judgments of this Court which have dealt, in particular, with Section 6 before its amendment in 2005, and with Section 8. In *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*[4], the effect of the old Section 6 was gone into in some detail by this Court. A Hindu widow claimed partition and separate possession of a 7/24th share in joint family property which consisted of her husband, herself and their two sons. If a partition were to take place during her husband's lifetime between himself and his two sons, the widow would have got a 1/4th share in such joint family property. The deceased husband's 1/4th share would then devolve, upon his death, on six sharers, the plaintiff and her five children, each having a 1/24th share therein. Adding 1/4th and 1/24th, the plaintiff claimed a 7/24th share in the joint family property. This Court held : (SCC pp. 386-87, paras 6-7)

"*6*. The Hindu Succession Act came into force on 17-6-1956. Khandappa having died after the commencement of that Act, to wit in 1960, and since he had at the time of his death an interest in Mitakshara coparcenary property, the preconditions of Section 6 are satisfied and that section is squarely attracted. By the application of the normal rule prescribed by that section, Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. But, since the widow and daughter are amongst the female relatives specified in Class I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to Section 6 comes into play and the normal rule is excluded. Khandappa's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship. Testamentary succession is out of question as the deceased had not made a testamentary disposition though,

under the Explanation to Section 30 of the Act, the interest of a male Hindu in Mitakshara coparcenary property is capable of being disposed of by a will or other testamentary disposition.

*7*. There is thus no dispute that the normal rule provided for by Section 6 does not apply, that the proviso to that section is attracted and that the decision of the appeal must turn on the meaning to be given to Explanation 1 of Section 6. The interpretation of that Explanation is the subject-matter of acute controversy between the parties."

**11.** This Court, in dealing with the proviso and Explanation 1 of Section 6, held that the fiction created by Explanation 1 has to be given its full effect. That being the case, it was held : (*Magdum case*[4], SCC pp. 389-90, para 13)

"*13*. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that 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 that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, *in addition to* the share which he or she received or must be deemed to have received in the notional partition."

(emphasis in original)



**12.** In *State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh*[5], this Court distinguished the judgment in *Magdum case*[4] in answering a completely different question that was raised before it. The question raised before the Court in that case was as to whether a female Hindu, who inherits a share of the joint family property on the death of her husband, ceases to be a member of the family thereafter. This Court held that as there

was a partition by operation of law on application of Explanation 1 of Section 6, and as such partition was not a voluntary act by the female Hindu, the female Hindu does not cease to be a member of the joint family upon such partition being effected.

**13.** In *Shyama Devi* v. *Manju Shukla*[6], this Court again considered the effect of the proviso and Explanation 1 to Section 6, and followed the judgment of this Court in *Magdum case*[4]. This Court went on to state that Explanation 1 contains a formula for determining the share of the deceased on the date of his death by the law effecting a partition immediately before a male Hindu's death took place.

**14.** On application of the principles contained in the aforesaid decisions, it becomes clear that, on the death of Jagannath Singh in 1973, the proviso to Section 6 would apply inasmuch as Jagannath Singh had left behind his widow, who was a Class I female heir. Equally, upon the application of Explanation 1 to the said Section, a partition must be said to have been effected by operation of law immediately before his death. This being the case, it is clear that the plaintiff would be entitled to a share on this partition taking place in 1973. We were informed, however, that the plaintiff was born only in 1977, and that, for this reason, (his birth being after his grandfather's death) obviously no such share could be allotted to him. Also, his case in the suit filed by him is not that he is entitled to this share but that he is entitled to a 1/8th share on dividing the joint family property between 8 co-sharers in 1998. What has therefore to be seen is whether the application of Section 8, in 1973, on the death of Jagannath Singh would make the joint family property in the hands of the father, uncles and the plaintiff no longer joint family property after the devolution of Jagannath Singh's share, by application of Section 8, among his Class I heirs? This question would have to be answered with reference to some of the judgments of this Court.

**15.** In *CWT* v. *Chander Sen*[2], a partial partition having taken place in 1961 between a father and his son, their business was divided and thereafter carried on by a partnership firm consisting of the two of them. The father died in 1965, leaving behind him his son and two grandsons, and a credit balance in the account of the firm. This Court had to answer as to whether credit balance left in the account of the firm could be said to be joint family property after the father's share had been distributed among his Class I heirs in accordance with



Section 8 of the Act. This Court examined the legal position and ultimately approved of the view of four High Courts, namely, Allahabad[7], Madras[8], Madhya Pradesh[9] and Andhra Pradesh[10], while stating that the Gujarat High Court[11] view contrary to these High Courts, would not be correct in law. After setting out the various views of the five High Courts mentioned, this Court held : (*Chander Sen case*[2], SCC pp. 577-78, paras 21-25)

> "*21*. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.
>
> *22*. In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court[11] view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the

Andhra Pradesh High Court[10] that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son, etc.

*23.* Before we conclude we may state that we have noted the observations of *Mulla's Commentary on Hindu Law*, 15th Edn. dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as *Mayne Hindu Law*, 12th Edn., pp. 918-19.

*24.* The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored.



*25.* In the aforesaid light the views expressed by the Allahabad High Court[7], the Madras High Court[8], the Madhya Pradesh High Court[9], and the Andhra Pradesh High Court[10], appear to us to be correct. With respect we are unable to agree with the views of the Gujarat High Court[11] noted hereinbefore."

**16.** In *Yudhishter* v. *Ashok Kumar*[12], SCC at pp. 210-11, para 10, this Court followed the law laid down in *Chander Sen case*[2].

**17.** In *Bhanwar Singh* v. *Puran*[3], this Court followed *Chander Sen case*[2] and the various judgments following *Chander Sen case*[2]. This Court held : *Puran case*[3], SCC pp. 90-91, paras 12-15)

"*12.* The Act brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non obstante provision in terms whereof any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided.

*13.* Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Class I of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

*14.* Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record-of-rights. A partition had taken place amongst the heirs of Bhima.

*15.* Although the learned first appellate court proceeded to consider the effect of

Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as



tenants-in-common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue."

**18.** Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there is a sole surviving coparcener. *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*[13], *Sheela Devi* v. *Lal Chand*[14] and *Rohit Chauhan* v. *Surinder Singh*[15] were cited for this purpose. None of these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarised as follows:

(*i*) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(*ii*) To proposition (*i*), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(*iii*) A second exception engrafted on proposition (*i*) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(*iv*) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(*v*) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(*vi*) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on



principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants-in-common and not as joint tenants.

**19.** Applying the law to the facts of this case, it is clear that on the death of Jagannath

Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants-in-common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable. The appeal is consequently dismissed with no order as to costs.

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† Arising out of SLP (C) No. 6036 of 2014. From the Judgment and Order dated 29-10-2013 of the High Court of Madhya Pradesh at Indore in Second Appeal No. 206 of 2005

[1] *Uttam* v. *Saubhag Singh*, 2013 SCC OnLine MP 10873

[2] *CWT* v. *Chander Sen*, (1986) 3 SCC 567 : 1986 SCC (Tax) 641

[3] *Bhanwar Singh* v. *Puran*, (2008) 3 SCC 87 : (2008) 1 SCC (Civ) 779

[4] *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383 : (1978) 3 SCR 761

[5] *State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh*, (1985) 2 SCC 321 : (1985) 3 SCR 358

[6] *Shyama Devi* v. *Manju Shukla*, (1994) 6 SCC 342

[7] *CIT* v. *Ram Rakshpal Ashok Kumar*, 1966 SCC OnLine All 429 : (1968) 67 ITR 164

[8] *CIT* v. *P.L. Karuppan Chettiar*, 1978 SCC OnLine Mad 30 : (1978) 114 ITR 523

[9] *Shrivallabhdas Modani* v. *CIT*, (1982) 138 ITR 673 (MP)

[10] *CWT* v. *Mukundgirji*, 1983 SCC OnLine AP 288 : (1983) 144 ITR 18

[11] *CIT* v. *Babubhai Mansukhbhai*, 1975 SCC OnLine Guj 77 : (1977) 108 ITR 417

[12] *Yudhishter* v. *Ashok Kumar*, (1987) 1 SCC 204

[13] *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*, (1988) 2 SCC 126

[14] *Sheela Devi* v. *Lal Chand*, (2006) 8 SCC 581

[15] *Rohit Chauhan* v. *Surinder Singh*, (2013) 9 SCC 419 : (2013) 4 SCC (Civ) 377

**(2017) 13 Supreme Court Cases 149 : (2017) 5 Supreme Court Cases (Civ) 582 : 2017 SCC OnLine SC 353**

**In the Supreme Court of India**

(BEFORE RANJAN GOGOI AND ASHOK BHUSHAN, JJ.)

RAM NATH SAO ALIAS RAM NATH SAHU SINCE DECEASED THROUGH LEGAL REPRESENTATIVES AND OTHERS . . Appellants;

*Versus*

GOBERDHAN SAO SINCE DECEASED THROUGH LEGAL REPRESENTATIVES AND OTHERS . . Respondents.

Civil Appeal No. 1110 of 2006[†], decided on April 6, 2017

**Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 proviso and Expln. I (as stood prior to amendment by Act 39 of 2005) — Partition of Mitakshara joint family property — Allotment of shares — Application of S. 6 proviso and Expln. I — Share of widow of original ancestor who became entitled to a share in the joint family property vide 1937 Act — Succession to**

**— After death of original ancestor in 1940, his widow's interest in joint family property continued to be same as her husband's by virtue of S. 3(2) of Hindu Women's Right to Property Act, 1937, though widow's share remained undetermined till partition of family property — Joint family also continued prior to coming into force of 1956 Act with only son of original ancestor as sole coparcener/karta, who had no male issue on date of father's death — Son died in 1961 i.e. after commencement of 1956 Act, leaving behind his mother, his two widows (one of them died prior to filing of partition suit) and their children and his sister and her sons — Thereupon, notional partition of properties between coparceners as they stood just before son's death in terms of Expln. I to S. 6 is to be presumed and accordingly shares to be determined — Devolution of share of deceased son would be by intestate succession in absence of will as per proviso to S. 6 — Shares of widow of original ancestor, living widow of deceased son and children of two widows of deceased son to be worked out accordingly — After death of original ancestor's widow, one half of her share would go to her daughter and other half would go to branch of original ancestor's son which would be divided amongst his heirs, namely, his widow and children — Hindu Women's Right to Property Act, 1937, S. 3(2)**

*Held* :

When the original ancestor *F* died, the Hindu Women's Right to Property Act, 1937 was in force. Under Section 3(2) of that Act, on the death of *F* his widow *P* became entitled to a share in the joint family property. However, the share of *P* would remain undetermined till such time when there is a partition in the family.

(Paras 9 and 10)

*Potti Lakshmi Perumallu* v. *Potti Krishnavenamma*, (1965) 1 SCR 26 : AIR 1965 SC 825, *relied on*



On the date of death of *F*, his son *M* did not have any male issue. However, the joint family in question can be understood to have continued with *M* as the "Karta" and the property continued to belong to the joint family. The position, therefore, prior to the coming into force of the Hindu Succession Act, 1956 was that the joint family continued on the death of *F* with *M* as the sole coparcener and the joint family properties continued to belong to the family and furthermore *P* continued to have a share in the property.

(Paras 11 and 12)

*Gowli Buddanna* v. *CIT*, (1966) 3 SCR 224 : AIR 1966 SC 1523, *relied on*

After death of *M* in the year 1961, following Explanation 1 to Section 6 of the Hindu Succession Act, 1956, a notional partition just before the death of *M* will have to be presumed. Accordingly, there would

be 8 sharers in the joint family properties viz. *M*, *B* (one of the two widows of *M*, other one having died before filing of partition suit), *P*, two sons of first widow of *M* and three sons of *B*. Share of each one of them would be one-eighth. *B* would be entitled to 1/8th share of the joint family properties upon the notional partition being given effect to. The share of the widow of a Hindu male coparcener following a notional partition has been recognised by the Supreme Court.

(Paras 14 and 15)

*Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383, *relied on*

Further, the 1/8th share of the deceased *M* in the joint family property would, vide proviso to Section 6 of the Hindu Succession Act, devolve on the surviving members of the joint family, by intestate succession in absence of a will.

(Para 16)

Accordingly, after 1961, *P* being widow of *F* had 1/8 plus 1/72th in the joint family property, namely, 10/72th share. *P* died in 1967 leaving behind her daughter *U* (sister of *M*) and children of her predeceased son *M*. *U* will be entitled to receive one half-share of *P* i.e. half of 10/72th share i.e. 10/144th. The remaining 10/144th that would go to the branch of *M* will have to be divided amongst 8 heirs of *M*, namely, the widow and the seven children.

(Para 17)

*Ramnath Sao* v. *Goberdhan Sao*, 2003 SCC OnLine Jhar 97 : 2003 AIR Jhar R 938, *modified*

Appeal allowed with modification R-D/58487/SV

Advocates who appeared in this case :

Gaurav Agrawal, Abhikalp Pratap Singh and Prashant Kumar, Advocates, for the Appellants;

Arup Banerjee, M.K. Verma and Braj Kishore Mishra, Advocates, for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

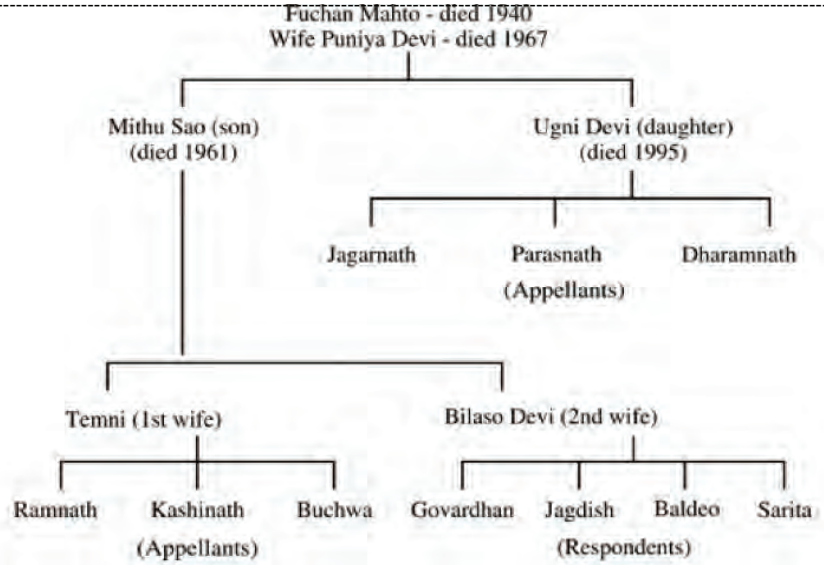




The Judgment of the Court was delivered by

**RANJAN GOGOI, J.**— The appellants are the defendants in a partition suit filed by the respondents, as plaintiffs, seeking partition of various properties specifically mentioned in Schedule 'B' and Schedule 'C' of the plaint.

**2.** At the outset, the following genealogical table is being set out to enable a clear and easy understanding of the facts and the findings with regard to the entitlement of the parties that would be arrived at in the course of the deliberations that follow:




**3.** The case of the respondent-plaintiffs is that Fuchan Mahto (died in 1940), the common ancestor of the parties had a son Mithu Sao who died in the year 1961. Mithu Sao had two wives, namely, Temni (1st wife) and Bilaso Devi (2nd wife). At the time of the filing of the suit for partition Temni (1st wife) was no more. The defendants in the suit Ramnath, Kashinath and Buchwa are the sons and daughter of Mithu Sao and Temni (1st wife) whereas the plaintiffs Goverdhan, Jagdish, Baldeo and Sarita are the sons and daughter of Mithu Sao and Bilaso Devi (2nd wife), who is a co-plaintiff.

**4.** According to the plaintiffs, they along with the defendants constituted a joint Hindu Mitakshara family which owned ancestral land recorded under Khata No. 19 of Village Lapanga in the district of Hazaribagh. It is the case of the plaintiffs that the joint family also acquired lands in several other villages in the name of one or other members of the joint family. According to the plaintiffs, the parties continued in joint possession of the properties,



both ancestral and subsequently acquired. As the members of joint family had increased it became inconvenient to continue to remain joint. Hence the suit for a decree of partition was filed.

**5.** The defendants contested the suit, inter alia, on the ground that there was no unity of title and possession between the parties. According to the defendants, after the death of Mithu Sao in the year 1961 or even before his death there was disruption in the family on account of the fact that Mithu Sao had married twice. There were serious differences in the family and the children of the first wife Temni separated from Mithu Sao. It is the case of the defendants that after the death of Mithu Sao the children of first wife and second wife again separated. The defendants pleaded that as there was no joint family in existence both the parties had separate earnings and only the ancestral lands of Khata No. 19 are available for partition, major portion of which had been acquired by the Government and compensation amount had been evenly distributed amongst the parties according to their respective shares. According to the defendants, the other items of the schedule property are self-acquired properties which are not liable to be partitioned.

**6.** The learned trial court decreed the suit holding that the plaintiffs are entitled to the extent of 63-1/2 paise share in the Schedule 'B' property; Items 1 to 8 of Village Labaga in Schedule 'C'; Items 1 and 2 of Village Rasda in Schedule 'C'; and Items 1 to 8 of

Village Hafuwa in Schedule 'C' properties and 12 paise share in the properties mentioned in Item 9 of Village Hafuwa in Schedule 'C' properties. The defendant-appellants, on the other hand, were found to be entitled to the remaining 37-1/2 paise in the Schedule 'B' property and Items 1 to 8 of Village Labaga; Items 1 and 2 of Village Rasda; and Items 1 to 8 of Village Hafuwa in Schedule 'C' properties. By the said decree which has been affirmed[1] in appeal by the High Court, so far as the property mentioned in Item 9 of Schedule 'C' is concerned, 12 and 11 paise share therein in favour of the plaintiffs and department have been granted. As the said property i.e. Item 9 of Schedule 'C' pertain to 23 paise share of the five sons of Mithu Sao in property purchased by them along with other persons by 8 different sale deeds, the said property is not the subject-matter of the present appeal in its truncated form, as indicated earlier.

**7.** This Court while issuing notice in the present appeal confined the area of scrutiny to the question of "allocation of shares as regards to the properties found to be joint family properties". In view of the aforesaid limited notice, the issue with regard to the shares of the respective parties in the joint family properties alone will have to be determined in the present appeal and no question of reopening the concurrent findings of the learned forums below with regard to the existence of joint family and the holding of properties jointly can arise.

**8.** We have heard the learned counsel for the parties.



**9.** Fuchan Mahto died in the year 1940. At the time of his death, the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as "the 1937 Act") was in force. Section 3(2) of the 1937 Act which is relevant for the present case provided as follows:

> "**3. (2)** When a Hindu governed by any school of Hindu law other than the Dayabhag school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had."

**10.** Under Section 3(2) of the 1937 Act, on the death of Fuchan Mahto his widow/wife Puniya Devi became entitled to a share in the joint family property. However, the share of Puniya Devi would remain undetermined till such time when there is a partition in the family. This is what has been held by this Court in *Potti Lakshmi Perumallu* v. *Potti Krishnavenamma*[2]. The relevant paragraph in the said judgment to the above effect is extracted below: (AIR p. 830, para 11)

> "*11*. … According to the theory underlying the Hindu law the widow of a deceased Hindu is his surviving half and, therefore, as long as she is alive he must be deemed to continue to exist in her person. This surviving half had under the Hindu law texts no right to claim a partition of the property of the family to which her husband belonged. But the 1937 Act has conferred that right upon her. When the Act says that she will have the same right of her husband had it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition."

**11.** On the date of death of Fuchan Mahto, his son Mithu Sao did not have any male issue. However, the joint family in question can be understood to have continued with Mithu Sao as the "Karta" and the property continued to belong to the joint family. The above view would find support from the decision of this Court in *Gowli Buddanna* v. *CIT*[3], relevant portion of which is extracted below: (AIR p. 1529, para 14)

> "*14*. … Property of a joint family therefore does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which

yielded the income originally belonged to a Hindu Undivided Family. On the death of Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu Undivided Family."

**12.** The position, therefore, prior to the coming into force of the Hindu Succession Act, 1956 was that the joint family continued on the death of Fuchan



Mahto with Mithu Sao as the sole coparcener and the joint family properties continued to belong to the family and furthermore Puniya Devi continued to have a share in the property.

**13.** At this stage, the provisions of Section 6 of the Hindu Succession Act, 1956 will require a specific notice which is extracted below:

"**6. *Devolution of interest in coparcenary property***.—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

*Explanation 1*.—For the purposes of this 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.

