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SUPREME COURT CASES

(1975) 1 SCC

entitled to any compensation higher than what was awarded by the Land Acquisition Officer. We should add that in one case, that is M. F. A. No. 83 of 1972, it is admitted on behalf of the respondents that a mistake had crept in in mentioning Rs.2,000 instead of Rs.2,500 an acre. In that appeal alone, that is C. A. No. 1703 of 1973, the judgment of the High Court will be modified to substitute the sum of Rs.2,000 for Rs.2,500. Otherwise, the appeals will stand dismissed. In the circumstances of this case there will be no order as to costs.

(1975) 1 Supreme Court Cases 160

(Before H. R. Khanna and A. C. Gupta, JJ.)

C. KRISHNA PRASAD

..

Appellant :

Versus

C. I. T., BANGALORE

..

Respondent.

Civil Appeal No. 1553(N) of 1970. decided on November 12, 1974

Income Tax — Hindu Undivided Family — A single member, held, cannot constitute a H.U.F. for the purposes of Income Tax — “Family” — Meaning of — Status of a single male member after partition — Nature of property held by him — Possibility of future additions to the single member ruled out to determine present status of the assessee — Held he was rightly assessed as an individual — Income Tax Act, 1961, Section 2(31) and 4 — Hindu Law — Joint family and coparcenary

The assessee was a member of a H.U.F. alongwith his father and brother. After partition of the property in 1958 the assessee was assessed as an individual. Till the assessment year 1963-64 he continued to be so assessed. However for the assessment year 1964-65 he claimed the status of H.U.F. though still unmarried. The Revenue rejected his stand which was confirmed by the High Court. Hence this appeal.

HELD :

The word “family” always signifies a group. Plurality of persons, is an essential attribute of a family. A single person, male or female, does not constitute a family. He or she would remain, what is inherent in the very nature of things, an individual, a lonely wayfarer till perchance he or she finds a mate. A family consisting of a single individual is a contradiction in terms. Section 2(31) of the Act treats a Hindu undivided family as an entity distinct and different from an individual and it would be wrong not to keep that difference in view. (Para 6)

The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity has no force. Under Hindu law a joint family may consist of a single member and widows of deceased male members. The expression “Hindu undivided family” in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the various schools of Hindu law. So the assessment in the status of a Hindu undivided family can be made only when there are two or more members of the Hindu undivided family. (Para 7)

Attorney General of Ceylon v. Ar. Arunachalan Chettiar, (1958) 34 ITR 42; 1957 AC 540 and *C. I. T. v. Rm. Ar. Ar. Veerappa Chettiar*, (1970) 1 SCC 174; (1970) 3 SCR 307, *relied on*.

Gowli Buddanna v. C. I. T., (1966) 60 ITR 293; (1966) 3 SCR 224, *referred to*.

The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth,

C. KRISHNA PRASAD v. C. I. T. (*Khanna, J.*)

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whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession. A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. 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* made by his father before he was born or begotten. (Para 8)

It cannot be denied that the appellant at present is the absolute owner of the property which fell to his share as a result of partition and that he can deal with it as he wishes. Even if the assessee-appellant in future introduces a new member into the family by adoption or otherwise, his present full ownership of the property cannot be affected. In order to determine the status of the assessee for the purpose of income tax the Court has to work at the realities as they exist before it. It cannot consider future possibilities which might or might not materialise. Speculation is not permissible. (Para 8)

Therefore the assessee was rightly assessed as an individual. (Para 8)

Anant Bhikappa Patil v. Shanker Ramchandra Patil, AIR 1943 PC 196: 70 IA 233, explained and distinguished

Appeal dismissed

M/2220/CT

The Judgment of the Court was delivered by

KHANNA, J.—This appeal on certificate is against the judgment of the Mysore High Court whereby the High Court answered the following question referred to it under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as the Act) in the affirmative in favour of the revenue and against the assessee-appellant :

Whether on the facts and in the circumstances of the case the assessee was rightly assessed in the status of an individual for the assessment year 1964-65?

2. C. Krishna Prasad assessee-appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed a Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. In the said partition the assessee got some house properties and vacant sites. The partition was recognised by the department and an order under Section 25-A of the Indian Income-tax Act, 1922 was passed recognising the partition with effect from November 1, 1958.

3. On the date of partition and also during the relevant period, i.e., the year ending on March 31, 1964, the assessee was unmarried. Up to the year 1963-64 the assessee was assessed in the status of an individual. For the assessment year 1964-65 the assessee filed a return showing his status as an individual. In the course, however, of the assessment proceedings for the assessment year 1964-65 the assessee claimed that he should be assessed in the status of a Hindu undivided family. The income-tax officer did not accept the claim of the assessee and held that his status was that of an individual. The order of the income-tax officer was affirmed on appeal by the Appellate Assistant Commissioner

and on further appeal by the Appellate Tribunal. At the instance of the assessee, the question reproduced above was referred to the High Court. The High Court, as already mentioned, agreed with the departmental authorities and answered the question against the assessee.

4. The short question which arises for determination, as would appear from the resume of facts given above, is whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of a Hindu undivided family even though no other person besides him is a member of the alleged family. This Court in the case of *Gowll Buddanna v. C. I. T.*¹ refrained from expressing an opinion on the point “whether a Hindu undivided family may for the purposes of the Indian Income-tax Act be treated as a taxable entity when it consists of a single member — male or female”.

5. After hearing the learned Counsel for the parties, we are of the opinion that the question which arises for determination in this appeal should be answered against the assessee.

6. Section 4 of the Act provides for the charging of income-tax on the total income of every person subject to the conditions prescribed in that section. “Person” has been defined in Section 2(31) of the Act and includes, inter alia, an individual and a Hindu undivided family. The inherent fallacy of the case set up on behalf of the assessee-appellant, in our opinion, is that according to him a single individual can constitute a Hindu undivided family and be assessed as such. “Family” connotes a group of people related by blood or marriage. According to *Shorter Oxford English Dictionary*, 3rd Ed. the word “Family” means the group consisting of parents and their children, whether living together or not; in wider sense, all those who are nearly connected by blood or affinity; a person’s children regarded collectively: those descended or claiming descent from a common ancestor; a house, kindred, lineage; a race; a people or group of peoples. According to Aristotle (*Politics I*), it is the characteristic of man that he alone has any sense of good and evil, or just and unjust, and the association of living beings who have this sense make a family and a State. It would follow from the above that the word “Family” always signifies a group. Plurality of persons is an essential attribute of a family. A single person, male or female, does not constitute a family. He or she would remain, what is inherent in the very nature of things, an individual, a lonely wayfarer till perchance he or she finds a mate. A family consisting of a single individual is a contradiction in terms. Section 2(31) of the Act treats a Hindu undivided family as an entity distinct and different from an individual and it would, in our opinion, be wrong not to keep that difference in view.

7. It is well settled that a Hindu joint family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth

1. (1966) 60 ITR 293; (1966) 3 SCR 224; AIR 1966 SC 1523.

an interest in the joint or coparcenary property, these being the sons, grandsons, and great grandsons of the holder of the joint property for the time being. The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity has no force. Under Hindu law a joint family may consist of a single male member and widows of deceased male members. The expression "Hindu undivided family" in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the various schools of Hindu law (see *Attorney-General of Ceylon v. Ar. Arunachalam Chettiar*² and *Gowli Buddanna v. C. I. T.* (supra)). In the case of *C. I. T. v. Rm. Ar. Ar. Veerappa Chettiar*³ this Court observed that under the Hindu law it is not predicated of a Hindu joint family that there must be a male member. It was accordingly held that so long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided among them, the joint family continues. One thing significant which follows from the above is that the assessment in the status of a Hindu undivided family can be made only when there are two or more members of the Hindu undivided family.

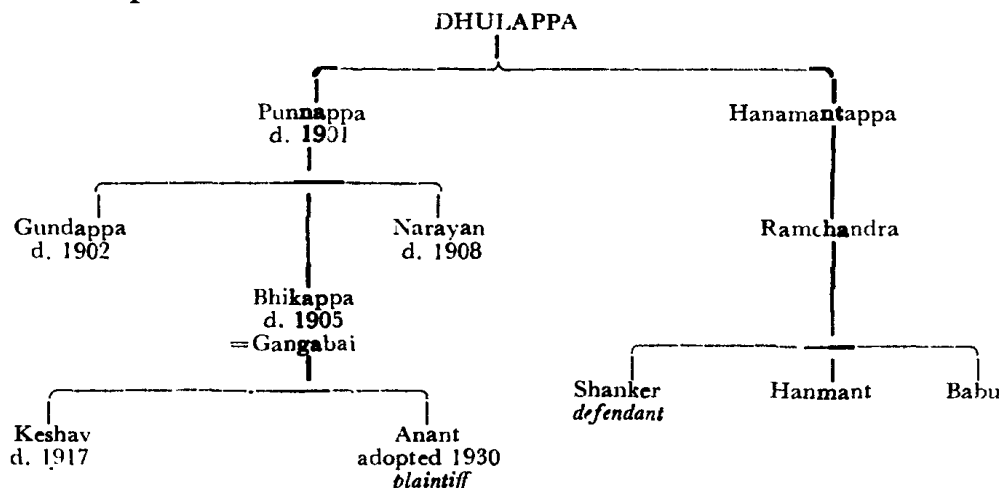
8. The share which a coparcener obtains on partition of ancestral property is ancestral property *as regards his male issue*. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. *As regards other relations*, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of *Mulla's Principles of Hindu Law*, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. 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 made by his father before he was born or begotten (see p. 320 *ibid.*). In view of the above it cannot be denied that the appellant at present is the absolute owner of the property which fell to his share as a result of partition and that he can deal with it as he wishes. There is admittedly no female member in existence who is entitled to maintenance from the above mentioned property or who is capable of adopting a son to a deceased coparcener. Even if the assessee-appellant in future introduces a new member into the family by adoption or otherwise, his present full ownership of the property cannot be affected. Such a new member on becoming a member of the coparcenary would be entitled to such share in the property as would remain undisposed of by the assessee. In order to determine the status of the assessee for the purpose of income-tax, we have to look to the realities as they exist

2. (1958) 34 ITR 42 : 1957 AC 540.

3. (1970) 3 SCR 307 : (1970) 76 ITR 467 : (1970) 1 SCC 174.

at present and it would not be correct to project into the matter future possibilities which might or might not materialise. This would indeed amount to speculation and the same is not permissible. Excursions to the realm of speculation may be legitimate and justified when one is engaged in the study of philosophy and metaphysics; they are wholly unwarranted when one is dealing with the mundane subject of the status of the assessee for the purpose of the income-tax assessment. For this purpose we have to look to facts as they exist and emerge from the record and not to what they may or may not be in future. As things are at present in the instant case, there can in our view be hardly any doubt that the assessee is an individual and not a family.

9. Mr. Desai on behalf of the appellant has referred to the case of *Anant Bhikappa Patil v. Shankar Ramchandra Patil*⁴. As considerable reliance has been placed upon that case, it may be necessary to deal with that case at some length. The dispute in that case was between parties governed by Hindu law and related to *watan* lands. The pedigree table of the parties was as under :



Dhullappa's sons Punnapa and Hanamantappa separated in 1857. The *watan* lands in dispute went to the share of Punnapa. Narayan, one of the sons of Punnapa, separated from him in his life time. Thereafter Punnapa died in 1901. Bhikappa died in 1905, leaving his widow Gangabai and son Keshav. Narayan died issueless in 1908 leaving two plots of *watan* lands. On the remarriage of the widow of Narayan, those two plots devolved by inheritance on Keshav. Keshav died unmarried in 1917. At that time his nearest heir was his collateral Shankar defendant. Shankar obtained possession in 1928 of the land in dispute, which had been left by Keshav after bringing a suit against Gangabai. In 1930 Gangabai adopted Anant plaintiff as a son to her deceased husband Bhikappa. In 1932 Gangabai as the next friend of Anant brought suit for possession of the land in dispute against Shankar. The trial Court decreed the suit. On appeal the High Court dismissed the suit

4. AIR 1943 PC 196 ; 70 IA 232.

for possession. On further appeal the Judicial Committee restored the decree of the trial Court. It was held by the Judicial Committee that the power of a Hindu widow to adopt does not come to an end on the death of the sole surviving coparcener. Neither does it depend upon the vesting or divesting of the estate, nor can the right to adopt be defeated by partition between the coparceners. The Judicial Committee also held that on the death of a sole surviving coparcener a Hindu joint family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member. The Judicial Committee further held that an adopted son can claim as preferential heir the estate of any person other than his adoptive father if such estate has vested before the adoption in some heir other than the adopting mother.

10. The above case, in our opinion, can hardly be of any assistance to the assessee-appellant. As would appear from the facts of that case, the question involved there related to the adoption by a widow after the death of the sole surviving coparcener. The question with which we are concerned, as to whether one individual can constitute a Hindu undivided family, was not before the Judicial Committee and it expressed no opinion on that question. According to Mr. Desai it is implicit in that judgment that from 1917 when Keshav died till 1930 when Anant plaintiff was adopted, there was a joint Hindu family even though the joint family consisted of Gangabai alone. We find it difficult to agree with Mr. Desai in this respect. As would appear from the facts of that case, Anant was adopted by Gangabai as a son of Bhikappa. It is now firmly established that the rights of the adopted son relate back to the date of the adoptive father's death and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of latter's death (*see p. 543 of Mulla's Principles of Hindu Law, 14th Ed.*). This principle of relation back is subject to certain exceptions but we are not concerned with them. As Bhikappa died in 1905, Anant should be deemed to have been in existence as the son of Bhikappa at the time of latter's death in 1905. A necessary corollary of the above legal fiction would be that Anant as the adopted son of Bhikappa would be taken to be in existence during the years 1917 to 1930. Gangabai consequently cannot be considered to be the sole member of the Hindu undivided family during the above period.

11. There is no merit in the appeal. It is accordingly dismissed with costs.

1959 SCC OnLine SC 9 : (1960) 2 SCR 253 : AIR 1960 SC 335

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, C.J. AND K. SUBBA RAO AND J.C. SHAH, JJ.)

MST RUKHMABAI ... Appellant;

Versus

LALA LAXMINARAYAN AND OTHERS ... Respondent.

Civil Appeal No. 173 of 1955*, decided on November 17, 1959

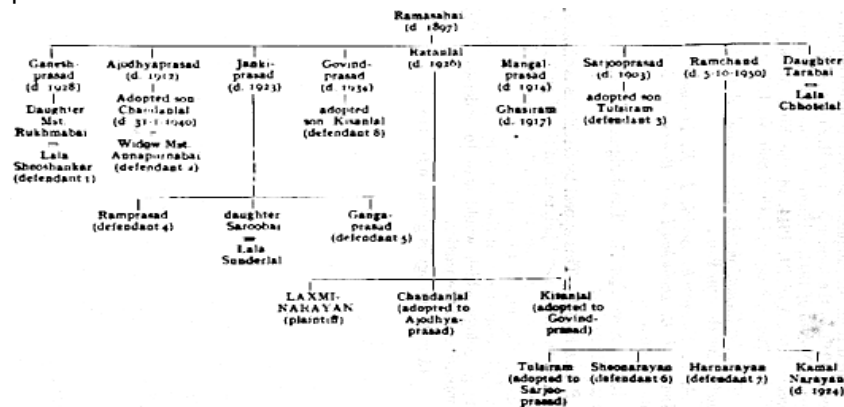
Advocates who appeared in this case:

W.S. Barlingay, Shankar Anand and A.G. Ratnaparkhi, for the Appellant;

A.V. Viswanatha Sastri, R.K. Monohar, S.N. Andley, J.B. Dadachanji and Rameshwar Nath, for the Respondent.

The Judgment of the Court was delivered by

K. SUBBA RAO, J.— This appeal by certificate is directed against the decree and judgment of the High Court at Nagpur, reversing those of the First Additional District Judge, Nagpur, in Civil Suit No. 12-A of 1940. It would be convenient at the outset to give the following genealogy which would help to understand the contentions of the parties.



During the life time of Ramasahai, he and his eight sons and one cousin, namely, Sitaram, constituted a joint Hindu family with Ramasahai as its manager. The joint family carried on its ancestral family business of excise contracts in several districts in the former C.P. & Berar provinces. On January 24, 1897, Ramasahai died and, at the time of his death, the family, though heavily indebted, had extensive properties distributed at various places like Nagpur, Kamptee Rajnandgaon, Raipur, Jabalpur etc. Sarjoo-prasad died in 1903, Ajodhya

Prasad in 1912, Mangalprasad in 1914, Jankiprasad in 1923, Ratanlal in 1926, Ganeshprasad in 1928, Govindprasad in 1934, and Ramchand in 1940. On February 27, 1915, Ganeshprasad, Jankiprasad, Govindprasad, Ratanlal and Ramchand, the surviving brothers executed a registered deed of relinquishment in favour of Jankiprasad. In that document it was recited that the brothers had become separated on January 24, 1898, by a deed of relinquishment of that date and that, as the said document was not registered, they were executing a fresh one confirming the earlier arrangement. On February 17, 1916, Govindprasad executed a trust deed in favour of his nephew, Chandanalal, the son of his deceased brother Ajodhyaprasad, and his niece, Rukhmabai, the daughter of his brother Ganeshprasad, both of whom were minors at that time. In that deed Govindprasad, after asserting that he had become divided from his brothers under the aforesaid two deeds of relinquishment, created a trust in a sum of Rs 15,000 for the benefit of the said minors, handed over the said money to the trustees appointed thereunder and directed them to construct a building or buy a land and pay the net income from the said property in equal shares to the two minor beneficiaries. With a part of that amount a site was purchased in Cotton Market, Nagpur, and between the years 1916 and 1921 a building was constructed thereon. On or about October 25, 1929, Rukhmabai filed a suit against Chandanalal for partition of the said property and obtained a decree against him on January 5, 1934, for partition and mesne profits. Chandanalal filed an appeal against that decree and it was dismissed. After the said decree, Chandanalal died on January 31, 1940. When the Commissioner appointed by the Court went to the building to effect the partition by metes and bounds, the respondent, who was in the house, obstructed the Commissioner, and thereafter on October 8, 1940, filed a suit, out of which the present appeal arises, for a declaration that the said trust deed executed by Govindprasad in favour of the appellant and Chandanalal was a sham document.

2. The respondents' case, inter alia is that the first relinquishment deed was brought into existence some time before the second registered relinquishment deed was executed and that the said deeds and the trust deed were parts of a same scheme of fraud conceived by the members of the family to defraud the creditors. The appellant, on the other hand, alleges that Govindprasad had really separated himself from the other members of the family, that he had his own businesses, that from out of his self-acquisitions he created the trust deed to benefit his minor nephew and niece for whom he had great love and affection, and that subsequently the trustees purchased a land and built the house thereon with additional funds supplied by him. She also alleges that the first respondent, after having set up by his natural

brother, Chandanlal, to resist her claim to the building and having failed in that attempt, started the present litigation to deprive her of the fruits of her decree.

3. On the pleadings the learned District Judge framed as many as 12 issues. He held, on a consideration of the documents and oral evidence adduced, that Govindprasad became divided from the members of the joint family in 1898, that thereafter he was carrying on the business of moneylending, was dealing in gold and silver, and also was taking liquor contracts, that out of his self-acquisitions he created the trust in respect of Rs 15,000, and that the land was purchased and the suit building was put up with the trust amount and additional amounts given by him. On those findings, the suit was dismissed. The Respondent 1, (hereinafter called "the respondent"), preferred an appeal against that decree to the High Court at Nagpur. The High Court held that the two relinquishment deeds were sham documents brought into existence to shield the liquid assets of the family, which were for that purpose placed in the hands of Govindprasad, that the trust deed was also a sham one designed to achieve the same purpose and that the house was also constructed with the aid of the family funds. For the first time before the High Court the appellant raised a plea of limitation. The learned Judges of the High Court held that the suit was within time under Article 120 of the Limitation Act. It was also for the first time contended that the respondent should be non-suited as he failed to claim a further relief within the meaning of the proviso to sub-section (1) of Section 42 of the Specific Relief Act. The High Court negatived the said contentions. It is not necessary to notice the other points raised before the High Court as they are not pressed before us. In the result the decree of the District Judge was set aside and the respondent's suit was decreed. Hence this appeal.

4. The main point that arises for consideration is whether the plaint-schedule house is the property of the joint family or whether it was built out of the self-acquisitions of Govindprasad in respect whereof he executed the trust deed. At the outset the relevant and well-settled principles of Hindu Law may be briefly noticed.

5. There is a presumption in Hindu law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the

others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

6. Bearing the aforesaid principles in view, we shall now proceed to consider the main issue in the appeal. The appellant naturally relies upon the document of 1898, in support of her case that Govindprasad renounced his interest in the joint family property in the year 1898. That document is Ex. D. 54-A, dated January 24, 1898, and is described as “farkatnama”. The seven brothers, Ganeshprasad, Ajodhyaprasad, Jankiprasad, Ratanlal, Mangalprasad, Sarjooprasad and Ramchand, executed the said relinquishment deed in favour of Govindprasad. It is stated therein as follows:

“... we are not pulling together well in affairs and you and we are not on good terms in family treatment. Ill-will between you and us all brothers is consequently growing more and more from day to-day. Similarly, as (our) father himself involved all ancestral property into debt and the remaining movables were partitioned by all at that very time, no movable and immovable ancestral property has now remained. Consequently, we all have to undergo trouble and sustain loss in our business.

We, therefore, execute this pharkhatnama (deed of relinquishment) and hereby declare as follows:

“Each brother should from this day enjoy his own self-acquired property and that he may acquire with his personal exertions—articles, grain, cash, movable and immovable property, so on and so forth. One has no connection with another, of family relation in property, transactions ... (torn), dealings and the like, of others. Each should enjoy his benefit and sustain his loss ... (torn) unless (we) give voluntarily (some ‘property’) to your children and (you) give voluntarily (some property) to our children, (they) shall have no manner of right against each other”.

This document purports to have been signed by the seven brothers. If this deed is not a sham document, it clearly brings about a division of

status between all the members of the family. It also proves that movables were divided between the brothers at the time of the death of their father, and that the joint family property, presumably because it was heavily involved in debts, was not divided in metes and bounds. Ex facie it does not support the appellant's version that Govindprasad alone separated from the joint family taking his share of movable properties at the time of his father's death and relinquishing his interest in all the immovable properties of the family. The first respondent attacks this document mainly on the ground that this was a sham one brought into existence after the year 1912 as a part of a scheme to defraud the creditors. The first circumstance relied upon is that this document, though it purports to bring about a division in status among the members of the family and, according to the appellant, amounts to a relinquishment of Govindprasad's interest in the extensive joint family property, was not registered. Doubtless an unregistered document can affect separation in status; but Ramasahai and his sons were carrying on extensive businesses, purchased properties in different places and in the course of their business they were executing registered mortgage deeds. The ostensible purpose of the execution of the document is alleged to be the intention of Govindprasad to free himself from the family troubles caused by its involvement in heavy debts and to eke out his livelihood by carrying on a new business of his own. It is not likely that he would not have insisted upon a registered document to achieve that purpose. There is therefore some justification for this comment. Secondly, if there was a partition of the movable properties either at the time of the execution of the document or even earlier a rich family like that of Ramasahai must have had large extent of movables the details of that partition should have found a place in the document. The absence of such details is indicative of the fact that the document was not really intended to be a formal document effecting a division between the parties.

7. This document did not see the light of day till the year 1915, when Govindprasad, for the first time, made a reference to it in Ex. D. 32, a registered relinquishment deed executed by him. On September 7, 1912, Govindprasad executed a Will, Ex. P. 1, bequeathing some properties described by him as his self-acquisitions. In that Will he stated thus:

"This property shown above is all my acquisition, and the ancestral property is not included in this or received by me. I too have not retained my right over the ancestral property...."

"My father expired on 27-1-1897 A.D. From that time without taking any share in my father's property, I have acquired this property by solely doing business; business of relations are not included in this nor have I joined in their business. Hence, nobody

has any right to this.”

If really there was in existence on that date a written relinquishment deed, Ex. D. 54, it is not likely that Govindprasad would not have mentioned that fact in the formal document he executed bequeathing his property. In contrast with this recital, in the Will Ex. P. 2, executed by him on May 1, 1919, the following recital is found:

“... I have taken no share at all in the movable and immovable property left by him, and all the property in my possession on my earning it is acquired by me, and consequently, my brothers, Lala Ganeshprasad, Jankiprasad Ratanlal, Ramchandra and all other brothers had executed a pharkath-nama (deed of relinquishment) in my favour on 24-1-1898 A.D....”

What could be the reason for Govindprasad not referring to the deed of relinquishment of the year 1898 in his Will of 1912, but thought fit to do so in his Will of 1919? The only possible explanation is that in between these two documents, another relinquishment deed, Ex. D. 32, executed by him on February 27, 1915, came into existence. We will have to say more about this document at a later stage of our judgment. This document, for the first time, affirms the recitals of the earlier alleged relinquishment deed of 1898 and is also registered. It is therefore a permissible inference that Ex. D. 54 might not have been in existence before Ex. D. 32 was executed or, at any rate, before Ex. P. 1 was executed by Govindprasad.

8. Reliance is also placed by the respondent on the alleged discrepancies between the particulars of partition given in Ex. D-54 and Ex. D-32. But we do not find much force in this contention, as the argument cuts both ways. If Ex. D-54 was forged to support Ex. D-32, there could not have been any room for introducing discrepancies between the two documents. We find no such irreconcilable discrepancies between the two documents and in substance the recitals are similar.

9. The respondent attacks the genuineness of Ex. D-54 by attempting to establish that the signatures of Ajodhyaprasad and Mangalprasad were forged after their death. If this was proved, this document might have come into existence only after 1914 i.e. after Mangalprasad had passed away. On the other hand, if Mangalprasad's signature was genuine, but Ajodhyaprasad's signature was a forged one, this document could have come into existence after 1912 but before 1914. The learned District Judge disposed of this contention with the following remarks:

“The expert examined the admitted signatures on document executed in the years 1903 and 1904 while the disputed document was executed in the year 1898. The opinion of the expert does not carry conviction and is not corroborated by circumstances. The

farkatnama was found to be genuine in the previous litigation.”