*Explanation 2*.—Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

**14.** After the death of Mithu Sao in the year 1961, following the provisions of Section 6 of the Hindu Succession Act, 1956, a notional partition just before the death of Mithu Sao will have to be presumed. There would, therefore, be 8 sharers in the joint family properties and the share of each one of them would be as follows:

| | |
|---|---|
| Mithu Sao | 1/8 |
| Bilaso Devi (wife) | 1/8 |
| Puniya Devi (mother) | 1/8 |
| Ramnath (son) | 1/8 |
| Kashinath (son) | 1/8 |
| Goverdhan (son) | 1/8 |
| Jagdish (son) | 1/8 |
| Baldeo (son) | 1/8 |

**15.** Insofar as Bilaso Devi, the wife of Mithu Sao is concerned, she would be entitled to 1/8th share of the joint family properties upon the notional partition being given effect to. The share of the widow of a Hindu male coparcener following a notional partition has been recognised by this Court in *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*[4]. Paras 9 and 14 of the

Report in *Gurupad Khandappa Magdum*[4] may be usefully noted hereinbelow: (SCC pp. 387 -88 & 390)

> "9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that 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. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. *Though the plaintiff, not being a coparcener, was not entitled to demand partition yet if a partition were to take place between her husband and his two sons, she would be entitled to receive a share equal to that of a son. (See Mulla's Hindu Law, Fourteenth Edn., p. 403, para 315)*. In a partition between Khandappa and his two sons, there would be four sharers in the coparcenary property the fourth being Khandappa's wife, the plaintiff. Khandappa would have therefore got a 1/4th share in the coparcenary property on the hypothesis of a partition between himself and, his sons.
>
> * * *
>
> *14*. The interpretation which we are placing upon the provisions of Section 6 its proviso and Explanation I thereto will further the legislative intent in regard to the enlargement of the share of female heirs, qualitatively and quantitatively. The Hindu Law of Inheritance (Amendment) Act, 1929 conferred heirship rights on the son's daughter, daughter's daughter and sister in all areas where the Mitakshara law prevailed. Section 3 of the Hindu Women's Rights to Property Act, 1937, speaking broadly, conferred upon the Hindu widow the right to a share in the joint family property as also a right to demand partition like any male member of the family. The Hindu Succession Act, 1956 provides by Section 14(1) that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as a full owner thereof and not as a limited owner. By restricting the operation of the fiction created by Explanation I in the manner suggested by the appellant, we shall be taking a retrograde step, putting back as it were the clock of social reform which has enabled the Hindu woman to acquire an equal status with males in matters of property. Even assuming that two interpretations of Explanation I are reasonably possible, we must prefer that interpretation which will further



> the intention of the legislature and remedy the injustice from which the Hindu women have suffered over the years."
>
> (emphasis supplied)

**16.** Next aspect of the case is with regard to the 1/8th share of Mithu Sao and the devolution of the said share to the surviving members of the joint family. In this regard, it can be held without any difficulty that under the proviso to Section 6 of the Hindu Succession Act, 1956 the share of Mithu Sao in the joint family property (1/8th) would devolve by intestate succession, in the absence of a will, in the following manner:

| | | | |
|---|---|---|---|
| Bilaso Devi | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Puniya Devi | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Ramnath | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Kashinath | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Goverdhan | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Jagdish | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Baldeo | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Buchwa Devi | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |
| Sarita | $\frac{1}{8 \times 9}$ | = | $\frac{1}{72}$ |

**17.** Thus after 1961 Puniya Devi being the widow of Fuchan Mahto had 1/8th *plus* 1/72th share in the joint family property, namely, 10/72th share. Puniya Devi died in the year 1967 leaving behind her daughter Ugni Devi and the children of her predeceased son Mithu Sao. Ugni Devi will be entitled to receive one-half share of Puniya Devi i.e. half of 10/72th share i.e. 10/144th share. The remaining 10/144th share that would go to the branch of Mithu Sao will have to be divided amongst 8 heirs of Mithu Sao, namely, the widow and the seven children. Thus, the aforesaid 10/144th share would devolve in the following manner.

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| | | | | | |
|---|---|---|---|---|---|
| Bilaso Devi | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Ramnath | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Kashinath | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Goverdhan | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Jagdish | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Baldeo | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Buchwa Devi | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |
| Sarita | $\frac{1}{8}$ | × | $\frac{10}{144}$ | = | $\frac{10}{1152}$ |

**18.** Consequently the share of each of the parties would be as follows:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Bilaso Devi | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Ramnath | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Kashinath | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Goverdhan | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Jagdish | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Baldeo | $\frac{1}{8}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 14.76% |
| Buchwa Devi | $\frac{0}{0}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 2.25% |
| Sarita | $\frac{0}{0}$ | + | $\frac{1}{72}$ | + | $\frac{10}{1152}$ | = | 2.25% |
| Ugni Devi | $\frac{10}{144}$ | | | | | | 6.94% |

Thus calculated the share of the appellants would be:

14.76 (Ramnath) + 14.76 (Kashinath) + 2.25 (Buchwa Devi) + 6.94 (legal representatives of Ugni Devi) = 38.1%



**19.** In view of the above, it will be necessary to modify the decree passed by the learned trial court as affirmed by the High Court by holding that the appellant-defendants are entitled to 38.1% share in the joint family property instead of 37.5% as ordered by the courts below.

**20.** The appeal consequently is allowed to the extent indicated above and with the aforesaid modification of the decree passed by the learned trial court as affirmed by the High Court.

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† Arising from the Judgment and Order in *Ramnath Sao* v. *Goberdhan Sao*, 2003 SCC OnLine Jhar 97 : 2003 AIR Jhar R 938 (Jharkhand High Court, Ranchi Bench, AFOD No. 307 of 1989, dt. 26-2-2003)

[1] *Ramnath Sao* v. *Goberdhan Sao*, 2003 SCC OnLine Jhar 97 : 2003 AIR Jhar R 938

[2] *Potti Lakshmi Perumallu* v. *Potti Krishnavenamma*, (1965) 1 SCR 26 : AIR 1965 SC 825

[3] *Gowli Buddanna* v. *CIT*, (1966) 3 SCR 224 : AIR 1966 SC 1523

* **Ed.**: The matter between two asterisks has been emphasised in original.

[4] *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383

# (2007) 11 Supreme Court Cases 357 : 2007 SCC OnLine SC 1291

(BEFORE TARUN CHATTERJEE AND DALVEER BHANDARI, JJ.)

KANWARJIT SINGH DHILLON . . Appellant;

*Versus*

HARDYAL SINGH DHILLON AND OTHERS . . Respondents.

Civil Appeal No. 4890 of 2007[†], decided on October 12, 2007

**A. Family Law — Succession Act, 1925 — Ss. 63, 65, 66, 222, 227, 273 & 276 — Jurisdiction of Probate Court — Extent of — Testator if had the authority to dispose of the properties bequeathed by him, if title to such properties or whether such properties were joint ancestral properties or acquired properties — Held, said questions do not fall under jurisdiction of Probate Court — The title of the testator in the properties bequeathed can be decided only by civil court on evidence — Albeit the probate could be admitted into evidence by the civil court to decide title suit but it would not be decisive for that purpose — Hence, a suit seeking declaration of title to certain properties on the allegations that the same were joint properties of HUF of which the plaintiff was a member and that SK was the karta of the HUF and had by utilising the income from the ancestral properties acquired various properties including the suit properties, held, not rendered non-maintainable merely because probate of a will executed by SK bequeathing the said properties to the appointed executor had already been granted to that executor and had attained finality — Civil Procedure Code, 1908 — S. 9 — Title suit filed subsequent to grant of probate of will in respect of the suit properties — Maintainability — Specific Relief Act, 1963, S. 34**

Partly allowing the appeal, the Supreme Court

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*Held*:

The suit for declaration of title and injunction was filed by the appellant inter alia on the allegations that the suit properties were joint family properties of HUF of which the appellant, his two brothers, mother and unmarried daughter were member. It was also alleged that by utilising the income from the ancestral agricultural land, various properties including the suit properties were acquired. Such allegations can only be decided on trial after parties are permitted to adduce

evidence in respect of their respective claims, it is not possible to hold that only because probate of the will of late SK had been granted, the suit for title and injunction was not maintainable in law. It is well settled that the functions of a Probate Court are to see that the will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue influence and the same was duly attested. It was, therefore, not competent for the Probate Court to determine whether late SK had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his will. The Probate Court is also not competent to determine the question of title to the suit properties nor can it go into the question whether the suit properties bequeathed by the will were joint ancestral properties or acquired properties of the testator.

(Paras 11, 8, 12 and 13)

*Chiranjilal Shrilal Goenka* v. *Jasjit Singh*, (1993) 2 SCC 507, *followed*

*Ishwardeo Narain Singh* v. *Kamta Devi*, (1953) 1 SCC 295 : AIR 1954 SC 280, *referred to*

*Rukmani Devi* v. *Narendra Lal Gupta*, (1985) 1 SCC 144, *explained* and *distinguished*

The title of the testator in the suit properties can only be decided by the civil court on evidence. It is true that the probate of the will granted by the competent Probate Court would be admitted into evidence that may be taken into consideration by the civil court while deciding the suit for title but grant of probate cannot be decisive for declaration as to whether at all the testator had any title to the suit properties or not.

(Para 12)

**B. Civil Procedure Code, 1908 — Or. 14 R. 2 — Dismissal of suit on the finding given on preliminary issue regarding the absence of jurisdiction of the court, without deciding other issues — Validity — Question left open**

**(Para 14)**

H-M/36885/S

Advocates who appeared in this case:

Anil Nauriya and Ms Sumita Hazarika, Advocates, for the Appellant;

Pradeep Gupta, K.K. Mohan, Suresh Bharati, Gagandeep Singh Kandhari, Ms Mithilesh Arya and Ms Laxmibai, Advocates, for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

1. (1993) 2 SCC 507, *Chiranjilal Shrilal Goenka* v. *Jasjit Singh* 361*c-d*

2. (1985) 1 SCC 144, *Rukmani Devi* v. *Narendra Lal Gupta* 360*e*, 362*b*

3. (1953) 1 SCC 295 : AIR 1954 SC 280, *Ishwardeo Narain Singh* v. *Kamta Devi* 361*d-e*

ORDER

**1.** Delay condoned.

**2.** Leave granted.

**3.** This appeal is directed against the judgment and final order dated 22-3-2004 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Revision No. 3861 of 2002 whereby an order dated 18-1-2000 of the



learned Civil Judge, Jalandhar, dismissing a suit for declaration and permanent injunction of the appellant, was affirmed.

**4.** Originally, the suit properties stood in the name of Ishar Singh (paternal grandfather of the appellant) which were subsequently mutated in the name of his two sons, S. Hazara Singh and S. Kirpal Singh. Late S. Kirpal Singh was the father of the appellant. Late S. Kirpal Singh died leaving behind some properties, both movable and immovable comprising agricultural land measuring 48 kanals 10 marlas situated at Jalandhar, a residential house bearing No. 148, Sector 27-A, Chandigarh and two deposits of Rs 20,000 and Rs 10,000 respectively (hereinafter referred to as "the suit properties"). According to the appellant, the suit properties left behind by late S. Kirpal Singh were their ancestral properties. After eight years of the death of late S. Kirpal Singh, Respondent 1 propounded an unregistered will left behind by late S. Kirpal Singh and applied for probate thereof in the High Court of Punjab and Haryana. As per the said will executed by late S. Kirpal Singh, the suit properties, both movable and immovable, were bequeathed by late S. Kirpal Singh in favour of Respondent 1 herein. Only a right of residence was given in favour of the widow of late S. Kirpal Singh and his unmarried daughter. In the aforesaid probate proceeding, objections were, however, filed by the appellant alleging that the said will was a forged and fabricated one. However, the probate was granted to Respondent 1 by the High Court and thereafter, the matter came up before this Court which also affirmed the order of the High Court granting probate in respect of the will executed by late

S. Kirpal Singh. Subsequent to the grant of probate of the will of late S. Kirpal Singh in respect of the suit properties more precisely on 9-3-1995, the appellant instituted a civil suit for declaration and injunction wherein the appellant sought a declaration to the effect that the suit properties were joint Hindu family properties.

**5.** In the suit filed at the instance of the appellant, Respondent 1 raised a preliminary issue by filing an application saying that after the probate having been granted of the will executed by late S. Kirpal Singh, the civil court had no jurisdiction to proceed with the suit for declaration of title and permanent injunction and accordingly the suit should be dismissed. The preliminary issue framed by the civil court is to the following effect:

> "Whether this court has jurisdiction in view of the probate granted by the Hon'ble Punjab and Haryana High Court vide order dated 5-4-1991, confirmed by the Divisional Bench of the Punjab and Haryana High Court on 1st December, 1993 and confirmed by the Hon'ble Supreme Court of India on 2-7-1994?"

**6.** By an order dated 18-1-2000, the learned Civil Judge, Jalandhar dismissed the suit on a finding that once the probate was granted by a competent Probate Court, and in view of the fact that in the suit the appellant had not challenged the probate proceeding, the civil court cannot have any jurisdiction to entertain the suit on the aforesaid ground and the suit was dismissed.

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**7.** Feeling aggrieved, a revision petition was filed before the High Court and the High Court by the impugned judgment and order had also affirmed the order of the civil court holding that the suit was not maintainable after the grant of probate by the competent Probate Court. The present special leave petition has been filed against the aforesaid order of the High Court in respect of which leave has already been granted.

**8.** In our view, the High Court as well as the civil court have acted illegally and with material irregularity in the exercise of their jurisdiction in dismissing the suit on the aforesaid preliminary issue by holding that after the probate having been granted by the competent Probate Court and affirmed by this Court, the civil court had no jurisdiction to proceed with the suit.

**9.** It is true that probate of the will executed by late S. Kirpal Singh has been granted by the competent Probate Court which relates to the

suit properties. But we have to look into the allegations made in the plaint. The plaint clearly states that the civil suit was for a declaration to the effect that the suit properties were joint Hindu family properties of HUF of which the appellant and his two brothers Hardyal Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur were the members. Consequential relief for permanent injunction was also sought restraining Respondent 1 from alienating the suit properties, in any manner, whatsoever. Besides claiming that the suit properties were the joint family properties, it was also averred in the plaint that late S. Kirpal Singh was the karta of the aforesaid HUF and by utilising the income from their ancestral agricultural land had acquired various properties including the suit properties.

**10.** The High Court by the impugned order, relying on a decision of this Court in *Rukmani Devi* v. *Narendra Lal Gupta*[1] affirmed the order of the civil court by holding that a probate granted by a competent Probate Court was conclusive of the validity of the will of late S. Kirpal Singh until it was revoked and no evidence could be admitted to impeach the said will except in a proceeding taken for revoking the probate. According to the High Court, a decision of the Probate Court would be a judgment *in rem* which would not only be binding on the parties to the probate proceeding but would be binding on the whole world. Upon the aforesaid finding, the High Court had affirmed the order of the civil court holding that the suit must be dismissed in view of the fact that the Probate Court had already granted probate in respect of the will executed by late S. Kirpal Singh relating to the suit properties. We are not in a position to agree with the views expressed by the High Court in the impugned order nor are we in agreement with the order passed by the civil court.

**11.** As noted hereinearlier, the suit for declaration of title and injunction has been filed by the appellant inter alia on the allegations that the suit properties are joint family properties of HUF of which the appellant and his



two brothers Hardyal Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur are members. It has also been claimed by the appellant in the suit that by utilising the income from the ancestral agricultural land, various properties including the suit properties were acquired. Such being the allegations made in the plaint which can only be decided on trial after parties are permitted

to adduce evidence in respect of their respective claims, it is difficult to hold that only because probate of the will of late S. Kirpal Singh has been granted, the suit for title and injunction must be held to be not maintainable in law. It is well-settled law that the functions of a Probate Court are to see that the will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue influence and the same was duly attested. It was, therefore, not competent for the Probate Court to determine whether late S. Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his will. The Probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the will were joint ancestral properties or acquired properties of the testator.

**12.** In *Chiranjilal Shrilal Goenka* v. *Jasjit Singh*[2] this Court while upholding the above views and following the earlier decisions of this Court as well as of other High Courts in India observed in para 15 at SCC p. 515 which runs as under:

> "*15*. In *Ishwardeo Narain Singh* v. *Kamta Devi*[3] this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Therefore, the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the Probate Court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the Probate Court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. *Probate Court does not decide any question of title or of the existence of the property itself.*"
>
> (emphasis supplied)

That being the position and in view of the nature of allegations made in the plaint, we do not find any reason as to how the High Court as well as the civil court could come to a conclusion that after the probate of the will executed by late S. Kirpal Singh was granted, the suit for declaration for title and injunction on the above allegation could not be said to be maintainable in law. The High Court also while holding that the suit was not maintainable, in view of the probate granted of the will of late S. Kirpal Singh had relied on a decision of this Court, as noted hereinearlier, in *Rukmani Devi*[1]. We are not in a position to agree with the High Court that this decision could at all be applicable in the facts and circumstances of the present case. A plain reading of this decision would not show that after the grant of probate by a competent court, the suit for title and permanent injunction cannot be said to be maintainable in law. What this Court held in that decision is that once a probate is granted by a competent court, it would become conclusive of the validity of the will itself, but, that cannot be decisive whether the Probate Court would also decide the title of the testator in the suit properties which, in our view, can only be decided by the civil court on evidence. It is true that the probate of the will granted by the competent Probate Court would be admitted into evidence that may be taken into consideration by the civil court while deciding the suit for title but grant of probate cannot be decisive for declaration of title and injunction whether at all the testator had any title to the suit properties or not.

**13.** Such being the position, we, therefore, hold that the High Court as well as the trial court had acted illegally in dismissing the suit of the appellant on the aforesaid sole ground after framing the preliminary issue. For the reasons aforesaid, the judgments of the High Court as well as of the trial court are set aside. The appeal is allowed to the extent indicated above. The trial court is now directed to decide the suit after framing issues, including the issue of maintainability of the suit after the probate being granted, if not already framed in the meantime and dispose of the same within a year from the date of production of a copy of this order before the trial court.

**14.** Before parting with this judgment, we may express one more aspect. As noted hereinearlier, a suit was dismissed by the trial court which was affirmed by the High Court in revision after framing preliminary issue which we have already noted hereinearlier. A question may arise whether the preliminary issue could be raised without deciding the other issues and the suit could be dismissed in view of

Order 14 Rule 2 of the Code of Civil Procedure. In view of our decision in this matter, we do not feel it proper to dwell on this aspect which is kept open for future consideration.

**15.** For the aforesaid reasons, the impugned order is set aside. The appeal is allowed. There will be no order as to costs.

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† Arising out of SLP (C) No. 20127 of 2005. From the Judgment and Order dated 22-3-2004 of the High Court of Punjab and Haryana at Chandigarh in CR No. 3861 of 2002

[1] (1985) 1 SCC 144

[2] (1993) 2 SCC 507

[3] (1953) 1 SCC 295 : AIR 1954 SC 280

MANU/MH/1610/2013

**Equivalent/Neutral Citation:** 2014(5)ABR677, 2014(3)ALLMR579, 2014(4)MhLj217

**IN THE HIGH COURT OF BOMBAY**

Chamber Summons No. 168 of 2012 in Suit No. 68 of 2010

**Decided On:** 23.09.2013

Shirin Baman Faramarzi of Bombay Zoroastrian Iranian Inhabitant **Vs.** Zubin Boman Faramarzi and Ors.

**Hon'ble Judges/Coram:**
*R.D. Dhanuka, J.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Ms. Rajani Iyer, Sr. Advocate i/any Mulla & Mulla*

*For Respondents/Defendant: Mr. Umesh Shetty, Ms. Sharlia D'souza i/by Flavia Legal for Respondent No. 1, Mr. Kusumakar Haushik and Mr. J.B. Nawlangi for Respondent No. 2*

**Case Note:**
**Family - Conversion of probate Petition into Petition for letters of administration - Section 222 of Indian Succession Act, 1925 - Additional Prothonotary and Senior Master disallowed chamber order filed by Petitioner for amendments to convert probate Petition into Petition for letters of administration on ground that since Petition was converted into suit and Will was disputed in affidavit in support filed by Caveator, no order for conversion could be passed by him - Hence, this Chamber Summons - Whether, probate could be granted in favour of beneficiary in view of Section 222 of Act - Held, Section 222 of Act made it clear that probate could be granted only to executor appointed by Will - Further, Section 231 of Act provided that if executor renounced or failed to accept executorship within time limited for acceptance or refusal thereof, Will may be proved and letters of administration, with copy of Will annexed, may be granted to person who would be entitled to administration in case of intestacy - It was observed that both executors who were alleged to have been appointed by deceased in Will in question had not come forward to act as executors - Moreover, merely because probate Petition was allowed to be converted into petition for Letters of Administration with Will annexed, it would not prove existence and/or execution of Will in question - Therefore, Petitioner who was claiming to be sole beneficiary under Will in question was entitled to seek conversion of Petition for probate into Petition for letters of administration with Will annexed and to proceed with Petition for Letters of Administration - Thus, Application made by Petitioner for seeking permission to convert probate Petition into Petition for Letters of Administration was justified and deserved to be granted - Chamber Summons made.**

**Ratio Decidendi:**
***"Conversion of probate Petition into Petition for Letters of Administration with Will annexed shall not prove existence and/or execution of Will in question."***

**JUDGMENT**

**R.D. Dhanuka, J.**

**1.** By this chamber summons petitioner/plaintiff seeks amendment of the petition, as per schedule appended to the chamber summons and seeks permission to convert the petition for probate into petition for letters of administration with the Will annexed dated 24th January, 2002. Petitioner is widow of late Boman Dinyar Faramarzi who died on 29th August, 2007. According to the petitioner, the said deceased had executed his last will and testament dated 22nd January, 2002. The said deceased had appointed Mr. Diniar Darab Mehta and Mr. Himanshu Kode, Advocate as executors of the said will. It is the case of the petitioner that since executors appointed by the said deceased did not take any steps to file any probate petition and in view of the fact that the earlier advocate on record appearing for the petitioner inadvertently filed petition for probate of the last will and testament of the said deceased in this court, inspite of filing petition for letters of administration with the Will annexed, petitioner by her advocates' letter dated 4th August, 2011 addressed to the Executors of the said Will placed on record that since petitioner through her son on several occasions both orally and in writing had requested the executors to carry out their duties as executors of the Will but as they failed to do so, petitioner was constrained to file petition for probate of the Will herself. By the said letter petitioner called upon the executors to perform their duties as executors of the said Will, agree to act as petitioners/applicants in the petition/suit and to take steps to obtain probate of the last Will and testament of the said deceased. Petitioner through her advocate sent reminder to the executors by letter dated 5th September, 2011. There was no reply from Himanshu Kode, Advocate one of the executors of the said Will. Mr. Diniar Mehta, the other executor, however, by his letter dated 9th September, 2011 informed petitioner's advocate that he was not in a position to confirm execution of the Will of the said deceased on the basis of the photocopy of the said Will which was annexed to the petition and only upon inspection of the original Will, he would be able to confirm the execution of the said Will of the said deceased. He requested the petitioner's advocate to provide inspection of the original Will executed by the said deceased and to furnish him a coloured photo copy thereof to enable him to convey his decision with regard to the execution of the Will. In the said letter, it was however, contended that since the petitioner had already initiated proceedings for obtaining probate of the Will, the question of the said executor renouncing the executorship of the said will did not arise. In response to the said letter, petitioner through her advocate's letter dated 28th September, 2011, clarified that the petitioner did not ask the executor to renounce the executorship of the Will but had sought to know whether the said executor wish to act as executor. It was also clarified that if the said executor seeks to take inspection of the original Will of the said deceased, he was free to do so in the office of the Prothonotary & Senior Maser of this court.

**2.** It is the case of the petitioner that since there was no further response from either of the executors, petitioner filed an application on 23rd April, 2012 before the Prothonotary & Senior Master for permission to allow the petitioner to convert the petition for probate into petition for letters of administration with Will dated 22nd January, 2012 annexed thereto by making necessary changes in the petition. It was also stated in the said application that caveat and affidavit dated 25th June, 2010 filed by the respondent through caveator be treated as caveat in the proceedings in petition for letters of administration. By letter dated 29th June, 2012 the learned Additional Prothonotary allowed the said application dated 23rd April, 2012 filed by the petitioner.