It may be noticed that the learned District Judge did not scrutinize the signatures with the help of the expert's evidence, and has not expressed any considered view thereon. But the High Court bestowed greater care on this aspect of the case, as it should, for, if this document was a forgery, it would go a long way to support the respondent's version. The learned Judges of the High Court considered the evidence of the expert, scrutinized the impugned signature of Ajodhyaprasad, compared it with his admitted signatures and agreed with the expert in holding that the disputed signature was not that of Ajodhyaprasad. So far as Mangalprasad's signature was concerned, the learned Judges were not able, on the evidence adduced, to hold that it was not his signature. The expert was examined as PW 3. He is practising as handwriting and finger-print expert in Nagpur since 1937, and he also keeps a branch office in Bombay. He has examined the impugned signature of Ajodhyaprasad with the latter's admitted signatures found in the mortgage deeds, Exs. P-7 dated March 10, 1898, P-66 dated November 2, 1902, and P-6 dated June 25, 1904. He has examined the disputed signatures synthetically and analytically and found differences in the pictorial aspect of the admitted signatures and the disputed signature in that the admitted signatures are fluently scribed with no hesitation and with a flourish, whereas both the fluency and flourish are lacking in the disputed signature. Examining the signatures analytically, he gives the following differences between the impugned signature and the admitted signatures : (i) in the disputed signature the down strokes end bluntly, whereas in the admitted signatures, they end in flourishing manner with ticks to the right; (ii) in the disputed signature, the down strokes have a tendency to curve in the centre quite differently from the down strokes in the admitted signatures; (iii) in the disputed signature there are dots after the letter “dha” in “dhasthur” instead of the usual dashes found in the admitted signatures; (iv) in the admitted signature in spelling the name “Ajodhyaprasad” the letters “Joo” have been used, whereas in the disputed signatures, the letters “Jo” have been used; (v) in the disputed signature there is uneven pen-pressure which is not found in the admitted signatures; (vi) there are over-writings in the disputed signature; and (vii) there is a marked difference in the formation of letters between those found in the admitted signatures and those found in the disputed signature. The credentials of this expert have not been questioned in the cross-examination. Except suggesting some irrelevant theories, no real attempt has been made to discredit this witness or demolish his factual observations or his conclusions. The appellant has not thought fit to examine another expert to contradict this witness or to prove her case. In the circumstances, we derive great

assistance from the expert's evidence in our attempt to compare for ourselves the disputed signature with the admitted signatures. The learned Judges of the High Court also compared the signatures with the help of a powerful magnifying glass. Hidayatullah, J., as he then was, gives the results of his observation thus:

“To begin with the pictorial aspect differs in many respects and even to a person not versed in the identification of handwritings they would appear to be dissimilar. The letter formations are different; the strokes and the little curls at the end of vertical strokes are all wrong. There is also a spelling change. Whereas the writer usually wrote ‘joo’, in the disputed signature this has been changed to ‘jo’. This detracts somewhat from the force of this argument but the document Exhibit P-81 is merely a copy of a copy and we were unable to compare the signatures as such. The fact however remains that barring this solitary instance, the admitted signatures contain the other spelling.”

Mudholkar, J., agreed with the observations of Hidayatullah, J. We must also give due weight to the observations of the learned Judges. We have also compared the impugned signature with the admitted signatures with the help of the expert's evidence, and we are inclined to agree with the view of the expert and the learned Judges of the High Court. The learned Counsel for the appellant has not been able to place before us any material to compel us to take a view different from that of the High Court. We, therefore, agree with the High Court that it has been established that the impugned signature of Ajodhyaprasad in Ex. D-54 is not his. This conclusion lends strong support to the respondent's version that Ex. D-54 must have been brought into existence at a later stage when Ajodhyaprasad was no more.

10. It leads us to the consideration of Ex D-32. It is dated February 27, 1915, and purports to be a relinquishment deed executed by Ganeshprasad, Jankiprasad, Ratanlal and Ramchand in favour of Govindprasad. In this document, referring to Ex D-54 it is stated that the brothers became separated on that date and that as the earlier document was not registered, they executed a fresh document and registered the same. A recital is also made, presumably to explain the conduct of some of the brothers in living together and having a common mess, that by such common living they should not be deemed to be united. This document, as we have already indicated, is attacked on the ground that it was part of a scheme of fraud and that it was executed only nominally to achieve the purpose of the said scheme. Our finding that the document of January 24, 1898, was subsequently got up after the death of Ajodhyaprasad undermines to some extent the reality of the transaction. That apart, we shall further scrutinize with great care the surrounding circumstances to unravel, if possible, the

true purpose of this document. It is common case that the members of the family had been executing nominal documents such as mortgage deeds, sale deeds etc. in favour of family friends to defeat or, at any rate, delay the creditors. Our attempt, therefore, will be to draw a real picture of the attempted scheme of fraud and to see whether this document will fit into that picture.

11. We have already noticed that at the time of the death of Ramasahai the family was heavily indebted. On June 12, 1895, Ramasahai, Sitaram, Ganeshprasad and Mangalprasad had executed a mortgage deed in favour of one Buty. On March 2, 1898, the said Buty filed Civil Suit No. 5 of 1898 against the members of the joint family for recovery of the amount due under the mortgage and obtained a decree on June 16, 1900. On August 25, 1897, Ajodhyaprasad, Ratanlal and Govindprasad executed a mortgage deed, Ex. P-81 in favour of Baliram Hari Bokhare for a sum of Rs 2400 alleged to have been borrowed from him on the said date. This document was executed six months before Buty filed his suit on his mortgage. Nothing further was heard of this mortgage. In the circumstances it may be assumed that the mortgage deed was only a sham one brought into existence to defraud the creditors. On March 10, 1898, Ganeshprasad, Ajodhyaprasad, Jankiprasad and Ratanlal executed a mortgage deed, Ex. P-7, in favour of one Hemraj for a sum of Rs 2000. Under this document, properties not covered by Ex. P-81 were mortgaged. There is nothing on record to show what has happened to this mortgage and whether the alleged debt was discharged. This also appears to be another sham transaction. On February 14, 1902, Ganeshprasad executed a mortgage deed, Ex. P-75, in favour of Sheoprasad : though this document is dated February 14, 1902, the stamp for the document appears to have been purchased only on April 27, 1902. This document appears to have been ante-dated for some ulterior purpose. On November 2, 1902, six of the Lala brothers i.e. all except Govindprasad and Mangalprasad, executed another mortgage deed, Ex. P-66, in favour of Narayanrao Govindrao Mahajan for a sum of Rs 9975 mortgaging thereunder the family immovable properties. For this mortgage deed a stamp paper purchased on June 25, 1898, was utilised. Again on February 26, 1903, the same executants executed another mortgage deed, Ex. P-74, in favour of the said Narayanrao Govindrao Mahajan for a sum of Rs 10,000. The stamp for this document was purchased on August 4, 1902. Both the Exs. P-66 and P-74 were presented for registration on February 26, 1903 but they were registered on March 4, 1903. This delay in the registration is presumably for the reason that the Lala brothers waited till the mortgagee executed an agreement, Ex. P-7, dated March 3, 1903, in their favour. Under this agreement, the mortgagee admitted that the said mortgages had been paid up and he

also undertook to execute a written “mortgage deed” and get the same registered at any time when the mortgagors paid the full expenses in that regard. This agreement proves beyond any doubt that the said two mortgages in favour of Narayanrao Govindrao Mahajan were colourable and sham transactions. On June 25, 1904, five out of the six executants, Sarjoooprasad having died meanwhile, executed a mortgage deed, Ex. P-6, in favour of Awasarilal for a sum of Rs 2000 for payment to Hemraj. It has already been noticed that there is no evidence on record to show that Hemraj paid any amount and the record does not disclose any further details in regard to this mortgage. On May 26, 1908, Ganeshprasad, Jankiprasad, Ratanlal and Ramchand executed a mortgage deed, Ex. P-76, in favour of one Kasturchand Daga for a sum of Rs 20,000. The document discloses that all the family properties mortgaged there under were purchased in execution in the name of the mortgagee with the funds provided by him and that, as the said amount was paid to him, the property was put in the possession of the mortgagors. It may be reasonably inferred from this recital that the properties purchased in the name of the said Daga were mortgaged to him for the amounts advanced by him. This document also recognized the existence of other mortgage debts due by the family to Daga. It may be mentioned that there is no dispute that the family was borrowing moneys from Daga. This document was not executed by Ajodhyaprasad, but he attested it. On July 31, 1914, Ganeshprasad and Ratanlal executed another mortgage deed, Ex. P-73, in favour of Narayanrao Govindrao Mahajan for a sum of Rs 18,925, being the amount alleged to be due by the family under two registered documents dated February 26, 1903. This mortgage was engrossed on a stamp paper purchased as early as January 31, 1903, and was registered on November 23, 1914. Before the registration of this document, the mortgagors obtained from the mortgagee a deed of agreement, Ex. P-38, dated October 6, 1914, admitting that the said mortgage was a nominal one. On June 18, 1915, Kasturchand Daga filed Civil Suit No. 1 of 1915 against the Lala brothers on the basis of the mortgage deed, Ex. P-76. Three days prior to the filing of this suit i.e. on June 15, 1915, Ganeshprasad, Ratanlal, Jankiprasad and Ramchand executed the following three sale-deeds : (i) sale-deed, Ex. P-9 dated February 21, 1915 in favour of Baliram Hari Bokhare conveying the family properties situated at Jubbulpore and Kamptee for a consideration of Rs 9500; (ii) sale-deed dated February 21, 1915, Ex. P-71, executed in favour of the said Baliram Hari Bokhare for a consideration of Rs 9250 in respect of properties at Raipur and Kamptee : this document was executed on a stamp paper purchased on August 8, 1910; and (iii) sale-deed dated June 11, 1915, Ex. P-70, in favour of Narayanrao Govindrao Mahajan for a consideration of Rs

10,000 conveying some property at Kamptee. The said three documents were registered on June 15, 1915, though they were all purported to have been executed on different dates. On June 20, 1915, Narayanrao Govindrao Mahajan executed three documents, Exs. P-10, P-35 and P-36. Ex. P-10 is an agreement executed by Narayanrao Govindrao Mahajan in favour of the Lala brothers, whereunder Narayanrao Govindrao Mahajan agreed to reconvey the property conveyed to him. Ex. P-35 is a receipt given by Narayanrao Govindrao Mahajan to Lala brothers, wherein it is mentioned that it was agreed between them at the time of the execution of the sale-deed that whenever the Lala brothers paid Narayanrao Govindrao Mahajan the amount of the sale-deed and interest thereon, the latter would return the said property and would execute a deed of reconveyance and that, as they have paid him a total amount of Rs 11,200, he would execute the reconveyance in their favour. Ex. P-36 of the same date is a Will executed by the said Narayanrao Govindrao Mahajan directing his heirs to convey the property to the Lala brothers in case he died without executing the said document. It is not disputed that the grandson of Narayanrao Govindrao Mahajan did execute a sale deed in favour of two members of the Lala brother's family and the same was given to Kasturchand Daga in discharge of his debt. The learned District Judge, and, on appeal, the High Court held that the said sale deeds were nominal transactions and the appellant did not, and could not, question the correctness of the facts found by them.

12. The two sale-deeds executed in favour of Baliram Hari Bokhare for a total sum of Rs 19,425, alleged to be the amount due under earlier mortgages executed in his favour are also colourable transactions; for, on July 1, 1915, Baliram Hari Bokhare executed Exs. P-11, P-33 and P-34 — under Ex. P-11 he agreed to reconvey the properties covered by the sale deeds if the said amount was paid to him; Ex. P-33 is a receipt given by Baliram Hari Bokhare to the Lala brothers acknowledging the receipt of the said amount and there is a recital in the document that he would reconvey the said property to the Lala brothers; and Ex. P-34 is a Will executed by Baliram Hari Bokhare directing his heirs to transfer the said property to the Lala brothers in case he died before transferring the same to the said brothers. It is, therefore, seen that the same pattern was followed by the Lala brothers in the case of the two sale deeds executed by them in favour of Baliram Hari Bokhare. It is said that the three sale-deeds exhausted the family's unencumbered immovable properties and there can hardly be any doubt that the three documents were executed to prevent the decree-holder in Civil Suit No. 1 of 1915, from proceeding against them after exhausting the mortgage properties. Both the District Judge and the High Court held that these documents were collusive; and, on the

facts noticed, their finding is correct.

13. The contesting respondent's case is that the farkatnama of February 27, 1915, was also executed as part of the said scheme to preserve the cash and the movables of the family for itself. The nominal sale-deeds executed in favour of Narayanrao Govindrao Mahajan and Baliram Hari Bokhare might be used to screen the family's immovable properties from being proceeded against in execution of the decree obtained against them, but could not prevent the decree-holder from proceeding against the family's movables and cash. It is said that the said farkatnama was intended to plug this loophole in the scheme of fraud. This document also was registered on the date when the other documents were registered. There is no acceptable reason why this document should have been executed and registered on the same date when admittedly colourable documents were executed by the family, if it was not intended to support the same design. The appellant suggests that the coincidence in dates was not decisive of the question raised; for, it might well have been that Govindprasad realising the danger which prompted his brothers to resort to fraudulent transactions insisted upon them to reaffirm the earlier transaction to avert the same danger to his self-acquisitions. This may be a plausible contention, but in the context of the then existing circumstances it does not appeal to us. The creditors' possible threat to proceed against Govindprasad's alleged self-acquisitions on the ground that they were part of the joint family property had always been there. What had happened was that instead of Buty, Daga become the creditor. There is, therefore, no reason why the tell-tale date was fixed for the execution of Ex. D-32, if it was not intended to be a prop to the common design of fraud. Further, it became necessary to put back the date of the alleged division in status to 1898 i.e. to a date prior to the filing of the suit by the creditor Buty against the family on March 2, 1898, to meet the possible argument that the claim could be traced back to that of Buty and therefore the alleged partition could not affect the claim of Daga. Ex. D-32 purports to be a confirmation of the farkatnama dated January 24, 1898. We have already held that the said document was an ante-dated one and that the signature of Ajodhyaprasad was forged therein. If so, it follows that Ex. D-32 is another link in the chain of fraud perpetrated by the family.

14. To summarize : the family had joint business and extensive properties as well as heavy debts at the time of the death of Ramasahai on January 24, 1897. After Ramasahai's death, the family creditor, Buty, filed a suit against the members of the family to enforce his mortgage. In the year 1898, the members of the family executed nominal mortgages in favour of Hemraj, Narayanrao Govindrao Mahajan and Chunnilal Sonar, and when some of the family properties were

brought to sale in execution of the decree obtained by Buty, they were purchased by Kasturchand Daga benami for the members of the family, and some of the members of the family executed a mortgage deed on May 26, 1908, for the sale price in favour of the said Daga. The said Daga filed Civil Suit No. 1 of 1915 against the family to enforce the mortgage, on June 18, 1915. Three days before the filing of this suit i.e. on June 15, 1915, the brothers brought into existence three nominal sale — deeds — two in favour of Baliram Hari Bokhare and another in favour of Narayanrao Govindrao Mahajan and a relinquishment deed in favour of Govindprasad; and all the documents were registered on the same day. Three of them were admittedly nominal documents and the fourth viz. the relinquishment deed, has been proved to be another nominal document. The said facts disclose an integrated scheme of fraud and it is not possible in the circumstances to single out therefrom Ex. D-32 and hold that it is a bona fide transaction; on the other hand, the circumstances already narrated by us indicate beyond any reasonable doubt that the said document is also a part of that scheme and intended to protect the cash and movables of the family.

15. The appellant relies upon the Wills executed by Govindprasad in 1912, 1919, 1920, 1926 and 1930 to establish that he was divided from the family, and that he was treating some properties as his self-acquisitions. If, as we have held, neither Ex. D-54 nor Ex D-32 effected a severance of Govindprasad from the joint family, the said documents would not carry the matter further; for the Wills were based upon the assertions made by Govindprasad that he was separated from his family in 1898 and that the properties he was bequeathing were his self-acquisitions. As we have held that there was no severance of the joint family, the evidentiary value of these documents must be rejected on the ground that they were further attempts on the part of the family to keep up the appearance consistent with the alleged partition.

16. We now come to the consideration of the main document in the case, namely, the trust deed dated February 17, 1916. It is marked as Ex. D-12. It purports to be a deed of trust executed by Govindprasad in favour of his nephew Chandanlal, the natural son of his brother Ratanlal and adopted son of his another brother Ajodhyaprasad, and his niece, Rukhmabai, the daughter of his eldest brother Ganeshprasad. Under this document Rs 15,000 was set up for the said beneficiaries, who were minors at that time. Kasheo Rao Laxman Rao Aurangabadkar, Gujalal, Davidin, Mahadeo, and Govindprasad were appointed trustees. The document directed that the trustees should carry on the management of the trust money and that they should make over the money to the minors on their attaining majority. They were also directed to construct a building or buy a land which might bring in good

rent and to reserve one-fourth for themselves for expenses of the building or the land, as the case may be, and to distribute the the remaining three-fourths in equal shares to the two beneficiaries. Alternatively, they were also directed to carry on a business with the said amount and distribute the income therefrom to the beneficiaries in equal shares. The first question that occurs to one is, why did Govindprasad execute the trust deed if his intention was to give a sum of Rs 15,000 to his nephew and niece; for, he could have easily achieved, that purpose by executing a Will or a settlement deed, and during his life time by giving them the income therefrom in equal shares. The amount set apart is comparatively small and is surprising that he should have appointed five trustees for implementing the trust. Secondly, the trust deed itself refers to the earlier deeds of relinquishment and we have already held that the said two deeds were colourable transactions. The trustees appointed were the agents of the family. Ex. P-72 dated September 9, 1913, the General Power of Attorney, shows that two of the trustees, Kasheo Rao Laxman Rao and Davidin were the family agents of the Lala brothers. Ex. P-38 dated October 6, 1914, indicates that Kasheo Rao Laxman Rao, one of the trustees, attested the said document whereunder Narayanrao Govindrao Mahajan declared that the mortgage deed executed in his favour by the Lala brothers was a nominal transaction. This shows that Kasheo Rao Laxman Rao was one of the close associates of the members of the family in executing the fraudulent documents. Mahadeo is the brother-in-law of Babulal, a servant of Ganeshprasad, who is the father of Rukhmabai, the appellant. The fact that most of the trustees were either the agents or the servants of the family is also a circumstance, though not conclusive, against the version of the appellant. Two minor members of the family were selected for the bequest; though ordinarily it may not have any significance, in the peculiar circumstances of the case, this fits in the general scheme of fraud perpetrated by the family. What is more, the trust comes to an abrupt end. Ex. D-3 is the deposition of Govindprasad in Civil Suit No. 204 of 1931. Therein he describes how the trust deed was implemented and how it came to an end. He says that for building the house the site opposite Cotton Market at Nagpur was acquired from Babulal, and Rs 10,000 out of the sum of Rs 15,000 was utilised for building the house and Rs 5000 was given to Babulal by the trustees as loan. The trustees demanded Rs 5000 more from him, but he gave them only Rs 2500 and another sum of Rs 2500 was given to them by Sheoshankar, the husband of the appellant. The trust was dissolved in 1921 and after that he commenced to construct the second storey and completed it with a sum of Rs 6000 returned by Babulal. This evidence proves that the trust was put to an end even before the completion of the building, and Govindprasad completed the

construction. This conduct indicates that no distinction was made between the trust property and his own property, and that, though a registered document had been executed, he was able to put to an end to the trust when he chose to do so. Ex. D-30 is the copy of the proceedings from the Proceeding Book filed by the trustees in Civil Suit No. 55 of 1929. Therein Govindprasad says that Chandanalal and Rukmabai became majors and, though he wanted to make over the building to them, they did not like to take it and agreed to have it left with him so long as he was alive and that, as Davidin left the place, Gajulal passed away, Mahadeo had gone to another district for a service and Kasheo Rao was unwilling to take further responsibility, he had taken over the building according to the wishes of his nephew and niece. This laboured explanation also demonstrates the nominal nature of the trust deed. Ex. D-35 is a Power of Attorney dated January 26, 1921, executed by Rukhmabai and Chandanalal in favour of Govindprasad. In that document both of them, who had become majors declared that they could not manage the property and therefore they appointed Govindprasad as their agent and authorized him to manage the property and act for them in the courts. Whatever might be the reason, the said document shows that the property was taken back by Govindprasad and there is nothing on record to show that any benefit from the trust reached the hands of either Chandanalal or Rukhmabai. This conduct of Govindprasad also fits in with the general scheme of colourable transactions : and the property in fact continued to be the joint family property.

17. There is also positive evidence, both documentary and oral, to prove that the brothers, including Govindprasad, were living as members of a joint Hindu family. Ex. P-63-A is a letter written by Ganeshprasad to Chandanalal. This letter is not dated, but it appears to have been written in or about the year 1926. In this letter Ganeshprasad points out:

“I have so far helped all my brothers upto this day and have been helping them so far as possible in spite of experiencing such great miseries. What should I do? Had I thought of passing my time by living separate, it could have been done in a good way; I would have not fallen in such difficulties. With all this you are seeing how memberji is causing different troubles. Whatever I have done, I have done with my earnings; I have given to my men family.”

In unravelling a fraud committed jointly by the members of a family, only such letters that passed inter se between them can give the clue to the truth. This letter shows that notwithstanding the assertions of the family to the contrary to suit a particular occasion, they were really living together as members of a joint family and the whole responsibility of the conduct of the affairs of the family was taken by

the eldest member of it. Ex. P-5 dated January 21, 1922, is a public notice given by all the members of the family and published in "The Maharashtra" on January 25, 1922. Therein they asserted that in Nagpur City they owned an ancestral property, consisting of a house, vacant land and a pacca well, constructed with stones for drinking water for the public, and that Mt. Deoka Bai, W/O Sitaram Lala Kalar had no right to sell the same. If Govindprasad had separated himself from the family, as it is now contended, he would not have joined in the issuing of this public notice, for, in that event he would not have had any interest in the ancestral property. Ex. P-59 is a copy of the application made by Govindprasad to the Secretary of State for India on May 19, 1922. In that application Govindprasad states:

"I have now to mention that for the long standing three years i.e. 1920-21, 1921-22, and the remaining nine months of 1922, I have undergone and have to undergo a serious loss of about rupees twenty thousand which is heavy and unbearable to meet the Government Revenue and to maintain my large family consisting of twenty-five (25) members."

Govindprasad alone could not have lost so much amount in his individual business. What is more, he had no children and so his family of twenty five members must have reference only to the members of the joint family.

18. There is also the evidence of PWs 12, 13 and 14, who are the common relatives of both the parties. PW 12, Bhagwandas, is the brother of Lala Chotelal, the husband of Tarabai, daughter of Ramasahai. He has been acquainted with the affairs of the family for about 30 years i.e. since the time his brother was married to Tara Bai. He is positive that Govindprasad used to live either at Kamptee or Nagpur in the family house and that all the brothers were keeping account books jointly. PW 13, Lala Sadanand, is the brother of Mangalprasad's wife. He says that his sister married Mangalprasad in 1896 or 1897 and his knowledge of the family, therefore, went back to that year. He asserts that the sons of Ramasahai were members of a joint Hindu family and that their excise contracts were also joint, and that none of the brothers had separate trade or property. PW 14, Lala Sitaram's son was married to Ratanlal's daughter about 25 years before the date of his giving the evidence. He supports the evidence of PWs 12 and 13. Nothing has been elicited in the course of cross-examination of any of these witnesses which would detract from the weight of their evidence. They are natural witnesses who could with authority speak to the affairs of the family. The oral evidence adduced by the plaintiff also establishes that there was no partition among the members of the family.

19. We, shall now briefly notice the admissions alleged to have been

made by one or other members of the family accepting the partition. In this context, the observations of the Judicial Committee in *Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju*¹ are apt and they read : It sometimes happens that persons make statements which serve their purpose, or proceed upon ignorance of the true position; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.

20. The issue in that case, as it is in the present case, was whether one of the members of a joint Hindu family separated himself from the others by renouncing his interest in the joint family property.

21. Exhibit 49 is the rejoinder filed by Lala Laxminarayan in Civil Suit No. 260 of 1931 filed against Sheoshankar, the husband of the appellant. Therein he stated that the members of the family separated from time to time and that the last but one group that remained joint was the one with four brothers and the very last was with two brothers, Ganeshprasad and Ratanlal and that after the death of the two brothers he (Lala Laxminarayan) was the only survivor. It is obvious that the said statement was made to serve his purpose in that suit and support his claim therein. Ex. D-11 is an application dated November 10, 1938, made by Lala Laxminarayan to the Deputy Commissioner, Nagpur, for exemption from furnishing security at Excise Sales. Therein he alleged that Lala Ratanlal owned and possessed immovable and movable properties worth about a lakh of rupees, which on his death devolved on his son, the applicant therein, that all the said properties were held by the applicant in his own right as the sole owner thereof and that he was in uninterrupted possession of the same since the death of his father. He also alleged that the business was inherited by the members of the family in 1890 and that he had been doing the business of his forefathers since the year 1927. In this document Laxminarayan did not set up any case of partition in 1898; but it is pointed out that he did not include the trust property in the schedule attached to that application. The object of that application was to show that he owned large extent of properties, and the fact that he had omitted some items of property would not establish that the said items were not joint family properties. That question has to be considered on other evidence. But what is important in Ex. D-11 is his assertion that there was no partition in the family. If we do not place much reliance on Ex. D-11, we should also, for the same reason, not place much value on the assertions made in Ex. D-49. Exs. D-49 and D-11 show that the plaintiff was making assertions to suit his purpose. Ex. D-56 is the deposition of Jankiprasad in Civil Suit No. 260 of 1931. Therein he stated that the defendants were all brothers but were divided. That was a suit filed by Kasturchand Daga against some of the brothers and, perhaps, Jankiprasad thought that it was necessary to assert separation

so that some of the family properties, other than those mortgaged, might be salvaged. The same Jankiprasad, in Ex. P-80, asserted to the contrary. In that exhibit he stated that the farkatnama was cancelled by him by notice to Govindprasad and that he and Govindprasad continued to have common food. The claim of the creditor, Kasturchand Daga, who sought to attach the trust property along with other family properties, was settled and some of the family properties were sold to him under Ex. P-24 in discharge of his claim. On the sale deed, Govindprasad made the following endorsement:

“As I have been living separate for a number of years from all the members of the family, I have no right to this property and no objection to its sale.”

This endorsement is entirely consistent with the case of the respondent that the properties in the hands of Govindprasad were intended to be preserved by this compromise. That statement must have been made to strengthen the case of the family. These contradictory statements were made by one or other members of the family to meet a particular contingency or to get an advantage, and, therefore, these cannot be of much value and the case really falls to be decided not on such statements, but on the basis of the relations of the various parties with the estate.

22. From the aforesaid evidence, we must hold that there was no severance in the joint family of Govindprasad and his brothers and that they continued to be joint, doing joint business, that all of them collusively brought into existence documents, including the relinquishment deeds, to tide over the financial difficulties in which they were involved.