**3.** It is the case of the petitioner that petitioner had carried out necessary amendments

in the papers and proceedings of the petition/suit pursuant to the said order and the same was kept ready for being re-declared by the petitioner. At the time of redeclaration however, office of this court found that since the caveat had been filed by the caveator herein, petition had been already converted into suit and therefore, the order for amendment by way of praecipe was not possible. Petitioner was advised to take out chamber order in the matter for the purpose of carrying out amendments, to convert the probate petition into petition for letters of administration. In the month of August, 2012, petitioner filed chamber order and filed affidavit in support thereof. It was stated in the chamber order that as the executors of the Will had not filed petition for probate even after repeated requests, petitioner who is the widow of the said deceased and the sole beneficiary named in the said Will decided to file petition in this court seeking representation of his estate. The erstwhile advocate inadvertently filed petition for probate of the last Will of the said deceased in this court instead of filing petition for letters of administration with Will annexed thereto. A copy of the said chamber order was served upon the advocates of the caveators who opposed the said chamber order before the Additional Prothonotary and Senior Master. By an order dated 5th September, 2012, the learned Additional Prothonotary and Senior Master, did not allow the said chamber order on the ground that since the petition was converted into a suit and the Will was disputed in the affidavit in support filed by the caveator, no order for conversion could be passed by him. Petitioner accordingly filed this chamber summons inter alia praying for amendment and for seeking permission of this court to convert the probate petition into petition for letters of administration of the Will annexed.

**4.** The caveator filed affidavit in this chamber summons. In the affidavit in reply filed by the caveator, one of the objection raised by the caveator is that the executors of the will were necessary and proper parties for adjudication of the issues involved in this Chamber summons but were not impleaded as parties to the chamber summons. In view of this objection raised by the caveator in the affidavit in reply and also across the bar in the hearing held on 6th August, 2013, this court passed an order granting leave to the petitioner to implead executors in the chamber summons and directed the petitioner to serve papers and proceedings on the executors. Impleadment of the executors was warranted also to ascertain their views whether any of them would act as executors or want to renounce their executorship. Pursuant to the said orders, executors were impleaded as respondent nos. 1 and 2 to the chamber summons. Inspite of service of papers and proceedings including chamber summons, Mr. Himanshu Kode, Advocate, one of the executor did not file any affidavit in reply and did not appear before this court to disclose whether he would act as executor and take steps to continue the proceedings or would renounce his executorship. Mr. Diniar Mehta the other executor who was impleaded as respondent no. 2 in the Chamber summons, filed affidavit in reply dated 12th September, 2013.

**5.** Ms. Iyer, learned senior counsel appearing on behalf of the petitioner submits that since the named executors did not come forward and take any steps to file probate petition and in view of the erstwhile advocate of the petitioner advised petitioner to file petition for probate instead of filing petition for letters of administration being the sole beneficiary, petitioner had applied before the Prothonotary and Senior Master for permission to convert the said probate petition into petition for letters of administration with Will annexed and for consequential amendments. At the stage of redeclaration of the petition, it was brought to the notice of the petitioner that since the petition was converted into the suit already, no order on the application for amendment could be made. Petitioner therefore, filed chamber order for identical relief. In view of the objections raised by the caveator that the petition was already converted into suit, on

the caveator filing caveat and affidavit in support, no order could be passed by the Prothonotary and Senior Master in the said chamber order filed by the petitioner. The learned Additional Prothonotary rejected the said chamber order.

**6.** Learned senior counsel submits that the petitioner is 69 years old and the only beneficiary in the said will and was otherwise entitled to file petition for letters of administration if there was no executor of the said will. It is submitted that though the named executors were called upon to act as executors, none of them came forward to file petition. My attention is invited to the correspondence exchanged between the petitioner through her advocate and executors. As far as Mr. Himanshu Kode, Advocate who was one of the executor is concerned, did not give any response to any of the letters. Mr. Mehta however, did not give any positive reply in response to the said letters and sought inspection of the original will of the deceased. It is submitted that pursuant to the order passed by this court, both the executors were impleaded as parties to the chamber summons. Mr. Himanshu Kode did not file any affidavit in reply disclosing his stand whether he would act as executor and would continue with the pending proceedings or even did not come forward for renouncing his executorship before this court. Ms. Iyer, invited my attention to the affidavit in reply filed by the caveator as well as by the executor Mr. Diniar Mehta. It is submitted that Mr. Mehta has filed this affidavit after inspection of the original Will which was furnished to the said executor by the Prothonotary and Senior Master pursuant to the order passed by this court. It is submitted that various incorrect statements are made by the said executor in his affidavit dated 12th September, 2013. Learned senior counsel would submit that since the said executor has not shown his readiness and willingness to act as executor on the basis of the Will annexed to the petition which was propounded by the petitioner, it would amount to renouncement of the executorship. It is submitted that in any event, the dispute about the genuineness of the Will raised by the said executor in the said affidavit can be decided at the stage of trial of the petition/suit.

**7.** Ms. Iyer placed reliance on section 222 of Indian Succession Act, 1925 in support of her submission that the probate can be granted only to the executor appointed by the Will. It is submitted that since the executors were appointed by the said deceased in his Will, this court can not grant probate to the beneficiary in this probate petition even if beneficiary is able to prove the execution of the Will. It is submitted that since the executors have failed to act and did not come forward to file the probate petition or to pursue the petition inspite of the petitioner repeatedly calling upon them to act as executor or to disclose their intention as to whether they want to renounce their executorship, no steps are taken by the executors. It is submitted that no prejudice would be caused to the caveator if the probate petition which is filed by the beneficiary who is otherwise entitled to file petition for letters of administration with Will annexed, if such probate petition is allowed to be converted into petition for letters of administration with Will annexed and if the caveat and affidavit in support thereof already filed by the caveator is treated as caveat and affidavit in support in petition for letters of administration with Will annexed upon its conversion. Ms. Iyer, placed reliance on the judgment of Supreme Court in the case of Shambhu Prasad Agarwal and Others Vs. Bhola Ram Agarwal : (2000) 9 SCC 714 and in particular paragraphs 2, 3, 5 and 6 which read thus:

> **2.** One Maina Devi, wife of late Baidyanath Agarwal executed a Will on 14/6/1976 nominating her nephew Matadin Agarwal to be the owner of her house, landed properties and other immovable properties. On 23/9/1981, Maina Devi died. In the year 1982, Matadin Agarwal filed a probate petition (Probate Case No. 1 of 1982) which was converted into Title Suit No. 1 of 1985. In the

probate petition, Matadin Agarwal claimed a grant of probate in his favour. On 13/7/1987, Matadin Agarwal died. On the death of Matadin Agarwal, his heirs who are appellants before us, filed an application in Title Suit No. 1 of 1985 for their substitution in place of Matadin Agarwal. They also filed another application for amendment of the petition. In the amendment application, it was prayed that instead of grant of probate the legal heirs may be granted letters of administration. These applications filed by the appellants herein were rejected by the court. The revision filed by them was also dismissed by the High Court. It is against these orders, the appellants are before us.

**3.** Learned counsel appearing for the appellants urged that the view taken by both the courts below is erroneous inasmuch as the appellants being the heirs of the legatee were entitled to be substituted and to pray for issue of letters of administration. However, this is contested by the learned counsel for the respondent.

**5.** We find that it is not disputed that Matadin Agarwal was a legatee under the will. It is true that Matadin Agarwal ought to have applied for issue of letters of administration and not for probate. However, this did not debar his heirs to get the probate petition amended. The trial court rejected both the application of the appellants on the ground that since the probate petition filed by the legatee related to his personal right, therefore, no right accrued to the appellants for their substitution in his place. This view, according to us, is not correct. Matadin Agarwal, as stated above, was a legatee and not an executor under the will. It is true that where an executor dies, his heirs cannot be substituted because the executor possessed personal right, but this is not applicable whether the heirs of a legatee apply for issue of letters of administration. It is not disputed that today the appellant can file a petition for issue of letter of administration. Since considerable time has elapsed, we feel that the interest of justice demands that the proceedings should came to an end as early as possible and we should not dismissed this appeal merely on highly technical ground.

**6.** For the aforesaid reason, we set aside the orders under challenge and send the case back to the trial court. We permit the appellants to be substituted in the proceedings and also permit them to amend the petition. It goes without saying that after the remand, it will be open to the parties to take such plea as may be available to them under the law. Since the matter is pending for a considerable time, we direct the lower court to decide the matter expeditiously. The appeal is allowed. There shall be no order as to costs.

**8.** Ms. Iyer, learned senior counsel placed reliance on the judgment of the Supreme Court in the case FGP Limited Vs. Saleh Hooseini Doctor and another MANU/SC/1629/2009 : (2009) 10 SCC 223 and in particular paragraph 33 which reads thus:

**33.** The aforesaid recitals in the Will are in consonance with Sections 222 and 234 of the Indian Succession Act. For better appreciation of this point, both the Sections are set out below:

**222.** Probate only to appointed executor.-(1) Probate shall be granted only to an executor appointed by the Will.

(2) The appointment may be expressed or by necessary implication.

> **234.** Grant of administration where no executor, nor residuary legatee, nor representative of such legatee.-When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly.

**9.** Ms. Iyer, learned senior counsel also placed reliance on the judgment of this court in the case of Smt. Vatsala Srinivasan Vs. Narisimha Raghunathana and anr. MANU/MH/0076/2011 : AIR 2011 Bom. 76 and in particular paragraphs 8 and 18 of the said judgment which read thus:

> **8.** Section 213 of the Indian Succession Act 1925 provides that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed or has granted letters of administration with the will or an authenticated copy annexed. Section 220 provides that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. The effect of a probate under Section 227 is that probate when granted establishes a will from the death of the testator and renders valid all intermediate acts of the executor as such. Under Section 222 a probate can be granted only to an executor appointed by the will. When probate has been granted to several executors and one of them dies, Section 226 stipulates that the entire representation of the testator accrues to the surviving executor or executors. Section 232 then provides as follows:-
>
> > **232.** Grant of administration to universal or residuary legatees.-When-
> > (a) the deceased has made a Will, but has not appointed an executor, or
> >
> > (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or
> >
> > (c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.
> >
> > (Emphasis supplied)
>
> Section 232 deals with three identified situations. The first is where no executor has been named in the will executed by the deceased. The second is where though an executor has been appointed by the deceased in the will the executor (i) is legally incapable; or (ii) refuses to act; or (iii) has died before the testator; or (iv) had died before he has proved the will. The third situation deals with a case where the executor after having proved the will has died but before the estate of the deceased has been administered. In either of these situations Section 232 provides that (i) a universal or a residuary legatee may be

admitted to prove the will; and (ii) letters of administration with the will annexed may be granted to him of the whole estate or of such part of the estate as remains to be administered. The law does not postulate a vacuum in the administration of the estate of a deceased testator. Hence in the several situations to which a reference has been made in Section 232, the Act contemplates that the universal or a residuary legatee may be admitted to prove the will with a consequential issuance of letters of administration with the will annexed. The second set of eventualities to which a reference has been made earlier contemplates a situation where the executor under a will of the deceased has died before the will was proved. The death of the testator before the will is proved may occur either before the presentation of a Petition for probate or, for that matter, even after the presentation of a Petition but before probate has actually been granted upon the will being proved. Whether as a matter of fact the death of the executor takes place before or after the institution of a Petition for probate, the death in such a case is prior to the will being proved. Hence in both the situations, a residuary legatee is entitled in law to be admitted to prove the will and to the issuance of letters of administration.

**18.** Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the will annexed is initiated for protecting the interest of the legatees under the will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the will. Having regard to these fundamental similarities in both the proceedings there is no conceivable reason as to why the law must be regarded as prohibiting a beneficiary from seeking to continue the proceedings upon the death of the sole executor and as incidental thereto for seeking formal conversion of the proceeding from one for the grant of a probate to one for the issuance of letters of administration. If there were to be a specific prohibition in law enacted by the legislature the position may have well been different. In the absence of a legal prohibition to the contrary the Court would not readily accept a submission, the effect of which would be to result in delaying the proceedings for the administration of the estate and a resultant multiplicity of proceedings. This is amplified in the present case where the recording of evidence is complete. Nearly eight years have elapsed since the institution of the suit. Evidence of seven witnesses has been recorded and the suit is ripe for final hearing. There is no dispute about the position that in any event the beneficiary would have been entitled to institute separate proceedings independently for the grant of letters of administration. That right can well be espoused by the beneficiary by seeking a continuation of the existing proceedings. It must be noted, that this right which is available is recognized with reference to a beneficiary under the will. A fundamental difference has to be made between a situation where the legal heirs of a sole executor seek impleadment in the proceedings on the death of the executor. The legal heirs of the sole executor cannot be brought on record since the right to seek probate of the will subsists in the executor alone. But that is not to say that a beneficiary under the will is prohibited from continuing the existing proceedings. The proceedings enure to the benefit of the legatee. The appointment of the administrator is but a step in aid of the proper administration of the

estate of the deceased. Section 273 provides that probate or letters of administration shall have effect over all the properties and estate of the deceased through the State in which the same is or are granted and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him. Parties, documents and facts are similar in both sets of proceedings. In this view of the matter and particularly having regard to the judgment of the Supreme Court to which we have made a reference earlier we are of the considered view that the learned Single Judge was not in error in allowing the Chamber Summons.

**10.** Mr. Shetty, learned counsel appearing for the caveator on the other hand submits that this Chamber Summons for seeking permission to convert probate petition into the petition for Letters of Administration itself is not maintainable. It is submitted that probate petition has been filed by the beneficiary and has not been correctly and properly instituted. Learned counsel submits that since executor appointed under the alleged Will in question has not renounced the executorship, the Chamber Summons for conversion of petition for probate into petition for Letters of Administration is not maintainable. It is submitted by the learned counsel that since executor had admittedly not renounced their alleged executorship before filing probate petition by the petitioner, conditions of Section 232 of the Indian Succession Act, 1925 are not satisfied. It is submitted that when probate petition was filed, there was no evidence placed on record to show that any of the executor had refused to act as executor. Except bare averments in the affidavit in support of the Chamber Summons, no correspondence was produced in the petition. It is submitted that letters addressed to the executors which are now placed on record alongwith affidavit in support of this Chamber Summons are addressed after filing of the petition.

**11.** Mr. Shetty, learned counsel further submits that in view of the affidavit filed by one of the executor Mr. Diniar Mehta, who has disputed the fact that he had not attended the office of the Sub Registrar as alleged in the petition, execution of the Will in question is suspicious and thus in any event at this stage this Chamber Summons seeking conversion of probate petition into the petition for Letters of Administration cannot be considered. It is submitted that Mr. Diniar Mehta, one of the alleged executor has disputed the existence of the Will in the form annexed to the petition. It is submitted by the learned counsel that in any event, the cause of action for making an application for conversion of the petition for probate into petition for Letters of Administration arose in the year 2008 whereas this Chamber Summons has been filed by the petitioner on 11th December, 2012 i.e. after there years after approval of cause of action and in view of Article 137 of Schedule I of the Limitation Act, 1963, Chamber Summons itself is barred by limitation and thus deserves to be dismissed on that ground alone. Learned counsel place reliance on the judgment of this court in case of Harinarayan G. Bajaj and another vs. Vijay Agarwal and others reported in MANU/MH/1787/2011 : 2012 (4) ALL MR 628 and in particular paragraphs 8 and 9 of the said judgment which reads thus:-

> **8.** In Kerala State Electricity Board Vs. T.P. Kunhaliumma MANU/SC/0323/1976 : (1976) 4 SCC 634, the Supreme Court was considering whether a petition filed before the District Judge under section 16(3) of the Indian Telegraph Act, 1885 claiming an enhancement of compensation was barred by Article 137 of the Limitation Act, 1963. Relying upon a decision of a two Judge Bench of the Supreme Court in the case of Town Municipal Council, Athani Vs. Presiding Officer, Labour Court, Hubli MANU/SC/0331/1969 : (1969) 1 SCC 873, it was contended before the court that Article 137 does not apply to the applications

which were presented of any tribunal bodies or authorities other than a civil court. Following the decision in Nityananda M. Joshi Vs. Life Insurance Corporation of India, the three Judge Bench of the Supreme Court held that Article 137 of the Limitation Act applies to any petition or application filed before a civil court under any Act. In paragraph no. 22 of the decision, the Supreme Court observed:

> The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in Athani Municipal Council case and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure

The decision in the case of Kerala State Electricity Board (supra) was followed by the Supreme Court in Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others MANU/SC/7451/2008 : (2008) 8 SCC 463. After extracting the above quoted passage from the decision of Kerala State Electricity Board (supra), the court held:

> In terms of the aforesaid judgment (Kerala State Electricity Board) any application to civil court under the Act is covered by Article 137.
>
> (Underlining supplied)

In view of the clear enunciation of law by the Supreme Court that every application made to a civil court is covered by Article 137 of the Limitation Act, it must be held that Article 137 applies even to an application made for amendment of the pleadings

**9.** Mr. Kamdar, learned counsel appearing for the defendants referred to and relied upon a decision of the Supreme Court in Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others MANU/SC/1724/2009 : (2009) 10 SCC 84 and invited my attention to the observations in paragraph no. 39 which reads thus:

> 39. The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice (see Ganga Bai Vs. Vijay Kumar and Arundhati Mishra Vs. Ram Charitra Pandey) The observations cannot be read out of context. It is settled principle of law that judgments of court are not to be read as statute but the observations made in a judgment must be read in the context in which they are made. The above quoted observations were made while dealing with an argument that the amendment should not be allowed as it sought to add a claim which was barred by limitation on the date on which the application for amendment was made. It was in this context that the Supreme Court held that the court has a discretion whether the amendment should be allowed or refused. In a given case, the question whether the claim which is sought to be

introduced by an amendment in the plaint is barred by limitation or not would be a mixed question of law and facts and in that case it would be inappropriate to shut out an amendment without the trial and without knowing whether the claim made is really barred by limitation. The decision on the question of limitation as to a claim often requires appreciation of evidence. The distinction between a claim sought to be introduced by an amendment being barred by limitation and the application for amendment being barred by limitation must be borne in mind. The starting point for computing period of limitation for making an application for amendment of the plaint is the date when the right to apply for amendment accrues. In a given case, the right to apply for amendment may accrue on a day which is different than the date on which the cause of action for the claim sought to be made by amendment accrues. Article 137 of the Limitation Act provides that the period of limitation for making of an application is to be computed from "when the right to apply accrues". The court would therefore, have to see when the right to apply for the amendment of pleadings accrued to the plaintiff and compute the period of limitation from the date when the right accrued.

**12.** Mr. Shetty also made an attempt to distinguish the judgment relied upon by Ms. Iyer, learned senior counsel appearing for the petitioner on the ground that in this matter, executors have not renounced their executorship before filing probate petition.

**13.** In rejoinder, Ms. Iyer, learned senior counsel submits that in the correspondence addressed by Mr. Diniar Mehta, in response to the letters addressed by the petitioner on 4th August 2011, it was not denied that any oral request was made by the petitioner to him to come forward and to act as an executor. My attention is invited to the letters addressed by Mr. Diniar Mehta in support of this submission. Learned senior counsel submits that the judgment relied upon by Mr. Shetty, learned counsel appearing for the caveators in case of Harinarayan G. Bajaj and another (supra) would not be applicable to the facts of this case since neither of the executors have rejected the request to act as an executor in the correspondence entered into. As far as Mr. Diniar Mehta is concerned, it is submitted that even in the letter addressed by him to the petitioner, it was made clear by him that till the inspection of the original Will was taken by him, he could not make any statement whether he would act as an executor or not. Learned senior counsel would submit that allegations made by Mr. Mehta for the first time in affidavit in reply filed by this court are totally incorrect. It is submitted that since the said executor did not want to act as an executor as can be demonstrated from the said affidavit and in view of the fact that Mr. Himanshu Kode, the other executor of the Will has not come forward before this court though papers and proceedings were served upon him to disclose his intention whether to act as an executor or not, application for seeking permission to convert the petition for probate into the petition for Letters of Administration be granted. Learned senior counsel submits that judgment thus relied upon by Mr. Shetty would be of no assistance to the caveator. It is submitted that in any event since the application filed by the petitioner is for conversion of the probate petition into the petition for Letters of Administration is with a view to bring this proceedings in conformity with the provisions of law, Article 137 of the Schedule 1 to the Limitation Act would not apply. It is submitted that in any event, the amendment can be allowed by this court in the interest of justice. It is submitted that even if Article 137 is applicable, chamber summons is within time.

REASONS AND CONCLUSION:-

**14.** It is not in dispute that the petition is filed by the beneficiary under the alleged Will in question. It is also not in dispute that by the alleged Will in question, there were two executors appointed by the said deceased. In the application made before the Prothonotary and Senior Master on 23rd April, 2012, it was stated by the petitioner that as executors appointed under the Will in question had not filed the petition for probate, the petitioner decided to file petition in this court. The earlier advocate for the petitioner had inadvertently filed petition for probate instead of filing the petition for Letters of Administration with Will annexed. In view of the objection raised by the caveator in the chamber order filed by the petitioner, learned Prothonotary and Senior Master did not allow the said chamber order. On perusal of the letters addressed by the petitioner to the executors on 4th August, 2011, it is clear that it was case of the petitioner that since none of the executors took any steps as an executor and did not apply for probate of the Will, the petitioner was constrained to file the petition for probate of the Will herself. It was also the case of the petitioner that as the executors failed to act as an executors of the last Will of the said deceased and had not renounced executorship, the petitioner called upon the executor to perform their duties and to agree to act as the petitioners in this petition/suit and to take steps to obtain probate of the last Will and testament of the said deceased. The petitioner had also called upon Mr. Diniar Mehta, one of the executor to inform whether he was willing to sign and affirm the usual affidavit as an attesting witness with regard to the execution of the Will in question as he was alleged to be one of the attesting witness to the Will in question. On perusal of the letter addressed by Mr. Diniar Mehta, it is clear that there is no denial in the said letter to the statement made by the petitioner in her advocate's letter dated 4th August, 2011 that the said Mr. Diniar Mehta did not take any steps as an executor nor applied for probate of Will and had failed to act as an executor. As far as Mr. Himanshu Kode, advocate who was the other executor of the said Will is concerned, he did not give any response to the letters addressed by the petitioner through her advocate nor filed any affidavit in reply nor remained present in this proceedings though served.