23. On the basis of the finding that Govind Prasad did not relinquish his share in the joint family, but continued to be its member, the next question is whether the sum of Rs 15,000, in respect whereof the trust deed was executed by Govindprasad and the moneys spent to put up the suit house, came out of the self acquisitions of Govindprasad. This question we must approach on the basis of our finding that Govindprasad continued to be a member of the joint Hindu family until his death. The initial burden is no doubt on the contesting respondent to prove that the trust property is part of the joint family property; but if it was established that there was sufficient nucleus from or with the aid of which the property could have been acquired, the burden shifts to the appellant. The first question, therefore, is whether the joint family had sufficient property or income out of which Govindprasad could have put aside Rs 15,000, under the trust deed and also could have advanced other amounts for constructing the building. We have already noticed at an earlier stage of the Judgment that the family owned extensive properties distributed at different places. Ex. 9-D-8 is

a copy of the Valuation Register for 1923 in Civil Suit No. 260 of 1931. There the annual income from one of the liquor shops, Lala Bada Liquor Shop, from the year 1919 to 1923 is given. The licence was for Rs 15,000. The profit for 1919-20 was Rs 1329; for 1920-21 was Rs 14,152; for 1921-22 was Rs 185; for 1922 was Rs 7650; and for 1923 was Rs 5140. Ex. 9-D-7 is the copy of the Valuation Register for 1924 in the same suit in respect of Janajail Liquor Shop, Nagpur. It shows that the profit for the year 1919-20 was Rs 1486; for 1920-21 was Rs 8814; for 1921-22 was Rs 1779; and for 1922-23 was Rs 3837. Ex. P-77 is a security bond executed by the members of the family in favour of Kasturchand Daga. It shows that security was given in connection with the contract taken by the family in the name of Lala Ratanlal for retail dealing in liquor in different shops at Kamptee and Nagpur during the years 1906 and 1907. In that connection Ratanlal deposited a sum of Rs 54,700. These three documents show the extensive business the members of the family were doing in liquor. Indeed, the learned counsel for the appellant does not dispute the fact that the family was in a position to give Govindprasad the amount covered by the trust deed and that spent for the construction of the building. If so, the question is whether the appellant has proved that Govindprasad paid the said amounts from and out of his self-acquisitions. If Govindprasad had a business of his own, he must have had accounts, but no such accounts were forthcoming. Summons was served on Tuljabai, the wife of Ganeshprasad and mother of Rukhmabai, for producing the account books of the Lala brothers from the year 1897 to 1928, but no accounts were produced except Ex. D-22, which is an extract from the accounts of Ganeshprasad covering a period of only one month of the year 1927. This extract does not help either party. It may, therefore, be held that the accounts, which could have thrown some light on the sources from which Rs 15,000, was drawn by Govindprasad and the further amounts for building the house were supplied, were not filed.

24. DW 1 is one Jainarayan, who was a member of Legislative Council of the State from 1930 to 1936. He states that Govindprasad was doing business in shares and also in moneylending, that he had his own account books; that before going to Jabalpure he took away all his account books, and that he (the witness) may still have one or two account books of Govindprasad with him. This witness did not produce any account books. Rukhmabai also says in her evidence that the account books of Govindprasad were with him but she could not say whether they were at Nagpur or at Kamptee. But Govindprasad in his deposition made on October 23, 1932, in Civil Suit No. 204 of 1931 stated that he had no regular account books showing his income or expenditure, but he had only a sort of note book and that was not in his possession then. If Govindprasad was doing business on a large scale,

as the appellant asked us to believe, he must have had account books. If we accept the statement of Govindprasad that he had no account books, it shows that he could not have had any extensive business; on the other hand, if we accept the evidence of DW 1 and Rukhmabai that he had account books, it was not explained why they were not produced.

25. The only direct evidence in regard to Rs 15,000, the subject-matter of the trust deed, and the moneys spent for building the house, is that of Govindprasad in the earlier suit viz. Civil Suit No. 204 of 1931, and it has been marked as Ex. D-3. He has stated therein that he had some deposits in banks and that out of affection he set apart Rs 15,000 for his nephew and niece and executed a trust deed in respect of that sum. He adds that out of the said sum of Rs 15,000, Rs 10,000 was spent in purchasing the site from Babulal and for constructing a part of the suit house thereon, and the balance of Rs 5000 was given to Babulal as loan. He further stated that the trust was dissolved in 1921 and that thereafter he spent another sum of Rs 6000 out of his own pocket in addition to the sum of Rs 6000 returned by Babulal for completing the building and that Sheoshankar, the husband of the appellant spent Rs 2500 in connection with the building; but in the cross-examination he admitted that he had no shop for gold and silver and that he used to do business in a small scale. He gave evasive answers when he was asked whether the first defendant was managing the liquor shop in dispute; he did not know whether the defendant was managing the liquor shop in dispute, he did not remember the year in which the shop was opened in the suit building; he could not say when the shop was discontinued; he admitted that he had no regular account books showing his income or expenditure. Though he said that he had a sort of note book, he said that he was not in possession of it then. Though he said in examination in-chief that he spent Rs 6000 for the building, had to admit in the cross-examination that the said money was not withdrawn from any bank. He also admitted that the materials were bought by Ganeshprasad and Ratanlal and that he did not know when they purchased them. The evidence of Govindprasad clearly establishes that he was merely lending his name for the family and that the amounts were spent from the family coffers under the supervision of one or other members of the family. Ex. P-62-A is a copy of the letter written by Ganeshprasad to Babulal in the year 1922 — Babulal was acting as the agent of Ganeshprasad. Therein Ganeshprasad complains that large amounts had already been spent but the upper portion of the building had not yet been constructed. Though it is suggested that Ganeshprasad was constructing some other building, in the year 1922, there is nothing on record to support that theory. Babulal was certainly connected with the suit building and the reference in the said

document must be to the suit building. This letter also shows that Ganeshprasad, presumably on behalf of the family, was giving moneys for the construction of the building. Ex. P-60-I-A is another letter written by Ganeshprasad to Babulal. Therein Ganeshprasad gave specific direction in regard to the construction of the building. The building referred to in this letter also must be the suit building.

26. Exs. D-63 to D-96 are the receipts for the amounts disbursed in connection with the construction of the suit building. Govindprasad states in Ex. D-3 that he used to hand over the money to his brother Ganeshprasad or Ratanlal for disbursement. This lame explanation cannot explain away the fact that the moneys were spent and receipts taken by the other members of the family in regard to the construction of the house.

27. Then remains the oral evidence of PWs 4, 5, 9 and 13, who were some of the contractors connected with the construction of the house and they say that either Ganeshprasad or Ratanlal asked them to do the work and paid them the amounts due to them. Their evidence is consistent with the evidence of Govindprasad in Ex. D-3. They are disinterested witnesses and their evidence can safely be accepted. There is also the evidence that the family liquor shop was located in the suit building and that must be so because it was built by the family.

28. The foregoing discussion of the evidence brings out the following facts : (i) the family had extensive business and was in a position to purchase the land and build the suit house; (ii) there is no reliable evidence to show that Govindprasad had separate income from which he could have set apart Rs 15,000 and paid an additional sum of Rs 6000 for building the house; (iii) there is evidence that Ganeshprasad and Ratanlal supervised the construction of the building, paid the contractors and had taken receipts from them; and (iv) though the trustees under the trust deed pretended to function thereunder, they were the agents of the family and the trust was abruptly put an end to in 1921. On the said facts it must be held that the appellant has failed to prove that Govindprasad had self-acquisitions and the suit site was purchased and the building put up thereon with the private funds of Govindprasad.

29. Before we close this aspect of the case, the conduct of the respondent in not questioning the trust deed from 1916 to 1940, when he filed the suit, requires some explanation. The contesting respondent was a minor. Even after he became a major, he could not have had any grievance because the trust deed was executed for the benefit of the family. It is in evidence that Ratanlal, his father, was living in the house till his death in the year 1926. It is also in evidence that he was residing in the house from the year 1936. It is true that when the litigation between Rukhmabai and Chandanlal was being conducted he

did not intervene; that may be because Chandanlal was his natural brother and he might not have thought fit to set up any claim against his brother. His conduct, therefore, is not such as to give rise to any inference that the trust deed was executed in regard to Govindprasad's self acquired income.

30. To summarize : There was no separation of the members of the family : all the members of the family continued to be joint and the family was doing business in different places. They had extensive properties and a fairly large income : they were also heavily indebted. The family was involved in debts in Ramasahai's life time and even after his death the position continued to be the same. Various attempts were made to salvage the properties of the family and to keep both the movable and immovable properties not mortgaged from the reach of the creditors. The relinquishment deeds, innumerable mortgages, sale deeds and the trust deed were all executed as parts of the same scheme. We, therefore, hold that the suit property was the joint family property and the respondent is entitled to the declaration he has asked for, namely, that the trust deed dated January 17, 1916, was a colourable and fictitious document and could not affect the respondent's right to ownership of the property in the suit.

31. The next question raised by the learned counsel for the appellant is that the suit should have been dismissed in limine as the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of Section 42 of the Specific Relief Act. The proviso to Section 42 of the said Act enacts that "no Court shall make any such declaration when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so". It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. The learned Counsel for the appellant contends that in the plaint the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court and, therefore, the plaintiff should have asked for a permanent injunction restraining the appellant from interfering with his possession. The appellant did not take this plea in the written statement; nor was there any issue in respect thereof, though as many as 12 issues were raised on the pleadings; nor does the judgment of the learned District Judge disclose that the appellant raised any such plea. For the first time the plea based on Section 42 of the Specific Relief Act was raised before the High Court, and even then the argument advanced was that the consequential relief should have been one for partition : the High Court rejected the contention on the ground that the plaintiff, being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the

other members of the family. It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act. In the circumstance, we are not justified in allowing the appellant to raise the plea before us.

32. This leaves us with the only surviving question, namely, whether the suit was barred by limitation. This point was raised for the first time in the High Court and the High Court allowed the same to be raised but negated the contention. The learned Counsel for the respondent contends that, for the reasons mentioned in regard to the plea based upon Section 42 of the Specific Relief Act, we should also not allow the appellant to raise this contention either. But there is an essential distinction between the two contentions; while in the former case, if the contention was allowed to be raised, the respondent would be prejudiced, in the latter case, even if this plea was taken at the earliest point of time, the contesting respondent would not have adduced better evidence or put before the Court further evidence. When the Court asked the learned Counsel to state what further facts he would have proved in respect of this plea if this contention was taken earlier, he was not able to suggest any. In the circumstances, when the appellate court allowed the appellant to raise the plea of limitation, we do not think we are justified at this stage to say that the High Court should not have allowed the plea to be raised.

33. The argument on the question of limitation is put thus : The plaintiff, respondent herein, had knowledge of the fraudulent character of the trust deed as early as 1917 or, at any rate, during the pendency of the partition suit between Rukhmabai and Chandanlal instituted in the year 1929, and the suit filed in 1940, admittedly after six years of the said knowledge, would be barred under Article 120 of the Limitation Act. Article 120 of the Limitation Act reads:

Description of Suit	Period of Limitation	Time from which period begins to run
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six Years	when the right to site accrues.

This Article was subject to judicial scrutiny both by the Judicial Committee as well as by the High Court of various States. The leading decision on the subject is that of the Judicial Committee in *Bolo v. Koklan*². Therein, Sir Benod Mitter, observed:

“There can be no ‘right to sue’ until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.”

The said principle was restated and followed by the Judicial Committee in *Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar*³ and in *Gobinda Narayan Singh v. Sham Lal Singh*⁴. The further question is, if there are successive invasions or denials of a right, when it can be held that a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In *Pothukutchi Appa Rao v. Secretary of State*⁵, a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasubba Rao, J., after considering the relevant decisions, expressed his view thus:

“There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit.”

He adds at p. 199:

“It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action?”

34. The legal position may be briefly stated thus : The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

35. The facts relevant to the question of limitation in the present case may be briefly restated : The trust deed was executed in 1916. The suit house was constructed in 1920. If, as we have held, the trust deed as well as the construction of the building were for the benefit of the family, its execution could not constitute any invasion of the plaintiff's right. Till 1926, the plaintiff's father, Ratanlal, was residing in that house. In 1928 when Daga challenged the trust deed, the family compromised the matter and salvaged the house. From 1936 onwards the plaintiff has been residing in the suit house. It is conceded that he had knowledge of the litigation between Rukhmabai and Chandanlal

claiming the property under the trust deed; but, for that suit he was not a party and the decision in that litigation did not in any way bind him or affect his possession of the house. But in execution of the decree, the Commissioner appointed by the Court came to the premises on February 13, 1937, to take measurements of the house for effecting partition of the property, when the plaintiff raised objection, and thereafter in 1940, filed the suit. From the aforesaid facts, it is manifest that the plaintiff's right to the property was not effectively threatened by the appellant till the Commissioner came to divide the property. It was only then there was an effectual threat to his right to the suit property and the suit was filed within six years thereafter. We, therefore, hold that the suit was within time.

In the result, the appeal fails and is dismissed with costs.

* Appeal from the judgment and decree dated September 9, 1949, of the former Nagpur High Court, in first appeal No. 45 of 1944, arising out of the judgment and decree dated April 24, 1944, of the First Additional District Judge, Nagpur, in Civil Suit No. 12-A of 1940

¹ (1935-36) LR 63 IA 397, 406

² (1929-30) LR 57 IA 325, 331

³ (1930) ILR 8 Rang 645

⁴ (1930-31) LR 58 IA 125

⁵ AIR 1938 Mad 193, 198

1972 SCC OnLine All 66 : 1972 All LJ 468 (FB) : AIR 1972 All 424
(FB) : 1972 RD 159 (FB)

Allahabad High Court
(Full Bench)

BEFORE G.C. MATHUR, SATISH CHANDRA AND A.K. KIRTY, JJ.

Chhotey Lal and others ... Defendants-Appellants.

Versus

Jhandey Lal and another ... Plaintiff-Respondents.

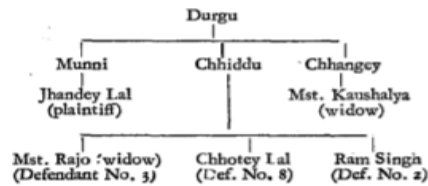
Second Appeal No. 3250 of 1966

Decided on March 10, 1972

The Judgment of the Court was delivered by

SATISH CHANDRA, J.:— A Division Bench has referred the Second Appeal to a Full Bench to resolve the conflict of opinion in *Mahabir Singh v. Bhagwanti*¹ and *Ram Singh v. Baldeo Prasad*².

2. This is a defendants' appeal. It arises out of a suit for partition of a house and a tenancy holding. The plaintiff set up the following pedigree:—



3. Munni died on 17-11-1918 leaving a son Jhandey Lal, the plaintiff -respondent. Chhangey died on 10-4-1925. His widow, Smt. Kaushalya died in 1932. Chhidu died during the pendency of the suit, leaving a widow, Smt. Rajo and two sons, who are defendants-appellants Nos. 1, 2 and 3.

4. The plaintiff's case was that the house as well as the holding in dispute was acquired by Durgu. On his death, these properties were inherited by his three sons in equal shares. The sons of Durgu constituted a joint Hindu family. The properties were coparcenary properties. On the death of Chhangey, his share went to the other

members of the coparcenary by survivorship. Consequently, the plaintiff had a 1/2 share in the house as well as in the tenancy holding.

5. The defence was that the three sons of Durgu were separate. Chhangey's share was inherited by his widow, Smt. Kaushalya. On her death, Chhangey's share went to his brother Chhiddu as the nearest heir. The plaintiff, who was one degree removed, did not inherit Chhangey's 1/3rd share. Consequently, Chhiddu's share was 2/3, while the plaintiff was entitled to 1/3rd share in the properties. The trial court held that the house as well as the tenancy holding was joint family property, succession to which was governed by the rule of survivorship. The plaintiff was entitled to a half share in both these properties. The suit was decreed for partition of a half share.

6. The defendants went up in appeal, which was dismissed. The defendants then came to this Court in second appeal. A learned single Judge held that the case could not be satisfactorily decided without a clear finding whether the family was joint or separate, and as to when did the family disrupt. This Court remanded the case to the lower appellate court for decision afresh. On remand, the learned Civil Judge held that the house as well as the disputed holding was acquired by Durgu. On his death, his three sons were members of a joint Hindu family. They inherited the house as well as the holding as members of the joint Hindu Family. The house as well as the holding was ancestral in their hands and it continued to be so upto 15 or 16 years before the institution of the suit. At the time of the disruption of the family in or about 1940, the plaintiff and Chhiddu alone were alive. Hence, each had a half share in the properties. The learned Judge repelled the argument that succession to the tenancy holding would be governed by Sec. 22 of the N.W.P. Tenancy Act, 1901, on the basis of a decision of this court in *Mahabir Singh v. Bhagwanti*¹, where it was held that in case a coparcenary body is the tenant, no individual member thereof can be said to have any interest in the holding, which could be inherited inaccordance with Sec. 22 of that Act. On the death of Chhangey, Smt. Kaushalya did not inherit his share; and hence, on her death, no interest in the holding passed to Chhiddu. On these findings, the appeal was dismissed. Aggrieved, the defendant again came to this Court in Second Appeal. At the hearing, a learned single Judge felt that there was a conflict of views between *Mahabir Singh's*¹ case mentioned above and *Ram Singh's*² case. He referred the appeal to a Division Bench. The Division Bench in its turn referred the matter to a Full-Bench. That is how the appeal has been laid before this Bench.

7. Mr. S.N. Agarwal, learned counsel appearing for the appellants, did not dispute the finding that the holding as well as the house was ancestral, and constituted coparcenary property of the three sons of

Durgu. He conceded that so far as the house was concerned, the rule of survivorship would apply, and the plaintiff would have a half share, because at the time of disruption in the family in 1940, the plaintiff and Chhidu alone



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were alive. In respect of the tenancy holding, Mr. Agarwal, however, challenged the finding that since the three brothers constituted a coparcenary, the properties inherited by them from their father did not belong to them but vested in the joint Hindu family or the coparcenary. He challenged the correctness of the view taken in *Mahabir Singh's case*¹.

8. In that case, Ram Prasad and his brothers were members of a joint Hindu family governed by the Mitakshara. The family owned an occupancy holding. Ram Prasad died leaving a widow and his brothers. The widow granted a lease of the holding to the defendant. The brothers filed a suit to set aside the lease. A Division Bench (Richards, C.J. and Rafiq, J.) held:—

“Ram Prasad was not the ‘tenant’ of the holding in question. The coparcenary body which made up the joint Hindu family of which he was a member constituted the ‘tenant’. The very moment that Ram Prasad died the coparcenary body continued to be the tenant but the body was composed of the survivors of the family. Ram Prasad had no interest which devolved upon anyone.”

9. On this view, it was held that Sec. 22, N.W.P. Tenancy Act, 1901, which provided that when a tenant dies his interest shall devolve in the way specified in the section, was not applicable. The widow of Ram Prasad did not inherit any interest in the holding. The lease granted by her was invalid. This decision was followed by another Division Bench (Tudball, J. and Sulaiman, J.) in *Mendya v. Jhurya*³. It was observed that there was nothing in the Tenancy Act to prevent a joint Hindu family as much acquiring an occupancy tenure. Sec. 22 lays down the devolution of the interest of an occupancy tenant when the tenant dies. If one member of a joint Hindu family which has acquired an occupancy tenure dies, the occupancy tenant does not the and therefore Sec. 22 does not operate. It was also observed that there was nothing in law before this Act was passed to prevent a joint Hindu family from acquiring occupancy rights. The same view was taken in *Achurji v. Haraj Ahir*⁴.

10. The Tenancy Act defined a ‘tenant’ to be a person who was or

but for a contract, would be liable to pay rent. Obviously, a person who was in law entitled to hold property would be competent to become a tenant within meaning of that Act. The Tenancy Act does not specifically say anything either way on the question whether a Hindu undivided family or coparcenary is a person or is competent to become a tenant.

11. A Joint Hindu family or a coparcenary is a creature of Hindu Law. In Mulla's Principles of Hindu law (13th Edition paragraph 214), it has been stated that a coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof. The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor. Thus, it is the common ancestor and the lineal descendants who together constitute a coparcenary.

12. In paragraph 915, Mulla abates:—

“The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that, he, that particular member, has a definite share, one-third or one-fourth.



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His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished⁵ by births in the family. It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is ‘undivided coparcenary interest’.....As observed by the Privy Council (I) ‘there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's life-time a common interest and a common possession.”

13. It is thus clear that the members of the joint family collectively own the coparcenary property. Each members has an interest in such property, though his interest becomes definite on partition. Till then, it is an undivided interest. The view expressed in *Mahabir Singh*¹ and the other cases mentioned above, that the members were not the tenants

of the holding because they had no interest in it, is with respect, fallacious. In law, the members of the joint Hindu family together become the tenant of the holding. The coparcenary body as such, and as an entity apart from its members, does not own property. The property does not vest in the coparcenary but in its members, though collectively. This view finds support in *Mahavirprasad Badridas v. M.S. Yagnik*⁶. Shah, J. (as he then was) held that “the property belonging to a Hindu undivided family is the ownership of the coparceners in that family and that such a family is not a corporation. It is not a juridical entity distinct from the members who constitute it. It cannot sue or be sued in the joint family name and cannot convey the property held by it in its joint character. The coparceners who are members of the Hindu undivided family are undoubtedly owners of the property; but a Hindu undivided family has no independent existence apart from the individuals who constitute the same. Statements sometimes made in decided cases and text books that a Hindu joint family is a “sort of corporation” in dealing with questions relating to enjoyment of the property of the family (see for instance *Anali Narhar Kulkarni v. Ramchandra Ravji Kulkarni*⁷ and Mayne a Hindu Law 11th Edition, Art. 243, at page 305) do not justify the view that a Hindu undivided family is a corporation”. His Lordship emphasised that the property is the property of the coparceners who for the time being constitute the Hindu undivided family.

14. Hindu Law does not recognise a joint Hindu family or coparcenary as a juristic personality capable of holding property, as an entity separate from the members of the family. When it is popularly said that a property is joint family or coparcenary property, the true position in law is that the members collectively own it, each having an interest. One of the distinctive features of such “coparcenary property” is in its passing on death of a member. According to Hindu law, the interest of a dead member passes by survivorship to other existing members of the family. It does not devolve on his personal heirs.

15. Learned counsel for the plaintiff-respondent submitted that if a deity or an idol can hold property, so can a joint Hindu family. The comparison is neither apt nor appropriate. The Hindu Law recognises a deity or idol to have a juristic personality entitling it to hold property. But as seen above, the rules of Hindu



Law do not clothe the joint Hindu family with such a status.

16. It is settled law that rules of personal law are subject to modification by statutory enactments⁸. If a statute provides how the interest of the owner of a particular kind of property will pass on his death, such provision will override and abrogate the rules of personal law in respect of such properties. Sec. 20(2) of the Tenancy Act of 1901 provided that the interest of an occupancy tenant was heritable subject to the provisions of that Act. Section 22 of that Act laid down a table of succession. These statutory provisions will prevail and will have the effect of abrogating the rule of Hindu law of an interest passing by survivorship, in relation to tenancy holdings governed by that Act. In *Bhura v. Shahabuddin*⁹, it was held that the rule of succession laid down in Sec. 22 of the Tenancy Act was deliberate departure from personal law and would override the latter. This decision was followed by another Bench in *Ali Buksh v. Barkatullah*¹⁰. It was held that Sec. 22 is independent and exclusive of the personal law of the deceased tenant. In *Sri Ram Singh v. Baldeo Prasad*² a Bench observed that the occupancy tenure is a creation of statute and the statute will regulate the devolution. The same view has been taken by the Board of Revenue in several cases¹¹.

17. In law the true position is that on the death of Durgu the three brothers collectively and jointly became the owners of the occupancy holding as well as the house. On the death of Chhangey (on 10th April, 1925) his interest in the holding would, in accordance with Sec. 22 of the Tenancy Act, devolve on his widow. It would not go to his brother by survivorship.

18. Now what was Chhangey's interest? It is said that a coparcener cannot predicate that his share is one third or one-fourth. He has a fluctuating interest, capable of being enlarged by deaths and liable to be diminished by births in the family. This principle is integrally linked with the rule of survivorship. When a statute supplants it by rules of succession, the result is that on death of a member, his interest goes to his mentioned heirs. Then ex-hypothesis, the interest of other coparceners will not get enlarged, because nothing passes to them. The necessary corollary is that death, like partition, inevitably makes definite the deceased member's share. At the time of Chhangey's death, there were three members in the family. Chhangey hence had a one-third share.

19. Smt. Kaushalya the widow of Chhangey died in 1932. At that time, Agra tenancy Act of 1926 was in force. Under Sec. 25(i) thereof a brother was a preferential heir to a brother's son. See *Dular Pandey v. Nanda Budhai*¹². Hence Chhiddu would inherit the one-third share till then held by Smt. Kaushalya. In this view, Chhiddu was entitled to a

two-third share while the plaintiff had a one-third share in the holding. In regard to the house, the rules of Hindu Law would continue to apply. In accordance with the rule of survivorship, the interest of Chhangey would pass to both the other surviving members of the family, namely Chhiddu and the plaintiff Jhandey Lal. On this basis, they both had a half share in the house.

20. In the result, the appeal succeeds and is allowed in part. The decree is modified. The plaintiff's suit for partition is decreed for a half



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share in the house and for a one-third share in the tenancy holding. Under the circumstances of the case, the parties will bear their own costs throughout.

Appeal partly allowed.

¹ 14 A.L.J. 278.

² 1932 A.L.J. 605.

³ 18 A.L.J. 769.

⁴ 1930 A.L.J. 974.

⁵ *Katama Natchiar v. The Raja of Shiragunga* (1863) 9 M.I.A. 539 543 and 611.

⁶ A.I.R. 1960 Bombay 191.

⁷ I.L.R. 10 Bom. at pp. 39 and 78.

⁸ *Kallu v. Sita* (16 A.L.J. 225).

⁹ I.L.R. 30 All. 128.

¹⁰ I.L.R. 34 All. 419.

¹¹ *Sri Lal Voika v. Kesho Das* (6 U.P. 433); *Somars Naddaf v. Kesho Singh* (13 S.D. of 1912 : 1 R.D. 322); and *Dharam Das v. Phula Kunwar* (5 S.D. of 1926 : 1 R.D. 508).

¹² 1938 A.L.J. 585 (F.B.).

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not entitled to any solatium on the compensation determined by the High Court in this case.

6. The net result is that both the appeals are dismissed. Parties are directed to bear their own costs throughout.

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(BEFORE R.S. PATHAK AND SARYASACHI MUKHARJI, JJ.)

COMMISSIONER OF WEALTH TAX,
KANPUR AND OTHERS

.. Appellants ;

Versus

CHANDER SEN AND OTHERS

.. Respondents.