**15.** In view of the issue raised by the caveator that the executors were necessary and/or proper parties to this Chamber Summons, to ascertain their views whether they would act as an executors or not, by an order dated 6th August, 2013 passed by this court, the petitioner was granted leave to amend to implead the executors and to serve papers and proceedings upon the executors. Though Mr. Diniar Mehta filed affidavit in response to the said order dated 6th August, 2013, no affidavit in reply is filed by Mr. Himanshu Kode. On perusal of the affidavit filed by Mr. Diniar Mehta on 12th September, 2013, it is noticed that the said Mr. Diniar Mehta has alleged that he was not witness to the Will in the present form as produced before this Court and had not attended the office of the Sub Registrar of Assurances of Mumbai on 22nd January, 2002 for the registration of the Will in question and had not made/affixed his signature before the Sub-Registrar of Assurances as claimed by the petitioner. Upon query raised by this court to the learned counsel appearing for Mr. Diniar Mehta, learned counsel made a statement that his client was not ready and willing to act as executor on the basis of the original Will as propounded by the petitioner and produced in this proceedings. Submissions made by the learned counsel is accepted.

**16.** Question that arises for consideration of this court is whether in this petition this court can grant probate in favour of the beneficiary in view of section 222 of the Indian Succession Act, 1925. On perusal of section 222 of the Indian Succession Act, 1925 it is clear that probate can be granted only to an executor appointed by the Will. Section 230 of the Indian Succession Act provides that the executor may renunciate orally in the presence of the Judge, or by a writing signed by him renouncing his rights to act as executor. Section 231 of the Act provides that if the executor renounces or fails to

accept the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

**17.** On perusal of the record produced by parties, in my view both the executors who were alleged to have been appointed by the said deceased in the Will in question have not come forward to act as an executors. Though this court had passed an order impleading the executors with a view to ascertain whether any of those executors who would act as executor or would renounce the executorship, as far as Mr. Himanshu Kode is concerned, he neither appeared before this court nor filed any affidavit in reply. There was no response given by Mr. Himanshu Kode to any of the letters addressed by the petitioner. As far as Mr. Diniar Mehta is concerned, he made a statement through his counsel that he did not want to act as an executor in respect of the Will in the form as annexed or produced with the petition by the petitioner. Since Mr. Himanshu Kode has not come forward to act as an executor though served with notice and proceedings and since Mr. Diniar Mehta has refused to act an executor in respect of the Will in the form in which it is produced by the petitioner, in my view in this situation, the beneficiary would have been entitled to file a petition for Letters of Administration with Will annexed. It is the case of the petitioner that since none of the executors had come forward to act as executors and in view of the erstwhile advocate filing a petition for probate instead of filing petition for Letters of Administration, petitioner had filed such proceedings. In my view, no prejudice would be caused to the caveator if the petition filed for probate is allowed to be converted into the petition for Letters of Administration in the circumstances referred to above.

**18.** Supreme Court in case of Shambhu Prasad Agarwal has considered a similar situation and has held that the petitioner in that case who had filed a petition for probate instead of filing petition for letters of administration would not be debarred to get the petition for probate amended. The petitioner in that case was a legatee and not an executor under the Will. It is held that the legal heirs could file a petition for issuance of letters of Administration even on the demise of the original petitioner and in the interest of justice proceedings would not come to an end and the appeal would not be dismissed merely on technical ground. I am respectfully bound by the judgment of the Supreme Court in case of Shambhu Prasad Agarwal (supra). In my view, the judgment of Supreme Court in case of Shambhu Prasad Agarwal (supra) squarely apply to the facts of this case.

**19.** In the facts of this case, it is clear that the petitioner who claims to be the sole beneficiary under the Will in question is 69 years old. On filing of the caveat and affidavit in support by the caveator, petition for probate has been already converted into a suit. Whether Will propounded by the petitioner was executed or not or validly attested or not would be an issue which would be tried at the time of trial of the petition. Merely because a probate petition is allowed to be converted into a petition for Letters of Administration with Will annexed, it would not prove the existence and/or execution of the Will in question. The caveator who has disputed the Will would be entitled to treat the caveat as well as affidavit in support of the caveat filed as caveat and affidavit in support in the petition for Letters of Administration with the Will annexed.

**20.** Supreme Court in case of FGP Limited (supra) on consideration of section 222 and 234 of the Indian Succession Act, 1925 has held that the said Act recognise the contingency where the executor appointed by the Will is unable to act, when there is no executor and no residuary legatee or representative of a residuary legatee, or he

declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly. I am respectfully bound by the statement of law declared by the Supreme Court in the said judgment.

**21.** Division Bench of this Court in case of Smt. Vatsala (supra) has held that the petition for grant of probate as well as proceedings for grant of administration with the Will annexed are in the interest of the legatees and the question involved in such proceedings will be the same, namely, about the truth and genuineness, authenticity of the will. It is held that there is no conceivable reason as to why the law must be regarded as prohibiting a beneficiary from seeking to continue the proceedings upon the death of the sole executor and as incidental thereto for seeking formal conversion of the proceeding from one for the grant of a probate to one for the issuance of letters of administration. It is held that in any event the beneficiary would have been entitled to institute separate proceedings independently for the grant of letters of administration which right can well be espoused by the beneficiary by seeking a continuation of the existing proceedings.

**22.** In my view, since in this case, both the executors have refused to act as executors, petitioner who is claiming to be a sole beneficiary under the Will in question is entitled to seek conversion of petition for probate into petition for letters of administration with Will annexed and to proceed with the petition for Letters of Administration. In my view, application thus made by the petitioner for seeking permission to convert the probate petition into the petition for Letters of Administration is justified and deserved to be granted.

**23.** As far as judgment of this court in case of Harinarayan G. Bajaj and another (supra) relied upon by Mr. Shetty, learned counsel appearing for the respondent on the issue of limitation is concerned, since the executors have not renounced at any point of time to act as an executor either in the correspondence or any time prior to filing of affidavit in this court, in my view limitation for making any application for amendment in this case would commence only when executors did not appear before this court and/or refused to act as executor before this court upon their impleadment. Chamber Summons thus is within time.

**24.** As far as submission of Mr. Shetty that in view of the serious allegations made by Mr. Diniar Mehta in his affidavit disputing the existence of the Will in the form as is produced by the petitioner and his signature before the Sub Registrar of Assurances is concerned, such issue can be decided at the stage of trial of the petition by leading oral evidence if parties so desire.

**25.** On perusal of the affidavit in support and for reasons recorded in affidavit in support, delay in filing this Chamber Summons is condoned. In my view, there is no merit in any of the submissions made by the caveator or by the executor who remained present before this Court. Case is made out by the petitioner for grant of reliefs as claimed in the Chamber Summons. Petition for probate which is converted as testamentary suit is restored as petition for probate and is converted to a petition for letters of administration with Will annexed. Caveat and affidavit in support of the caveat filed by the caveator shall be treated as caveat and affidavit in support in petition for letters of administration with Will annexed. Chamber Summons is accordingly made absolute in terms of prayers (a), (b) and (c). Amendment to be carried out within eight

weeks from today. On oral application of Mr. Shetty, learned counsel appearing for the caveator, operation of this order is stayed for a period of four weeks from today. There shall be no order as to costs.

**(2015) 8 Supreme Court Cases 615 : (2015) 4 Supreme Court Cases (Civ) 1 : 2015 SCC OnLine SC 415**

**In the Supreme Court of India**

(BEFORE KURIAN JOSEPH AND AMITAVA ROY, JJ.)

JAGDISH CHAND SHARMA . . Appellant;

*Versus*

NARAIN SINGH SAINI (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS . . Respondents.

Civil Appeals Nos. 4181-82 of 2015[†], decided on May 1, 2015

A. **Evidence Act, 1872 — Ss. 71 and 68 — S. 71 cannot be invoked as substitute to mandatory requirements of S. 68 of Evidence Act r/w S. 63(c) of Succession Act — Execution of will cannot be sought to be proved by other evidence under S. 71 on failure of attesting witness to prove by credible evidence execution and attestation as required under S. 68 of Evidence Act r/w S. 63(c) of Succession Act — Family and Personal Laws — Succession Act, 1925, S. 63(c)**

B. **Evidence Act, 1872 — S. 71 — Requires strict construction — Applies only in two contingencies viz. denial of execution or failure to recollect execution of document concerned by attesting witness before court — Denial must be clear and unhesitating and failure to recollect must be real**

C. **Family and Personal Laws — Succession Act, 1925 — S. 63(c) — Mandatory — Failure or deficiency in compliance would invalidate document/instrument of disposition of property**

D. **Family and Personal Laws — Succession Act, 1925 — S. 63(c) — *Animo attestandi* essential condition for valid attestation of will — Evidence Act, 1872, S. 68**

E. **Family and Personal Laws — Succession Act, 1925 — S. 61 — Void will — Suspicious circumstances, if any, surrounding the will, must be removed by propounder by adducing cogent evidence — If bequest ex facie unnatural, unfair and improbable, propounder has to clear attendant negativity and credibly show testator's cognizant, free, objective and discerning state of mind at the time of creation of will — Appellant having failed to do so, will rightly held to be not proved by High Court — Will — Genuineness — Suspicious circumstances — Onus on propounder to dispel**

The appellant claimed that a will had been executed in 1973 by one *N* (since deceased), the predecessor-in-interest of the respondents, thereby bequeathing the property mentioned therein to him. The appellant filed a petition under Section 276 of the Succession Act with the will annexed, seeking grant of letter of administration. The parties adduced oral and documentary evidence. Whereas the appellant examined six witnesses, including himself, two attesting witnesses *K* (an advocate) and *B* and the Sub-Registrar concerned; the respondents examined eight witnesses in support of their case.

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The appellant deposed that he had joined the deceased *N*, in the year 1952 for realising rent of his property and also for looking after the matters pertaining to litigation in connection therewith. The witness stated that in the process, he was also made the attorney of the deceased and while realising rent used to accompany the son of *N*. He referred to some differences between the father and the son with regard to alleged wrongdoings of the latter qua immovable properties. He denied to have visited the Office of the Sub-Registrar and insisted that *K* had signed the certificate of the petition under Section 276 of the Succession Act. He also asserted that *K* had attested the will after seeing the same. He identified the signature of the testator on the will.

*K* deposed that though he owned to be the author of the document, having drafted it, he could not recall whether he did so on the instruction of the testator. He did not remember whether the will had been handed over by him to his father or the testator. He also could not state whether the contents of the will were read over and explained to the testator by him or his father. He was not sure as to whether he had

signed the will in presence of the testator or not or whether the testator had signed the document in his presence. He stated that he was present in the Office of the Sub-Registrar when the will was presented for registration and had signed on the back page thereof but clarified that he did so only as an identifying witness. He could not say as to whether the signatures and thumb impressions of the testator on the back page of the will had been obtained in his presence or not. He was unequivocal in stating that he had signed the certificate at the foot of the petition for grant of letter of administration as he was asked to do so by the appellant and he did not do so in the capacity of an attesting witness to the will. He even denied to have gone through the contents of the certificate before subscribing thereto.

The witness *B* was claimed to have put his signature on the will in the presence of the testator. He, however, was unhesitant in testifying that he had not seen the testator signing the document. He denied to have appeared before the Sub-Registrar or to have identified the testator before the said authority. His unambiguous statement on oath is that he had signed the document outside the Office of the Sub-Registrar.

The Sub-Registrar on the date on which he had testified, the will was laid before him for registration. Incidentally, it was on the very same date of its execution. He deposed that the testator was identified before him by *K* and *B* that these two persons did sign the document in his presence as identifying witnesses on the back of p. 1 thereof. He stated further that the contents of the will were read out to the testator and he was asked as to whether he did execute the same himself. The witness deposed that to this, the testator acknowledged in the affirmative whereupon he (the witness) endorsed the same. The witness proved his endorsements. He also stated that the testator had signed and put his thumb marks in his presence in acknowledgment of the execution of the will by him. In cross-examination, the witness admitted that he had made his endorsements in the capacity of a registering authority only. While admitting that on the very same date another document, purporting to be a will executed by the same testator had also been presented before him for registration, he admitted that both the identifying witnesses of the will involved were also the identifying witnesses of the other will.



The space in the will meant to mention the age and the date of execution thereof had remained vacant till it was produced for registration. This was though as claimed by the appellant, the document had already been executed by the testator by putting his signature on both the pages along with the signatures of the attesting witnesses, as well. On the back of p. 1 of the will, there are two signatures and thumb impressions said to be of the testator beneath the stamped endorsements in the official pro forma signed by the Sub-Registrar. On the same page the signature of *K* and thumb impression of *B* were also available.

The trial court held that the will had been validly executed by the testator with a sound disposing state of mind in the presence of two attesting witnesses. Consequently, the letter of administration as prayed for, by the appellant vis-à-vis the said will was granted.

The respondents preferred appeal before the High Court. Referring to the testimony of the attesting witnesses, the High Court held that they could not prove the execution of the will as well as the attestation thereof within the meaning of Section 63(*c*) of the Act, a mandatory legal edict. The High Court also dismissed the plea based on Section 71 of the 1872 Act noting that the evidence of the attesting witnesses produced by the appellant, did not only demonstrate lack of intention to attest the will, but also, rendered the execution of the document and their signatures thereon doubtful. The High Court noticed as well the circumstances attendant on the bequest to render it doubtful in view of the suspicious bearing thereof. It amongst others noted therefore to arrive at this conclusion, that the deceased testator was versed only in Urdu and that the will was drafted in English, and that on the very same day he had executed two other wills involving different properties with the possibility that the will in question, was got signed, by representing it to be a part of the other transactions. The history of past litigation between the testator and the appellant involving allegations of his unauthorised acts and misuse of power also did weigh with the High Court to deduce that it was unlikely that the testator would out of natural love and affection bequeath his property or any portion thereof to such a person, by depriving his own children. The decision of the trial court was thus set aside.

The main question before the Supreme Court in appeal was whether *N*, deceased, had executed the will validly while possessed of a sound disposing mind?

Affirming the answer of the High Court in the negative, and dismissing the appeal, the Supreme Court

*Held* :

A will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it carries with it an overwhelming element of sanctity. As understandably, the testator/testatrix, as the case may be, at the time of testing the document for its validity, would not be available, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation. This is more so, as many a times, the manner of dispensation is in stark departure from the prescribed canons of devolution of property to the heirs and legal representatives of the deceased. The rigour of Section 63(*c*) of the Act and Section 68 of the 1872 Act is thus befitting



the underlying exigency to secure against any self-serving intervention contrary to the last wishes of the executor.

(Para 57)

The legislatively prescribed essentials of a valid execution and attestation of a will under Section 63(*c*) of the Succession Act are mandatory in nature, so much so that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property. The interplay of Section 63(*c*) of the Succession Act as also Sections 68 and 71 of the Evidence Act and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions.

(Paras 22, 22.2 and 22.3)

Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Succession Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Succession Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(*c*) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

(Para 57.1)

*Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, (2003) 2 SCC 91; *M.B. Ramesh* v. *K.M. Veeraje Urs*, (2013) 7 SCC 490 : (2013) 3 SCC (Civ) 576, *relied on*

Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing.

(Para 57.2)

*CIT* v. *Ajax Products Ltd.*, AIR 1965 SC 1358, *relied on*

In the present case, on a cumulative assessment of the evidence of *K* and *B*, it is clear that Section 71 of the Act, is not invocable in the facts and circumstances of the case so as to permit the propounder/appellant to resort to any other evidence to prove the execution and attestation of the will involved as comprehended therein. The account of the relevant facts bearing on the execution and attestation of the will as provided by these witnesses though is thoroughly inadequate qua the prescriptions of Section 63(*c*) of the Act does not amount to denial of execution or failure to recollect the said event as contemplated in this provision. The evidence of the Sub-Registrar also on oath, does neither prove nor demonstrate in unmistakable terms that both the identifying witnesses had seen the testator put his signatures and thumb impressions for the execution of the will. His testimony also does not establish that the witnesses, *K* and *B* had put their signature/thumb impression before the Sub-Registrar in presence of the testator. Evidently, the Sub-Registrar was not present at the time of initial execution of the will and thus could not have witnessed the said event. On overall perspective, his testimony also does not conform to the imperatives of Section 63(*c*) of the Act. His narration on affirmation at the trial, does not either by itself meet the essentialities of Section 63(*c*) of the Act or can be construed to be a supplement of the evidence of *K* and *B* to furnish the proof of execution and attestation of the will as enjoined by the law. The evidence of *K, B* and the Sub-Registrar analysed collectively or in isolation, does not evince *animo attestandi*, an essential imperative of valid attestation of a will. As Section 71 of the 1872 Act by no means can be conceived of to be a diluent of the rigour of Section 63 of the Act, the testimony of these witnesses falls short of the probative content to construe the instrument to be a validly executed will as envisaged by law.

(Paras 39, 42 to 44)

*Girja Datt Singh* v. *Gangotri Datt Singh*, AIR 1955 SC 346, *relied on*

*Pentakota Satyanarayana* v. *Pentakota Seetharatnam*, (2005) 8 SCC 67, *distinguished*

*Neki Ram* v. *Ama Ram Godara*, (2001) 9 SCC 503 : 2002 SCC (L&S) 55, *referred to*

The materials on record as a whole, do not present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the will, by denying his wife, children and grandchildren who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is ex facie unnatural, unfair and improbable thus reflecting on the testator's cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument. The suspicious circumstances which shrouded the will were required to be removed by the propounder by cogent evidence.

(Para 58)

*H. Venkatachala Iyengar* v. *B.N. Thimmajamma*, AIR 1959 SC 443; *Surendra Pal* v. *Saraswati Arora*, (1974) 2 SCC 600; *Rabindra Nath Mukherjee* v. *Panchanan Banerjee*, (1995) 4 SCC 459; *Jaswant Kaur* v. *Amrit Kaur*, (1977) 1 SCC 369, *relied on*

The High Court has appropriately appreciated the law and the facts in the right perspective and the impugned decision does not call for any interference.

(Para 60)

*Narain Singh* v. *State*, 2014 SCC OnLine Del 3433 : (2014) 211 DLT 632, *affirmed*

R-D/54969/CV



Advocates who appeared in this case:

Paras Kuhad, Senior Advocate (Nikhil Singhvi, Ms Kartika Sharma and Abhishek Gupta, Advocates) for the Appellant;

Daljit Singh, Senior Advocate (Ashok Saini, Ms Vandana Sehgal, Rohan Thawani, Hardeep Singh Anand, Anand Daga and Mandeep Singh Vinaik, Advocates) for the Respondents.

***Chronological list of cases cited*** ***on page(s)***



The Judgment of the Court was delivered by

**AMITAVA ROY, J.**— Leave granted. The genesis of the lingering dissension in the instant proceeding lies in the will claimed by the appellant herein to have been executed on 22-10-1973 by Nathu Singh (since deceased), the predecessor-in-the interest of the respondents, thereby bequeathing the property mentioned therein to him (the appellant). The judgment and order dated 15-5-2007 passed in PC No. 249 of 1980 (renumbered as PC No. 160 of 2006), by the District Judge, Tis Hazari Court, Delhi, granting letter of administration to him, has been reversed by the High Court of Delhi by its judgment and order dated 2-7-2014 rendered in *Narain Singh* v. *State*[1] as assailed herein.

**2.** We have heard Mr Paras Kuhad, Senior Advocate for the appellant and Mr Daljeet Singh, Senior Advocate for the respondents.

**3.** A brief outline of the pleaded facts would portray the rival orientations. The appellant, to reiterate, filed an application under Section 276 of the Succession Act, 1925 (for short hereinafter referred to as "the Act") with the will annexed, seeking grant of

letter of administration. He stated that the will had been executed by Mr Nathu Singh on 22-10-1973, as the sole and absolute owner amongst others of Municipal House Tax No. 807 (Private No. A/152 to A/162/1) situated at Sukhdev Nagar, Kotla Mubarakpur, New Delhi, bequeathing the same to him.

**4.** The appellant stated that the testator nursed great love and affection for him for the services rendered by him and was not favourably disposed



towards his sons for their disagreeable conduct and activities. It was mentioned that the testator expired on 2-8-1980 at Delhi whereafter, Shri Harswaroop Sharma, resident of 41, Subhash Market, Kotla Mubarakpur, informed him to receive the will lying in his custody. It was, thereafter, according to the appellant that the application for letter of administration was filed. In the petition, he averred the names and particulars of the sons and daughters of the deceased testator and disclosed further that the subject-matter of the will was located in New Delhi. That the will was executed and made in Delhi was also mentioned. The appellant did provide and sign a verification declaring the correctness of the statements made therein. Further another verification subscribed by Mr G.C. Kumar, Advocate, Delhi in the capacity of an attesting witness to the will, was also made.

**5.** On the receipt of the notice of the proceedings registered on this petition, objections were filed by Mr Jaswant Singh (since deceased), son of the testator and also by his other sons and daughters separately. For the sake of brevity the substance of the objections registered by the children of the testator would be synopsised.

**6.** It was pleaded that the property said to have been bequeathed was ancestral joint Hindu family property and thus, the testator had no authority to execute the will in favour of the appellant. While denying the claim that the appellant did enjoy the love and affection of the testator, it was asserted that he (the appellant) in fact had been appointed by the testator as his rent collector on 11-5-1973 and was endowed with a registered power of attorney. The objectors averred that as the appellant failed to render his sincere services, the power of attorney was revoked. That the appellant did create tenancy in favour of his wife, Shrimati Santosh Kumar Sharma in respect of Shop No. F-16 belonging to the testator without his knowledge for which he (testator) had instituted a suit against him (the appellant) in the year 1975 for recovery of damages, was also stated. The objectors did further refer to several complaints made by the testator against the appellant for his unsatisfactory services and misuse of power including misappropriation of rents collected by him. They also stated that the appellant had appeared as a witness in a criminal case against the deceased and was also placed under suspension by his employer where he served as a teacher.