Civil Appeals Nos. 1668-70 of 1974†,
decided on July 16, 1986

Hindu Succession Act, 1956 — Sections 8 and 4 — Applicability — Son, who separated by partition from his father, would on father's death inherit father's assets in his individual capacity and not as karta of his HUF by virtue of Section 8 — Therefore, income or assets so inherited would be assessed as income or assets of the son individually and not as income or assets of the son's HUF — Wealth Tax — Income Tax

'R' and his son 'C' constituted an HUF. As a result of partial partition the HUF business was divided between the two and thereafter, it was carried on by a partnership consisting of the two. The house property of the family continued to remain joint. The mother and wife of 'R' having predeceased him, when he died he left behind him his only son 'C' and grandsons. 'C' who constituted a joint family with his own sons, filed a return of his net wealth by including the property of the family which on the death of 'R' passed on to 'C' by survivorship and also the assets of the business which devolved upon 'C' on father's death. But 'C' did not include a sum of Rs 1,85,043, standing to the credit balance of 'R' in his account in the books of the firm on the ground that that amount devolved on him in his individual capacity and was not the property of the assessee-family. The Wealth Tax Officer did not accept this contention and held that the sum of Rs 1,85,043 also belonged to the assessee-family. The High Court decided in favour of 'C', the respondent-assessee. Dismissing the Revenue's appeal and affirming the High Court's judgment and order Supreme Court

Held :

Under the Hindu Law, the moment a son is born, he gets a share in the 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

†From the Judgment and Order dated August 17, 1973 of the Allahabad High Court in W.T. Reference No. 371 of 1971 and I.T Reference No. 452 of 1971

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will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. But this position has since been affected by Section 8 of the Hindu Succession Act. Since the Preamble to the Act reiterates that the Act is to 'amend' and codify the law and Section 4 thereof makes it clear that one should look to the Act in case of doubt and not to the pre-existing Hindu law, the express words of Section 8 of the Act would prevail over the aforesaid general law. When therefore, son inherits the property in the situation contemplated by Section 8 he does not take it as karta of his own undivided family but takes it in his individual capacity. The Schedule to the Act referred to in Section 8(a) indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son. (Paras 15 and 22)

CIT v. Ram Rakshpal, Ashok Kumar, (1968) 67 ITR 164 (All); Addl.

CIT v. P.L. Karuppan Chettiar, (1973) 114 ITR 523 (Mad); Shrivallabhdas

Modani v. CIT, (1982) 138 ITR 673 (MP) and CWT v. Mukundgirji, (1983) 144 ITR 18 (AP), approved

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

R-M/7397/CT

Advocates who appeared in this case :

V.S. Desai, Senior Advocate (Miss A. Subashini, Advocate with him), for the Appellants;

P.K. Mukherjee and A.K. Sengupta, Advocates, for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J.—These appeals arise by special leave from the decision of the High Court of Allahabad dated August 17, 1973. Two of these appeals are in respect of assessment years 1966-67 and 1967-68 arising out of the proceedings under the Wealth Tax Act, 1957. The connected reference was under the Income Tax Act, 1961 and related to the assessment year 1968-69. A common question of law arose in all these cases and these were disposed of by the High Court by a common judgment.

2. One Rangi Lal and his son Chander Sen constituted a Hindu undivided family. This family had some immovable property and the business carried on in the name of Khushi Ram Rangi Lal. On October 10, 1961, there was a partial partition in the family by which the business was divided between the father and the son, and thereafter, it was carried on by a partnership consisting of the two. The firm was assessed to income tax as a registered firm and the two partners were separately assessed in respect of their share of income. The house property of the family continued to remain joint. On July 17, 1965, Rangi Lal died leaving behind his son, Chander Sen, and his grandsons i.e. the sons of Chander Sen. His wife and mother predeceased him and he had no other issue except Chander Sen. On his death there was a credit balance of Rs 1,85,043 in his account in the books of the firm. For the assessment year 1966-67 (valuation date

October 3, 1965), Chander Sen, who constituted a joint family with his own sons, filed a return of his net wealth. The return included the property of the family which on the death of Rangi Lal passed on to Chander Sen by survivorship and also the assets of the business which devolved upon Chander Sen on the death of his father. The sum of Rs 1,85,043 standing to the credit of Rangi Lal was not included in the net wealth of the family of Chander Sen (hereinafter referred to as 'the assessee-family') on the ground that this amount devolved on Chander Sen in his individual capacity and was not the property of the assessee-family. The Wealth Tax Officer did not accept this contention and held that the sum of Rs 1,85,043 also belonged to the assessee-family.

3. At the close of the previous year ending on October 22, 1962, relating to the assessment year 1967-68, a sum of Rs 23,330 was credited to the account of late Rangi Lal on account of interest accruing on his credit balance. In the proceedings under the Income Tax Act for the assessment year 1967-68, the sum of Rs 23,330 was claimed as deduction. It was alleged that interest was due to Chander Sen in his individual capacity and was an allowable deduction in the computation of the business income of the assessee-family. At the end of the year the credit balance in the account of Rangi Lal stood at Rs 1,82,742 which was transferred to the account of Chander Sen. In the wealth tax assessment for the assessment year 1967-68, it was claimed, as in the earlier year, that the credit balance in the account of Rangi Lal belonged to Chander Sen in his individual capacity and not to the assessee-family. The Income Tax Officer who completed the assessment disallowed the claim relating to interest on the ground that it was a payment made by Chander Sen to himself. Likewise, in the wealth tax assessment, the sum of Rs 1,82,742 was included by the Wealth Tax Officer in the net wealth of the assessee-family. On appeal the Appellate Assistant Commissioner of Income Tax accepted the assessee's claim in full. He held that the capital in the name of Rangi Lal devolved on Chander Sen in his individual capacity and as such was not to be included in the wealth of the assessee-family. He also directed that in the income tax assessment the sum of Rs 23,330 on account of interest should be allowed as deduction. The revenue felt aggrieved and filed three appeals before the Income Tax Appellate Tribunal, two against the assessments under the Wealth Tax Act for the assessment years 1966-67 and 1967-68 and one against the assessment under the Income Tax Act for the assessment year 1967-68. The Tribunal dismissed the revenue's appeals.

4. The following question was referred to the High Court for its opinion :

Whether, on the facts and in the circumstances of the case, the

conclusion of the Tribunal that the sum of Rs 1,85,043 and Rs 1,82,742 did not constitute the assets of the assessee-Hindu undivided family is correct ?

5. Similarly in the reference under the Income Tax Act, the following question was referred :

Whether, on the facts and in the circumstances of the case, the interest of Rs 23,330 is allowable deduction in the computation of the business profits of the assessee-joint family ?

6. The answer to the questions would depend upon whether the amount standing to the credit of late Rangi Lal was inherited, after his death, by Chander Sen in his individual capacity or as a karta of the assessee-joint family consisting of himself and his sons.

7. The amount in question represented the capital allotted to Rangi Lal on partial partition and accumulated profits earned by him as his share in the firm. While Rangi Lal was alive this amount could not be said to belong to any joint Hindu family and *qua* Chander Sen and his sons, it was the separate property of Rangi Lal. On Rangi Lal's death the amount passed on to his son, Chander Sen, by inheritance. The High Court was of the opinion that under the Hindu law when a son inherited separate and self-acquired property of his father, it assumed the character of joint Hindu family property in his hands *qua* the members of his own family. But the High Court found that this principle has been modified by Section 8 of the Hindu Succession Act, 1956. Section 8 of the said Act provides, inter alia, that the property of a male Hindu dying intestate devolved according to the provisions of that chapter in the Act and indicates further that it will devolve first upon the heirs being the relatives specified in Class I of the Schedule. Heirs in the Schedule Class I includes and provides firstly son and thereafter daughter, widow and others. It is not necessary in view of the facts of this case to deal with other clauses indicated in Section 8 or other heirs mentioned in the Schedule. In this case as the High Court noted that the son, Chander Sen was the only heir and therefore the property was to pass to him only.

8. The High Court in the judgment under appeal relied on a Bench decision of the said High Court rendered previously. Inadvertently, in the judgment of the High Court, it had been mentioned that that judgment was in *Khudi Ram Laha v. CIT*¹ but that was a case which dealt with entirely different problem. The decision which the High Court had in mind and on which in fact the High Court relied was a decision in the case of *CIT v. Ram Rakshpal*,

1. (1968) 67 ITR 364 (All)

*Ashok Kumar*². In the said decision the Allahabad High Court held that in view of the provisions of the Hindu Succession Act, 1956, the income from assets inherited by a son from his father from whom he had separated by partition could not be assessed as the income of the Hindu undivided family of the son. The High Court relied on the commentary in Mulla's "*Hindu Law*", 13th Edn., page 248. The High Court also referred to certain passages from Dr Derret's "*Introduction to Modern Hindu Law*" (para 411, at page 252). Reliance was also placed on certain observations of this Court and the Privy Council as well as on Mayne's "*Hindu Law*". After discussing all these aspects the court came to the conclusion that the position of the Hindu law was that partition took away, qua a coparcener, the character of coparcenary property from the property which went to the share of another coparcener upon a division, although the property obtained by a coparcener upon partition continued to be coparcenary property for him and his unseparated issue. In that case what had happened was one Ram Rakshpal and his father Durga Prasad, constituted a Hindu undivided family which was assessed as such. Ram Rakshpal separated from his father by partition on October 11, 1948. Thereafter Ram Rakshpal started business of his own, income whereof was assessed in the hands of the assessee-family. Shri Durga Prasad also started business of his own after partition in the name and style of M/s Murli-dhar Mathura Prasad which was carried on by him till his death. Durga Prasad died on March 29, 1958 leaving behind him his widow, Jai Devi, his married daughter, Vidya Wati and Ram Rakshpal and Ram Rakshpal's son, Ashok Kumar, as his survivors. The assets left behind by Durga Prasad devolved upon three of them in equal shares by succession under the Hindu Succession Act, 1956. Vidya Wati took away her one-third share, while Jai Devi and Shri Ram Rakshpal continued the aforesaid business inherited by them in partnership with effect from April 1, 1958 under a partnership deed dated April 23, 1958. The said firm was granted registration for the assessment year 1958-59. The share of profit of Shri Ram Rakshpal for the assessment year under reference was determined at Rs 4210. The assessee-family contended before the Income Tax Officer that this profit was the personal income of Ram Rakshpal and could not be taxed in the hands of the Hindu undivided family of Ram Rakshpal, and held that Ram Rakshpal contributed his ancestral funds in the partnership business of Murli Dhar Mathura Prasad and that, hence, the income therefrom was taxable in the hands of the assessee family. The High Court finally held on these facts in *CIT v. Ram Rakshpal*² that the assets of the business left by Durga Prasad in the hands of Ram Rakshpal would be governed by Section 8 of the Hindu Succession Act, 1956.

2. (1968) 67 ITR 164 (All)

9. The High Court in the judgment under appeal was of the opinion that the facts of this case were identical with the facts in the case of *CIT*¹ and the principles applicable would be the same. The High Court accordingly answered the question in the affirmative and in favour of the assessee so far as assessment of wealth tax is concerned. The High Court also answered necessarily the question on the income tax reference affirmatively and in favour of the assessee.

10. The question here, is, whether the income or asset which a son inherits from his father when separated by partition the same should be assessed as income of the Hindu undivided family of son or his individual income. There is no dispute among the commentators on Hindu law nor in the decisions of the court that under the Hindu law as it is, the son would inherit the same as karta of his own family. But the question, is, what is the effect of Section 8 of the Hindu Succession Act, 1956? The Hindu Succession Act, 1956 lays down the general rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. Class I of the Schedule reads as follows :

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.

11. The heirs mentioned in Class I of the Schedule are son, daughter etc. including the son of a predeceased son but does not include specifically the grandson, being a son of a son living. Therefore, the short question, is, when the son as heir of Class I of the Schedule inherits the property, does he do so in his individual capacity or does he do so as karta of his own undivided family ?

12. Now the Allahabad High Court has noted that the case of *CIT v. Ram Rakshpal, Ashok Kumar*² after referring to the relevant authorities and commentators had observed at page 171 of the said report that there was no scope for consideration of a wide and general nature about the objects attempted to be achieved by a piece of legislation when interpreting the clear words of the enactment. The learned judges observed referring to the observations of Mulla's "*Commentary on Hindu Law*", and the provisions of Section 6 of the Hindu Succession Act that in the case of assets of the business left by father in the hands of his son will be governed by Section 8 of the Act and he would take in his individual capacity. In this connection reference

was also made before us to Section 4 of the Hindu Succession Act. Section 4 of the said Act provides for overriding effect of Act. Save as otherwise expressly provided in the Act, 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 the Act and any other law in force immediately before the commencement of the Act shall cease to apply to Hindus insofar it is inconsistent with any of the provisions contained in the Act. Section 6 deals with devolution of interest in coparcenary property and it makes it clear that 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 the Act. The proviso indicates 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 Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

13. Section 19 of the said Act deals with the 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 per capita and not per stripes and as tenants-in-common and not as joint tenants.

14. Section 30 stipulates that any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925.

15. It is clear that under the Hindu law, the moment a son is born, he gets a share in the 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. But the question is : is the position affected by Section 8 of the Hindu Succession Act, 1956 and if so, how ? The basic argument is that Section 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. It is this position which has mainly induced the Allahabad High Court in the two judgments, we have noticed,

to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. On the other hand, the Gujarat High Court has taken the contrary view.

16. In *CIT v. Babubhai Mansukhbhai*³, the Gujarat High Court held that in the case of Hindus governed by the Mitakshara law, where a son inherited the self-acquired property of his father, the son took it as the joint family property of himself and his son and not as his separate property. The correct status for the assessment to income tax of the son in respect of such property was as representing his Hindu undivided family. The Gujarat High Court could not accept the view of the Allahabad High Court mentioned hereinbefore. The Gujarat High Court dealt with the relevant provisions of the Act including Section 6 and referred to Mulla's "*Commentary*" and some other decisions.

17. Before we consider this question further, it will be necessary to refer to the view of the Madras High Court. Before the Full Bench of Madras High Court in *Additional CIT v. P.L. Karuppan Chettiar*⁴, this question arose. There, on a partition effected on March 22, 1954, in the Hindu undivided family consisting of P, his wife, their son, K and their daughter-in-law, P was allotted certain properties as and for his share and got separated. The partition was accepted by the revenue under Section 25-A of the Indian Income Tax Act, 1922. K along with his wife and their subsequently born children constituted a Hindu undivided family which was being assessed in that status. P died on September 9, 1963, leaving behind his widow and divided son, K, who was the karta of his Hindu undivided family, as his legal heirs and under Section 8 of the Hindu Succession Act, 1956, the Madras High Court held, that these two persons succeeded to the properties left by the deceased, P, and divided the properties among themselves. In the assessment made on the Hindu undivided family of which K was the karta, for the assessment year 1966-67 to 1970-71, the Income Tax Officer included for assessment the income received from the properties inherited by K from his father, P. The inclusion was confirmed by the Appellate Assistant Commissioner but, on further appeal, the Tribunal held that the properties did not form part of the joint family properties and hence the income therefrom could not be assessed in the hands of the family. On a reference to the High Court

3. (1977) 108 ITR 417 (Guj)

4. (1978) 114 ITR 523 (Mad)

at the instance of the revenue, it was held by the Full Bench that under the Hindu law, the property of a male Hindu devolved on his death on his sons and grandsons as the grandsons also have an interest in the property. However, by reason of Section 8 of the Hindu Succession Act, 1956, the son's son gets excluded and the son alone inherits the property to the exclusion of his son. No interest would accrue to the grandson of *P* in the property left by him on his death. As the effect of Section 8 was directly derogatory of the law established according to Hindu law, the statutory provision must prevail in view of the unequivocal intention in the statute itself, expressed in Section 4(1) which says that to the extent to which provisions have been made in the Act, those provisions shall override the established provisions in the texts of Hindu law. Accordingly, in that case, *K* alone took the properties obtained by his father, *P*, in the partition between them, and irrespective of the question as to whether it was ancestral property in the hands of *K* or not, he would exclude his son. Further, since the existing grandson at the time of the death of the grandfather had been excluded, an after-born son of the son will also not get any interest which the son inherited from the father. In respect of the property obtained by *K* on the death of his father, it is not possible to visualise or envisage any Hindu undivided family. The High Court held that the Tribunal was, therefore, correct in holding that the properties inherited by *K* from his divided father constituted his separate and individual properties and not the properties of the joint family consisting of himself, his wife, sons and daughters and hence the income therefrom was not assessable in the hands of the assessee-Hindu undivided family. This view is in consonance with the view of the Allahabad High Court noted above

18. The Madhya Pradesh High Court had occasion to consider this aspect in *Shrivallabhdas Modani v. CIT*⁵, and the Court held that if there was no coparcenary subsisting between a Hindu and his sons at the time of death of his father, property received by him on his father's death could not be so blended with the property which had been allotted to his sons on a partition effected prior to the death of the father. Section 4 of the Hindu Succession Act, 1956, clearly laid down that "save as expressly provided in the Act, 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 should cease to have effect with respect to any matter for which provision was made in the Act". Section 8 of the Hindu Succession Act, 1956 as noted before, laid down the scheme of succession to the property of a

Hindu dying intestate. The Schedule classified the heirs on whom such property should devolve. Those specified in Class I took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as an heir under Class I of the Schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son in his grandfather's property during the lifetime of his father which existed under the Hindu law as in force before the Act, was not saved expressly by the Act, and therefore, the earlier interpretation of Hindu law giving a right by birth in such property "ceased to have effect". The court further observed that in construing a Codification Act, the law which was in a force earlier should be ignored and the construction should be confined to the language used in the new Act. The High Court felt that so construed, Section 8 of the Hindu Succession Act should be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu dying intestate. Therefore, the property which devolved on a Hindu on the death of his father intestate after the coming into force of the Hindu Succession Act, 1956, did not constitute HUF property consisting of his own branch including his sons. It followed the Full Bench decision of the Madras High Court as well as the view of the Allahabad High Court in the two cases noted above including the judgment under appeal.

19. The Andhra Pradesh High Court in the case of *CWT v. Mukundgirji*⁰ had also to consider the aspect. It held that a perusal of the Hindu Succession Act, 1956 would disclose that Parliament wanted to make a clear break from the old Hindu law in certain respects consistent with modern and egalitarian concepts. For the sake of removal of any doubts, therefore, Section 4(1)(a) was inserted. The High Court was of the opinion that it would, therefore, not be consistent with the spirit and object of the enactment to strain provisions of the Act to accord with the prior notions and concepts of Hindu law. That such a course was not possible was made clear by the inclusion of females in Class I of the Schedule, and according to the Andhra Pradesh High Court, to hold that the property which devolved upon a Hindu under Section 8 of the Act would be HUF property in his hands vis-a-vis his own sons would amount to creating two classes among the heirs mentioned in Class I, viz., the male heirs in whose hands it would be joint family property vis-a-vis their sons; and female heirs with respect to whom no such concept could be applied or contemplated. The intention to depart from the pre-existing Hindu law was again made clear by Section 19 of the Hindu Succession Act which stated that if two or more heirs succeed together to the property of an intestate,

they should take the property as tenants-in-common and not as joint tenants and according to the Hindu law as obtained prior to Hindu Succession Act two or more sons succeeding to their father's property took as joint tenants and not tenants-in-common. The Act, however, has chosen to provide expressly that they should take as tenants-in-common. Accordingly the property which devolved upon heirs mentioned in Class I of the Schedule under Section 8 constituted the absolute properties and his sons have no right by birth in such properties. This decision, however, is under appeal by certificate to this Court. The aforesaid reasoning of the High Court appearing at pages 23 to 26 of Justice Reddy's view in *CWT v. Mukundgirji*⁶ appears to be convincing.

20. We have noted the divergent views expressed on this aspect by the Allahabad High Court, Full Bench of the Madras High Court, Madhya Pradesh and Andhra Pradesh High Courts on one side and the Gujarat High Court on the other.

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'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-a-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-a-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.

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dealing with Section 6 of the Hindu Succession Act at pages 924-26 as well as Mayne's on "*Hindu Law*", 12th Edn., pages 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, the Madras High Court, the Madhya Pradesh High Court, and the Andhra Pradesh High Court, appear to us to be correct. With respect we are unable to agree with the views of the Gujarat High Court noted hereinbefore.

26. In the premises the judgment and order of the Allahabad High Court under appeal is affirmed and the Appeals Nos. 1668-1669 of 1974 are dismissed with costs. Accordingly Appeal No. 1670 of 1974 in Income Tax Reference which must follow as a consequence in view of the findings that the sums standing to the credit of Rangi Lal belongs to Chander Sen in his individual capacity and not the joint Hindu family, the interest of Rs 23,330 was an allowable deduction in respect of the income of the family from the business. This appeal also fails and is dismissed with costs.

27. The Special Leave Petition No. 5327 of 1978 must also fail and is dismissed. There will be no order as to costs of this.

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(BEFORE R.S. PATHAK AND SABYASACHI MUKHARJI, JJ.)

JAGDISH SUGAR MILLS LTD.

Appellant ;

Versus

COMMISSIONER OF INCOME TAX, LUCKNOW

Respondent.

Civil Appeal No. 1348 (NT) of 1974†, decided on July 16, 1986

Income Tax — Deduction — Amount for which building, machinery or plant sold exceeding written down value — Applicability of second proviso to Section 10(2)(vii) of Income Tax Act, 1922 — Whether sale voluntary or compulsory — Held, second proviso also applicable in case of auction sale for recovery of arrears of cane cess as arrears of land revenue under Sections 279 and 282 of U.P. Z.A. L.R. Act — U.P. Zamindari Abolition & Land Reforms Act, 1950, Sections 279, 282 and 286

†From the Judgment and Order dated January 7, 1974 of the Allahabad High Court in I.T.R. No. 364 of 1971

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2J

(BEFORE SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.)

JOGI RAM

.. Appellant;

Versus

SURESH KUMAR AND OTHERS

.. Respondents.

Civil Appeals Nos. 1543-44 of 2019[†], decided on February 1, 2022

A. Family and Personal Laws — Hindu Succession Act, 1956 — Ss. 14(1) & (2) and S. 30 — Held, a restricted estate can be created by a will in favour of a female, so long as it is a new and independent right and does not amount to the recognition of a pre-existing right as per the principles laid down in *V. Tulasamma*, (1977) 3 SCC 99

— Objective of S. 14(1) is to create an absolute interest in case of a limited interest of wife where such limited estate owes its origin to the law as it stood then — Objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of — If it is held so it would imply that if wife is disinherited under will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of intent of testator — That cannot be objective of S. 14(1)

— Will bequeathed testator's estate to his son, appellant and his second wife *R* (first wife being deceased whose progeny is appellant) — Property was bequeathed half-and-half to appellant and *R* — However, nature of bequest was different for the two — Appellant was given absolute ownership rights to extent of his share of property whereas *R* was given a limited ownership for her enjoyment during her lifetime with respect to her share of land with a specific provision that she would not alienate, transfer or create third-party rights over the same — Thereafter property was to vest absolutely in appellant after her lifetime — Testator in present case, had taken all care for needs of maintenance of his wife by ensuring that revenue generated from estate would go to her alone — He, however, wished to give only a limited life interest to her as second wife with son inheriting complete estate after her lifetime — Thus, held, it would be provisions of S. 14(2) which would come into play in such a scenario and *R* only had a life interest in her favour — Natural sequitur is that respondent vendees cannot inherit a better title than what vendor *R* had and, thus, view taken by trial court and first appellate court is the correct view and sale deeds in favour of respondents by *R* cannot be sustained — Property Law — Transfer of Property Act, 1882 — Ss. 7 and 8 — *Nemo dat quod non habet*

[†] Arising from the Judgment and Order in *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978 (Punjab and Haryana High Court, RSA No. 210 of 2011, dt. 22-2-2018) [Reversed]

B. Civil Procedure Code, 1908 — S. 11 — Declaratory decree — When binding as res judicata — Principle as clarified in *Shakuntla Devi*, (2005) 5 SCC 390, that if the earlier declaratory decree which is sought to be made the basis of res judicata is delivered by a court without jurisdiction or is contrary to the existing law at the time the issue comes up for reconsideration, such earlier declaratory decree cannot be held to be res judicata in a subsequent case unless protected by any special enactment — Held, not applicable in present case, as declaratory decree in question was passed by competent court and there was no change in law post passing of the said decree

— In earlier round of litigation daughter of *R* sought a collusive decree when she had no interest in property — She then sought to create lease interest in the property — Both these aspects were held against *R* and her daughter right up to the Supreme Court in the first round of litigation where it was finally held that *R* had only a limited estate in the property in question

— Rights of respondent vendees are derived only from *R* and once judgment is binding on *R* it cannot be said that she can create rights contrary to judgment in favour of third parties and that too was done during pendency of litigation — Held, repeated endeavours of *R* and her daughter to establish an absolute interest had failed and thus, their transferees could not claim a better right than them — Furthermore, as the respondent vendees were not bona fide purchasers, they could not take the benefit of the proviso to S. 41 TPA — Property Law — Transfer of Property Act, 1882 — S. 41 proviso — Evidence Act, 1872 — S. 41 — Specific Relief Act, 1963, Ss. 34 and 35

Allowing the appeals, the Supreme Court

Held :

Conclusion (4) in para 62 of *V. Tulasamma*, (1977) 3 SCC 99 explains where Section 14(2) of the 1956 Act would apply, and this does inter alia apply to a will which creates an independent and new title in favour of females for the first time, so long as the same is not a recognition of a pre-existing right. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) of the 1956 Act will not operate in that sphere. (Para 34)

V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99, explained and applied

Jayanti Subbiah v. Alamelu Mangamma, 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45;

Yellawa v. Bhimangavda, 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452, considered

Sadhu Singh v. Gurdwara Sahib Narike, (2006) 8 SCC 75; *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*, (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390; *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105, cited

Objective of Section 14(1) of the 1956 Act is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to the law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife

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if all other aspects including maintenance are taken care of. If it was to be held so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective of Section 14(1) of the 1956 Act. (Para 35)

The testator in the present case, *T*, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. Hence, it would be the provisions of Section 14(2) of the 1956 Act which would come into play in such a scenario and *R* only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained. (Para 36)

The sequence of litigations can hardly be said to classify the respondents as bona fide purchasers, so as to claim the benefit of the proviso to Section 41 of the TP Act, 1882. The first endeavour was by the daughter of *R* by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against *R* and her daughter's right till the Supreme Court in the first round of litigation clearly opining that *R* had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor *R*. (Paras 37, 38, 11 and 28)

Jupudy Pardha Sarathy v. Pentapati Rama Krishna, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390, distinguished on fact

The rights of the respondents are derived only from *R* and once the judgment is binding on *R*, it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. From the facts on record it can be said that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will, the respondents being third parties. The repeated endeavour of *R* and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from *R*. (Para 39)

Suresh Kumar v. Jogi Ram, 2018 SCC OnLine P&H 6978, reversed

Ram Devi v. Jogi Ram, RSA No. 1700 of 1999, order dated 23-10-2001 (P&H); *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293; *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752; *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127, referred to

Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613, cited

Appeals allowed

RM-D/68476/CV

Advocates who appeared in this case :

Gagan Gupta (Advocate-on-Record), Advocate, for the Appellant;
Manish Kr. Choudhary, Ashutosh Kumar, Bhaskar Mishra, Ms Namita Choudhary (Advocate-on-Record), Ms Srishti Khurana, Ms Nikita Jain and Ms Srishti Choudhary, Advocates, for the Respondents.

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d The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.—

Background

e 2. The consequences of a testamentary disposition by a will dated 15-4-1968 by one Tulsi Ram, who passed away on 17-11-1969 is still pending resolution before us after half a century.

f 3. The will aforesaid bequeathed the testator's estate to his son, the appellant herein, and his second wife Ram Devi (the first wife being deceased whose progeny is the appellant). Land measuring 175 kanals and 9 marlas, a residential house and a Bara in Village Jundla, Haryana was bequeathed half-and-half to the appellant and Ram Devi. However, the nature of bequeath was different for the two. The appellant was given absolute ownership rights to the extent of his share of land and property whereas Ram Devi was given a limited ownership for her enjoyment during her lifetime with respect to her share of the land with a specific provision that she could not alienate, transfer or create third-party rights over the same. Thereafter the property was to vest absolutely in the appellant after her lifetime.

g 4. It appears that the properties were enjoyed as per the will after the demise of Tulsi Ram in 1969 for quite a few years till the first round of litigation began — Bimla Devi, daughter of Ram Devi instituted a suit in the Court of Sub-Judge, 1st Class, Karnal for declaration against her mother, Ram Devi, claiming that she had become owner in possession of half-share of the land willed to Ram Devi by Tulsi Ram, which resulted in a decree being passed on **h** 15-1-1986. It may be stated at this stage itself that by very nature the suit was collusive.

5. On the decree being passed Bimla Devi executed a lease deed in favour of one Amar Singh on 17-6-1986 in respect of land falling within Ram Devi's limited share. This prompted the appellant to file Civil Suit No. 94 of 1993 for declaration and permanent injunction before the Senior Sub-Judge, Karnal impleading Ram Devi, Bimla Devi and Amar Singh. The gravamen of the suit was that Ram Devi having only a limited life interest the decree of declaration by Bimla Devi had been obtained through collusion and the lease deed was a bogus document which would not have any effect upon the rights of the appellant to inherit the property after the demise of Ram Devi. The suit was, however, contested only by Ram Devi with the other two defendants being proceeded ex parte. The suit resulted in a judgment and decree dated 27-9-1995 to the effect that the appellant having proved the will executed by Tulsi Ram, the case clearly fell under Section 14(2) of the Hindu Succession Act, 1956 (hereinafter referred to as "the said Act") which was in the nature of an exception as it precluded the benefits of Section 14(1) of the said Act to accrue with respect of a property inter alia inherited under a will with a restricted right in such a property. Thus, it was concluded that the limited estate of Ram Devi could not be expanded to an absolute estate and the decree of the civil court dated 15-1-1986 and the lease deed dated 17-6-1986 were consequently set aside.

6. It may be noted that even though the suit was pending in the interregnum period Ram Devi executed two sale deeds dated 29-4-1993 qua land measuring 38 kanals 14 marlas in favour of one Dharam Singh and 11 kanals 3 marlas in favour of Kanta Devi. Another sale deed was subsequently executed on 8-6-1998/9-6-1998 in favour of Baldeva for land measuring 40 kanals 8 marlas. All these were part of the suit land. The latter was during the pendency of the appeal by Ram Devi before the Additional District Judge, Karnal which appeal was also finally dismissed vide judgment dated 15-4-1999. Insofar as the appeal qua Baldeva was concerned, that was also dismissed due to inability of Ram Devi to serve notice on Baldeva despite sufficient opportunity.

7. In the third round of the same litigation Ram Devi's second appeal under Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as "the PC Act") also met the same fate vide judgment dated 23-10-2001 in *Ram Devi v. Jogi Ram*¹. The whole matter ought to have received a quietus thereafter as the special leave petition was also dismissed vide order dated 29-4-2002². It may be noticed that in the interregnum period Ram Devi also passed away on 26-8-1999. This is as far as the story of the first round of litigation.

8. The second round of litigation began when the appellant instituted Civil Suit No. 256/157 of 2008 before the Civil Judge, SD, Karnal for declaration and injunction challenging the sale deeds executed by Ram Devi. This suit was also decreed vide judgment and decree dated 13-8-2009 in favour of the appellant.

¹ RSA No. 1700 of 1999, order dated 23-10-2001 (P&H)

² *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293

9. Once again the gravamen of the decision of the learned Civil Judge was the earlier judgment and decree dated 27-9-1995 opining that Ram Devi had only a limited ownership right and could not have alienated the suit property. There being no change in law, the previous decree in favour of the appellant was held binding among the parties and their successors-in-interest. The sale deeds executed, thus, found to be unsustainable being against the decree of the lower court. Once again, opinion was the same as to the construction of Sections 14(1) and 14(2) of the said Act as any contrary interpretation would tantamount to proscribing the right of a Hindu to execute a will as envisaged under Section 30 of the said Act. The court granted a decree of possession to the appellant being the rightful owner of the same. The court also noted that the title of the purchasers could not be better titled than Ram Devi possessed as they had acquired their rights from her and could not even be considered bona fide purchasers for value in view of the history of the litigation.

10. Kanta Devi, legal heirs of Baldev and Dharam Singh then preferred an appeal against the said judgment dated 13-8-2009, which was dismissed vide judgment dated 7-10-2010 in Civil Appeal No. 56 of 2009. That gave rise to the second appeal before the High Court, being RSA No. 210 of 2011.

11. The respondents pleaded before the High Court by relying upon the judgment of this Court in *V. Tulasamma v. Sesha Reddy*³ to contend that Ram Devi's right over the suit property granted under the will had crystallised into an absolute ownership right making her competent to transfer the same. The subsequent judgment of this Court in *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*⁴ was also referred to in support of the said proposition. The decree in the first round of litigation was contended not to operate as res judicata in the second suit as the judgment in the earlier suit was contrary to the law prevailing at the time of their consideration (*Shakuntla Devi v. Kamla*⁵ which referred to *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy*⁶). Without prejudice to the same the respondents also claimed to be bona fide purchasers for value and, thus, were protected under Section 41 of the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act").

12. On the other hand the appellant contended that the doctrine of res judicata would apply in view of the earlier adjudication as the matter of Ram Devi having a limited estate has been upheld right till the Supreme Court. The appellant had also taken possession of the suit property and execution of the judgments was under challenge before the High Court.

³ (1977) 3 SCC 99

⁴ (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

⁵ (2005) 5 SCC 390

⁶ (1970) 1 SCC 613

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13. The fate of the respondents after the amendment turned favourable as they succeeded before the High Court in terms of the impugned judgment dated 22-2-2018⁷. The discussion in the impugned judgment revolves around three aspects: a

13.1. Whether the first round of litigation operate as res judicata for the appeal.

13.2. Whether Ram Devi's limited right over the suit property conferred through the will had crystallised into an absolute right under Section 14(1) of the said Act. b

13.3. Whether the High Court was mandated to frame a substantial question of law in deciding the second appeal.

14. On the first aspect the High Court found that the factual scenario and legal principles enunciated in *Shakuntla Devi case*⁵ would be squarely applicable to the facts of the present case. In the factual scenario of that case, one Uttamdasi was the successor of the suit property and had alienated the same through a sale deed and gift deed. The daughter of Uttamdasi, Takami, successfully challenged the alienation and the decree became final. Uttamdasi thereafter executed a will with respect to the same suit property. Tikami instituted a suit for possession on the basis of a previous declaratory decree wherein she had been held to have ownership right of the property. This Court opined that the case would constitute as a principle of res judicata. The first declaratory decree in favour of Tikami was granted on the basis of a limited right held by Uttamdasi in the suit property. By the time the second decree was tried, the Supreme Court in *V. Tulasamma case*³ had declared the law under Section 14 of the said Act to the extent that the beneficiary under a will such as Uttamdasi with limited rights would become the absolute owner of the same. Since the law had been altered since the first declaratory decree, the same would not operate as res judicata in a decree for possession. The judgment in *V. Tulasamma case*³ was not retrospective but a declaratory decree simpliciter would not attain finality if it is used in a future decree of possession and it would be open for a defendant in a future suit for possession to establish that the earlier declaratory decree was not lawful. Thus, the respondents were held entitled to challenge the appellant's possession of the suit property. c
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15. On the second aspect the High Court has taken a view that *V. Tulasamma case*³ had sufficiently resolved any uncertainty under Sections 14(1) & 14(2) of the said Act. A Hindu female has a right to maintenance on a property if a charge was created for her maintenance, the right would become legally enforceable irrespective, even without a charge, the claim for maintenance was a pre-existing right so that any transfer declaring such right would not confer a new title but merely confirm pre-existing rights and Section 14(2) of the said g

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

h

a Act cannot be interpreted in a manner that would dilute Sections 14(1) and 14(2) of the said Act. Only in a scenario where the instrument created a new title in favour of the wife for the first time, would Section 14(2) would come into play and not where there was a pre-existing right. Ram Devi was held to have been conferred with a limited right which would translate into an absolute right over the suit property as it was only a confirmation of the pre-existing right over the property.

b 16. On the last aspect it was held that in view of the decision of this Court in *Pankajakshi v. Chandrika*⁸, the High Court was not required to frame a substantial question of law while deciding the plea as Section 97(1) of the Civil Procedure Code, 1908 (hereinafter referred to as “the said Code”) would have no applicability to the PC Act.

c 17. On the appellant approaching this Court notice was issued⁹ in the SLP on 4-7-2018 with the direction to maintain status quo as on the date as the appellant had already taken over possession in the execution of the decree. Leave was granted on 4-2-2019¹⁰ and the interim order⁹ made absolute.

18. In the conspectus of the aforesaid, the matter was heard by us.

The arguments

d 19. In order to appreciate the provisions of the said Act, it may be appropriate to reproduce Section 14 of the said Act as under:

e “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.

f *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.

g (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.”

h 20. There is no doubt that Section 14 of the said Act is the part of the said Act to give rights of a property to a Hindu female and was a progressive step. Sub-section (1) of Section 14 of the said Act makes it clear that it applies to properties acquired before or after the commencement of the said Act. Any

8 (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

9 *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752

10 *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127

property so possessed was to be held by her as full owner thereof and not as a limited owner. The Explanation to sub-section (1) of Section 14 of the said Act defines the meaning of “property” in this sub-section to include both movable and immovable property acquired by the female Hindu by inheritance or devise or a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, or by her skill or exertion, or by purchase or by prescription or in any other manner whatsoever, including *stridhana*. The Explanation is quite expansive.

21. Sub-section (2) of Section 14 of the said Act is in the nature of a proviso. It begins with a “non obstante clause”. Thus, it says that “[n]othing 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....”, etc. where a restricted estate in such property is prescribed. In our view the objective of sub-section (2) above is quite clear as enunciated repeatedly by this Court in various judicial pronouncements i.e. there cannot be a fetter in a owner of a property to give a limited estate if he so chooses to do including to his wife but of course if the limited estate is to the wife for her maintenance that would mature in an absolute estate under Section 14(1) of the said Act.

22. Before considering the submissions it would be appropriate to turn to the will itself. The will while conferring a limited estate on Ram Devi, Tulsi Ram had clearly stated that she will earn income from the property for her livelihood. The income, thus, generated from the property is what has been given for maintenance and not the property itself. The next clarification is that after the lifetime of Ram Devi, the appellant will get the ownership of the remaining half portion also. It is specified that in case Ram Devi pre-deceases Tulsi Ram, then all the properties would go absolutely to the appellant and that the other children will have no interest in the property.

23. We may note that Tulsi Ram had six children. One son and four daughters are from the first wife and Bimla Devi was the daughter from the second wife. At the stage when the will was executed one of the daughters was unmarried and the will also provided that in case for performing the marriage Ram Devi needs money she will have the right to mortgage the property and earn money from the same and will further have the right to gain income even prior to the marriage.

24. We have set forth the terms and conditions of the will to understand the intent of the testator. The testator is, at least, clear in terms that the income derived from the property is what is given to the second wife as maintenance while insofar as the properties are concerned, they are divided half-and-half with the appellant having an absolute share and the wife having a limited estate which after her lifetime was to convert into an absolute estate of the appellant.

25. Now turning to the submissions of the learned counsel for the parties.

26. The learned counsel for the appellant contended that the life estate was not given to Ram Devi in lieu of recognition of any pre-existing right of Ram Devi or in lieu of maintenance and, thus, Section 14(2) of the said Act would apply and not Section 14(1) of the said Act. The plea of res judicata was again reiterated. It was urged that the High Court proceeded on an erroneous premise as if the law had changed from the first round of litigation while the fact was that the law was the same at both stages of time. The distinction which was sought to be made was that *Shakuntla Devi case*⁵ was wrongly relied upon as the will in that case was dated 1-10-1935 and it was, thus, a pre-1956 will and, thus, that judgment was not precedent for factual scenario in question. The suit property was a self-acquired property of Tulsi Ram and, thus, he was competent to execute the will.

27. We may note that the learned counsel for the appellant did seek to contend that since possession of the property was taken over by the appellant and Ram Devi was not in possession thereof, she cannot claim the benefit of Section 14(1) of the said Act (*Sadhu Singh v. Gurdwara Sahib Narike*¹¹ and *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*¹²). We may, however, note that in our perspective that is not a material consideration as the possession is stated to have been taken over in pursuance of the decree of the trial court.

28. On behalf of the respondents it was, once again, emphasised that the factual scenario was similar to *Shakuntla Devi case*⁵ and the rights of a female Hindu post the said Act have been crystallised and enunciated in *V. Tulasamma case*³ since she was an absolute owner she was entitled to sell the land and the respondents were bona fide buyers who were protected by Section 41 of the TP Act. Further no substantial question of law was required to be framed in view of the Constitution Bench judgment of the Supreme Court in *Pankajakshi case*⁸.

Our view

29. We have extracted the relevant portions of the enactment, the document in question being the will and have already opined on the interpretation of the will. The submissions of the learned counsel for the parties have, thus, to be appreciated in the conspectus of the same.

30. We do believe that there are only two real aspects to be examined in the present case as the issue of even framing a question of law stands settled. The two aspects, in our view are as under:

30.1. (i) In the given factual scenario did Ram Devi become the absolute owner of the property in view of Section 14(1) of the said Act or in view of the will the Explanation under Section 14(2) would apply.

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

¹¹ (2006) 8 SCC 75

¹² (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

⁸ *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

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30.2. (ii) What is the effect of the first round of litigation which came up to this Court between the appellant and Ram Devi, the two beneficiaries of the will.

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31. We are of the view that both these questions have to be answered in favour of the appellant and for that reason the impugned judgment is unsustainable.

32. We would first like to turn to the seminal judgment in *V. Tulasamma case*³. In para 20 the propositions emerging in respect of incidents and characteristics of a Hindu woman's right to maintenance have been crystallised as under: (SCC pp. 113-14)

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"20. Thus on a careful consideration and detailed analysis of the authorities mentioned above and the Shastric Hindu Law on the subject, the following propositions emerge with respect to the incidents and characteristics of a Hindu woman's right to maintenance:

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'(1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow;

d

(2) though the widow's right to maintenance is not a right to property but it is undoubtedly pre-existing right in property i.e. it is a *jus ad rem not jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court;

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(3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance;

(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right;

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(5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort (*Jayanti Subbiah v. Alamelu Mangamma*¹³ and *Yellawa v. Bhimangavda*¹⁴) of co-owner in the property of her husband, though her co-ownership is of a subordinate nature; and

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³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

¹³ 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45

¹⁴ 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452

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a (6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance.’ ”

b 33. In the light of the aforesaid passage, Sections 14(1) and 14(2) of the said Act were entered by the Court. The word “possessed” was held to be used in a wide sense not requiring a Hindu woman to be in actual or physical possession of the property and it would suffice if she has a right in the property. The discussion in para 33 thereafter opines that the intention of Parliament was to confine sub-section (2) of Section 14 of the said Act only to two transactions viz. a gift and a will, which clearly would not include property received by a Hindu female in lieu of maintenance or at a partition. The intention of Parliament in adding the other categories to sub-section (2) was merely to ensure that any transaction under which a Hindu female gets a new or independent title under any of the modes mentioned in Section 14(2) of the said Act. The conclusions were thereafter set forth in para 62 of the judgment as under: (SCC pp. 135-36)

d “62. We would now like to summarise the legal conclusions which we have reached after an exhaustive consideration of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

e (1) The Hindu female’s right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

g (2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

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(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

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(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

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(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

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(6) The words "possessed by" used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

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(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

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34. In our view the relevant aspect of the aforesaid conclusion is Conclusion (4) in para 62 which opines where sub-section (2) of Section 14 of the said Act would apply, and this does inter alia apply to a will which may create independent and new title in favour of females for the first time and is not a recognition of a pre-existing right. In such cases of a restricted estate in favour of a female is legally permissible and Section 14(1) of the said Act will not operate in that sphere.

35. We may add here that the objective of Section 14(1) is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of. If we were to hold so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective, in our view.

36. The testator in the present case, Tulsi Ram, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. We are, thus, of the view that it would be the provisions of Section 14(2) of the said Act which would come into play in such a scenario and Ram Devi only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained.

37. On consideration of the second aspect, we must begin by stating that the sequence of litigations can hardly be said to classify the respondents as bona fide purchasers. The first endeavour was by the daughter of Ram Devi by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against Ram Devi and her daughter right till the Supreme Court in the first round of litigation clearly opining that Ram Devi had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor Ram Devi.

38. We may also notice that the reliance on *Shakuntla Devi case*⁵ by the High Court is misplaced as the factual scenario cannot be said to be identical. In fact the most crucial aspect was that the will in question was dated 1-10-1935, a pre-1956 will which is the distinguishing factor. The same factual scenario prevailed in *Jupudy Pardha Sarathy case*⁴. We must also notice that the High

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

⁴ *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

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Court wrongly proceeded on the basis that the first round of litigation would not create any binding precedents because there was change in law after the first round of litigation. There is, in fact, no change in law as all the judgments were much prior in time.

39. We have already stated that the rights of the respondents are derived only from Ram Devi and once the judgment is binding on Ram Devi it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. We believe from the facts on record that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will respondents being third parties. The repeated endeavour of Ram Devi and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from Ram Devi.

Conclusion

40. The result of the aforesaid is that the appeals are allowed and the impugned judgment⁷ of the learned Single Judge of the High Court is set aside and the decree of the trial court dated 13-8-2009 as affirmed by the appellate court dated 7-10-2010 is reaffirmed. The parties are left to bear their own costs.

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978

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(BEFORE SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.)

JOGI RAM

.. Appellant;

Versus

SURESH KUMAR AND OTHERS

.. Respondents.

Civil Appeals Nos. 1543-44 of 2019[†], decided on February 1, 2022

A. Family and Personal Laws — Hindu Succession Act, 1956 — Ss. 14(1) & (2) and S. 30 — Held, a restricted estate can be created by a will in favour of a female, so long as it is a new and independent right and does not amount to the recognition of a pre-existing right as per the principles laid down in *V. Tulasamma*, (1977) 3 SCC 99

— Objective of S. 14(1) is to create an absolute interest in case of a limited interest of wife where such limited estate owes its origin to the law as it stood then — Objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of — If it is held so it would imply that if wife is disinherited under will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of intent of testator — That cannot be objective of S. 14(1)

— Will bequeathed testator's estate to his son, appellant and his second wife *R* (first wife being deceased whose progeny is appellant) — Property was bequeathed half-and-half to appellant and *R* — However, nature of bequest was different for the two — Appellant was given absolute ownership rights to extent of his share of property whereas *R* was given a limited ownership for her enjoyment during her lifetime with respect to her share of land with a specific provision that she would not alienate, transfer or create third-party rights over the same — Thereafter property was to vest absolutely in appellant after her lifetime — Testator in present case, had taken all care for needs of maintenance of his wife by ensuring that revenue generated from estate would go to her alone — He, however, wished to give only a limited life interest to her as second wife with son inheriting complete estate after her lifetime — Thus, held, it would be provisions of S. 14(2) which would come into play in such a scenario and *R* only had a life interest in her favour — Natural sequitur is that respondent vendees cannot inherit a better title than what vendor *R* had and, thus, view taken by trial court and first appellate court is the correct view and sale deeds in favour of respondents by *R* cannot be sustained — Property Law — Transfer of Property Act, 1882 — Ss. 7 and 8 — *Nemo dat quod non habet*

[†] Arising from the Judgment and Order in *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978 (Punjab and Haryana High Court, RSA No. 210 of 2011, dt. 22-2-2018) [Reversed]

- B. Civil Procedure Code, 1908 — S. 11 — Declaratory decree — When binding as res judicata — Principle as clarified in *Shakuntla Devi*, (2005) 5 SCC 390, that if the earlier declaratory decree which is sought to be made the basis of res judicata is delivered by a court without jurisdiction or is contrary to the existing law at the time the issue comes up for reconsideration, such earlier declaratory decree cannot be held to be res judicata in a subsequent case unless protected by any special enactment — Held, not applicable in present case, as declaratory decree in question was passed by competent court and there was no change in law post passing of the said decree**

- In earlier round of litigation daughter of *R* sought a collusive decree when she had no interest in property — She then sought to create lease interest in the property — Both these aspects were held against *R* and her daughter right up to the Supreme Court in the first round of litigation where it was finally held that *R* had only a limited estate in the property in question

- Rights of respondent vendees are derived only from *R* and once judgment is binding on *R* it cannot be said that she can create rights contrary to judgment in favour of third parties and that too was done during pendency of litigation — Held, repeated endeavours of *R* and her daughter to establish an absolute interest had failed and thus, their transferees could not claim a better right than them — Furthermore, as the respondent vendees were not bona fide purchasers, they could not take the benefit of the proviso to S. 41 TPA — Property Law — Transfer of Property Act, 1882 — S. 41 proviso — Evidence Act, 1872 — S. 41 — Specific Relief Act, 1963, Ss. 34 and 35

- Allowing the appeals, the Supreme Court

Held :

- Conclusion (4) in para 62 of *V. Tulasamma*, (1977) 3 SCC 99 explains where Section 14(2) of the 1956 Act would apply, and this does inter alia apply to a will which creates an independent and new title in favour of females for the first time, so long as the same is not a recognition of a pre-existing right. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) of the 1956 Act will not operate in that sphere. (Para 34)

V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99, explained and applied

Jayanti Subbiah v. Alamelu Mangamma, 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45;

Yellawa v. Bhimangavda, 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452, considered

- Sadhu Singh v. Gurdwara Sahib Narike*, (2006) 8 SCC 75; *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*, (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390; *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105, cited

- Objective of Section 14(1) of the 1956 Act is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to the law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife

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if all other aspects including maintenance are taken care of. If it was to be held so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective of Section 14(1) of the 1956 Act. (Para 35)

The testator in the present case, *T*, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. Hence, it would be the provisions of Section 14(2) of the 1956 Act which would come into play in such a scenario and *R* only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained. (Para 36)

The sequence of litigations can hardly be said to classify the respondents as bona fide purchasers, so as to claim the benefit of the proviso to Section 41 of the TP Act, 1882. The first endeavour was by the daughter of *R* by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against *R* and her daughter's right till the Supreme Court in the first round of litigation clearly opining that *R* had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor *R*. (Paras 37, 38, 11 and 28)

Jupudy Pardha Sarathy v. Pentapati Rama Krishna, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390, distinguished on fact

The rights of the respondents are derived only from *R* and once the judgment is binding on *R*, it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. From the facts on record it can be said that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will, the respondents being third parties. The repeated endeavour of *R* and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from *R*. (Para 39)

Suresh Kumar v. Jogi Ram, 2018 SCC OnLine P&H 6978, reversed

Ram Devi v. Jogi Ram, RSA No. 1700 of 1999, order dated 23-10-2001 (P&H); *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293; *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752; *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127, referred to

Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613, cited

Appeals allowed

RM-D/68476/CV

Advocates who appeared in this case :

Gagan Gupta (Advocate-on-Record), Advocate, for the Appellant;
Manish Kr. Choudhary, Ashutosh Kumar, Bhaskar Mishra, Ms Namita Choudhary (Advocate-on-Record), Ms Srishti Khurana, Ms Nikita Jain and Ms Srishti Choudhary, Advocates, for the Respondents.

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	14. 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452, <i>Yellawa v. Bhimangavda</i>	284g

d The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.—

Background

e 2. The consequences of a testamentary disposition by a will dated 15-4-1968 by one Tulsi Ram, who passed away on 17-11-1969 is still pending resolution before us after half a century.

f 3. The will aforesaid bequeathed the testator's estate to his son, the appellant herein, and his second wife Ram Devi (the first wife being deceased whose progeny is the appellant). Land measuring 175 kanals and 9 marlas, a residential house and a Bara in Village Jundla, Haryana was bequeathed half-and-half to the appellant and Ram Devi. However, the nature of bequeath was different for the two. The appellant was given absolute ownership rights to the extent of his share of land and property whereas Ram Devi was given a limited ownership for her enjoyment during her lifetime with respect to her share of the land with a specific provision that she could not alienate, transfer or create third-party rights over the same. Thereafter the property was to vest absolutely in the appellant after her lifetime.

g 4. It appears that the properties were enjoyed as per the will after the demise of Tulsi Ram in 1969 for quite a few years till the first round of litigation began — Bimla Devi, daughter of Ram Devi instituted a suit in the Court of Sub-Judge, 1st Class, Karnal for declaration against her mother, Ram Devi, claiming that she had become owner in possession of half-share of the land willed to Ram Devi by Tulsi Ram, which resulted in a decree being passed on **h** 15-1-1986. It may be stated at this stage itself that by very nature the suit was collusive.

5. On the decree being passed Bimla Devi executed a lease deed in favour of one Amar Singh on 17-6-1986 in respect of land falling within Ram Devi's limited share. This prompted the appellant to file Civil Suit No. 94 of 1993 for declaration and permanent injunction before the Senior Sub-Judge, Karnal impleading Ram Devi, Bimla Devi and Amar Singh. The gravamen of the suit was that Ram Devi having only a limited life interest the decree of declaration by Bimla Devi had been obtained through collusion and the lease deed was a bogus document which would not have any effect upon the rights of the appellant to inherit the property after the demise of Ram Devi. The suit was, however, contested only by Ram Devi with the other two defendants being proceeded ex parte. The suit resulted in a judgment and decree dated 27-9-1995 to the effect that the appellant having proved the will executed by Tulsi Ram, the case clearly fell under Section 14(2) of the Hindu Succession Act, 1956 (hereinafter referred to as "the said Act") which was in the nature of an exception as it precluded the benefits of Section 14(1) of the said Act to accrue with respect of a property inter alia inherited under a will with a restricted right in such a property. Thus, it was concluded that the limited estate of Ram Devi could not be expanded to an absolute estate and the decree of the civil court dated 15-1-1986 and the lease deed dated 17-6-1986 were consequently set aside.

6. It may be noted that even though the suit was pending in the interregnum period Ram Devi executed two sale deeds dated 29-4-1993 qua land measuring 38 kanals 14 marlas in favour of one Dharam Singh and 11 kanals 3 marlas in favour of Kanta Devi. Another sale deed was subsequently executed on 8-6-1998/9-6-1998 in favour of Baldeva for land measuring 40 kanals 8 marlas. All these were part of the suit land. The latter was during the pendency of the appeal by Ram Devi before the Additional District Judge, Karnal which appeal was also finally dismissed vide judgment dated 15-4-1999. Insofar as the appeal qua Baldeva was concerned, that was also dismissed due to inability of Ram Devi to serve notice on Baldeva despite sufficient opportunity.