**7.** The respondents/objectors averred further that the appellant was present at the time of execution of two other wills by the testator in favour of one Kisan Lal and Vimala Devi and suggested that he (the appellant) by playing fraud on him (the testator) might have got his will signed, in the process of getting the above two documents executed. In all, the respondents/objectors assertively emphasised that the facts and circumstances prevailing at the relevant point of time did not at all warrant/justify execution of any will by Mr Nathu Singh in favour of the appellant by depriving his children. They, in categorical terms, denied the execution of the will and also the signatures and the thumb impressions of Mr Nathu Singh thereon as claimed by the appellant. They averred as well that the testator was conversant only



with Hindi language and that the contents of the will in English had never been read over

or explained to him.

**8.** In his rejoinder, the appellant refuted the respondent's cavil based on jointness of the property. While insisting that the property was the self-acquired asset of the deceased, the appellant stated that therefrom the testator, not only, had conveyed portions by way of sale, but also, had gifted some to his children. He categorically denied the allegation of his disagreeable activities and misuse of powers. He instead, did impute fraudulent act of the respondent, Mr Jaswant Singh in getting his name mutated in the revenue records in place of Mr Nathu Singh for which, a litigation between the two did ensue. He accused the said respondent for being responsible for institution of cases against him by Mr Nathu Singh.

**9.** On these competing pleadings, the following issues were framed:

*1.* Whether Mr Nathu Singh Saini, deceased executed the will dated 22-10-1973, validly while possessed of a sound disposing mind?

*2.* Relief.

**10.** The parties thereafter adduced oral and documentary evidence. Whereas, the appellant examined six witnesses including himself, Mr G.C. Kumar, Advocate (attesting witness), AW 3 Mr A.K. Jain, Sub-Registrar, New Delhi and AW 5 Mr Budh Ram (attesting witness), the respondents offered 8 witnesses in support of their case. Needless to say, the appellant proved amongst the others the will, Ext. A-1.

**11.** The learned trial court, on its assessment of the evidence adduced, concluded that the appellant could prove that the will dated 22-10-1973, Ext. A-1 was executed by the testator in a sound disposing state of mind after fully understanding its contents and that it was duly registered. Having held so, it observed that the onus of proving that the document was not a genuine will did shift to the respondents. On an analysis of the evidence offered by the respondents, the learned trial court was of the view that the same was inadequate to displace the validity of the will. It thus returned a finding that the will dated 22-10-1973, Ext. A-1 had been validly executed by the testator with a sound disposing state of mind in the presence of two attesting witnesses. Consequently, the letter of administration as prayed for, by the appellant vis-à-vis the said will was granted.

**12.** Aggrieved, the respondents preferred appeal being FAO No. 279 of 2007 in the High Court of Delhi. By the impugned judgment and order[1], as adverted to hereinabove, the verdict of the learned trial court has been reversed. The High Court on a threadbare evaluation of the pleadings and the evidence on record, on the touchstone of the relevant provisions of the Act and the Evidence Act, 1872 (for short hereinafter referred to as "the 1872 Act"), determined that the will dated 22-10-1973 had not been proved as per law and that no probate or letter of administration could be granted.



Referring to the testimony of the attesting witnesses, the High Court held that they could not prove the execution of the will as well as the attestation thereof within the meaning of Section 63(*c*) of the Act, a mandatory legal edict. The High Court also dismissed the plea based on Section 71 of the 1872 Act noting that the evidence of the attesting witnesses produced by the appellant, did not only demonstrate lack of intention to attest the will, but also, rendered the execution of the document and their signatures thereon doubtful. The High Court noticed as well the circumstances attendant on the bequest to render it doubtful in view of the suspicious bearing thereof. It amongst others noted therefore to arrive at this conclusion, that the deceased testator was versed only in Urdu and that the will was drafted in English, and that on the very same day he had executed two other wills involving different properties with the possibility that the will in question, was got signed, by representing it to be a part of the other transactions. The history of past litigation between the testator and the appellant involving allegations of his unauthorised acts and

misuse of power also did weigh with the High Court to deduce that it was unlikely that the testator would out of natural love and affection bequeath his property or any portion thereof to such a person, by depriving his own children. The decision of the trial court was thus interfered with.

**13.** Mr Kuhad has insistently argued that the impugned judgment and order suffers from apparent misreading of pleadings and evidence on the record and is thus liable to be annulled. Relying in particular on the testimony of the witnesses, AW 1 and AW 5, the learned Senior Counsel has urged that the execution and the attestation of the will in question have been duly proved as required under Section 63 of the Act. Drawing sustenance from Section 71 of the 1872 Act, the learned Senior Counsel has maintained that even assuming that the testimony of AW 1 and AW 5 was deficient vis-à-vis the requirement of Section 63(*c*) of the Act, the appellant having examined both the attesting witnesses, it was permissible for him to prove the execution and attestation of the will by adducing other evidence. Mr Kuhad has thus argued that the evidence of AW 3, Sub-Registrar before whom, the will had been registered on completion of all legal formalities, did as well assuredly establish the execution and attestation of the will as required by law and thus the High Court had erred in holding to the contrary. As the testimony of AW 3, the Sub-Registrar amply proved all the essentials of Section 63(*c*) of the Act, the learned trial court had validly granted the letter of administration, he maintained. Referring to the evidence of AW 1, Mr G.C. Kumar, Advocate, Mr Kuhad urged that the verification signed by him at the foot of the application for letter of administration did buttress, the correctness of the contents thereof and, thus the stray deviations in his version at the trial ought to have been discarded as inconsequential. In any case, the casualness of the testimony of the attesting witnesses does not adversely impact upon the validity of the will, as such conduct could have been the yield of an endeavour of the respondents to gain them over.

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**14.** While repudiating the conclusions of the High Court inferring denial of execution by the attesting witnesses and lack of animus on their part to attest the will as well as the suspicious circumstances noticed by it, to be perverse and opposed to the weight of the materials on record, the learned Senior Counsel insisted that having regard to the basic requisites of valid will in law, namely, free and sound disposing state of mind of the testator, understanding of the implication of the bequest, admission of execution thereof by him/her and due attestation thereof, the deductions of the High Court contrary thereto are indefensible and are thus liable to be negated.

**15.** Apart from contending that the respondents had failed to discharge their onus to prove their objections in the face of the overwhelming evidence of execution and attestation of the will in law, the learned Senior Counsel has urged that the High Court had fallen in error as well in acting upon the additional evidence adduced before it under Order 41 Rule 27 of the Civil Procedure Code (for short hereinafter referred to as "the Code"), without offering an opportunity to the appellant to counter such prayer.

**16.** The following decisions were relied upon to reinforce the above contentions: *Girja Datt Singh* v. *Gangotri Datt Singh*[2], *H. Venkatachala Iyengar* v. *B.N. Thimmajamma*[3], *Surendra Pal* v. *Saraswati Arora*[4], *Rabindra Nath Mukherjee* v. *Panchanan Banerjee*[5], *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*[6], *Pentakota Satyanarayana* v. *Pentakota Seetharatnam*[7] and *M.B. Ramesh* v. *K.M. Veeraje Urs*[8].

**17.** Per contra, Mr Singh has argued that it being apparent on the face of the records that neither the execution nor the attestation of the will involved had been proved by any

of the witnesses, the impugned judgment[1] is unassailable and thus the instant petition is liable to be dismissed in limine. The findings recorded by the High Court being founded on an in-depth scrutiny of the materials on record, are unmistakably conclusive and thus this Court would not embark upon a fresh appraisal thereof, he maintained. The learned Senior Counsel by referring to the evidence of the witnesses AW 1, AW 5 in particular has emphatically pleaded that as the appellant had failed to prove either the execution or the attestation of the will, Section 71 of the 1872 Act is inapplicable to the facts of the present case, and thus the testimony of AW 3 is wholly irrelevant. Without prejudice to this, the learned Senior Counsel has urged that the evidence of AW 3 as well falls short of the requirements of Section 63(*c*) of the Act and thus, cannot be invoked to the



advantage of the appellant. As the evidence of AW 1 and AW 5 does not attract the contingencies enumerated in Section 71 of the 1872 Act, the version of AW 3, in any view of the matter, is of no avail to the appellant, he asserted. The learned Senior Counsel maintained that even dehors the additional evidence laid before the High Court under Order 41 Rule 27 of the Code, the findings recorded in the impugned judgment and order[1] are sustainable in law and on facts and thus no interference therewith is called for.

**18.** Mr Singh relied on the decisions hereunder to endorse his arguments: *Jaswant Kaur* v. *Amrit Kaur*[9], *Neki Ram* v. *Ama Ram Godara*[10] and *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*[6].

**19.** The contentious pleadings and the assertions based thereon in the backdrop of the evidence as a whole have been duly analysed by us. The competing perspectives notwithstanding, the purport and play of Section 63 of the Act read with Sections 68 and 71 of the 1872 Act as deciphered by various judicial enunciations would have a decisive bearing on the process of resolution of the irreconcilable issues that demand to be addressed. It would thus be apt, nay, imperative to refer to these legal provisions before embarking on the appreciation of the evidence to the extent indispensible.

**20.** Section 63 of the 1925 Act and Sections 68 and 71 of the 1872 Act, are thus extracted hereunder for ready reference:

**20.1.** The Succession Act, 1925

"**63.** ***Execution of unprivileged wills***.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules—

(*a*) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(*b*) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(*c*) 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 acknowledgment 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 witness be present at the same time, and no particular form of attestation shall be necessary*."

(emphasis supplied)

**20.2.** The Evidence Act, 1872

"**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 not 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 provisions 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.

* * *

**71.** ***Proof when attesting witness denies the execution***.—If the attesting witness *denies or does not recollect* the execution of the document, *its execution may be proved by other evidence*."

(emphasis supplied)

**21.** As would be evident from the contents of Section 63 of the Act that to execute the will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as will. The section further mandates that the will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgment of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

**22.** It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a will under the Act are mandatory in nature, so much so that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

**22.1.** In the evidentiary context Section 68 of the 1872 Act enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of the court and capable of giving evidence proves its execution. The proviso attached to this section relaxes this requirement in case of a document, not being a will, but has been registered in accordance with the provisions of the Registration Act, 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied.

**22.2.** These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court



conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the

same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the court concerned and is capable of giving evidence.

**22.3.** Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinise the evidence adduced by the parties.

**22.4.** As hereinbefore mentioned, the appellant has endeavoured to prove the execution and attestation of the will, Ext. A-1 through AW 1 Mr G.C. Kumar and AW 5 Mr Budh Ram. He has examined as well AW 3 Mr A.K. Jain, Sub-Registrar, New Delhi before whom the will was registered on the very same day of its execution i.e. 22-10-1973.

**22.5.** Be that as it may, AW 1 Mr Kumar deposed on oath that he was enrolled as a lawyer in or about 1971 and used to assist his father who was a deed writer in Urdu language. The witness stated that he used to come to Tis Hazari Court for attending his cases. He testified to have seen the will (Ext. A-1) which he claimed had been drafted by him. He failed to remember as to whether the testator, Mr Nathu Ram Singh had come to his father in his presence or that his father had given him instructions to write the will. The witness even failed to remember whether the will had been given to him by his father or by the testator. He also could not recall as to whether he was present when the testator had signed the will. The witness, however, admitted that Ext. A-1 did bear his signatures as an attesting witness but deposed that due to lapse of time, he did not remember whether any other person was also present and had attested the document when he had signed it. He, however, stated to have been present in the Office of the Sub-Registrar when the will, Ext. A-1 was presented for registration. He also admitted to have signed the document on the backside thereof in the presence of the clerk of the office. The witness stated that he had also identified the testator before the Sub-Registrar but clarified that it was as per the prevalent practice for an identifying witness to do so. He added by stating that he had signed the document only in that capacity. The witness deposed further, that he could not say whether the thumb impression and the signatures of the testator at the time of the registration and appearing on the back of page one of the will had been obtained in his presence or not. He even failed to recall as to whether



the contents of the will had been read over and explained to the testator by him or by his father.

**22.6.** This witness (AW 1) was declared hostile and was cross-examined on behalf of the appellant in course whereof he deposed that he could not say whether he had signed the will in presence of the testator. When confronted, he admitted to have signed the certificate at the foot of the application under Section 276 of the Act praying for grant of letter of administration but denied to have done so as an attesting witness of the will. He stated instead that he had put his signatures as the appellant wanted him to do so. He even denied to have read the contents of the certificate. He refuted the suggestion that he had made a false statement in court being won over by the respondents.

**23.** AW 2 Shri Harswaroop has stated on oath that in November 1973, the testator had handed over to him one will with a direction to deliver it to the appellant upon his death. According to this witness, he did so after the demise of Mr Nathu Singh and handed over the will to the appellant. The witness stated to have seen the will (Ext. A-1), bearing the

signature of Mr Nathu Singh at several places. He claimed of being conversant with the handwriting and signature of Mr Nathu Singh. Admittedly, however, this witness is neither one to the execution of the will, nor the attestation thereof as obligated by law.

**24.** Before reverting to AW 3 in the ordinary sequence, the testimony of AW 5 figuring in the chain of attestation as presented by the appellant would be referred to. This witness, Mr Budh Ram claimed to have known the deceased testator. He stated on oath that he had seen the document (Ext. A-1) and identified his signatures thereon. He deposed to have signed the document in presence of the testator. He, however, hastened to add that he had not seen the testator signing the will. He denied to have appeared before the Sub-Registrar or to have identified the testator before the said authority. He stated that he had signed the document outside the office. Though, he asserted that the testator was mentally alert on the date on which he (witness) had signed the will, he clarified that he did not do so on the asking of the testator. The witness, however, admitted the presence of the testator at that time.

**25.** In cross-examination, the witness (AW 3) disclosed that the appellant was also present on the date on which he had signed the document and that he did not know the contents of the said document. He stated further that he had not been told that any will was executed by Mr Nathu Singh and that he was to attest it. Noticeably, this witness had not been declared to be hostile.

**26.** AW 3 Mr A.K. Jain who at the relevant time was the Sub-Registrar, New Delhi, on oath, stated that the will (Ext. A-1) had been presented before him for registration on 22-10-1973. According to this witness, the testator was identified before him by one Mr Budh Ram and Mr G.C. Kumar, Advocate. The witness stated that these persons did sign the document in his presence as identifying witnesses on the back of p. 1 of Ext. A-1. He deposed as well that the testator was read out the contents of the document and was



asked as to whether he was executing the will himself and that on his acknowledgment in the affirmative, he (witness) made his endorsement on the document in his own hand. While proving his endorsement, the witness iterated that the testator had admitted the execution of the will and also proved his (testator) signatures and thumb impressions thereon.

**27.** In his cross-examination, the witness (AW 3) stated that he did not know the testator personally and that he had made his endorsements on the will in the capacity of a registering authority only. He admitted that on the very same date, another document purporting to be a will executed by Mr Nathu Singh was also presented for registration for which the identifying witnesses had been the same.

**28.** The testimony of AW 4 Mr Ramchander Sharma is to the effect that the appellant had borne the expenses for the firewood of the funeral pyre of the deceased Nathu Singh. The testimony of AW 7 Mr M.S. Santosh Goel and AW 8 Mr Satish Kumar being insignificant vis-à-vis issues involved is not necessary to be dilated upon.

**29.** AW 6 Mr Jagdish Chander Sharma, the appellant, deposed that he had joined the deceased Mr Nathu Singh, in the year 1952 on the recommendation of his brother-in-law. He stated that the deceased entrusted him the duty to realise rent of his property and also to look after the matters pertaining to litigation in connection therewith. The witness stated that in the process, he was also made the attorney of the deceased and while realising rent used to accompany Mr Jaswant Singh, his (Nathu Singh) son. He referred to some differences between the father and the son with regard to alleged wrongdoings of the latter qua immovable properties resulting in institution of a suit by Mr Nathu Singh against Mr Jaswant Singh. According to this witness, Mr Jaswant Singh was inimically disposed towards him for which he made a complaint against him in his department for which he was placed under suspension. He stated that Mr Nathu Singh thereafter, in the

interest of his job, cancelled his power of attorney but asked him to look after the property and to realise the rents. According to the witness, Mr Jaswant Singh out of his persisting animosity caused a raid to be conducted in his house, and after the demise of Mr Nathu Singh did openly intimidate him of dire consequences. He denied to have visited the Office of the Sub-Registrar on 22-10-1973 and insisted that AW 1 Mr G.C. Kumar, Advocate had signed the certificate of the petition under Section 276 of the Act. He also asserted that AW 1 had attested the will after seeing the same. According to this witness, the relationship of Mr Nathu Singh with his sons was strained as they had been endeavouring to take over the possession of his properties. The witness identified the signature of the testator on the will, Ext. A-1.

**30.** In his detailed cross-examination, the witness (AW 6) referred to several legal proceedings, civil and criminal instituted by the testator which according to him, however, did fizzle out with time without yielding any adverse verdict against him. While mentioning that Mr Nathu Singh used to dispose of his properties by executing wills, the witness also mentioned about



litigations between him and his son Mr Jaswant Singh. He admitted that at the time of death of the testator, his wife, sons, daughters and several grandchildren were alive. In categorical terms, he stated that the testator had no quarrel with his wife and daughters. He also mentioned about gift of properties by Mr Nathu Singh to his sons.

**31.** The testimonies of RW 1 Mr Ramesh Kumar, RW 2 Mr M.S. Rao and RW 4 Mr Ramesh Chander Sharma being not of any determinative significance are not being referred to. RW 3 Mr Narayan Singh Saini, son of the testator deposed that his (testator) family comprised of his wife, Smt Chanderwati, three sons and three daughters. He stated that during the lifetime of the testator, he had executed three separate gift deeds conveying property to each of his sons. That Mr Nathu Singh had a host of grandchildren was also stated by this witness. He mentioned in particular that the testator had a very cordial relationship with the children till he died so much so that they along with the grandchildren used to congregate on all family functions. He averred that the testator had appointed the appellant as his attorney for collecting rent from his tenants. Thereby, the testator had also authorised the appellant to prepare documents with regard to the properties which he intended to sell from time to time. The witness deposed that the testator eventually had to cancel the power of attorney as the appellant was found indulging in interpolation of tenancies without his consent and with mala fide intention misappropriated his properties. He stated further that at the time of his death, the testator was aged ninety years. He reiterated that the will in question was deceitfully inserted amongst other documents to procure the signature of the testator.

**32.** The version of RW 5 Mr Gulab Chand and RW 6 Mr Bhupesh Gupta is also of not any consequence vis-à-vis the issues involved. RW 7 Mr Ram Chander Saini deposed on oath that he used to represent Mr Nathu Singh in various legal proceedings including one instituted against the appellant. He denied the suggestion that Mr Nathu Singh had a very cordial relationship with the appellant.

**33.** RW 8 Mr Rajinder Singh, grandson of Mr Nathu Singh, in his statement on oath expressed his ignorance about any litigation between his grandfather and his father Mr Jaswant Singh.

**34.** The fascicule of the evidence viewed as hereinabove qua the execution and the attestation of the will thus can be compartmentalised into two slots. The first comprising of the testimony of AW 1 Mr G.C. Kumar and Mr Budh Ram and the other of AW 3 Mr A.K. Jain, Sub-Registrar, New Delhi.

**35.** Evident it would be from the deposition of AW 1 that though he owned to be the

author of the document, having drafted it, he could not recall whether he did so on the instruction of the testator. He did not remember as well as to whether the will had been handed over by him to his father or the testator. He failed to recollect also whether he was present when the testator had signed the will, Ext. A-1. Though, he admitted that the document did



bear his signatures as an attesting witness at two places being Points "A" and "B", he could not recall whether there was any other person also present and had similarly attested the document when he had signed at Point "A". He was categorical in stating that he was present in the Office of the Sub-Registrar when the will was presented for registration and had signed on the back page thereof but clarified that he did so only as an identifying witness. He could not say as to whether the signatures and thumb impressions of the testator at Points "Y" and "Y-1" on the back page of the will had been obtained in his presence or not. He also could not state whether the contents of the will were read over and explained to the testator by him or his father. He was candid to assert that he was not sure as to whether he had signed the will in presence of the testator or not or whether the testator had signed the document in his presence. He was unequivocal in stating that he had signed the certificate at the foot of the petition for grant of letter of administration as he was asked to do so by the appellant and he did not do so in the capacity of an attesting witness to the will. He even denied to have gone through the contents of the certificate before subscribing thereto.

**36.** The evidence of AW 1, as a whole is, therefore clearly deficient vis-à-vis with the requirements of Section 63(*c*) of the Act. Noticeably, he does not deny either the execution of the will or has not failed to recollect the said event. In clear terms, this witness stated that though he had signed the document, he was not sure that he did so in the presence of any other person attesting the same. He could not also remember as to whether he was present when the testator had signed the will. He clarified in no uncertain terms that his signatures on the will before the Sub-Registrar were only as an identifying witness. His is thus not a stance of either denial of the execution of the will or of failure to recollect such execution as contemplated in Section 71 of the 1872 Act.

**37.** To cap it all, AW 1 even endeavoured to represent that he had signed the certificate at the foot of the application for the letter of administration not voluntarily but on being insisted upon by the appellant. He was categorical in his testimony to the effect that he had not signed the certificate acknowledging the fact that he was an attesting witness. The evidence of AW 1 Mr G.C. Kumar, Advocate thus does not inspire confidence to be acted upon in proof of the execution and attestation of the will, Ext. A-1.

**38.** AW 5 Mr Budh Ram was categorical in owning his signatures on the will at Points "C" and "Y-2" and claimed to have to put the same in the presence of the testator. He, however, was unhesitant in testifying that he had not seen the testator signing the document at Points "B" and "Y-1". He denied to have appeared before the Sub-Registrar or to have identified the testator before the said authority. His unambiguous statement on oath is that he had signed the document outside the Office of the Sub-Registrar. His evidence as well cannot be construed to be one of denial of execution of the will. This witness, as his evidence would clearly demonstrate, also did neither falter nor was equivocal so as to suggest that he failed to recollect the execution of the document. The conditions, precedent for application of



Section 71 of the 1872 Act, therefore, are also not available in the context of the evidence

of this witness.

**39.** On a cumulative assessment of the evidence of AW 1 and AW 5, we are of the unhesitant opinion that Section 71 of the Act, is not invocable in the facts and circumstances of the case so as to permit the propounder/appellant to resort to any other evidence to prove the execution and attestation of the will involved as comprehended therein. The account of the relevant facts bearing on the execution and attestation of the will as provided by these witnesses though is thoroughly inadequate qua the prescriptions of Section 63(*c*) of the Act does not amount to denial of execution or failure to recollect the said event as contemplated in this provision.