7. In the third round of the same litigation Ram Devi's second appeal under Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as "the PC Act") also met the same fate vide judgment dated 23-10-2001 in *Ram Devi v. Jogi Ram*¹. The whole matter ought to have received a quietus thereafter as the special leave petition was also dismissed vide order dated 29-4-2002². It may be noticed that in the interregnum period Ram Devi also passed away on 26-8-1999. This is as far as the story of the first round of litigation.

8. The second round of litigation began when the appellant instituted Civil Suit No. 256/157 of 2008 before the Civil Judge, SD, Karnal for declaration and injunction challenging the sale deeds executed by Ram Devi. This suit was also decreed vide judgment and decree dated 13-8-2009 in favour of the appellant.

¹ RSA No. 1700 of 1999, order dated 23-10-2001 (P&H)

² *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293

9. Once again the gravamen of the decision of the learned Civil Judge was the earlier judgment and decree dated 27-9-1995 opining that Ram Devi had only a limited ownership right and could not have alienated the suit property. There being no change in law, the previous decree in favour of the appellant was held binding among the parties and their successors-in-interest. The sale deeds executed, thus, found to be unsustainable being against the decree of the lower court. Once again, opinion was the same as to the construction of Sections 14(1) and 14(2) of the said Act as any contrary interpretation would tantamount to proscribing the right of a Hindu to execute a will as envisaged under Section 30 of the said Act. The court granted a decree of possession to the appellant being the rightful owner of the same. The court also noted that the title of the purchasers could not be better titled than Ram Devi possessed as they had acquired their rights from her and could not even be considered bona fide purchasers for value in view of the history of the litigation.

10. Kanta Devi, legal heirs of Baldev and Dharam Singh then preferred an appeal against the said judgment dated 13-8-2009, which was dismissed vide judgment dated 7-10-2010 in Civil Appeal No. 56 of 2009. That gave rise to the second appeal before the High Court, being RSA No. 210 of 2011.

11. The respondents pleaded before the High Court by relying upon the judgment of this Court in *V. Tulasamma v. Sesha Reddy*³ to contend that Ram Devi's right over the suit property granted under the will had crystallised into an absolute ownership right making her competent to transfer the same. The subsequent judgment of this Court in *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*⁴ was also referred to in support of the said proposition. The decree in the first round of litigation was contended not to operate as res judicata in the second suit as the judgment in the earlier suit was contrary to the law prevailing at the time of their consideration (*Shakuntla Devi v. Kamla*⁵ which referred to *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy*⁶). Without prejudice to the same the respondents also claimed to be bona fide purchasers for value and, thus, were protected under Section 41 of the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act").

12. On the other hand the appellant contended that the doctrine of res judicata would apply in view of the earlier adjudication as the matter of Ram Devi having a limited estate has been upheld right till the Supreme Court. The appellant had also taken possession of the suit property and execution of the judgments was under challenge before the High Court.

³ (1977) 3 SCC 99

⁴ (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

⁵ (2005) 5 SCC 390

⁶ (1970) 1 SCC 613

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13. The fate of the respondents after the amendment turned favourable as they succeeded before the High Court in terms of the impugned judgment dated 22-2-2018⁷. The discussion in the impugned judgment revolves around three aspects: a

13.1. Whether the first round of litigation operate as res judicata for the appeal.

13.2. Whether Ram Devi's limited right over the suit property conferred through the will had crystallised into an absolute right under Section 14(1) of the said Act. b

13.3. Whether the High Court was mandated to frame a substantial question of law in deciding the second appeal.

14. On the first aspect the High Court found that the factual scenario and legal principles enunciated in *Shakuntla Devi case*⁵ would be squarely applicable to the facts of the present case. In the factual scenario of that case, one Uttamdasi was the successor of the suit property and had alienated the same through a sale deed and gift deed. The daughter of Uttamdasi, Takami, successfully challenged the alienation and the decree became final. Uttamdasi thereafter executed a will with respect to the same suit property. Tikami instituted a suit for possession on the basis of a previous declaratory decree wherein she had been held to have ownership right of the property. This Court opined that the case would constitute as a principle of res judicata. The first declaratory decree in favour of Tikami was granted on the basis of a limited right held by Uttamdasi in the suit property. By the time the second decree was tried, the Supreme Court in *V. Tulasamma case*³ had declared the law under Section 14 of the said Act to the extent that the beneficiary under a will such as Uttamdasi with limited rights would become the absolute owner of the same. Since the law had been altered since the first declaratory decree, the same would not operate as res judicata in a decree for possession. The judgment in *V. Tulasamma case*³ was not retrospective but a declaratory decree simpliciter would not attain finality if it is used in a future decree of possession and it would be open for a defendant in a future suit for possession to establish that the earlier declaratory decree was not lawful. Thus, the respondents were held entitled to challenge the appellant's possession of the suit property. c
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15. On the second aspect the High Court has taken a view that *V. Tulasamma case*³ had sufficiently resolved any uncertainty under Sections 14(1) & 14(2) of the said Act. A Hindu female has a right to maintenance on a property if a charge was created for her maintenance, the right would become legally enforceable irrespective, even without a charge, the claim for maintenance was a pre-existing right so that any transfer declaring such right would not confer a new title but merely confirm pre-existing rights and Section 14(2) of the said g

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

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a Act cannot be interpreted in a manner that would dilute Sections 14(1) and 14(2) of the said Act. Only in a scenario where the instrument created a new title in favour of the wife for the first time, would Section 14(2) would come into play and not where there was a pre-existing right. Ram Devi was held to have been conferred with a limited right which would translate into an absolute right over the suit property as it was only a confirmation of the pre-existing right over the property.

b 16. On the last aspect it was held that in view of the decision of this Court in *Pankajakshi v. Chandrika*⁸, the High Court was not required to frame a substantial question of law while deciding the plea as Section 97(1) of the Civil Procedure Code, 1908 (hereinafter referred to as “the said Code”) would have no applicability to the PC Act.

c 17. On the appellant approaching this Court notice was issued⁹ in the SLP on 4-7-2018 with the direction to maintain status quo as on the date as the appellant had already taken over possession in the execution of the decree. Leave was granted on 4-2-2019¹⁰ and the interim order⁹ made absolute.

18. In the conspectus of the aforesaid, the matter was heard by us.

The arguments

d 19. In order to appreciate the provisions of the said Act, it may be appropriate to reproduce Section 14 of the said Act as under:

e “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.

f *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.

g (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.”

h 20. There is no doubt that Section 14 of the said Act is the part of the said Act to give rights of a property to a Hindu female and was a progressive step. Sub-section (1) of Section 14 of the said Act makes it clear that it applies to properties acquired before or after the commencement of the said Act. Any

8 (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

9 *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752

10 *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127

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property so possessed was to be held by her as full owner thereof and not as a limited owner. The Explanation to sub-section (1) of Section 14 of the said Act defines the meaning of “property” in this sub-section to include both movable and immovable property acquired by the female Hindu by inheritance or devise or a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, or by her skill or exertion, or by purchase or by prescription or in any other manner whatsoever, including *stridhana*. The Explanation is quite expansive.

21. Sub-section (2) of Section 14 of the said Act is in the nature of a proviso. It begins with a “non obstante clause”. Thus, it says that “[n]othing 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....”, etc. where a restricted estate in such property is prescribed. In our view the objective of sub-section (2) above is quite clear as enunciated repeatedly by this Court in various judicial pronouncements i.e. there cannot be a fetter in a owner of a property to give a limited estate if he so chooses to do including to his wife but of course if the limited estate is to the wife for her maintenance that would mature in an absolute estate under Section 14(1) of the said Act.

22. Before considering the submissions it would be appropriate to turn to the will itself. The will while conferring a limited estate on Ram Devi, Tulsi Ram had clearly stated that she will earn income from the property for her livelihood. The income, thus, generated from the property is what has been given for maintenance and not the property itself. The next clarification is that after the lifetime of Ram Devi, the appellant will get the ownership of the remaining half portion also. It is specified that in case Ram Devi pre-deceases Tulsi Ram, then all the properties would go absolutely to the appellant and that the other children will have no interest in the property.

23. We may note that Tulsi Ram had six children. One son and four daughters are from the first wife and Bimla Devi was the daughter from the second wife. At the stage when the will was executed one of the daughters was unmarried and the will also provided that in case for performing the marriage Ram Devi needs money she will have the right to mortgage the property and earn money from the same and will further have the right to gain income even prior to the marriage.

24. We have set forth the terms and conditions of the will to understand the intent of the testator. The testator is, at least, clear in terms that the income derived from the property is what is given to the second wife as maintenance while insofar as the properties are concerned, they are divided half-and-half with the appellant having an absolute share and the wife having a limited estate which after her lifetime was to convert into an absolute estate of the appellant.

25. Now turning to the submissions of the learned counsel for the parties.

26. The learned counsel for the appellant contended that the life estate was not given to Ram Devi in lieu of recognition of any pre-existing right of Ram Devi or in lieu of maintenance and, thus, Section 14(2) of the said Act would apply and not Section 14(1) of the said Act. The plea of res judicata was again reiterated. It was urged that the High Court proceeded on an erroneous premise as if the law had changed from the first round of litigation while the fact was that the law was the same at both stages of time. The distinction which was sought to be made was that *Shakuntla Devi case*⁵ was wrongly relied upon as the will in that case was dated 1-10-1935 and it was, thus, a pre-1956 will and, thus, that judgment was not precedent for factual scenario in question. The suit property was a self-acquired property of Tulsi Ram and, thus, he was competent to execute the will.

27. We may note that the learned counsel for the appellant did seek to contend that since possession of the property was taken over by the appellant and Ram Devi was not in possession thereof, she cannot claim the benefit of Section 14(1) of the said Act (*Sadhu Singh v. Gurdwara Sahib Narike*¹¹ and *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*¹²). We may, however, note that in our perspective that is not a material consideration as the possession is stated to have been taken over in pursuance of the decree of the trial court.

28. On behalf of the respondents it was, once again, emphasised that the factual scenario was similar to *Shakuntla Devi case*⁵ and the rights of a female Hindu post the said Act have been crystallised and enunciated in *V. Tulasamma case*³ since she was an absolute owner she was entitled to sell the land and the respondents were bona fide buyers who were protected by Section 41 of the TP Act. Further no substantial question of law was required to be framed in view of the Constitution Bench judgment of the Supreme Court in *Pankajakshi case*⁸.

Our view

29. We have extracted the relevant portions of the enactment, the document in question being the will and have already opined on the interpretation of the will. The submissions of the learned counsel for the parties have, thus, to be appreciated in the conspectus of the same.

30. We do believe that there are only two real aspects to be examined in the present case as the issue of even framing a question of law stands settled. The two aspects, in our view are as under:

30.1. (i) In the given factual scenario did Ram Devi become the absolute owner of the property in view of Section 14(1) of the said Act or in view of the will the Explanation under Section 14(2) would apply.

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

¹¹ (2006) 8 SCC 75

¹² (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

⁸ *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

30.2. (ii) What is the effect of the first round of litigation which came up to this Court between the appellant and Ram Devi, the two beneficiaries of the will.

a

31. We are of the view that both these questions have to be answered in favour of the appellant and for that reason the impugned judgment is unsustainable.

32. We would first like to turn to the seminal judgment in *V. Tulasamma case*³. In para 20 the propositions emerging in respect of incidents and characteristics of a Hindu woman's right to maintenance have been crystallised as under: (SCC pp. 113-14)

b

"20. Thus on a careful consideration and detailed analysis of the authorities mentioned above and the Shastric Hindu Law on the subject, the following propositions emerge with respect to the incidents and characteristics of a Hindu woman's right to maintenance:

c

'(1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow;

d

(2) though the widow's right to maintenance is not a right to property but it is undoubtedly pre-existing right in property i.e. it is a *jus ad rem not jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court;

e

(3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance;

(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right;

f

(5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort (*Jayanti Subbiah v. Alamelu Mangamma*¹³ and *Yellawa v. Bhimangavda*¹⁴) of co-owner in the property of her husband, though her co-ownership is of a subordinate nature; and

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³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

¹³ 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45

¹⁴ 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452

h

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a (6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance.’ ”

b 33. In the light of the aforesaid passage, Sections 14(1) and 14(2) of the said Act were entered by the Court. The word “possessed” was held to be used in a wide sense not requiring a Hindu woman to be in actual or physical possession of the property and it would suffice if she has a right in the property. The discussion in para 33 thereafter opines that the intention of Parliament was to confine sub-section (2) of Section 14 of the said Act only to two transactions viz. a gift and a will, which clearly would not include property received by a Hindu female in lieu of maintenance or at a partition. The intention of Parliament in adding the other categories to sub-section (2) was merely to ensure that any transaction under which a Hindu female gets a new or independent title under any of the modes mentioned in Section 14(2) of the said Act. The conclusions were thereafter set forth in para 62 of the judgment as under: (SCC pp. 135-36)

d “62. We would now like to summarise the legal conclusions which we have reached after an exhaustive consideration of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

e (1) The Hindu female’s right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

g (2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

h

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

a

(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

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d

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

e

(6) The words "possessed by" used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

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(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

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34. In our view the relevant aspect of the aforesaid conclusion is Conclusion (4) in para 62 which opines where sub-section (2) of Section 14 of the said Act would apply, and this does inter alia apply to a will which may create independent and new title in favour of females for the first time and is not a recognition of a pre-existing right. In such cases of a restricted estate in favour of a female is legally permissible and Section 14(1) of the said Act will not operate in that sphere.

35. We may add here that the objective of Section 14(1) is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of. If we were to hold so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective, in our view.

36. The testator in the present case, Tulsi Ram, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. We are, thus, of the view that it would be the provisions of Section 14(2) of the said Act which would come into play in such a scenario and Ram Devi only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained.

37. On consideration of the second aspect, we must begin by stating that the sequence of litigations can hardly be said to classify the respondents as bona fide purchasers. The first endeavour was by the daughter of Ram Devi by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against Ram Devi and her daughter right till the Supreme Court in the first round of litigation clearly opining that Ram Devi had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor Ram Devi.

38. We may also notice that the reliance on *Shakuntla Devi case*⁵ by the High Court is misplaced as the factual scenario cannot be said to be identical. In fact the most crucial aspect was that the will in question was dated 1-10-1935, a pre-1956 will which is the distinguishing factor. The same factual scenario prevailed in *Jupudy Pardha Sarathy case*⁴. We must also notice that the High

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

⁴ *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

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Court wrongly proceeded on the basis that the first round of litigation would not create any binding precedents because there was change in law after the first round of litigation. There is, in fact, no change in law as all the judgments were much prior in time.

39. We have already stated that the rights of the respondents are derived only from Ram Devi and once the judgment is binding on Ram Devi it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. We believe from the facts on record that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will respondents being third parties. The repeated endeavour of Ram Devi and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from Ram Devi.

Conclusion

40. The result of the aforesaid is that the appeals are allowed and the impugned judgment⁷ of the learned Single Judge of the High Court is set aside and the decree of the trial court dated 13-8-2009 as affirmed by the appellate court dated 7-10-2010 is reaffirmed. The parties are left to bear their own costs.

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978

elaborate rules governing the conduct and service of these extra departmental agents were brought into operation in 1964. We do not therefore think an examination of these two decisions will be relevant or useful for disposing of the appeals before us.

6. The appeals are accordingly dismissed with costs : one set of hearing fee, in respect of all the appeals except C.A. 1172 of 1972. C. A. 1751 of 1972 and C. A. 2275 of 1972 in which separate orders as to costs were made earlier.

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(BEFORE P. N. BHAGWATI, A. C. GUPTA AND
S. MURTAZA FAZAL ALI, JJ.)

V. TULASAMMA AND OTHERS .. Appellants;

Versus

SESHA REDDY (DEAD) .BY L. RS. .. Respondents.

Civil Appeal No. 1360 of 1968†, decided on March 17, 1977

Hindu Succession Act, 1956 — Sections 14(1) and (2) — Section 14(2) is in the nature of a proviso to Section 14(1), and must be construed strictly without impinging on the amplitude of Section 14(1) — Section 14(1) applies to properties granted to a female Hindu in virtue of a pre-existing right of maintenance — Section 14(2) applies when property is granted to a female Hindu for the first time without any pre-existing right

Interpretation of Statutes — Statute must be read as a whole — Bill may be referred to for interpreting Act

Words and Phrases — ‘Possessed’ and ‘any property’ meaning of — ‘Restricted estate’ not same as of limited interest

The appellant claimed maintenance out of the joint family properties in the hands of the respondent who was her deceased husband's brother. The husband had died in 1931. The claim was decreed and in execution of the decree, a compromise was arrived at allotting certain properties to the appellant for her maintenance and she was only given a limited interest in those properties without any power of alienation. The appellant continued to be in possession and after the Hindu Succession Act, 1956, came into force she leased out the properties. The respondent filed a suit for a declaration that the alienations were not binding on him and could remain valid only till the lifetime of the appellant. The appellant claimed that she had become a full owner under Section 14(1) of the Act, but the trial Court decreed the suit on the ground that her interest was not enlarged in view of Section 14(2). The first appellate Court reversed the decree, but the High Court, in second appeal, restored the decree in the respondent's favour.

Allowing the appeal the Supreme Court

Held :

Per P. N. Bhagwati and R. S. Sarkaria, JJ.

(1) Section 14(1) is wide in its scope and ambit. It says that any property possessed by a female Hindu, whether acquired before or after the commence-

†Appeal by Special Leave from the Judgment and Order dated November 22, 1967 of the Andhra Pradesh High Court in Second Appeal 804 of 1964.

ment of the Act, shall be held by her as full owner. The words 'any property' are large enough to cover any kind of property, and the Explanation says that property would include 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 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 the Act. The words 'possessed of' mean the state of owning or having in one's hand or power. It need not be actual or physical possession or personal occupation of the property but may be possession in law. It can be even constructive possession in any form recognised by law provided that she has not parted with her rights and is capable of obtaining possession of the property. (Para 68)

Gummalapura Taggina Matada Kotturuswami v. Setra Veerappa, (1959) Supp 1 SCR 178; *S. S. Munna Lal v. S. S. Rajkumar*, (1962) Supp 3 SCR 418 and *Mangal Singh v. Rattno*, AIR 1967 SC 1786, referred to.

(2) Section 14(2) provides that 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, or will or other instrument or decree, order or award prescribe a restricted estate in such property. This provision is in the nature of a proviso or exception to sub-section (1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve the social purpose of bringing about a change in the social or economic position of woman in Hindu Society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). (Para 69)

(3) Moreover, it is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the Statute so as, as far as possible, to make a consistent enactment of the whole statute. Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1). (Para 69)

(4) Sub-section (2) cannot therefore be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1). The language of sub-section (2) is apparently wide to include acquisition of property by a Hindu female under an instrument etc. where such instrument etc. prescribes for her a restricted estate and this would apparently cover a case of property given to her under sub-section (1) with limited interest for her in the property. But that would virtually emasculate sub-section (1) and the Explanation (1) to it would be rendered meaningless because, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument, order or award would be excluded from the operation of the beneficial provision in sub-section (1), since in most of such cases, where property has been allotted to a Hindu female prior to the Act, there would be a provision in consonance with the customary Hindu law prescribing a limited interest in the property allotted; and in property allotted subsequent to the Act, it would be the easiest thing to provide that the Hindu female shall only have a limited interest and thus make a mockery of sub-section (1). That could not have been the intention of the legislature and therefore, sub-section (2) must be confined to cases where property is acquired by a Hindu female for the first time as a grant, **without any pre-existing right** under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. That this is the legislative intendment is also made clear by the circumstances that the Hindu Succession Bill referred to acquisition of property by a Hindu female under gift or will only and it was only subsequently, in the Act, that other modes of

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acquisition were added. Where, however, property is acquired by a Hindu female at a partition or in lieu of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope of sub-section (2), but within the scope of sub-section (1). (Paras 69 and 70)

Badri Prashad v. Smt. Kanso Devi, (1969) 2 SCC 586 and *Nirmal Chand v. Vidya Wanti*, (1969) 3 SCC 628, followed.

(5)(a) It is settled law that a widow is entitled to maintenance out of her deceased husband's estate irrespective of whether that estate is in the hands of his male issue or is in the hands of his coparcener. This right to be maintained is not a *jus in rem* unless the right has ripened into a charge against specific property, but it is certainly a *jus ad rem*, that is, a right against the joint family property. Therefore, where specific property is allotted to her in lieu of her claim to maintenance, the allotment would be in satisfaction of her *jus ad rem*, namely, the right to be maintained out of the joint family property. The widow would be getting the property in virtue of her pre-existing right, the instrument giving the property being merely a document effectuating such pre-existing right and not making a grant of the property for the first time without any antecedent right or title. (Para 71)

(b) In fact, even if the instrument were silent as to the nature of the interest given to the widow, in the property given her in virtue of a pre-existing right, she would have no more than a limited interest in the property under customary Hindu Law and hence a provision in the instrument prescribing that she would have only a limited interest merely records the true legal position, and would not attract sub-section (2) but would be governed by sub-section (1). (Para 71)

In the instant case, since the properties were acquired by the appellant under the compromise in lieu of or in satisfaction of her right of maintenance, it is sub-section (1) and not sub-section (2) that would be applicable and hence the appellant must be deemed to have become full owner notwithstanding that the compromise prescribed a limited interest to her. (Para 73)

S. B. Patil v. Gangabai, AIR 1972 Bom 16; *Sumeshwar Misra v. Swami Nath Tiwari*, AIR 1970 Pat 348; *Gadew Reddayya v. Varapula Venkataraju*, AIR 1965 AP 66; *Lakshmi Devi v. Shankar Jha*, AIR 1967 Mad 428; *H. Venkanagouda v. Hanamangouda*, AIR 1972 Mys 286; *Smt. Sharbati Devi v. Pt. Hiralal*, AIR 1964 Punj 114; *Sashadhar Chandra Dev v. Tara Sundari Desi*, AIR 1962 Cal 438; *Saraswathi Ammal v. Anantha Shenoi*, AIR 1966 Ker 66 and *Kunji Thomman v. Meenakshi*, ILR (1970) 2 Ker 45, approved.

Gurunadham v. Sundrarajulu, ILR (1968) 1 Mad 467; *Santhanam v. Subramania*, ILR (1967) 1 Mad 68; *S. Kachapalaya Gurakkal v. V. Subramania Gurukkal*, AIR 1972 Mad 219; *Shiva Pujan Rai v. Jamuna Missir*, ILR (1947) Pat 1118; *Gopisetti Kondaiiah v. Gunda Subbarayudu*, ILR (1968) AP 621; *Ram Jag Misir v. The Director of Consolidation*, AIR 1975 All 151 and *Ajab Singh v. Ram Singh*, AIR 1959 J & K 92, overruled.

Per Fazal Ali, J.

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by the customary Hindu law and has been strongly stressed even by the earlier Hindu Jurists starting from Manu and Yajnavalkya. Such a right may not be a right to property, that is, *jus in rem*, but it is a right against property, that is *jus ad rem*. The husband has a personal obligation to maintain his wife and if he or the family has property the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female the said right becomes a legally enforceable one. But, even without a charge the claim for maintenance is indubitably a pre-existing right, so that, any transfer to her declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing right. (Paras 20 and 62)

(2) Under the customary Hindu law the widow is almost a co-owner of the properties with her husband and even before the Hindu Women's Right to Property Act, 1937, she was entitled to the share of a son on the death of her husband after partition according to some schools of Hindu law. The 1937 Act did not introduce any new right but merely gave a statutory recognition to the old customary law on the subject. Therefore, if the widow's claim for maintenance or right to get the share of a son existed before the 1937 Act, it is futile to dub this right as flowing from that Act. (Para 58)

(3) Section 14(1) and the Explanation thereto of the Hindu Succession Act, 1956, provide that any property possessed by a female Hindu, whether acquired before or after the commencement of the 1956 Act, shall be held by her as full owner thereof and not as a limited owner; and that 'property' includes both movable and immovable property acquired by her by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether from 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 the 1956 Act. The language is in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the Act and promote the socio-economic ends, namely, to enlarge her limited interest to absolute ownership in consonance with the changing temper of the times sought to be achieved by such a long legislation. (Paras 23 and 62)

(4) Section 14(2) provides that nothing contained in Section 14(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 decree, order or award prescribes a restricted estate in such property. It is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision. (Paras 31 and 62)

(5) Section 14(2) applies only to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females **for the first time** and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases, a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in that sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, Section 14(2) has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus, where a property is allotted or transferred to a female in lieu of maintenance or a share at a partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee. (Para 62)

(6) The use of terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', or 'arrears of maintenance' etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2). (Para 62)

(7) The words 'possessed by' in Section 14(1) are of the widest possible amplitude and include the state of owing a property even though the owner is not in actual or physical possession of it. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed, but had not been given actual possession under a final decree,

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the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well-settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because, the section does not contemplate the possession of a trespasser without any right or title. (Para 62)

(8) The words 'restricted estate' in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest but also any other kind of limitation that may be placed on the transferee. (Para 62)

Narayan Rao Ramachandra Pant v. Ramabai, LR 5 IA 114; *Mst. Dan Kuer v. Mst. Sarla Devi*, LR 73 IA 208; *Pratapmull Agarwalla v. Dhan Bati Bibi*, LR 63 IA 33; *Namangini Dasi v. Kedarnath Kundu Chowdhry*, ILR 16 Cal 758 (PC), and text books on Hindu Law, referred to.

Rani Bai v. Sri Yadunandan Ram, (1969) 1 SCC 604; *S. S. Munnalal v. S. S. Raj Kumar*, 1962 Supp 3 SCR 418; *Eramma v. Verrupanna*, (1966) 2 SCR 626; *Mangal Singh v. Smt. Ratno*, (1967) 3 SCR 454; *Sukhrum v. Gauri Shanker*, (1968) 1 SCR 476; *Badri Pershad v. Smt. Kanso Devi*, (1969) 2 SCC 586 and *Nirmal Chand v. Vidyawanti*, (1969) 3 SCC 628, followed.

Smt. Naraini Devi v. Smt. Ramo Devi, (1976) 1 SCC 574, overruled.

B. B. Patil v. Gangabai, AIR 1972 Bom 16; *Gadem Reddayya v. Varapula Venkataraju*, AIR 1965 AP 66; *Venkanagouda v. Hanamanagouda*, AIR 1972 Mys 286; *Sumeshwar Mishra v. Swami Nath Tewari*, AIR 1970 Pat 348; *Smt. Sharbati Devi v. Pt. Hiralal*, AIR 1964 Punj 114 and *Sasadhara Chandra Day v. Smt. Tara Sundari Dasi*, AIR 1962 Cal 438, approved.

Narayan Patra v. Tara Patra, (1970) 36 Cut LT 567; AIR 1970 Ori 131; *Gopisetty Kondaiiah v. Gunde Subbarayudu*, ILR 1968 AP 621; *S. Kachapalaya Gurukkal v. Subramania Gurukkal*, AIR 1972 Mad 279; *Gurunadham v. Sundrajulu Chetty*, ILR (1968) 1 Mad 567; *Ram Jag Missir v. Director of Consolidation, U. P.*, AIR 1975 All 151 and *Ajab Singh v. Ram Singh*, AIR 1959 J & K 92, overruled.

In the instant case, (a) the properties in suit were allotted to the appellant under a compromise in lieu of maintenance; (b) the appellant was given only a life interest in the properties; (c) she continued in possession till after the 1956 Act was passed; (d) the alienations (leases) were made by her thereafter. Therefore, since the properties were allotted to her in recognition of a pre-existing right, the case falls under Section 14(1) and not Section 14(2) and hence the appellant would acquire an absolute interest as she was in constructive possession of the properties. (Para 63)

S-M/3527/C

Advocates who appeared in this case :

T. S. Krishnamurthi Iyer, Senior Advocate (*R. K. Pillai* and *R. Vesudev Pillai*, Advocates, with him), for the Appellants;

T. V. S. Narasimhachari, Advocate, for the Respondents.

The Judgments of the Court were delivered by

FAZAL ALI, J.—This is a defendant's appeal by special leave against the judgment of the High Court of Andhra Pradesh dated November 22, 1967 and arises in the following circumstances.

2. Venkatasubba Reddy, husband of appellant 1 Vaddeboyina Tulasamma — hereinafter to be referred to as 'Tulasamma' — died in the year 1931 in a state of jointness with his step brother V. Sesa Reddy and left behind Tulasamma as his widow. On October 11, 1944 the appellant Tulasamma filed a petition for maintenance in *forma pauperis* against the respondent in the Court of the District Munsif, Nellore. This application was set *ex parte* on January 13, 1945 but subsequently the petition was registered as a suit and an *ex parte* decree was passed against

the respondent on June 29, 1946. On October 1, 1946 the respondent filed an interlocutory application for recording a compromise alleged to have been arrived at between the parties out of Court on April 9, 1945. The appellant Tulasamma opposed this application which was ultimately dismissed on October 16, 1946. An appeal filed by the respondent to the District Judge, Nellore was also dismissed. Thereafter Tulasamma put the decree in execution and at the execution stage the parties appear to have arrived at a settlement out of Court which was certified by the Executing Court on July 30, 1949 under Order XXI, Rule 2 of the Code of Civil Procedure. Under the compromise the appellant Tulasamma was allotted the Schedule properties, but was to enjoy only a limited interest therein with no power of alienation at all. According to the terms of the compromise the properties were to revert to the plaintiff after the death of Tulasamma. Subsequently Tulasamma continued to remain in possession of the properties even after coming into force of the Hindu Succession Act, 1956 — hereinafter to be referred to as 'the 1956 Act' or 'the Act of 1956'. By two registered deeds dated April 12, 1960 and May 25, 1961, the appellant leased out some of the properties to defendants 2 and 3 by the first deed and sold some of the properties to defendant 4 by the second deed. The plaintiff/respondent filed a suit on July 31, 1961 before the District Munsiff, Nellore for a declaration that the alienation made by the widow Tulasamma were not binding on the plaintiff and could remain valid only till the lifetime of the widow. The basis of the action filed by the plaintiff was that as the appellant Tulasamma had got a restricted estate only under the terms of the compromise her interest could not be enlarged into an absolute interest by the provisions of the 1956 Act in view of Section 14(2) of the said Act. The suit was contested by the appellant Tulasamma who denied the allegations made in the plaint and averred that by virtue of the provisions of the 1956 Act she had become the full owner of the properties with absolute right of alienation and the respondent had no locus standi to file the present suit. The learned Munsiff decreed the suit of the plaintiff holding that the appellant Tulasamma got merely a limited interest in the properties which could be enjoyed during her lifetime and that the alienations were not binding on the reversioner. Tulasamma then filed an appeal before the District Judge, Nellore, who reversed the finding of the trial Court, allowed the appeal and dismissed the plaintiff's suit holding that the appellant Tulasamma had acquired an absolute interest in the properties by virtue of the provisions of the 1956 Act. The learned Judge further held that sub-section (2) of Section 14 had no application to the present case, because the compromise was an instrument in recognition of a pre-existing right. The plaintiff/respondent went up in second appeal to the High Court against the judgment of the District Judge. The plea of the plaintiff/respondent appears to have found favour with the High Court which held that the case of the appellant was clearly covered by Section 14(2) of the Hindu Succession Act and as the compromise was an instrument as contemplated by Section 14(2) of the 1956 Act Tulasamma could not get an absolute interest under Section 14(1) of the Act. The High Court further held that by virtue of the compromise the appellant

Tulasamma got title to the properties for the first time and it was not a question of recognising a pre-existing right which she had none in view of the fact that her husband had died even before the Hindu Women's Right to Properties Act, 1937. We might further add that the facts narrated above have not been disputed by Counsel for the parties.

3. The appeal has been argued only on the substantial questions of law which turn upon the interpretation of sub-sections (1) and (2) of Section 14 of the Hindu Succession Act, 1956. It is common ground that in this case as also in the other connected appeals, the properties in suit were allotted under a compromise or an instrument in lieu of maintenance. It is also admitted that the appellant Tulasamma was in possession of the properties at the time when the 1956 Act came into force. Finally it is also not disputed that the compromise did purport to confer only a limited interest on the widow restricting completely her power of alienation. We have now to apply the law on the facts mentioned above. Similar points were involved in the other two appeals (135 of 1973 and 126 of 1972). We have heard all the three appeals together and in all these appeals Counsel for the parties have confined their arguments only to the questions of law without disputing the findings of fact arrived at by the Courts below.

4. Thus the two points that fall for determination in this appeal may be stated thus :

(1) whether the instrument of compromise under which the properties were given to the appellant Tulasamma before the 1956 Act in lieu of maintenance falls within Section 14(1) or is covered by Section 14(2) of the 1956 Act; and

(2) whether a Hindu widow has a right to property in lieu of her maintenance, and if such a right is conferred on her subsequently by way of maintenance it would amount to mere recognition of pre-existing right or a conferment of a new title so as to fall squarely within Section 14(2) of the 1956 Act.

5. There appears to be serious divergence of judicial opinion on the subject and the High Courts have taken contrary views on this point. Some High Courts, particularly, the Bombay, Punjab, Calcutta and Patna have veered round to the view that a right of maintenance claimed by a Hindu widow is a pre-existing right and any instrument or document or transaction by which the properties are allotted to the widow in lieu of her maintenance would only be in recognition of a pre-existing right and would not confer any new title on the widow. Following this line of reasoning the aforesaid High Courts have held that the properties allotted to the Hindu widow even though they conferred a limited interest would fall clearly within the ambit of Section 14(1) of the 1956 Act by virtue of which the limited interest could be enlarged into an absolute interest on the coming into force of the 1956 Act. On the other hand the Orissa, Allahabad, Madras and Andhra Pradesh High Courts have taken a contrary view and have held that as the Hindu widow's right to maintenance is not a right to property, the property allotted to her in lieu of maintenance confers on her a right or a title to the property for the first time and therefore such conferment is protected

by Section 14(2) of the 1956 Act and is not covered by Section 14(1). Unfortunately, however, there is no decision of this Court which is directly in point, though there are some decisions which tend to support the view taken by the Bombay High Court.

6. Before, however, resolving this important dispute it may be necessary to consider the real legal nature or the incidents of a Hindu widow's right to maintenance. In order to determine this factor we have to look to the concept of a Hindu marriage. Under the Shastric Hindu Law, a marriage, unlike a marriage under the Mohammedan Law which is purely contractual in nature, is a sacrament — a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife is completely transplanted in the household of her husband and takes a new birth as a partner of her husband becoming a part and parcel of the body of the husband. To a Hindu wife her husband is her God and her life becomes one of selfless service and unstinted devotion and profound dedication to her husband. She not only shares the life and loves, the joys and sorrows, the troubles and tribulations of her husband but becomes an integral part of her husband's life and activities. Colebrooke in his book 'Digest of Hindu Law' Vol. II describes the status of wife at p. 158 thus :

A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts : whether she ascend the pile after him, or survive for the benefit of her husband, she is a faithful wife.

This being the position after marriage, it is manifest that the law enjoins a corresponding duty on the husband to maintain his wife and look after her comforts and to provide her food and raiments. It is well settled that under the Hindu Law the husband has got a personal obligation to maintain his wife and if he is possessed of properties then his wife is entitled as of right to be maintained out of such properties. The claim of a Hindu widow to be maintained is not an empty formality which is to be exercised as a matter of concession or indulgence, grace or gratis or generosity but is a valuable spiritual and moral right which flows from the spiritual and temporal relationship of the husband and wife. As the wife is in a sense a part of the body of her husband, she becomes co-owner of the property of her husband though in a subordinate sense. Although the right of maintenance does not *per se* create a legal charge on the property of her husband, yet the wife can enforce this right by moving the Court for passing a decree for maintenance by creating a charge. This right is available only so long as the wife continues to be chaste. Thus the position is that the right of maintenance may amount to a legal charge if such a charge is created either by an agreement between the parties or by a decree.

7. There are a number of authorities which have taken the view that even if the property is transferred and the transferee takes the property with notice of the right of the widow to be maintained out of the property, the purchaser takes the obligation to maintain the widow out of the property purchased and the wife or widow can follow the property in the hands

of the purchaser for the limited purpose of her maintenance. We shall, however, deal with these authorities a little later.

8. Colebrooke in his 'Digest of Hindu Law', Vol. II, quotes the Mahabharata at p. 121 thus :

Where females are honoured, there the deities are pleased ; but where they are unhonoured, there all religious acts become fruitless.

This clearly illustrates the high position which is bestowed on Hindu women by the Shastric Law. Again Colebrooke in his book Vol. II at p. 123, while describing the circumstances under which the maintenance is to be given to the wife, quotes Manu thus :

MANU :—Should a man have business abroad, let him assure a fit maintenance to his wife, and then reside for a time in a foreign country ; since a wife, even though virtuous, may be tempted to act amiss, if she be distressed by want of subsistence :

While her husband, having settled her maintenance, resides abroad, let her continue firm in religious austerities ; but if he leave no support, let her subsist by spinning and other blameless arts.

This extract clearly shows that there is a legal obligation on the part of the husband to make arrangements for his wife's due maintenance even if he goes abroad for business purposes. Colebrooke again quotes Yajnavalkya at p. 243 of his book Vol. II thus :

When the father makes an equal partition among his sons, his wives must have equal shares with them, if they have received no wealth either from their lord or from his father.

If he makes an equal partition among his sons by his own choice, he must give equal shares to such of his wives also as have no male issue.

This shows that when a partition is effected, the Hindu Law enjoins that the wife must get an equal share with the sons, thus reinforcing the important character of the right of maintenance which a Hindu wife or widow possesses under the Hindu Law.

9. Similarly Golapchandra Sarkar Sastri dealing with the nature and incidents of the Hindu widow's right to maintenance observes in his treatise 'Hindu Law' at p. 533 thus :

When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being a legal incident of her marital co ownership in all her husband's property But after his death, his widow's right of maintenance becomes limited to his estate, which, when it passes to any other heir, is charged with the same There cannot be any doubt that under Hindu law, the wife's or widow's maintenance is a legal charge on the husband's estate ; but the Courts appear to hold, in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely, a claim against the husband's heir, or an equitable charge on his estate ; hence the husband's debts are held to have priority, unless it is made a charge on the property by a decree.

The view of the author appears to be that the Courts hold that the right of maintenance of a widow does not amount to a legal charge and this is so because proper materials were not placed before the Courts. In other words, the author seems to indicate that the original Hindu Law contained clear provisions that the right of maintenance amounts to a charge on the property of her husband and the obligation runs with the

property so that any person who inherits the property also takes upon the obligation to maintain the widow. Sastri quotes from the original texts various extracts regarding the nature and extent of the right of maintenance of the Hindu woman some of which may be extracted thus :

The support of the group of persons who should be maintained, is the approved means of attaining heaven, but hell is the man's portion if they suffer : therefore he should carefully maintain them.

The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependants, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained. — Manu, cited in Srikrishna's commentary on the Dayabhaga, ii, 22.

It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds. — Manu cited in the Mitakshara while dealing with gifts.

The last extract clearly shows the imperative nature of the duty imposed on the owner of the property to maintain wife, aged mother, father, etc. even at the cost of perpetrating a hundred misdeeds.

10. Similarly Sastri in his book quotes Yajnavalkya at p. 523 thus :

Property other than what is required for the maintenance of the family may be given.

The learned Author highlights the importance of the right of maintenance as being a charge on the property of the husband and observes as follows :

The ancestral immovable property is the hereditary source of maintenance of the members of the family, and the same is charged with the liability of supporting its members, all of whom acquire a right to such property from the moment they become members of the family, by virtue of which they are at least entitled to maintenance out of the same. Such property cannot be sold or given away except for the support of the family : a small portion of the same may be alienated, if not incompatible with the support of the family.

There is no difference between the two schools as regards the view that the ancestral property is charged with the maintenance of the members of the family, and that no alienation can be made, which will prejudicially affect the support of the group of persons who ought to be maintained. Hence heirs are bound to maintain those whom the last holder was bound to maintain.

The author further points out that under the Mitakshara law the daughter-in-law does, with her husband, acquire a right to the ancestral property, since her marriage, but she becomes her husband's co-owner in a subordinate sense, and the principal legal incident of this ownership is the right to maintenance, which cannot be defeated by gift or devise made by the holder of such property. Similar observations have been made by the learned Author at p. 528 of the book which may be extracted thus :

According to both the schools, the lawfully wedded wife acquires from the moment of her marriage a right to the property belonging to the husband at the time and also to any property that may subsequently be acquired by him, so that she becomes a co-owner of the husband, though her right is not co-equal to that of the husband, but a subordinate one, owing to her disability founded on her status of perpetual or lifelong tutelage or dependence.

* * * * *

This right of the wife to maintenance from her husband is not lost even if the husband renounces Hinduism.

This right subsists even after the husband's death although her husband's right

as distinguished from hers may pass by survivorship or by succession to sons or even to collaterals; these simply step into the position of her husband, and she is required by Hindu law to live under their guardianship after her husband's death. Finally it is pointed out by the learned Author at p. 529 of the book that the right which a woman acquires to her husband's property subsists even after his death and observed thus :

According to both the schools, the right which a woman acquires to her husband's property subsists after his death, whether his interest passes by succession or by survivorship to the male issue or any other person, and that this right does not depend upon the widow's not possessing other means of support.

11. Summarising the nature of the liability of the husband to maintain his wife, the learned Author observed as follows at p. 533 of his book :

When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being a legal incident of her marital co-ownership in all her husband's property But after his death, his widow's right of maintenance becomes limited to his estate, which, when it passes to any other heir, is charged with the same There cannot be any doubt that under Hindu law the wife's or widow's maintenance is a legal charge on the husband's estate; but the Courts appear to hold, in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely a claim against the husband's heir, or an equitable charge on his estate; hence the husband's debts are held to have priority, unless it is made a charge on the property by a decree.

To sum up, therefore, according to Sastri's interpretation of Shastric Hindu Law the right to maintenance possessed by a Hindu widow is a very important right which amounts to a charge on the property of her husband which continues to the successor of the property and the wife is regarded as a sort of co-owner of the husband's property though in a subordinate sense, i.e. the wife has no dominion over the property.

12. Similarly Mayne in his "Treatise on Hindu Law and Usage", 11th Edn., has traced the history and origin of the right of maintenance of a Hindu woman which according to him arises from the theory of an undivided family where the head of the family is bound to maintain the members including their wives and their children. The learned Author observes thus : (p. 813)

The importance and extent of the right of maintenance necessarily arises from the theory of an undivided family. The head of such a family is bound to maintain its members, their wives and their children, to perform their ceremonies and to defray the expenses of their marriages;

Again at p. 816 para 684 the author stresses the fact that the maintenance of a wife is a matter of personal obligation on the part of the husband and observes thus :

The maintenance of a wife, aged parents and a minor son is a matter of personal obligation arising from the very existence of the relationship and quite independent of the possession of any property, ancestral or acquired 'It is declared by Manu that the aged mother and father, the chaste wife and an infant child must be maintained even by doing a hundred misdeeds'.

Again it has been observed at p. 818 para 687 :

The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage.

The author points out at p. 821 paragraph 689 that even after the coming into force of the Hindu Women's Rights to Property Act, 1937 which

confers upon the widow a right of succession in respect of the non-agricultural property, she is still entitled to maintenance from the family property. The author observes thus :

It cannot, therefore, be said that the reason of the right has ceased to exist and the right is gone. It was accordingly held that the widow of a deceased coparcener is still entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate.

Furthermore, the author cites the passage of Narada cited in Smritichandrika regarding which there is no dispute. The saying runs thus :

Whichever wife (patni) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment.

At p. 822 para 690 the author points out that the right of a widow to be maintained is taken over even by the heirs of the husband who succeed to his property either by inheritance or by survivorship. In this connection the following observations are made :

She is entitled to be maintained where her husband's separate property is taken by his male issue. Where, at the time of his death, he was a coparcener she is entitled to maintenance as against those who take her husband's share by survivorship.

The Hindu Law is so zealous in guarding the interests of Hindu women that the obligation for maintaining the Hindu woman falls even on the King when he takes the estate by escheat or by forfeiture.

13. Similarly Mulla in his book "Hindu Law", 14th Edn., describes the incidents and characteristics of Hindu wife's right to maintenance and observes thus at p. 597 :

A wife is entitled to be maintained by her husband, whether he possesses property or not. When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style. The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired.

We might further mention that the Hindu women's right to maintenance finally received statutory recognition and the entire law on the subject was consolidated and codified by the Hindu Married Women's Right to Separate Maintenance and Residence Act, 1946 — hereinafter to be referred to as 'the Act of 1946' — which came into force on April 23, 1946. Thus there appears to be complete unanimity of the various schools of Hindu Law on the important incidences and indicia of the Hindu women's right to maintenance which has now received statutory recognition and which only shows that the right to maintenance though not an indefeasible right to property is undoubtedly a pre-existing right. We shall now refer to some of the authorities which have dealt with this aspect of the matter.

14. In *Narayan Rao Ramchandra Pant v. Ramabai*¹, the Judicial Committee pointed out that the widow's right to maintenance arises from the common law which developed from time to time. Justice West of the Bombay High Court appears to have entered into a very elaborate

1. I.R 5 IA 114; I.L.R 3 Bom 415.

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discussion of the entire law on the subject in *Lakshman Ramchandra Joshi v. Satyabhamabai*² and observed as follows :

These several authorities, no doubt, afford, in combination, a strong support to the proposition that a widow's maintenance, especially as against the sons, is a charge on the estate, a right in rem in the fullest sense adhering to the property, into whatever hands it may pass.

These observations were reiterated in a later case in *Nahadabai v. Mahadeo Narayan, Kashinath Narayan and Shamabai*³. The observations of West, J., in *Lakshman Ramchandra Joshi's case* (supra), were fully approved by the Judicial Committee in *Mst. Dan Kuer v. Mst. Sarla Devi*⁴, where it was observed :

But, apart from this circumstance, the judgment of West, J., whose dissertations on Hindu Law must always command great esteem, contains an exposition of the law on this point, and the case is therefore rightly regarded as a leading authority on the question. In the course of his judgment that learned Judge quotes with approval the remarks of Phear, J., in *Srimati Bhagabati v. Kanailal Mitter* (1872) 8 Ben. L.R. 226 — that "as against one who has taken the property as heir, the widow has a right to have a proper sum for her maintenance ascertained and made a charge on the property in his hands. She may also, doubtless, follow the property for this purpose into the hands of anyone who takes it as a volunteer, or with notice of her having set up a claim for maintenance against the heir" and that "when the property passes into the hands of a bona fide purchaser without notice, it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge, or which does not contain all the elements necessary for it ripening into a specific charge.

Summarising the entire position the Privy Council enunciated the law thus :

The true rule of Hindu law in such matters would appear to be as follows :

Two obligations confront a joint Hindu family. (1) The obligation to pay the debts (for instance, of the father) binding on the family; and (2) the moral obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation, as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the court; that, so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to pay the binding debts will have precedence (as, for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance fee; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other.

In *Pratommull Agarwalla v. Dhan Bati Bibi*⁵, the Judicial Committee pointed out that while a mother may not be the owner of her share until partition is made and has no pre-existing right with regard to the share in the property, but she has a pre-existing right for maintenance. This Court also has made similar observations in a large number of cases regarding the nature and extent of the Hindu women's right to maintenance. In *Beni Bai v. Shri Yadunandan Ram*⁶, this Court, while dealing with a situation where a widow claimed the right of maintenance but refused to hand over possession of the property until she secured her proper

2. 11.R 2 Bom 494.

3. 1LR 5 Bom 99.

4. 1.R 73 IA 208 : AIR 1947 PC 8 : 227 IC 83.

5. 1.R 63 IA 33 : AIR 1936 PC 20 : 159 IC 1080.

6. (1969) 3 SCR 789 : (1969) 1 SCC 604.

maintenance, observed as follows :

It cannot be disputed that the appellant who is the widow of a pre-deceased son of Jangi Jogi was entitled to receive maintenance so long as she did not re-marry out of the estate of her father-in-law. Although her claim for maintenance was not a charge upon the estate until it had been fixed and specifically charged thereupon her right was not liable to be defeated except by transfer to a bona fide purchaser for value without notice of a claim or even with notice of a claim unless the transfer was made with the intention of defeating her right. The courts in India have taken the view that where a widow is in possession of a specific property for the purpose of her maintenance a purchaser buying with notice of her claim is not entitled to possession of that property without first securing proper maintenance for her: (vide **Rachawa v. Shivayogappa** — I.L.R. 18 Bom. 679). . . . In the present case it is difficult to understand how the appellant could be deprived of the possession of properties by a trespasser. Moreover she was presumably in possession of these properties in lieu of her right of maintenance and could not be deprived of them even by Jugli Bai without first securing proper maintenance for her out of the aforesaid properties.

In **Sheo Dyal Tewaree v. Judoonath Tewaree**⁷, the Calcutta High Court stressed the fact that although the widow may not be the owner of a share but she had a pre-existing right of maintenance.

15. Elucidating the nature and extent of a right of a Hindu wife to maintenance, the Calcutta High Court pointed out in **Srinath Das v. Probodh Chunder Das**⁸ that the right of maintenance is really identified with the husband's proprietary right though of a subordinate nature.

16. In **Hemangini Dasi v. Kedarnath Kundu Chowdhry**⁹ the Privy Council held that if the estate remained joint and undivided the maintenance of the mother remained a charge on the whole estate and that any share that the widow took in the property which was equal to the share of a son was really in lieu of maintenance for which the estate was liable

17. The position has been very succinctly stated and meticulously analysed by a decision of the Madras High Court in **K. V. Thangavelu v. The Court of Wards, Madras**¹⁰, where, dealing with the entire history of the matter and relying on various original texts of the Hindu jurists, the Madras High Court pointed out that a cogent ground for preferring the widow's claim is to be found in her qualified or subordinate co-ownership in the husband's property declared by the **Mitakshara**. The Court referred to verse 52 of Vyavaharadhaya (Chapter II) where the Mitakshara refers to Apastamba's Dharmasutra as follows :

From marriage arises also jointness (sahatwam) in the holding of property (dravyaparagraphestiu).

18. In an earlier case **T. Sarojini Devi v. T. Sri Kristna**¹¹, the Madras High Court held that even after the coming into force of the Hindu Women's Right to Property Act 1937, which did not apply to agricultural lands, the right of the Hindu widow to maintenance stood

7. (1868) 9 WR 61.

8. 11 CIJ 580; 6 IC 244.

9. ILR 16 Cal 758; 16 IA 115; 13 IJ 210.

10. (1946) 2 MLJ 143; AIR 1947 Mad 38; 228 IC 215.

11. ILR 1945 Mad 61; AIR 1944 Mad 401; (1944) 1 MLJ 361.

intact and the widow was entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate. To the same effect is an earlier decision of the Madras High Court in *Jayanti Subbiah v. Alamelu Mangamma*¹² where the High Court pointed out that under the Hindu Law the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of her relationship and quite independent of the possession by the husband of any property ancestral or self-acquired. We fully agree with this exposition of the law which is supported by a large number of authorities as discussed above.

19. In *Yella'wa v. Bhimangavda*¹³, the Bombay High Court was of the view that even the heir of the husband's property could not be allowed to recover possession from the widow without first making proper arrangements for her maintenance. This case was approved by this Court in *Rani Bai's case* (*supra*).

20. Thus on a careful consideration and detailed analysis of the authorities mentioned above and the Shastric Hindu Law on the subject, the following propositions emerge with respect to the incidents and characteristics of a Hindu woman's right to maintenance :

- (1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow ;
- (2) though the widow's right to maintenance is not a right to property but it is undoubtedly a pre-existing right in property, i e. it is a *jus ad rem* not *jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court ;
- (3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance ;
- (4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right ;
- (5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort of co-owner in the

12. ILR 27 Mad 45 : 12 MLJ 270.

13. ILR 18 Bom 458.

property of her husband, though her co-ownership is of a subordinate nature ; and

- (6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance.

21. With this preface regarding a Hindu woman's right to maintenance and the necessary concomitants and incidents of those rights, we now proceed to determine the question of law that arises for consideration in this appeal. Before taking up that question, I might trace the historical growth of the legislation introducing slow and gradual changes in the Shastric Hindu Law from time to time. The exact origin of Hindu Law is steeped and shrouded in antiquity and, therefore, it is not possible to determine the ethics or justification for assigning a somewhat subordinate position to a Hindu woman in matters of inheritance, marriage and the nature of the limited interest which she took even after inheriting her husband's property. It is also strange that the Hindu Law made no provision for divorce at all. This may be due to the fact that during the time of Manu and Yajnavalkya the structure of the Hindu society was quite different and there being no social problem of the magnitude that we have today, it was not considered necessary to break up the integrity and solidarity of a Hindu family by allowing ownership rights to the Hindu females. Another object may have been to retain the family property within the family in order to consolidate the gains which a particular family may have made. However, these are matters of speculation. But one thing is clear, namely, that the Hindu jurists were very particular in making stringent provisions safeguarding the maintenance of the Hindu females either by the husband or even by his heirs after his death. Perhaps they thought that the property which a widow may receive in lieu of maintenance or the expenses which may be incurred for her maintenance would be a good substitute for the share which she might inherit in her husband's property. Nevertheless, the Legislature appears to have stepped in from time to time to soften the rigours of the personal law of Hindus by adding new heirs, conferring new rights on Hindu females and making express provisions for adoption, maintenance, etc. It appears that the question of conferring absolute interest on the Hindu female had engaged the attention of the Legislature ever since 1941 but the idea took a tangible shape only in 1954 when the Hindu Succession Bill was introduced and eventually passed in 1956. This Bill was preceded by a Hindu Code Committee headed by Mr. B. N. Rau who had made a number of recommendations which formed the basis of the 1956 Act.