**40.** The above notwithstanding, expedient it would be, in the face of the protracted controversy, to examine as well the evidence of AW 3, Mr A.K. Jain, Sub-Registrar, New Delhi, refuge whereof has been sought for by the appellant under Section 71 of the Act, in the alternative.

**40.1.** This witness, to reiterate, was the Sub-Registrar at Asaf Ali Road, New Delhi on the date on which, as he had testified, the will was laid before him for registration. Incidentally, it was on the very same date of its execution i.e. 22-10-1973. He deposed that the testator Mr Nathu Singh was identified before him by AW 1 Mr G.C. Kumar, Advocate and Mr Budh Ram AW 5. According to this witness, these two persons did sign the document in his presence as identifying witnesses on the back of p. 1 thereof. He stated further that the contents of the will were read out to the testator and he was asked as to whether he did execute the same himself. The witness deposed that to this, the testator acknowledged in the affirmative whereupon he (the witness) endorsed the same. The witness proved his endorsements at the portions encircled "S" and "S-1". He also stated that the testator had signed and put his thumb marks as "Y" and "Y-1" in his presence in acknowledgment of the execution of the will by him.

**40.2.** In cross-examination, the witness admitted that he had made his endorsements in the capacity of a registering authority only. While admitting that on the very same date another document, purporting to be a will executed by the same testator had also been presented before him for registration, he admitted that both the identifying witnesses of the will involved were also the identifying witnesses of the other will.

**41.** A plain perusal of the will presented in course of the arguments would reveal that the space therein meant to mention the age and the date of execution thereof had remained vacant till it was produced for registration. This was though as claimed by the appellant, the document had already been executed by the testator by putting his signature at Point "B" on both the pages along with the signatures of the attesting witnesses, AW 1 and AW 5 as well. On the back of p. 1 of the will, there are two signatures and thumb impressions "Y" and "Y-1" said to be of the testator beneath the stamped endorsements in the official pro forma signed by AW 3. On the same page,



the signature of AW 1 Mr G.C. Kumar, Advocate and thumb impression of AW 5 Budh Ram are also available at Points "X" and "Y-2", respectively.

**42.** Noticeably, though the official endorsements, as above seem to suggest that those signified admission of execution of the document by the testator before AW 3, the evidence of this witness on oath, does neither prove nor demonstrate in unmistakable terms that both the identifying witnesses had seen the testator put his signatures and thumb impressions for the execution of the will. His testimony also does not establish that the witnesses, AW 1 and AW 5 had put their signature/thumb impression before the Sub-Registrar in presence of the testator. This assumes significance not only as per the non-relaxable mandate of Section 63(*c*) of the Act but also for the version of AW 1 that he had signed the document at the time of registration only as an identifying witness and that he

did not remember as to whether the thumb impressions and the signatures of the testator at "Y" and "Y-1" were obtained in his presence or not. The testimony of AW 5 to the effect that his signature as well as thumb impression at "Y-2" though made in presence of the testator was taken outside the Sub-Registrar's Office is significant as the same, if accepted, would mean that he had not seen the testator signing the will either at Point "B" or putting his signature and thumb impression at "Y" and "Y-1" on the back side of p. 1 of the will. To reiterate, he stated on oath that he had not identified the testator before the Sub-Registrar. Evidently, AW 3 was not present at the time of initial execution of the will and thus could not have witnessed the said event.

**43.** In the overall perspective thus, the testimony of AW 3, in our estimate, does not conform to the imperatives of Section 63(*c*) of the Act. His narration on affirmation at the trial, does not either by itself meet the essentialities of Section 63(*c*) of the Act or can be construed to be a supplement of the evidence of AW 1 and AW 5 to furnish the proof of execution and attestation of the will as enjoined by law.

**44.** The evidence of AW 1, AW 3 and AW 5, analysed collectively or in isolation, does not evince *animo attestandi*, an essential imperative of valid attestation of a will. As Section 71 of the 1872 Act by no means can be conceived of to be a diluent of the rigour of Section 63 of the Act, the testimony of these witnesses falls short of the probative content to construe Ext. A-1 to be a validly executed and attested will as envisaged in law.

**45.** In *Girja Datt Singh*[2], the testimony of the two attesting witnesses was found wanting in credibility for which the propounder did fall back on the admission of the testator about the execution of the will involved at the time of registration in presence of two persons Mr Mahadeo Prasad and Mr Nageshur, who also had appended their signatures at the foot of the endorsement of the Sub-Registrar. These signatures were contended to be enough to prove due attestation of the will. It was held that mere signatures



of these two persons appearing at the foot of the endorsement of registration could not be presumed to have been made as attesting witnesses or in the capacity of attesting witnesses and absence of *animo attestandi* was underlined.

**46.** This Court in *H. Venkatachala Iyengar*[3] while dilating on the statutory requisites of valid execution of a will, observed that unlike other documents this testamentary instrument speaks from the death of the testator and by the time when it is produced before a court, the testator had departed from his temporal state and is not available to own or disown the same. It was thus emphasised that this does introduce an element of solemnity in the decision on the question as to whether the document propounded is proved to be the last will and testament of the departed testator. In this context, it was emphasised that the propounder would be required to prove by satisfactory evidence that (*i*) the will was signed by the testator, (*ii*) he at the relevant time was in a sound and disposing state of mind, (*iii*) he understood the nature and effect of the dispositions, and that (*iv*) he put his signature to the document of his own free will. It was observed that ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, the court would be justified in making a finding in favour of the propounder signifying that he/she had been able to discharge his/her onus to prove the essential facts. The necessity of removal of the suspicious circumstances attendant on the execution of the will, however, was underlined as well. That no hard-and-fast or inflexible rule can be laid down for the appreciation of the evidence to this effect was acknowledged.

**47.** That a propounder has to demonstrate that the will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he

understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in the presence of the two witnesses who had attested it in his presence and in the presence of each other, in order to discharge his onus to prove due execution of the said document was reiterated by this Court amongst others in *Surendra Pal*[4]. It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a will may be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the propounder, unnatural, improbable and unfair bequests indicative of lack of testator's free will and mind, etc. In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by any



reasonable and prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the same, and on his failure, probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.

**48.** In *Jaswant Kaur*[9] this Court held that suspicion generated by the distrustful circumstances cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory when the will was made or that those like the wife and children of the testator, who would normally receive their due share in the estate, were disinherited because the testator might have had seen reasons for excluding them. It was underscored that it was obligatory for the propounder to remove all legitimate suspicions before the document could be accepted as the last will of the testator.

**49.** In *Rabindra Nath Mukherjee*[5] this Court entertained the view that the witnesses to the will, if interested for the propounder is perceived to be a suspicious circumstance, the same would lose significance if the document is registered and the Sub-Registrar does certify that the same had been read over to the executor who on doing so admits the contents.

**50.** In *Pentakota Satyanarayana*[7] the testator P. Srirammurthy had admitted the execution of the will involved. He, however, expired while the suit was pending. The will was registered and the signature of the testator was identified by two witnesses whereupon the Sub-Registrar had signed the document. In this textual premise, it was held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement did amount to sufficient attestation within the meaning of the Act. It was held as well that the endorsement of the Sub-Registrar that the executant had acknowledged before him the execution, did also amount to attestation. The facts revealed that the will was executed before the Sub-Registrar on which the signature of the testator as well as signature and the thumb impression of the identifying witnesses were taken by the said authority, whereafter the latter signed the deed. In general terms, it was observed that registration of the will per se did not dispense with the need of proving its execution and the attestation in the manner as provided in Section 68 of the 1872 Act. It was enunciated as well that execution consisted of signing a document, reading it over and understanding and completion of all formalities necessary for the validity of the act involved. The facts as obtained in this decision are distinguishable from those in hand and are incomparable on many counts. No analogy can be drawn from this case to conclude that the testimony of AW 3 even if read with that of AW 1 and AW 5

can sum up to prove valid execution and attestation of the will as stipulated by Section 63 (*c*) of the Act.

**51.** *Janki Narayan Bhoir*[6] witnessed a fact situation where one of the attesting witnesses of the will, though both were alive at the relevant time, was produced to prove the execution thereof. The scribe of the document was also examined. The attesting witness deposed that he had not seen the other witness present at the time of execution of the will and further he did not remember as to whether he along with the latter were present either when the testator had put his signature on the will or that he had identified the person who had put the thumb impression on the document. The issue raised before this Court was that the evidence of the said attesting witness had failed to establish the attestation of the will by the other attesting witness who though available had not been examined and thus the will was not proved. The contrary plea was that though Section 63 of the Act required attestation of a will by at least two witnesses, it could be proved by examining one attesting witness as per Section 68 of the 1872 Act and by furnishing other evidence as per Section 71 thereof.

**52.** While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of the 1872 Act vis-à-vis a document required by law to be compulsorily attested, it was held in *Janki Narayan Bhoir case*[6] that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the will was not sufficient and that attestation thereof was also to be proved as required by Section 63(*c*) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a will, in terms of Section 63(*c*) of the Act viz. attestation by two attesting witnesses in the manner as contemplated therein. It was exposited that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the will by the other witness, his testimony would fall short of attestation of the will by at least two witnesses for the simple reason that the execution of the will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under Section 63 of the Act. It was held that where the attesting witness examined to prove the will under Section 68 of the 1872 Act fails to prove the due execution of the will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.



**53.** Qua Section 71 of the 1872 Act, it was held in *Janki Narayan Bhoir case*[6] to be in the form of a safeguard to the mandatory provision of Section 68 to cater to a situation where it is not possible to prove the execution of the will by calling the attesting witnesses though alive i.e. if the witnesses either deny or do not recollect the execution of the will. Only in these contingencies by the aid of Section 71, other evidence can be furnished. It was further clarified that Section 71 of the 1872 Act would have no application to a case where one attesting witness who alone had been summoned fails to prove the execution of the will and the other attesting witness though available to prove the execution of the same, for reasons best known, is not summoned before the court.

**54.** This Court in *Janki Narayan Bhoir case*[6] underlined that Section 71 of the 1872 Act was meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility and cannot be let down without any other opportunity of proving the due execution of the document by other evidence. That, however, Section 71 cannot be invoked so as to absolve the party of his obligation under Section 68 read with Section 63 of the Act and to liberally allow him, at his will or choice, to make available or not, necessary witness otherwise available and amenable to jurisdiction of the court, was highlighted in emphatic terms. That no premium upon such omission or lapse so as to enable him to give a go-by to the mandates of law relating to proof of execution of a will, as contemplated by these statutory provisions, was precisely underlined. In the facts and circumstances of that case, as the second attesting witness though available had not been summoned, the benefit of Section 71 of the 1872 Act was not extended. The will was thus held to be not proved for the failure of the attesting witness so produced, to testify as per the ordainment of Section 63(*c*) of the Act.

**55.** In *M.B. Ramesh*[8], one Smt Nagammanni had executed a will. One of the attesting witnesses C. Basavaraje Urs, in his evidence, stated about the presence of the other witness (naming him), the testatrix, himself and one Sampat Iyengar to be present when the will was written. He deposed further that one Mr Narayanmurti was the scribe. This witness proved that the will was signed by Smt Nagammanni and that he had signed the document too in her presence. On a consideration of the totality of the circumstances emerging from the narration of the attesting witness, this Court held that the omission on the part of this witness to specifically state about the signature of the other witness on the will in presence of the testatrix did amount to his failure to recollect the said fact and thus the deficiency could permissibly be replenished by the aid of Section 71 of the 1872 Act. In no uncertain terms,



this Court did hold that the issue of validity of the will was to be considered in context of the attendant singular facts.

**56.** The legal propositions adumbrated by the judicial pronouncements, adverted to hereinabove, do not admit of any exception. However, these are of no avail to the appellant herein in the conspectus of present facts. The evidence of the witness AW 1, AW 3 and AW 5 does not exhibit either denial of the execution of the will or their failure to recollect the said phenomenon and thus, does not attract the applicability of Section 71 of the 1872 Act.

**57.** A will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer res integra, that it carries with it an overwhelming element of sanctity. As understandably, the testator/testatrix, as the case may be, at the time of testing the document for its validity, would not be available, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation. This is more so, as many a times, the manner of dispensation is in stark departure from the prescribed canons of devolution of property to the heirs and legal representatives of the deceased. The rigour of Section 63(*c*) of the Act and Section 68 of the 1872 Act is thus befitting the underlying exigency to secure against any self-serving intervention contrary to the last wishes of the executor.

**57.1.** Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of

Section 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68



of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(*c*) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

**57.2.** Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing. This underlying principle is inter alia embedded in the decision of this Court in *CIT* v. *Ajax Products Ltd.*[111]

**58.** The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the will, Ext. A-1, by denying his wife, children and grandchildren who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is ex facie unnatural, unfair and improbable thus reflecting on the testator's cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument.

**59.** In the wake of the determinations made hereinabove, we are of the unhesitant opinion that the challenge laid in the instant appeal lacks in merit.

**60.** The High Court, in our estimate, has appropriately appreciated the law and the facts in the right perspective and the impugned decision[1] does not call for any interference. The appeals are dismissed. No cost.

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† Arising out of SLPs (C) Nos. 36311-12 of 2014. From the Judgment and Order dated 2-7-2014 of the High Court of Delhi at New Delhi in FAO No. 279 of 2007

[1] 2014 SCC OnLine Del 3433 : (2014) 211 DLT 632

[2] AIR 1955 SC 346

[3] AIR 1959 SC 443

[4] (1974) 2 SCC 600

[5] (1995) 4 SCC 459

[6] (2003) 2 SCC 91

[7] (2005) 8 SCC 67

[8] (2013) 7 SCC 490 : (2013) 3 SCC (Civ) 576

[9] (1977) 1 SCC 369 : (1977) 1 SCR 925

[10] (2001) 9 SCC 503 : 2002 SCC (L&S) 55

[111] AIR 1965 SC 1358

**2016 SCC OnLine Chh 1252 : (2016) 168 AIC 367 : (2017) 1 CGLJ 173**

**In the High Court of Chhattisgarh at Bilaspur**

(BEFORE DEEPAK GUPTA, C.J.)

Awadhesh Pratap Singh son of Shri. Gajadhar Singh, aged about 55 years, Resident of Chiruldih Ward No. 2, Raipur, Tahsil and District Raipur ..... Appellant

*v.*

1. Ashok Upadhyay son of Shri. Rampal Upadhyay, aged about 20 years, resident of Karbala para, Raipur, Tahsil and District Raipur, Chhattisgarh.
2. Laxmi Narayan Dev Sthan Prabandhak Committee, Songarhi, District Bhandara, Maharashtra ..... Respondents

For Appellant : Shri. G.D. Vaswani, Advocate.

For Respondent No. 1 : Shri. Vikram Dixit, Advocate.

For Respondent No. 2 : Shri. Narendra Kumar Vyas, Advocate.

Miscellaneous Appeal No. 6 of 2006

Decided on September 16, 2016

The Judgment of the Court was delivered by

**DEEPAK GUPTA, C.J.**:— This appeal has a long and chequered history. One will (Exhibit P/1) was executed by one Smt. Thakur Dei Bai widow of Late Shri. Thakur Prasad Sharma in favour of Ashok Upadhyay-Respondent No. 1, son of Shri. Rampal Upadhyay. This will is purported to be executed on 05.03.1990 whereby the testator has bequeathed her entire property in favour of legatee-Ashok Upadhyay. It is not disputed that Ashok Upadhyay was born in 1977 and at that time when this will was executed, he was a minor. Smt. Thakur Dei Bai died on 05.04.1990 soon after execution of the will. Thereafter, Ashok Upadhyay through his father Rampal Upadhyay filed a petition under Section 276 of the Indian Succession Act, 1925 (hereinafter called 'the Act') for grant of probate of the will executed by Thakur Dei Bai on 05.03.1990. It is not disputed that even at the time this petition was filed, he was a minor.

**2.** This petition for grant of probate was rejected by the Trial Court on two grounds, one, that the Petitioner had not given the details of all the immovable properties and probate had been prayed only in respect of movable properties and secondly, two rival wills had been set up, one by Appellant herein and one by Respondent No. 2-Laxmi Narayan Dev Sthan Prabandhak Committee, who were non-applicants before the Trial Court. Ashok Upadhyay by that time had turned major and he himself filed an appeal being Miscellaneous Appeal No. 794 of 2001 before this Court. This appeal was disposed of on 22.06.2005 and though this Court held that there was a defect in the petition for grant of probate inasmuch as non-mentioning of all the properties was an improper act, the Court went on to hold that this fact was not sufficient to entail dismissal of the application for grant of probate and that the probate Court should have asked the Appellant to furnish detailed particulars. With regard to second objection, this Court, after referring to the judgment of the Apex Court in *Ishwardeo Narain Singh* v. *Smt. Kamta Devi* (AIR 1954 SC 280) held that the probate Court had nothing to do with the title of the property but is only concerned with the question as to whether the document put forward is the last will and executed according to law. Thereafter, this Court made reference to the judgment of Madhya Pradesh High Court and Sections 213 and 214 of the Act and held that though it is not necessary to seek

probate but the executor is entitled to seek probate if he so desires and there is no restriction in granting probate for both the properties together. The appeal was disposed of in the following terms:

> "12. The appeal is partly allowed, the impugned order passed by the Court below is set aside and the case is remanded back with a direction to decide that application filed by the appellant under Section 276 of the Indian Succession Act on merit in accordance with law."

**3.** After remand, the probate application was allowed and the will set up by Respondent-Ashok Upadhyay was held to be duly executed. This order is under challenge before this Court.

**4.** Shri. Vaswani, learned counsel for the Appellant basically raised three issues, (i) minor cannot be an executor in a will; (ii) a minor cannot apply for grant of probate, and; (iii) the application for grant of probate was itself misconceived and therefore, no order can be passed a a later stage even if the minor has attained majority. It was also urged that though the legatee has been termed as an executor in terms of will, nothing was to be done by him and therefore, his appointment as executor is only an ornamental language and nothing more.

**5.** On the other hand, Shri. Vikram Dixit, learned counsel for the Respondent No. 1 submits that even if there be some error at the time of filing of the execution petition, that irregularity is removed due to the fact that Ashok Upadhyay attained majority in the meanwhile and this Court had passed an order after Ashok Upadhyay had attained majority remanding the case back to the trial Court. He submits that the probate has rightly been granted and this order could not be interfered with by this Court.

**6.** Shri. Vyas, learned counsel for the Respondent No. 2 submits that in pursuance to another will of Smt. Thakur Dei Bai all the properties have already been registered in the name of the Trust and therefore, the will has been given effect to and the properties are in possession of the Trust.

**7.** Section 244 of the Act reads as follows:

> "**244. Administration, during minority of sole executor or residuary legatee**.—When a minor is sole executor or sole residuary legatee, letters of administration, with the Will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the Will shall be granted to him."

**8.** The opening word of this Section clearly envisages that a minor can also be the sole executor of a will. The opening words of this Section are "when a minor is sole executor or sole residuary legatee" and therefore, the Act itself envisages that a minor can be appointed as executor. The reason behind this is not far to seek. A person may execute a will at a young age. He may appoint his minor son or daughter as the executor expecting that he will live a long life. The will comes into operation only after death of the testator. No one is sure about his/her death. Therefore, a minor can be appointed as an executor in terms of Section 244 of the Act. However, Section 244 itself makes it clear that when the minor is the sole executor, no probate can be granted in his favour but only letters of administration can be granted in favour of the guardian of the minor with the will being annexed thereto. When the minor attains majority and not before that, probate of will shall be granted to the executor/legatee. In this case, reading of the will shows that the testator had appointed Ashok Upadhyay as the sole executor.

**9.** It is urged by Shri. Vasvani that the sole executor was also sole legatee under the will and nothing was to be done by him and therefore, his appointment as sole executor is meaning less. I am unable to agree with this submission of Shri. Vaswani. Even in a case where there is only one legatee and all the properties goes to the

legatee and nothing further is required to be done, it is the option of the testator whether to appoint executor or not. It is not necessary that the executor in all cases must be the legatee. Sometimes, persons who are not beneficiaries under the will are also appointed and can be appointed as executors. The work which the executor is to do is to deal with the estate of the deceased in such a manner that the last wish of the testator as expressed in his/her will is given effect to in letter and spirit. Even when there is one legatee, the testator may leave behind debts. It is the duty of the executor to discharge such debts and then make payment of the remaining property of the deceased to the sole beneficiary under the will. Once the testator has appointed an executor, it is neither for the Court nor for any other person to say that the executor has not been appointed or that appointment of the executor is meaningless.

**10.** That brings us to the last question as to whether the Court could have granted probate in favour of the executor-Ashok Upadhyay in view of the fact that he was a minor at the time of filing of the petition for grant of succession certificate. There can be no manner of doubt that the application for grant of succession was not property constituted when it was filed. However, even on the basis of this very document, the Court could have granted letters of administration in favour of the guardian of the minor and it was not necessary to file separate petition for grant of letters of administration. One cannot also ignore the fact that the executor attained majority in 1995. The case was decided against him on 18.10.2001 and thereafter, he filed an appeal before this Court. That appeal was entertained by this Court and when that appeal was heard, no objection was raised by the present Appellant that no probate can be granted in favour of Ashok Upadhyay. This Court remanded the matter which would lead to a prima facie conclusion that this Court felt that the probate Court only has to look into the application on merits but not on the question whether the executor was minor or major when the probate was granted. Ashok Upadhyay had already turned into a major. He was almost 28 years old at that time. Therefore, even if there was any irregularity in the application, by passage of time that irregularity has been cured as by the time probate was granted, the executor had become major.

**11.** As far as merits are concerned, the probate Court is only to decide whether the will was validly executed or not. It does not decide the question of title. Whether it is the trust or the executor or any other person who is legally entitled to the properties will have to be decided by the competent civil Court when the matter is raised before it. However, in view of the fact that the will was executed by Smt. Thakur Dei Bai in favour of Ashok Upadhyay, he was entitled to grant of probate.

**12.** In view of the above discussion, the appeal is dismissed.

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**2018 SCC OnLine Kar 3828 : ILR 2019 Kar 2035 : AIR 2018 Kar 100 : (2018) 3 Kant LJ 67 : (2018) 183 AIC 810 : (2018) 2 KCCR 1391 : (2018) 2 AIR Kant R 540 : (2018) 3 ICC 215 : (2019) 5 RCR (Civil) 70**

**In the High Court of Karnataka**[†]

(BEFORE JOHN MICHAEL CUNHA, J.)

Laxman

*Versus*

Basavanni and Another[*]

M.F.A. No. 14805/2007 (ISA)

Decided on January 24, 2018

**A) INDIAN SUCCESSION ACT, 1925 (for brevity 'the Act') — SECTION 222 — Probate only to appointed executor — Probate shall be granted only to an executor appointed by the Will — A universal legatee is not entitled for grant of probate —**

*Held* :

Probate could be granted only to an executor appointed by the Will either expressly or by necessary implication. It is now well settled that the right of an executor to apply for probate of the Will is personal to the executor. Though the executor may renounce probate, but in view of the provision of Section 222 of the Act, no discretion is left with the Court to grant probate to any person other than the executor. Even an universal or residuary legatee is not entitled for grant of probate. - In order to entitle for grant of probate, the Will must contain expressly or by implication the name of the executor, otherwise no probate can be granted to any person. This legal position is now well settled.

(Para 7)

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**B) INDIAN SUCCESSION ACT, 1925 (for brevity 'the Act') — SECTIONS 222 AND 232 — Probate only to appointed executor and grant of administration to universal or residuary Legatees — Universal legatee and residuary legatee — Meaning of —**

*Held* :

A universal legatee is one to whom the whole of the estate of the testator is disposed under the Will; whereas a residuary legatee is a person to whom the surplus or residuary of the property is bequeathed under the Will. - A conjoint reading of Sections 222 and 232 of the Act, makes it abundantly clear that probate could be granted only to an executor appointed under the Will either expressly or by implication. All other persons who claim under the Will as legatees or beneficiaries including an universal legatee or residuary legatee are entitled only for grant of Letters of Administration with Will annexed.

(Para 7)

*Further Held* :

(a) In the absence of any express or implied appointment of a person as executor, merely on the basis of the bequests made in their favour as legatees or beneficiaries, they do not derive a right to grant of probate. - In the instant case, the petitioners appear to have filed the petition on the supposition that they are appointed as executors under the

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Will in question. There is no recital in the Will appointing the petitioners as executors either expressly or by implication. In the absence of any such appointment as executors, by virtue of the above provisions, the petitioners are not entitled for grant of probate. Petitioners are mere legatees or beneficiaries under the Will Ex. P-8. There is no pleading or evidence whatsoever to show that the petitioners are appointed as executors by implication. In the absence of any such material, the order passed by the Court below granting probate to the petitioners can not be sustained.

(Paras 7, 8)

(b) Another material defect which renders the grant invalid is that the jurisdiction of the Probate Court is invoked by the petitioners by making an application under Section 276 of the Act. Section 276 of the Act deals with the contents of the petition for probate. The petitioners are neither appointed as executors under the Will nor have they proved that they answer the character of executors by implication. As such, they were not entitled to present the petition under Section 276 of the Act. Since the petitioners have sought to prove the Will as legatees, they were required to make an application for grant of Letters of Administration with the Will annexed by making necessary application under Section 278 of the Act. Even if the petition made before



the Court is construed as one under Section 278 of the Act, still the petition falls short of the requirements prescribed under Section 278 of the Act.

(Para 9)

**C) INDIAN SUCCESSION ACT, 1925 (for brevity 'the Act') — SECTIONS 278 AND 263 — Petition for Letters of Administration and cause for revocation of the probate or letters of administration —**

*Held* :

Section 278 of the Act prescribes the procedure for making a petition for Letters of Administration - From the provision of Section 278 of the Act, it is clear that in addition to all other requirements prescribed therein the petitioner is also required to state the family or the other relatives of the deceased and their respective residences in the petition. In the instant case, except making the appellant herein as the sole respondent, the other legal heirs of the deceased are not arraigned as parties to the petition. In this context, it may be necessary to refer to Section 263 of the Act which provides for revocation or annulment of probate or letters of administration for just cause. As per this provision, the grant of probate or letters of administration may be revoked or annulled for just cause. The explanation of Section 263 of the Act enumerates just causes which could lead to the revocation of the Will.

(Para 10)



*Further Held* :

Illustration (ii) to Section 263 of the Act, clearly states that when the grant is made without citing the parties, who ought to have been cited, the same furnishes a just cause for revocation or annulment of the probate or letters of administration. In the instant case, undisputedly the testator had left behind five sons and three daughters. Even in the petition, the petitioners have given the genealogy, wherein the names of other legal heirs find place. But the petitioners have not made all the legal heirs of the testator parties to the proceedings nor have they taken any citation to the legal heirs of the deceased. It is also noticed that even general citation has not been issued calling upon the interested persons to see the proceeding or to appose the grant.

(Para 11)

**D) INDIAN SUCCESSION ACT, 1925 (for brevity 'the Act') — SECTION 235 — Citation before grant of administration to legatee other than universal or residuary —**

*Held* :

Section 235 of the Act requires publication of special citation before grant of Letters of Administration to legatees other than universal or residual legatees. - Under the Act, citations are of two kinds, (i) Compulsory citation or Special citation; (ii) Discretionary citation or general citation.



The citation under Section 235 of the Act is compulsory unlike in Section 283 of the Act where the District Judge is conferred with the discretion to issue citation before grant of probate or letters of administration.

(Para 12)

*Further Held* :

In the instant case, the petitioners do not answer the description of either the universal legatee or residuary legatee. Therefore, it was incumbent on the petitioners to distinctly state in the petition the family or the relatives of the deceased and their respective residences as laid down in Section 278 of the Act and also to take out special citation to them as required under Section 235 of the Act. As the petitioners have failed to comply with these statutory requirements, the entire proceedings are rendered defective and vitiated.

(Para 12)

**E) INDIAN SUCCESSION ACT, 1925 (for brevity 'the Act') — SECTION 295 — Procedure in contentious cases —**

*Held* :

Once the proceedings become contentious, it is not open for the Court to proceed with the matter in a summary way and allow the parties to prove the Will in common form. The Section provides that the proceedings shall take as nearly as possible form of a regular suit. The Section



does not require that when the petition becomes contentious, it should be registered as a suit. But having assumed the form of a suit, all the incidents of the suit undoubtedly have to be followed as prescribed in Section 268 of the Act.

(Para 14)

*Further Held* :

(a) From the nature of the dispute raised by the respondent, it is evident that the proceedings had become contentious and therefore the Probate Court was required to convert the petition into a regular suit as required under Section 295 of the Act.

(Para 13)

(b) Normally, the proceedings become contentious on filing the caveat supported by affidavit disputing the execution of the Will or the mental capacity of the testator to execute the Will. In the instant case, the respondent having specifically disputed the execution of the Will and the mental capacity of the deceased, the Court below was required to convert the petition into a regular suit and therefore deal with the matter by framing issues and pronouncing the Judgment as provided under Code of Civil Procedure, 1908. The Court below has failed to follow these mandatory legal and procedural requirements which has vitiated the grant.

(Para 14)



(c) It is also noticed that the petitioners have failed to comply with the requirements of Section

52 of the Karnataka Court Fees and Suits Valuation Act, 1958. Affidavit of valuation has not been filed. No direction appears to have been given to the grantee to execute the bond or to file the Accounts and Inventory, as required under Section 291 of the Act. All these defects render the impugned order unsustainable in law.

(Para 15)

(d) The defects noted above are not mere procedural irregularities but the blatant violations of substantive law. For these reasons, the impugned order is liable to be set- aside. The proceedings conducted before the Learned District Judge being defective in form and substance, keeping in mind the legal and proprietary rights of the petitioners and to safeguard the interest claimed by them under the Will in question, the matter requires to be remanded to the Learned Judge for fresh consideration.

(Para 16)

**Miscellaneous First Appeal is Allowed.**

Advocates who appeared in this case:

Sri R.M. Kulkami and Smt. Hemalekha K S, Advocates for Appellant;

Kum. Bhagyashree, Advocate for Sri Ramachandra Mali, Advocate for R land R2.



The Judgment of the Court was delivered by

**JOHN MICHAEL CUNHA, J.**:— This appeal is directed against the Order dated 04.09.2007 passed by the Principal District Judge, Belagavi in P & SC No. 5/2002 ordering probate of the Will dated 20.06.2001 in favour of the respondents.

**2.** The facts leading to the appeal are as follows:

(i) The respondent Nos. 1 & 2 (hereinafter referred to as petitioner Nos. 1 & 2) propounded a Will said to have been executed by their father late Satteppa Hanchinamani on 20.06.2001 bequeathing to them half share each in the house property bearing No. 563 and open space bearing No. 351 situated at Yamakanamaradi in Hukkeri Taluk. In the petition, the appellant herein was arrayed as the sole respondent. He opposed the petition inter alia contending that the petition was bad for non-joinder of necessary parties; the deceased Satteppa was not in sound state of mind to do any transaction much less to execute the alleged Will. The Will propounded by the petitioners is a created document in collusion with the witnesses and the Doctor who has falsely certified that the deceased was in sound state of mind. It is a created and concocted document. The respondent also denied that the deceased Satteppa was the exclusive owner in actual and physical possession of the properties involved in the Will.



(ii) The Trial Court recorded the evidence of the GPA of the petitioners, as well as the evidence of the medical officer and the attesting witnesses and the scribe to the Will. The original Will was marked as Ex. P-8. Rebutting the above evidence, the appellant herein examined himself as RW-1 and produced in evidence 10 documents in support of his contention. Upon hearing the parties and considering the material produced by the parties by the impugned order, the

Probate Court directed issuance of the probate to the petitioners in accordance with law.

(iii) Feeling aggrieved by the impugned order, the sole respondent before the Court below has preferred this appeal.

**3.** I have heard the Learned Counsel appearing for the parties and have scrutinized the original Will, as well as the oral and documentary evidence on record.

**4.** The main contention urged by the Learned Counsel for the appellant is that, PW-1 was the Power Of Attorney of the petitioners. He was not competent to speak about the due execution of the Will and hence his evidence could not have been taken into consideration in proof of the Will propounded by the petitioners. He has further contended that, the deceased was aged 86 years at the time of his death. The Will in question is stated to have been executed by him 25 days earlier to his death. He was not in a fit physical and mental condition to execute the said Will. He further contended that the appellant/respondent had specifically disputed the execution of the Will, as well as the mental capacity of the testator to execute the



said Will. In view of the said contentions, the proceedings had become contentious and therefore, it was incumbent on the Court below to convert the petition into a regular suit as prescribed in Section 295 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act', for brevity); but the Trial Court proceeded to dispose of the petition in a summary way contrary to the provisions of the Act; therefore, the entire proceedings are vitiated and are liable to be set aside. With regard to the findings recorded by the Trial Court, the Learned Counsel would contend that the petitioners have failed to prove the due execution of the Will. The doctor examined by them is an interested witness and hence he pleads that the impugned Judgment be set-aside and the probate ordered to the petitioners be cancelled.

**5.** Refuting the above contentions, the Learned Counsel appearing for the petitioners would submit that, merely because the deceased was advanced in age cannot be a reason to hold that he was not in a fit condition to execute the Will or that the Will is shrouded with suspicion. The execution of the Will is duly proved by examining the attesting witnesses as well as the scribe to the said Will. Their evidence has not been shaken in the cross-examination. The mental condition of the deceased is proved by the evidence of the medical officer who has certified that the testator was in fit condition to execute the Will. Therefore there is absolutely no error or infirmity in the findings recorded by the Probate Court on the question of the execution of Will. The Learned Counsel further contends that even with regard to the bequests made under the Will, the testator has explained the reasons for disinheriting the respondent. The GPA was



one of the sons of the testator. Since the petition was presented under Section 276 of the Act in their capacity as the executors, it was not necessary for the petitioners to make all the legal heirs of the testator as parties to the proceedings. The order passed by the Probate Court is in accordance with the provisions of the Indian Succession Act and hence, she seeks for the dismissal of the appeal.

**6.** After hearing the parties and on perusal of the impugned order and the records of the proceedings, the questions that fall for consideration are:—

*(i) Whether the Court below was justified in granting probate to the petitioners in respect of the last Will and Testament of late Satteppa Hanchinamani dated 20.06.2001?*

*(ii) Whether the petition filed under Section 216 of the Indian Succession Act seeking probate of the aforesaid Will dated 20.06.2001 is in accordance with the provisions of the Indian Succession Act?*

**7.** Having regard to the provisions of the Indian Succession Act, 1925, I am of the view that the probate ordered by the Court below is defective in form and substance and is contrary to the specific provisions of the Act and therefore can not be sustained for the following reasons:



(i) Section 222 of the Act, specifies the persons to whom probate can be granted. It reads as under:

"S. ***222. Probate only to appointed executor—***

*(1) Probate shall be granted only to an executor appointed by the Will.*

*(2) The appointment may be expressed or by necessary implication."*

The above provision in unambiguous terms lays down that probate could be granted only to an executor appointed by the Will either expressly or by necessary implication. It is now well settled that the right of an executor to apply for probate of the Will is personal to the executor. Though the executor may renounce probate, but in view of the above provision, no discretion is left with the Court to grant probate to any person other than the executor. Even an universal or residuary legatee is not entitled for grant of probate. This position becomes clear from the reading Section 232 of the Act, which is extracted here below:

***"S.232. Grant of administration to universal or residuary legatees - When***

*(a) the deceased has made a Will, but has not appointed an executor, or*



*(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or*

*(c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased,*

*an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole state, or of so much thereof as may be unadministered."*

(ii) A conjoint reading of Sections 222 and 232 of the Act, makes it abundantly clear that probate could be granted only to an executor appointed under the Will either expressly or by implication. All other persons who claim under the Will as legatees or beneficiaries including an universal legatee or residuary legatee are entitled only for grant of Letters of Administration with Will annexed. Auniversal

legatee is one to whom the whole of the estate of the testator is disposed under the Will; whereas a residuary legatee is a person to whom the surplus or residuary of the property is bequeathed under the Will. But in the absence of any express or implied appointment of a person as executor, merely on the basis of the bequests made in their favour as legatees or beneficiaries, they do not derive a right to grant of probate. From the above provisions, it follows that in order to entitle



for grant of probate, the Will must contain expressly or by implication the name of the executor, otherwise no probate can be granted to any person. This legal position is now well settled.

**8.** In the instant case, the petitioners appear to have filed the petition on the supposition that they are appointed as executors under the Will in question. I have carefully gone through the said Will at Ex. P-8.1 do not find any recital therein appointing the petitioners as executors either expressly or by implication. In the absence of any such appointment as executors, by virtue of the above provisions, the petitioners are not entitled for grant of probate. Petitioners are mere legatees or beneficiaries under the Will Ex. P-8. There is no pleading or evidence whatsoever to show that the petitioners are appointed as executors by implication. In the absence of any such material, the order passed by the Court below granting probate to the petitioners, in my view is opposed to the specific provisions of the Act and therefore, cannot be sustained.

**9.** Another material defect which renders the grant invalid is that the jurisdiction of the Probate Court is invoked by the petitioners by making an application under Section 276 of the Act. Section 276 of the Act deals with the contents of the petition for probate. But as already discussed above, the petitions are neither appointed as executors under the Will nor have they proved that they answer the character of executors by implication. As such, they were not entitled to present the petition under Section 276 of the Act. Since the petitioners have sought to prove the Will as legatees, they were required to make



an application for grant of Letters of Administration with the Will annexed by making necessary application under Section 278 of the Act. Even if the petition made before the Court is construed as one under Section 278 of the Act, still the petition falls short of the requirements prescribed under Section 278.

(i) Section 278 of the Act prescribes the procedure for making a petition for Letters of Administration. It reads as follows:

***S. 278. Petition for letters of administration—***

*(1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—*

*(a) the time and place of the deceased's death.*

*(b) the family or other relatives of the deceased, and their respective residences;*

*(c) the right in which the petitioner claims;*

*(d) the amount of assets which are likely to come to the petitioner's hands;*

*(e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and*



*(f) when the application is to the District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.*

*(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."*

**10.** From the above provision it is clear that in addition to all other requirements prescribed therein the petitioner is also required to state the family or the other relatives of the deceased and their respective residences in the petition. In the instant case, as already stated above, except making the appellant herein as the sole respondent, the other legal heirs of the deceased are not arraigned as parties to the petition. In this context, it may be necessary to refer to Section 263 of the Act which provides for revocation or annulment of probate or letters of administration for just cause. As per this provision, the grant of probate or letters of administration may be revoked or annulled for just cause. The explanation to Section 263 of the Act enumerates just causes which could lead to the revocation of the Will. The said explanation reads as under:



"S.263 xx xx xx

*Explanation— Just cause shall be deemed to exist where—*

*(a) the proceedings to obtain the grant were defective in substance; or*

*(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; or*

*(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or*

*(d) the grant has become useless and inoperative through circumstances; or*

*(e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.*

**11.** Illustration (ii) to Section 263 of the Act, clearly states that when the grant is made without citing the parties, who ought to

have been cited, the same furnishes a just cause for revocation or annulment of the probate or letters of administration. In the instant case, undisputedly the testator had left behind five sons and three daughters. Even in the petition, the petitioners have given the genealogy, wherein the names of other legal heirs find place. But the petitioners have not made all the legal heirs of the testator parties to the proceedings nor have they taken any citation to the legal heirs of the deceased. It is also noticed that even general citation has not been issued calling upon the interested persons to see the proceeding or to appose the grant.

**12.** Under the Act, citations are of two kinds, (i) Compulsory citation or Special citation (ii) Discretionary citation or general citation. Section 235 of the Act requires publication of special citation before grant of Letters of Administration to legatees other than universal or residual legatees. Section 235 of the Act reads as under:

> ***"S. 235. Citation before grant of administration to legatee other than universal or residuary*** *- Letters of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration."*



The citation under this Section is compulsory unlike in Section 283 of the Act where the District Judge is conferred with the discretion to issue citation before grant of probate or letters of administration. In the instant case as already discussed above, the petitioners do not answer the description of either the universal legatee or residuary legatee. Therefore, it was incumbent on the petitioners to distinctly state in the petition the family or the relatives of the deceased and their respective residences as laid down in Section 278 of the Act and also to take out special citation to them as required under Section 235 of the Act. As the petitioners have failed to comply with these statutory requirements, the entire proceedings are rendered defective and vitiated.

**13.** Another procedural irregularity noted in the proceedings conducted by the Court below is that right from the inception the respondent had disputed the mental capacity of the testator and has also disputed the due execution of the Will. From the nature of the dispute raised by the respondent, it is evident that the proceedings had become contentious and therefore the Probate Court was required to convert the petition into a regular suit as required under Section 295 of the Act. Section 295 reads as follows:

> ***"S. 295. Procedure in contentious cases*** *- In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the*



*Code of Civil Procedure, 1908 (5 of 1908), in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."*

**14.** In view of the above provision, once the proceedings become contentious, it is not open for the Court to proceed with the matter in a summary way and allow the parties to prove the Will in common form. The Section provides that the proceedings shall take as nearly as possible form of a regular suit. The Section does not require that when the petition becomes contentious, it should be registered as a suit. But having assumed the form of a suit, all the incidents of the suit undoubtedly have to be followed as prescribed in Section 268 of the Act. Normally, the proceedings become contentious on filing the caveat supported by affidavit disputing the execution of the Will or the mental capacity of the testator to execute the Will. In the instant case, the respondent having specifically disputed the execution of the Will and the mental capacity of the deceased, the Court below was required to convert the petition into a regular suit and therefore deal with the matter by framing issues and pronouncing the Judgment as provided under Code of Civil Procedure. The Court below has failed to follow these mandatory legal and procedural requirements which in my view, has vitiated the grant.



**15.** It is also noticed that the petitioners have failed to comply with the requirements of Section 52 of the Karnataka Court Fees and Suit Valuation Act. Affidavit of valuation has not been filed. No direction appears to have been given to the grantee to execute the bond or to file the Accounts and Inventory, as required under Section 291 of the Act. All these defects in my view render the impugned order unsustainable in law.

**16.** The defects noted above are not mere procedural irregularities but blatant violations of substantive law. For these reasons, the impugned order is liable to be set aside. The proceedings conducted before the Learned District Judge being defective in form and substance, keeping in mind the legal and proprietary rights of the petitioners and to safeguard the interest claimed by them under the Will in question, the matter requires to be remanded to the Learned Judge for fresh consideration. Hence, the following:

**ORDER**

The appeal is allowed.

The impugned order dated 20.06.2001 passed by the Principal District Judge, Belagavi in P & SC No. 5/2002 and the consequent grant of probate is set aside.



The matter is remitted to the Court of the Learned District Judge with liberty to the petitioners to seek amendment of the petition or to make fresh petition in accordance with the provisions of the Indian Succession Act, 1925 and the Rules Governing Probate and Succession Matters, 1966, within three months from the date of this order. In such event, the Learned District Judge shall dispose of the petition strictly in accordance with the provisions of the above Act and Rules.

———

† Dharwad Bench

* M.F.A. No. 14805/2007 (ISA) Dated : 24th day of January, 2018.

**2022 SCC OnLine Gau 152 : (2022) 3 Gau LR 172 : AIR 2022 Gau 40 : (2022) 3 GLT 644**

**In the High Court of Gauhati**

(BEFORE PARTHIV JYOTI SAIKIA, J.)

Ravinder Duggal @ Ravinder Kumar Duggal ... Appellant;

*Versus*

Rajeshkaliaandors. ... Respondents.

Test. App. No. 6 of 2010

Decided on January 21, 2022

**Indian Succession Act, 1925 — Will — Probate — Will is an obstruction in the line of succession — Petition for probate — Conscience of Court of law must be cleared by the propounder by adducing cogent and reliable evidence — Propounder himself took a prominent part in the execution of the Will, conferring substantial benefit to him — Must be treated as a suspicious circumstance attending the execution of the Will — Propounder is required**



to remove the said suspicion by clear and satisfactory evidence — Mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it

**[Para 33].**

Advocates who appeared in the case:

Mr. J.C. Gaur and Mr. D. Mazumdar for the appellant.

Mr. A.R. Shome and Mr. S. Chauhan for the respondents.

Cases referred : Chronological

*Bharpur Singh* v. *Shamsher Singh*, (2009) 3 SCC 687.

*Meenakshiammal* v. *Chandrasekaran*, (2005) 1 SCC 280.

*Daulat Ram* v. *Sodha*, (2005) 1 SCC 40.

*Kalyan Singh* v. *Chhoti*, (1990) 1 SCC 266.

*Indu Bala Bose* v. *Manindra Chandra Bose*, (1982) 1 SCC 20.

*H. Venkatachala Iyengar* v. *B.N. Thimmajamma*, AIR 1959 SC 443

**JUDGMENT**

**1.** Heard Mr. D. Mazumdar, the learned senior counsel appearing for

the appellant as well as Mr. S. Chauhan, the learned counsel representing the respondent.

**2.** This is an appeal under section 299 of the Indian Succession Act, 1925, against the judgment dated 15.12.2009 passed by the Additional District Judge, FTC No. 2, Kamrup (M) at Guwahati in Probate Title Suit No. 3/2005 rejecting the prayer of the appellant for grant of probate in respect of **a** Will.

**3.** Smt. Jagadish Kumari Duggal (now deceased) was a State Government employee and in the year 1992, she retired from service. Late Jagadish Kumari Duggal was unmarried. She had one sister named Prakash Duggal and one brother late Manohar Duggal pre-deceased her. He died unmarried during the lifetime of late Jagadish Kumari Duggal.

**4.** The sister Smt. Prakash Duggal has two daughters, namely, Saroj Bala and Kanchan Mala. All of them lived together. Saroj Bala has four children and Kanchan Mala has three children.

**5.** In the month of July 2004, when Jagadish Kumari Duggal was aged about 70 years, she went to Punjab for pilgrimage. Before leaving for Punjab, Jagadish Kumari Duggal had given one closed envelope to Kanchan Mala.

**6.** On 29.12.2004, Saroj Bala got a telephonic information from an undisclosed source that Jagadish Kumari Duggal had expired on 9.9.2004. She was also informed that her last rites were also performed at Punjab.

**7.** After getting the aforesaid news, on 3.1.2005, Kanchan Mala had



opened the envelope which was given to her by Jagadish Kumari Duggal. She found that the envelope contained a Will. By that Will, Jagadish Kumari Duggal had bequeathed her property consisting of a plot of land measuring 2 kathas within Guwahati city and an RCC building standing thereon and another property at Shillong, Meghalaya in favour of Saroj Bala.

**8.** Saroj Bala, accordingly, filed a petition for granting probate.

**9.** When Notices were issued, the present appellant appeared and contested the claim petition of Saroj Bala. The appellant filed a written statement and also filed a counter-claim stating that on 17.9.2004, just 21 days before her death, Jagadish Kumari Duggal had executed a Will in his favour bequeathing the aforementioned properties to him.

**10.** The appellant denied that late Manohar Duggal, the brother of late Jagadish Kumari Duggal had died unmarried. The appellant claimed that Manohar Duggal was married and had a son and the said

son died at the age of 14 years and, thereafter, Manohar Duggal and his wife died.

**11.** The appellant further denied that in the month of July 2004 late Jagadish Duggal had gone to Punjab for pilgrimage. The appellant has claimed that in the month of July 2004, late Jagadish Duggal was seriously ill and, therefore, she called him to look after her. The appellant has stated that he immediately came down to Guwahati and had taken late Jagadish Kumari Duggal to Delhi and Amritsar for better medical treatment.

**12.** According to the appellant, late Jagadish Kumari Duggal actually expired on 9.10.2004 at Amritsar, Punjab, not on 9.9.2004, as claimed by Saroj Bala. He further claimed that he had performed the last rites of late Jagadish Kumari Duggal at Punjab.

**13.** On the basis of the pleadings of both sides, the learned trial court had framed the following issues:

1. Whether Will dated 28.5.2004 alleged to have been executed by the deceased in favour of plaintiff is a genuine document on which the probate can be granted to the plaintiff?
2. Whether the deceased handed over the possession of her house or scheduled property to the plaintiff prior to her disposition from Guwahati to Amritsar in July 20th?
3. Whether the plaintiff had entered into the house of deceased in January 2005 illegally?
4. Whether the defendant is entitled to probate of the Will dated

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17.9.2004 executed by the deceased in favour of the defendant at Amritsar?

5. Whether the defendant is entitled to recovering of possession of deceased's property from the plaintiff?
6. To what relief/reliefs the parties are entitled to?

**14.** During the trial of the case, the appellant had examined witnesses whereas Saroj Bala did not adduce any evidence in support of her prayer for probate. Since Saroj Bala did not adduce any evidence in support of her prayer for probate, her prayer was dismissed by the court below. On the other hand, on consideration of the evidence adduced by the appellant, the trial court dismissed the counter-claim.

**15.** I have carefully gone through the evidence on record. The only point for determination in this appeal is as to whether the execution of the Will dated 17.9.2004 was proved by the appellant.

**16.** The requirement of proof of a Will is the same as any other document, except that the evidence tendered for proving a will should additionally satisfy the requirement of section 63 of the Succession Act, 1925 and section 68 of the Evidence Act, 1872.

**17.** The appellant has stated in his evidence that on 27.3.2004, he was telephonically informed that Jagadish Kumari Duggal was suffering from serious ailments and was admitted at Nemcare Hospital, Guwahati. After getting the news, he immediately came down to Guwahati and met Jagadish Kumari Duggal in the hospital. The appellant has stated that after arriving at the hospital, he came to know from the doctors that Jagadish Kumari Duggal was suffering from cancer. On 30.7.2004 Jagadish Kumari Duggal was discharged from the hospital and on 8.8.2004 the appellant took her to Delhi and, thereafter, to Amritsar. On 17.9.2004 Jagadish Kumari Duggal had executed the Will in his favour, bequeathing her properties at Guwahati and Shillong and after 21 days she expired.

**18.** The second witness is Tapan Kumar Gupta, a resident of Shillong. He holds the power of attorney of Rabindra Duggal. On the basis of the said Power of Attorney he filed a suit.

**19.** The third witnesses Kulbhushan Duggal. He is the brother of Rabindra Duggal. He claimed to be a close relative of Jagadish Kumari Duggal.

**20.** It is an admitted fact that on 17.9.2004, when Jagadish Kumari Duggal had executed the Will, she was seriously suffering from cancer and only after 21 days she expired.



**21.** Now, at this stage section 59 of the Indian Succession Act, 1925 is relevant. Section 59 states that every person of "sound mind" not being a minor may dispose of his property by Will. Was late Jagadish Kumari Duggal in a "sound state of mind" on 17.9.2004?

**22.** In order to buttress his argument, Mr. Mazumdar has relied upon the following judgments:—

(i) *H. Venkatachala Iyengar* v. *B.N. Thimmajamma*, AIR 1959 SC 443

(ii) *Daulat Ram* v. *Sodha*, (2005) 1 SCC 40

(iii) *Meenakshiammal* v. *Chandrasekaran*, (2005) 1 SCC 280

(iv) *Bharpur Singh* v. *Shamsher Singh*, (2009) 3 SCC 687

**23.** In *H. Venkatachala Iyengar* (supra), the Supreme Court has held

as under:

> "18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proyed to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature



and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the

Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the

document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own freewill in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

**24.** In the case of *Daulat Ram* (supra) it has been held as under:

"10. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirements of section 63 of the Indian Succession Act, 1925. In order to assess as to whether the will has been validly executed and is a genuine document, the propounder has to show that the will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so."

**25.** In *Meenakshiammal* (supra), it is held as under:

"21. In the case of *Madhukar D. Shende* v. *Tarabai Aba Shedage*, (2002) 2 SCC 85 : (2002) 2 SCC 85 : AIR 2002 SC 637 it has been held as follows : (SCC pp. 91-92, paras 8-9)

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of section 63 of the Succession Act, 1925 and section 68 of the Evidence Act, 1872. If

after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was. duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained



mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in *R.* v. *Hodge*, (1838) 2 Lewis CC 227 may be apposite to some extent:

> "The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict — positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will

may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

**26.** In the case of *Bharpur Singh* (supra), the Apex Court has held as under:

"23. Suspicious circumstances like the following may be found to be surrounded in the execution of the will:

(i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.



(ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.

(iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

(iv) The dispositions may not appear to be the result of the testator's free will and mind.

(v) The propounder takes a prominent part in the execution of the will.

(vi) The testator used to sign blank papers.

(vii) The will did not see the light of the day for long.

(viii) Incorrect recitals of essential facts.

**24.** The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the will had been duly proved or not. It may be true that the will was a registered one, but the same by itself would

not mean that the statutory requirements of proving the will need not be complied with."

**27.** The trial court held that the will executed in favour of the present appellant is a suspicious one.

**28.** From the materials available in the record, the suspicious circumstances in respect of the will dated 17.9.2004 can be categorized as under:

(i) the natural legal heirs were deprived;

(ii) the relationship between the appellant and Jagadish Kumari Duggal has not been disclosed;

(iii) Jagadish Kumari Duggal was admittedly suffering from terminal cancer at the time of execution of the Will in favour of the appellant;

(iv) the appellant does not properly know the antecedents of the sisters and the other close relatives of Jagadish Kumari Duggal;

(v) the appellant took a prominent role in execution of the will date 17.9.2004.

**29.** The learned trial court has held that the will dated 17.9.2004 was executed in a suspicious circumstance. On this point, I have decided to agree with the decision of the trial court. In this case, the most important question that arises is as to what is the relationship of the appellant with late Jagadish Kumari Duggal. The appellant never disclosed his relationship with her. So, this court has sufficient reasons to hold that the appellant-Ravinder Duggal is a stranger.



**30.** It was the duty of the appellant, being the propounder of the will, to prove that the will was not executed in a suspicious circumstance. There is no dispute that the 70-year old testator late Jagadish Kumari Duggal was terminally ill on 17.9.2004 and she died only 21 days after execution of the said will.

**31.** Another aspect of the matter that requires to be mentioned herein is that the attesting witnesses are the appellant and his brother but they never disclosed that they are brothers. Rather they concealed that fact.

**32.** It appears from the evidence on record that the appellant does not know the details about the family of late Jagadish Kumari Duggal.

**33.** A Will is an instrument by which a person makes a disposition of his/her property to take effect after his/her death and this act itself by

its own measure ambulatory and revocable during his/her lifetime. A will is an obstruction in the line of succession. When a petition for probate is under consideration in a court of law, the conscience of the court must be cleared by the propounder by adducing cogent and reliable evidence. In the case in hand, it is clearly visible that the propounder himself had taken a prominent part in the execution of the will, which confers a substantial benefit to him. If the propounder has taken a prominent part in the execution of the will and is to receive substantial benefit under it, that itself must be treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. The mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it.

**34.** In *Kalyan Singh* v. *Chhoti*, (1990) 1 SCC 266, the Supreme Court has held—

> "20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the. nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion. on the nature of the evidence adduced by the party.

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> 21. In *H. Venkatachala Iyengar* v. *S.N. Thimmajamma*, 1959 Supp (1) SCR 426 : AIR 1959 SC 443, Gajendragadkar, J, as he then was, has observed that although the mode of proving a will did not ordinarily differ from that of proving any other document, nonetheless it requires an element of solemnity in the decision on the question as to whether the document propounded is proved as

the last will and testament of departed testator. Where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Where there are suspicious circumstances, the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. These principles have been reiterated in the subsequent decision of this court in *Rani Purnima Devi* v. *Kumar Khagendra Narayan Dev*, (1962) 3 SCR 195 : AIR 1962 SC 567 and *Indu Bala Bose* v. *Manindra Chandra Bose*, (1982) 1 SCC 20."

**35.** In *Indu Bala Bose* v. *Manindra Chandra Bose*, (1982) 1 SCC 20, the Supreme Court has held as under:

"7. This court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by section 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations -see *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, *AIR 1964 SC 529; H. Venkatachala Ialyengar* v. *B.N. Thimmajamma*, *AIR 1959 SC 443 : 1959 Supp (1) SCR 426 : 1959 SCJ 507; Rani Purnima Devi* v. *Kumar Khagendra Narayan Dev*, *AIR 1962 SC 567 : (1962) 3 SCR 195 : (1962) 1 SCJ 725.*

8. Needless to say that any and every circumstance is not a "suspicious" circumstance. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."

**36.** Reverting to the case in hand, the circumstances categorized hereinbefore clearly show that the will dated 17.9.2004 executed by late Jagadish Kumari Duggal was executed in a suspicious circumstances. The appellant being the propounder of the will failed to remove the doubts by clear and satisfactory evidence

**37.** This court is of the opinion that the learned trial court correctly appreciate the evidence on record and arrived at a correct finding.

**38.** Under the said premised reasons, the present appeal is devoid of merit. Hence, the appeal is dismissed and disposed of.

**39.** Send back the LCR.

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MANU/SC/1035/2023

**Equivalent/Neutral Citation:** 2023(251)AIC65, AIR2023SC4680, 2023 (161) ALR 731, 2023(6)BLJ38, 2023 (4) CCC 20 , 2023(4)CivilCC(S.C.), 2023(4)ICC801, 2023 INSC 847, 2023(4)RCR(Civil)376, 2024 163 RD429, 2023(4)RLW2879(SC), 2023(12)SCALE697, (2023)9SCC734

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 3351 of 2014 (Arising out of SLP (C) No. 17115/2010)

**Decided On:** 21.09.2023

Meena Pradhan and Ors. **Vs.** Kamla Pradhan and Ors.

**Hon'ble Judges/Coram:**
*Abhay Shreeniwas Oka, J.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Ashutosh Garg, AOR*

*For Respondents/Defendant: Sumeer Sodhi, AOR and Shreya Singh, Adv.*

**Case Note:**
**Civil - Will - Letter of administration - Testator before his death executed Will in presence of two witnesses - After death of testator, Plaintiffs filed case for receiving testator's dues wherein succession certificate was issued in favour of Respondent No. 1 - Proceedings stood concluded with reversal of order by High Court - Pursuant to this order of High Court, proceedings for grant of Probate or Letter of Administration were initiated by both Plaintiffs - Defendants challenged execution of Will in favour of Plaintiffs - Civil Court while relying on testimony of attesting witness upheld validity of Will in favour of beneficiaries and issued Letter(s) of Administration - Said order was challenged by Defendants before High Court - High Court confirmed order of Civil Court wherein it upheld validity of Will and issued Letters of Administration - Hence, present appeal - Whether there were sufficient grounds that warrant interference with concurrent findings of fact, upholding validity of Will.**

**Facts:**

**Testator, seven days before his death executed a Will in the presence of two witnesses. After the death of the testator, the Plaintiffs filed a case for receiving the testator's dues wherein a succession certificate was issued in favour of Respondent No. 1 by Additional District Judge. Proceedings stood concluded with the reversal of such an order by the High Court of Madhya Pradesh in terms of order quashing the entire proceedings, observing the authenticity and genuineness of the Will, in existence to be adjudicated in appropriate proceedings. Pursuant to this order of the High Court, proceedings for a grant of Probate or Letter of Administration were initiated by both the Plaintiffs. The Defendants challenged the execution of the Will in favour of the Plaintiffs, also raising an objection about the testator having married Plaintiff No. 1. The Civil Court, while relying on the testimony of an attesting witness upheld the validity of the Will in favour of the beneficiaries and accordingly issued Letter(s) of Administration. The said order was challenged by the Defendants. The High Court in repelling the Defendant's contention of**

**the Will being a forged document, by discussing the relevant statutory provisions and decisions of this Court, affirmed the order of the Civil Court.**

**Held, while dismissing the appeal:**

**(i) It had to be proved that the testator signed the Will out of his own free Will, at the time of execution he had a sound state of mind, he was aware of the nature and effect thereof and the Will was not executed under any suspicious circumstances.[11]**

**(ii) Coming to the facts of the case, a careful perusal of the relevant material on record and applying the provisions and the case laws it was evident that the Will was duly executed by the testator in the presence of witnesses out of his free Will in a sound disposing state of mind and the same stands proven through the testimony of one of the attesting witnesses, who was examined by the Civil Court. This witness categorically states that the testator executed the Will in question and, both he and the testator signed the Will in the presence of each other.[12]**

**(iii) As far as allegations made by the Defendants are concerned, this court was of the opinion that there was no evidence on record to conclude that the deceased was not in a fit or stable mental condition at the time of execution of a Will, or that a Will was executed under suspicious circumstances, or the presence of any element of undue influence.[13]**

**Ratio Decidendi:**
***Since the testator/testatrix, at the time of testing the document for its validity, would not be available for deposing as to the circumstances in which the Will came to be executed, stringent requisites for the proof thereof have been statutorily enjoined to Rule out the possibility of any manipulation.***

**JUDGMENT**

**Abhay Shreeniwas Oka, J.**

**1.** The facts, in brief, giving rise to the present appeal are as under: There was one Bahadur Pradhan who married Meena Pradhan (Defendant-2/Appellant No. 1 herein) with whom he had two children namely, Ravi Kumar (Defendant-3/ Appellant No. 2 herein) and Ku. Sushma (Defendant-4/Appellant No. 3 herein). Allegedly, he divorced his first wife and solemnised another marriage with Kamla Pradhan (Plaintiff-1/Respondent No. 1 herein) who gave birth to a child namely Ku. Ritu (Plaintiff-2/Respondent No. 2 herein). Bahadur Pradhan (hereinafter referred to as 'testator'), seven days before his death (07.08.1992), executed a Will on 30.07.1992 in the presence of two witnesses namely Lok Bahadur Thapa (not examined) and Suraj Bahadur Limboo (PW-2).

**2.** After the death of the testator, the Plaintiffs filed a case for receiving the testator's dues wherein a succession certificate was issued in favour of Respondent No. 1 by VI Additional District Judge, Jabalpur vide order dated 05.07.1995. Proceedings stood concluded with the reversal of such an order by the High Court of Madhya Pradesh in terms of order dated 17.11.1995, quashing the entire proceedings, observing the authenticity and genuineness of the Will, in existence to be adjudicated in appropriate proceedings.

**3.** Pursuant to this order of the High Court, proceedings Under Section 276 of the Indian Succession Act 1925 (hereinafter referred to as 'the Succession Act') for a grant of Probate or Letter of Administration were initiated by both the Plaintiffs. The Defendants challenged the execution of the Will in favour of the Plaintiffs, also raising an objection about the testator having married Plaintiff No. 1.

**4.** The Civil Court, Jabalpur, MP vide order dated 11.12.2001, in Succession Case No. 22/98 while relying on the testimony of an attesting witness, namely, Suraj Bahadur Limboo (PW2) upheld the validity of the Will in favour of the beneficiaries and accordingly issued Letter(s) of Administration. The said order was challenged by the Defendants. The High Court in repelling the Defendant's contention of the Will being a forged document, by discussing the relevant statutory provisions and decisions of this Court, affirmed the order of the Civil Court.

**5.** Hence, the instant Appeal against the final judgment dated 25.03.2010 in Misc. Appeal No. 382 of 2002 passed by the High Court of Madhya Pradesh, confirming the order of the Civil Court in Succession Case No. 22/98 wherein it upheld the validity of the Will and issued Letters of Administration.

**6.** The issue that arises for our consideration is whether there are sufficient grounds that warrant interference with the concurrent findings of the fact, upholding validity of a Will.

**7.** Before delving into the facts of the case, it is pertinent to reproduce the relevant provisions dealing with the validity and execution of the Will.

Section 63 of the Indian Succession Act, 1925

Execution of unprivileged wills- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) 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 acknowledgement 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 witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of Indian Evidence Act 1872

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: xxx

**8 .** Thus, a bare reading of the above-mentioned provisions would show that the requirements enshrined Under Section 63 of the Succession Act have to be categorically complied with for the execution of the Will to be proven in terms of Section 68 of the Evidence Act.

**9 .** A Will is an instrument of testamentary disposition of property. It is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. It speaks from the death of the testator. Since the testator/testatrix, at the time of testing the document for its validity, would not be available for deposing as to the circumstances in which the Will came to be executed, stringent requisites for the proof thereof have been statutorily enjoined to Rule out the possibility of any manipulation.

**10.** Relying on H. Venkatachala Iyengar v. B.N. Thimmajamma, MANU/SC/0115/1958 : 1959 Supp (1) SCR 426 (3-Judge Bench), Bhagwan Kaur v. Kartar Kaur, MANU/SC/1671/1994 : (1994) 5 SCC 135 (3-Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, MANU/SC/1155/2002 : (2003) 2 SCC 91(2-Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, MANU/SC/0366/2009 : (2009) 4 SCC 780 (3-Judge Bench) and Shivakumar v. Sharanabasappa, MANU/SC/0395/2020 : (2021) 11 SCC 277 (3-Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

i. The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

iii. A Will is required to fulfil all the formalities required Under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will, at least one of the

attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;

x. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind'[1]. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc.

**11.** In short, apart from statutory compliance, broadly it has to be proved that (a) the testator signed the Will out of his own free Will, (b) at the time of execution he had a sound state of mind, (c) he was aware of the nature and effect thereof and (d) the Will was not executed under any suspicious circumstances.

**12.** Coming to the facts of the case, a careful perusal of the relevant material on record and applying the provisions and the case laws it is evident that the Will was duly executed by the testator in the presence of witnesses out of his free Will in a sound disposing state of mind and the same stands proven through the testimony of one of the attesting witnesses, namely, Suraj Bahadur Limboo who was examined as PW-2 by the Civil Court. This witness categorically states that the testator executed the Will in question and, both he and the testator signed the Will in the presence of each other.

**13.** As far as allegations made by the Defendants are concerned, we are of the opinion that there is no evidence on record to conclude that the deceased was not in a fit or stable mental condition at the time of execution of a Will, or that a Will was executed under suspicious circumstances, or the presence of any element of undue influence.

**14.** Thus, in the case at hand, we are of the opinion that both the courts below have rightly noted that the relevant provisions were complied with, and given the well-reasoned order upholding the validity of the Will, the same does not warrant interference of this Court.

**15.** As far as the allegations of second marriage and bigamy are concerned, we refrain from entertaining such submissions as the same is not a relevant factor in deciding the main lis, which is confined to the validity of the Will.

**16.** This Appeal is bereft of any merit and hence dismissed. Since the validity of the Will stands proven according to settled principles of law, consequential benefits be disbursed accordingly.

**17.** Interlocutory Application(s) if any, stand disposed of. No order as to costs.

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[1]Shivakumar (supra)