22. After the attainment of independence, the entire perspective changed, the nature of old human values assumed a new complexion and the need for emancipation of womanhood from feudal bondage became all the more imperative. Under the strain and stress of socio-economic conditions and a continuous agitation by the female Hindus for enlarge-

ment of their rights a new look to the rights of women as provided by the Shastric Hindu Law had to be given. In pursuance of these social pressures it was necessary to set up a new social order where the women should be given a place of honour and equality with the male sex in every other respect. This was the prime need of the hour and the temper of the times dictated the imperative necessity of making revolutionary changes in the Hindu Law in order to abolish the invidious distinction in matters of inheritance between a male and a female. Similarly it was realised that there should be express provision for divorce on certain specified grounds inasmuch as the absence of such a provision had perpetrated a serious injustice to the Hindu females for a long time. It seems to me that it was with this object in view that the Legislature of our free country thought it as its primary duty to bring forth legislation to remove the dangerous anomalies appearing in the Hindu Law. Even during the British times, there were certain legislations modifying certain provisions of the Hindu Law, e.g., the Hindu Law of Inheritance Act which added a few more heirs including some females; the Hindu Women's Right to Property Act, 1937, which provided that on partition a widow would be entitled to the same share as the sons in the property of her husband. The Act of 1937, while giving a share to the wife on partition had not disturbed her right to claim maintenance which was preserved intact and although she was not permitted to sue for partition she was undoubtedly entitled to sue for maintenance without having recourse to the remedy of partition. After independence the Parliament passed the Hindu Minority and Guardianship Act, 1956, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Marriage Act, 1956 which regulated the law of marriage and divorce and ultimately the Hindu Succession Act, 1956 which provided for intestate succession. The Hindu Succession Act, 1956 was, therefore, undoubtedly a piece of social legislation which fulfilled a long felt need of the nation and was widely acclaimed by the entire people as would appear from the debates which preceded the passing of the Act.

23. It is in the light of these circumstances that we have now to interpret the provisions of Section 14(1) and (2) of the Act of 1956. Section 14 of the 1956 Act runs thus :

14. (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

This Court has interpreted the scope and ambit of Section 14(1) and the Explanation thereto on several occasions and has pointed out that the object of the legislation was to make revolutionary and far-reaching changes in the entire structure of the Hindu society. The word “possessed” used in Section 14(1) has also been interpreted by this Court and it has been held that the word has been used in a very wide sense so as to include the state of owning or having the property in one’s power and it is not necessary for the application of Section 14(1) that a Hindu woman should be in actual or physical possession of the property. It is sufficient if she has a right to the property and the said property is in her power or domain. In *S. S. Munna Lal v. S. S. Rajkumar*¹⁴ it was held by this Court that the interest which a widow got by declaration of her share under a preliminary decree would fall within the ambit of Section 14(1) and even though the widow did not get actual possession of the property until a final decree is passed she would in law be deemed to be in possession of the property. In that case, the High Court had held that mere declaration of the share of the widow passed only an inchoate interest to her and she never came to possess the share within the meaning of Section 14 of the Act and, therefore, the property remained joint family property. This Court reversed the judgment of the High Court holding that once a preliminary decree was passed in favour of the widow granting her a share in the property she must be deemed to be in possession of the property in question. Their Lordships emphasize that the words “possessed by” used in Section 14(1) clearly indicated that such a situation was envisaged by the Legislature. While interpreting the provisions of Section 14 the Court also pointed out that the 1956 Act was a codifying enactment which had made far-reaching changes in the structure of the Hindu society and object was to sweep away traditional limitations placed on the rights of the Hindu women. In this connection, the Court observed as follows :

The Act is a codifying enactment, and has made far-reaching changes in the structure of the Hindu law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance, and sweeps away the traditional limitations on her powers of dispositions which were regarded under the Hindu law as inherent in her estate Normally a right declared in an estate by a preliminary decree would be regarded as property, and there is nothing in the context in which Section 14 occurs or in the phraseology used by the Legislature to warrant the view that such a right declared in relation to the estate of a joint family in favour of a Hindu widow is not property within the meaning of Section 14. In the light of the scheme of the Act and its avowed purpose it would be difficult, without doing violence to the language used in the enactment, to assume that a right declared in property in favour of a person under a decree for partition is not a right to property. If under a preliminary decree the right in favour of a Hindu male be regarded as property the right declared in favour of a Hindu female must also be regarded as property.

Earlier the Court observed in that very case as under :

By Section 14(1) the Legislature sought to convert the interest of a Hindu female which under the Shastric Hindu law would have been regarded as a limited interest into an absolute interest and by the explanation thereto gave to the expression “property” the widest connotation. The expression includes property

14. 1962 Supp 3SCR 418 : AIR 1962 SC 1493.

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acquired by a Hindu female 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. By Section 14(1) manifestly it is intended to convert the interest which a Hindu female has in property however restricted the nature of that interest under the Shastric Hindu law may be into absolute estate.

24. The matter was again considered by this Court in *Eramma v. Verrupanna*¹⁵ where it was held that before a widow can get absolute interest under Section 14(1) she must have some vestige of title, i.e. her possession must be under some title or right and not be that of a rank trespasser. In this connection the Court observed as follows :

The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the Explanation to Section 14(1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however, restricted the nature of her interest may be It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. It follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words, the provisions of Section 14(1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property.

25. In *Mangal Singh v. Smt. Rattno*¹⁶, a widow came into possession of her husband's property in 1917 and continued to be in possession of the same till 1954 when she was dispossessed by a collateral of her husband under the orders of the Revenue authorities. She filed a suit for recovery of possession and during the pendency of the suit the Act of 1956 came into force. This Court upholding the judgment of the High Court held that the dispossession of the widow being illegal, she must be deemed to be, in the eye of law, to continue in possession of the properties and acquired an absolute interest with the coming into force of the Act of 1956. It was not a case where a Hindu female had parted with her right so as to place herself in a position where she could in no manner exercise her rights in that property any longer when the Act came into force. This Court observed as follows :

It is significant that the Legislature begins Section 14(1) with the words "any property possessed by a female Hindu" and not "any property in possession of a female Hindu". If the expression used had been "in possession of" instead of "possessed by", the proper interpretation would probably have been to hold that, in order to apply this provision, the property must be such as is either in actual possession of the female Hindu or in her constructive possession. The constructive possession may be through a lessee, mortgagee, licensee, etc. The use of the expression "possessed by" instead of the expression "in possession of", in our opinion, was intended to enlarge the meaning of this expression. It is commonly known in English language that a property is said to be possessed by a person, if he is its owner, even though he may, for the time being, be out of actual possession or even constructive possession.

15. (1966) 2 SCR 626 : AIR 1966 SC 1879 : (1967) 1 SCJ 746. 16. (1967) 3 SCR 454 : AIR 1967 SC 1786 : (1968) 1 SCJ 487.

It appears to us that the expression used in Section 14(1) of the Act was intended to cover cases of possession in law also where lands may have descended to a female Hindu and she has not actually entered into them. It would of course, cover the other cases of actual or constructive possession. On the language of Section 14(1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property.

26. Again, while referring to an earlier case, namely, *Eramma v. Verrupappa* (supra), the Court clarified the position thus :

This case also, thus, clarifies that the expression "possessed by" is not intended to apply to a case of mere possession without title, and that the legislature intended this provision for cases where the Hindu female possesses the right of ownership of the property in question. Even mere physical possession of the property without the right of ownership will not attract the provisions of this section. This case, also, thus, supports our view that the expression "possessed by" was used in the sense of connoting state of ownership and, while the Hindu female possesses the rights of ownership, she would become full owner if the other conditions mentioned in the section are fulfilled. The section will, however, not apply at all to cases where the Hindu female may have parted with her rights so as to place herself in a position where she could, in no manner, exercise her rights of ownership in that property any longer.

27. In *Sukhram v. Gauri Shankar*¹⁷ the facts were as follows :

28. Hukam Singh and Sukh Ram were two brothers. Chidda, the second appellant was the son of Sukh Ram and thus Chidda, Hukam Singh and Sukh Ram were members of a joint Hindu family governed by the Benares School of Mitakshara Law. Hukam Singh died in 1955 leaving behind his widow Krishna Devi. On December 15, 1956, Krishna Devi sold half share of the house belonging to the joint family. This sale was challenged by the other members of the joint family on the ground that Krishna Devi had merely a life interest. The question raised was whether Krishna Devi acquired an absolute interest in the properties after coming into force of the Hindu Succession Act, 1956. It was argued before this Court that according to the Benares School, a male co-parcener was not entitled to alienate even for value his undivided interest in the coparcenary without the consent of other coparceners and, therefore, Krishna Devi could not have higher rights than what her husband possessed. This Court, however, held that in view of the express words of Section 14 of the 1956 Act, once the widow was possessed of property before or after the commencement of the Act, she held it as full owner and not as a limited owner and, therefore, any restriction placed by Shastric Hindu Law was wiped out by the legislative intent as expressed in the Act of 1956. The Court observed thus :

But the words of Section 14 of the Hindu Succession Act are express and explicit : thereby a female Hindu possessed of property whether acquired before or after the commencement of the Act holds it as full owner and not as a limited owner. The interest to which Krishna Devi became entitled on the death of her husband under Section 3(2) of the Hindu Women's Right to Property Act, 1937, in the property of the joint family is indisputably her "property" within the meaning of Section 14 of Act 30 of 1956, and when she became "full owner" of that property she acquired a right unlimited in point of user and duration and uninhibited in point of disposition.

17. (1968) 1 SCR 476 : AIR 1968 SC 365 : (1968) 2 SCJ 122.

This case indirectly supports the view that if the intention of the Legislature was to confer absolute interest on the widow, no limitation can be spelt out either from the old Shastric Law or otherwise which may be allowed to defeat the intention. This Court went to the extent of holding that the words in Section 14(1) are so express and explicit that the widow acquired a right unlimited in point of user, though a male member governed by the Benares school had no power of alienation without the consent of other coparceners. Under the Act the female had higher powers than the male because the words of the statute did not contain any limitation at all. On a parity of reasoning, therefore, where once a property is given to the widow in lieu of maintenance and she enters into possession of that property, no amount of restriction contained in the document can prevent her from acquiring absolute interest in the property because the contractual restriction cannot be higher than the old Hindu Shastric Law or the express words of the Act of 1956.

29. In *Badri Pershad v. Smt. Kanso Devi*¹⁸ the prepositor died in 1947 leaving behind five sons and a widow. Soon after his death disputes arose between the parties and the matter was referred to an arbitrator in 1950. The arbitrator in his award allotted shares to the parties wherein it was stated that the widow would only have widow's estate in those properties. While the widow was in possession of the properties, the Act of 1956 came into force and the question arose whether or not she became full owner of the property or she only had a restricted interest as provided in the grant, namely, the award. This Court held that although the award had given a restricted estate, but this was only a narration of the state of law as it existed when the award was made. As the widow, however, inherited the property under the Hindu Women's Right to Property Act, her interest became absolute with the passing of the Act of 1956 and she squarely fell within the provisions of Section 14(1) of the Act. It was further held that the mere fact that the partition was by means of an award would not bring the matter within Section 14(2) of the Act, because the interest given to the widow was on the basis of a pre-existing right and not a new grant for the first time. This Court observed as follows :

The word "acquired" in sub-section (1) has also to be given the widest possible meaning. This would be so because of the language of the Explanation which makes sub-section (1) applicable to acquisition of property by inheritance or devise or at a partition or in lieu of maintenance or arrears of maintenance or by gift or by a female's own skill or exertion or by purchase or prescription or in any manner whatsoever. Where at the commencement of the Act a female Hindu has a share in joint properties which are later on partitioned by metes and bounds and she gets possession of the properties allotted to her there can be no manner of doubt that she is not only possessed of that property at the time of the coming into force of the Act but has also acquired the same before its commencement.

This Court relied upon two earlier decisions viz., *S. S. Munnalal's case* and *Sukhrum's case* (supra). This case appears to be nearest to the point which falls for determination in this appeal, though it does not cover the points argued before us directly.

18. (1970) 2 SCR 95; (1969) 2 SCC 586.

30. Lastly our attention was drawn to an unreported decision of this Court in *Nirmal Chand v. Vidya Wanti (dead) by her legal representatives*¹⁹ in which case Amin Chand and Lakhmi Chand were the owners of agricultural and non-agricultural properties. The properties were partitioned in the year 1944 and Lakhmi Chand died leaving behind him the appellant and his second wife Subhrai Bai and his daughter by this wife. There was a regular partition between Amin Chand and Subhrai Bai by a registered document dated December 3, 1945 under which a portion of the property was allotted to Subhrai Bai and it was provided in the document that Subhrai Bai would be entitled only to the user of the land and she will have no right to alienate it in any manner but will have only life interest. Later, Subhrai Bai bequeathed the property in 1957 to her daughter Vidya Wanti. Subhrai Bai died and Vidya Wanti's name was mutated in the papers after coming into force of the Act of 1956. The point raised before the High Court was that as Subhrai Bai had been given only a limited interest in the property she had no power to bequeath the property to her daughter as her case was not covered by Section 14(1) but fell under Section 14(2) of the Act. This Court pointed out that at the time when the property was allotted to Subhrai Bai, the Hindu Succession Act had not come into force and according to the state of Hindu Law as it then prevailed Subhrai Bai was undoubtedly entitled only to a limited interest. There was a restriction in the partition deed that Subhrai Bai would enjoy usufruct of the property only and shall not be entitled to make any alienation. It was not a restriction as such but a mere statement of law as it then prevailed. Such a restriction, therefore, would not bring the case of Subhrai Bai under Section 14(2) of the Act and, therefore, she would acquire an absolute interest after the passing of the Act of 1956 and was, therefore, competent to execute the will in favour of her daughter. This Court observed as follows :

If Subhrai Bai was entitled to a share in her husband's properties then the suit properties must be held to have been allotted to her in accordance with law. As the law then stood she had only a life interest in the properties taken by her. Therefore the recital in the deed in question that she would have only a life interest in the properties allotted to her share is merely recording the true legal position. Hence it is not possible to conclude that the properties in question were given to her subject to the condition of her enjoying it for her lifetime. Therefore the trial Court as well as the first appellate Court were right in holding that the facts of the case do not fall within Section 14(2) of the Hindu Succession Act, 1956.

31. In the light of the above decisions of this Court the following principles appear to be clear :

- (1) that the provisions of Section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times ;
- (2) it is manifestly clear that sub-section (2) of Section 14 does not refer to any transfer which merely recognises a pre-

19. (1969) 3 SCC 628.

existing right without creating or conferring a new title on the widow. This was clearly held by this Court in *Badri Pershad's case* (supra).

- (3) that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession ;
- (4) that sub-section (2) of Section 14 is merely a proviso to sub-section (1) of Section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision.

32. We have given our anxious consideration to the language of Section 14(1) and (2) and we feel that on a proper interpretation of Section 14(2) there does not appear to be any real inconsistency between Section 14(1), the explanation thereto and sub-section (2). To begin with, Section 14(1) does not limit the enlargement of the estate of a Hindu widow to any particular interest in the property. On the other hand the Explanation to Section 14(1) brings out the real purpose of Section 14(1) by giving an exhaustive category of cases where principle of Section 14(1) has to operate, i.e. to cases where a Hindu female would get an absolute interest. The argument of the learned Counsel for the appellant is that as the right of maintenance was a pre-existing right, any instrument or transaction by which the property was allotted to the appellant would not be a new transaction so as to create a new title but would be only in recognition of a pre-existing right, namely, the right of maintenance. On the other hand Mr. Natesan appearing for the respondents submitted that the object of the proviso was to validate rather than to disturb the past transactions which had placed certain restrictions or curbs on the power of a Hindu female and as the language of the proviso is very wide there is no warrant for not applying it to cases where pre-existing rights are concerned. In the alternative, Mr. Natesan argued that the Hindu Women's right to maintenance is not a legal right unless an actual charge is created in respect of the property and is, therefore, not enforceable by law. It is, therefore, not correct to describe a claim of a Hindu female's right to maintenance simpliciter as a pre-existing right because all the necessary indicia of a legal right are wanting.

33. After considering various aspects of the matter we are inclined to agree with the contentions raised by Mr. Krishna Murty Iyer appearing for the appellants. In the first place, the appellant's contention appears to be more in consonance with the spirit and object of the statute itself. Secondly, we have already pointed out that the claim of a Hindu female for maintenance is undoubtedly a pre-existing right and this has been so held not only by various Courts in India but also by the Judicial Committee of the Privy Council and by this Court. It seems to us, and it has been held and discussed above, that the claim or the right to maintenance

possessed by a Hindu female is legally a substitute for a share which she would have got in the property of her husband. This being the position, where a Hindu female who gets a share in her husband's property acquires an absolute interest by virtue of Section 14(1) of the Act, could it be intended by the legislature that in the same circumstances a Hindu female who could not get a share but has a right of maintenance would not get an absolute interest? In other words, the position would be that the appellant would suffer because her husband had died prior to the Act of 1937. If the husband of the appellant had died after 1937, there could be no dispute that the appellant would have got an absolute interest, because she was entitled to her share under the provisions of the Hindu Women's Right to Property Act, 1937. Furthermore, it may be necessary to study the language in which the Explanation to Section 14(1) and sub-section (2) of Section 14 are couched. It would be seen that while the Explanation to Section 14(1) clearly and expressly mentions "property acquired by a female Hindu" *at a partition or in lieu of maintenance or arrears of maintenance*, there is no reference in sub-section (2) at all to this particular mode of acquisition by a Hindu female which clearly indicates that the intention of the Parliament was to exclude the application of sub-section (2) to cases where the property has been acquired by a Hindu female either at a partition or in lieu of maintenance etc. The Explanation is an inclusive definition and if the Parliament intended that everything that is mentioned in the Explanation should be covered by sub-section (2) it should have expressly so stated in sub-section (2). Again the language of sub-section (2) clearly shows that it would apply only to such transactions which are absolutely independent in nature and which are not in recognition of or in lieu of pre-existing rights. It appears from the Parliamentary Debates that when the Hindu Succession Bill, 1954, was referred to a Joint Committee by the Rajya Sabha, in Section 14(2) which was Clause 16(2) of the Draft Bill of the Joint Committee, the words mentioned were only gift or will. Thus the intention of the Parliament was to confine sub-section (2) only to two transactions, namely, a gift or a will, which clearly would not include property received by a Hindu female in lieu of maintenance or at a partition. Subsequently, however, an amendment was proposed by one of the members for adding other categories, namely, an instrument, decree, order or award which was accepted by the Government. This would show that the various terms, viz., gift, will, instrument, decree, order or award mentioned in Section 14(2) would have to be read *ejusdem generis* so as to refer to transactions where right is created for the first time in favour of the Hindu female. The intention of the Parliament in adding the other categories to sub-section (2) was merely to ensure that any transaction under which a Hindu female gets a new or independent title under any of the modes mentioned in Section 14(2), namely, gift, will, decree, order, award or an instrument which prescribes a restricted estate would not be disturbed and would continue to occupy the field covered by Section 14(2). This would be the position even if a Hindu male was to get the property by any of the modes mentioned in Section 14(2): he would also get only a restricted interest and, therefore, the Parliament thought that there was

no warrant for making any distinction between a male or a female in this regard and both were, therefore, sought to be equated.

34. Finally, we cannot overlook the scope and extent of a proviso. There can be no doubt that sub-section (2) of Section 14 is clearly a proviso to Section 14(1) and this has been so held by this Court in *Badri Pershad's case* (supra). It is well settled that a provision in the nature of a proviso merely carves out an exception to the main provision and cannot be interpreted in a manner so as to destroy the effect of the main provision or to render the same nugatory. If we accept the argument of the respondents that sub-section (2) of Section 14 would include even a property which has been acquired by a Hindu female at a partition or in lieu of maintenance then a substantial part of the Explanation would be completely set at naught which could never be the intention of the proviso. Thus we are clearly of the opinion that sub-section (2) of Section 14 of the proviso should be interpreted in such a way so as not to substantially erode Section 14(1) or the Explanation thereto. In the present case we feel that the proviso has carved out completely a separate field and before it can apply three conditions must exist :

- (i) that the property must have been acquired by way of gift, will, instrument, decree, order of the Court or by an award ;
- (ii) that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property ; and
- (iii) that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognise or give effect to a pre-existing right which the female Hindu already possessed.

Where any of these documents are executed but no restricted estate is prescribed, sub-section (2) will have no application. Similarly where these instruments do not confer any new title for the first time on the female Hindu, Section 14(2) would have no application. It seems to me that Section 14(2) is a salutary provision which has been incorporated by the Parliament for historical reasons in order to maintain the link between the Shastric Hindu Law and the Hindu Law which was sought to be changed by recent legislation, so that where a female Hindu became possessed of property not in virtue of any pre-existing right but otherwise, and the grantor chose to impose certain conditions on the grantee, the Legislature did not want to interfere with such a transaction by obliterating or setting at naught the conditions imposed.

35. There was some argument at the bar regarding the use of the term "limited owner" in Section 14(1) and "restricted estate" in Section 14(2). Not much, however, turns upon this. I think that the Parliament advisedly used the expression "restricted estate" in Section 14(2), because while a limited interest would indicate only a life estate, a restricted estate is much wider in its import. For instance, suppose a donor while giving the property to a Hindu female inserts a condition that she will have to pay Rs. 200 to donor or to one of his relatives till a particular time, this would not come within the term "limited interest", but it would be included by the term "restricted estate". That is the only justification for the difference in the terminology of Section 14(1) and (2) of the Act.

36. Having discussed the various aspects of Section 14(1) and (2) we shall now deal with the authorities cited before us by counsel for the parties which are by no means consistent. We will first deal with the authorities which took the view that we have taken in this case. In this connection the sheet-anchor of the argument of the learned Counsel for the appellant is the decision of the Bombay High Court in *B. B. Patil v. Gangabai*²⁰ and that of the Counsel for the respondents is the decision of the Madras High Court in *Gurunadham v. Sundrarajulu*²¹ and *Santhanam v. Subramania*²². The latter case was affirmed in appeal by the Division Bench of the Madras High Court in *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal*²³ and the aforesaid Division Bench judgment forms the subject-matter of Civil Appeal 135 of 1973 which will be disposed of by us by a separate judgment.

37. We will now take up the case of the Bombay High Court relied upon by the learned Counsel for the appellant which, in our opinion, lays down the correct law on the subject. In *B. B. Patil v. Gangabai* the facts briefly were that the properties in question were the self-acquired properties of Devgonda and after his death in 1902, Hira Bai daughter-in-law of Devgonda (widow of his son Appa, who also died soon thereafter) came into possession of the properties. Disputes arose between Hira Bai and Nemgonda, the nephew of Devgonda, and the matter having been referred to the arbitrator he gave his award on October 15, 1903 and a decree in terms of the award was passed on October 24, 1903. Under the decree in terms of the award, 65 acres of land and one house was allotted to Hira Bai out of which 30 acres were earmarked for the provision of maintenance and marriage of the three daughters and the rest of the property was ordered to be retained by Hira Bai for life with certain restrictions. After her death these properties were to revert to Nemgonda. The dispute which was the subject-matter of the appeal before the High Court was confined to 35 acres of land and the house which was in possession of Hira Bai. Hira Bai continued to be in possession of these properties right upto February 25, 1967. Meanwhile Nemgonda had died and his sons, defendants 2 to 6 claimed the properties. After the death of Hira Bai, the plaintiffs, who were two out of the three daughters of Hira Bai, filed a suit for possession claiming entire title to the properties in possession of Hira Bai on the ground that Hira Bai was in possession of the properties as limited owner at the time of the passing of the Hindu Succession Act, 1956 and so her limited estate was enlarged into an absolute estate and the plaintiffs were, therefore, entitled to succeed to her properties in preference to the reversioners. The suit was contested by defendants 2 to 6 mainly on the ground that as Hira Bai under the compromise was to retain only a life interest in the properties, her case would be covered by Section 14(2) of the Act and after her death the properties would revert to the reversioners. The Court held that as Hira Bai was put in possession of the properties in lieu of her maintenance,

20. MR 1972 Bom 16. 73 Bom LR 407.
1971 Mah LJ 657.

429: (1967) 1 AllJ 454.

22. ILR (1967) 1 Mad 68.

21. ILR (1968) 1 Mad 567: AIR 1967 SC

23. AIR 1972 Mad 279, 85 Mad LW 202.

Section 14(2) had no application, because the award merely recognised the pre-existing rights of Hira Bai and did not seek to confer any fresh rights or source of title on Hira Bai. Thus even though the award did provide that Hira Bai would have a limited interest, Section 14(2) would have no application and Hira Bai will get an absolute interest after the coming into force of the Hindu Succession Act, 1956. The Court observed :

The explanation, thus, brings under its purview all properties traditionally acquired by a Hindu female in which merely by reason of the incidents of the Hindu law she has limited ownership. In other words, sub-section (1) read with this explanation provides that any property, howsoever acquired and in possession of a Hindu female after the commencement of the Act shall be held by her as a full owner in all cases where she formerly held merely limited ownership. As a matter of fact, this sub-section proceeds on the basis that there are several categories of properties of which a Hindu female, under the provisions of the Hindu Law, is merely a limited owner. By this enactment her rights are enlarged and wherever under the Hindu Law she would merely obtain limited ownership, she would, after the commencement of the Act, obtain full ownership.

There is consensus of judicial opinion with regard to the ambit of sub-section (2) of Section 14 of the Act. It covers only those cases of grants where the interest in the grantee is created by the grant itself, or, in other words, where the gift, will, instrument, decree, order or award is the source of origin of the interest created in the grantee. Where, however, the instruments referred to above are not the source of interest created but are merely declaratory or definitive of the right to property antecedently enjoyed by the Hindu female, sub-section (2) has no application; and it matters not if in such instruments it is specifically provided in express terms that the Hindu female had a limited estate or that the property would revert on her death to the next reversioner; such terms are merely the reiteration of the incidents of the Hindu Law applicable to the limited estate.

Dwelling on the nature and incidents of the right of the widow to maintenance before the Hindu Women's Right to Property Act, 1937, Palekar, J., speaking for the Court described the various characteristics and incidents of the right of a Hindu female for maintenance (which have already been discussed by us). Finally, the Judge observed as follows :

It appears to us that in the context of the Hindu widows the right to maintenance conferred under the Hindu Law is indistinguishable in quality from her right to a share in the family property. That may well be the reason why the explanation to sub-section (1) of Section 14 of the Act makes the female allottee of property "in lieu of maintenance" as much a limited owner as when the widow acquires on "inheritance" or "at a partition". And if in the latter two cases it is conceded that sub-section (2) does not apply on the ground of antecedent right to the family properties, we do not see any rational justification to exclude a widow who has an equally sufficient claim over the family properties for her maintenance.

38. Thus the following propositions emerge from a detailed discussion of this case :

(1) that the widow's claim to maintenance is undoubtedly a tangible right though not an absolute right to property so as to become a fresh source of title. The claim for maintenance can, however, be made a charge on the joint family properties, and even if the properties are sold with the notice of the said charge, the sold properties will be burdened with the claim for maintenance ;

(2) that by virtue of the Hindu Women's Rights to Property Act, 1937 the claim of the widow to maintenance has been crystallized into a full-fledged right and any property allotted to her in lieu of maintenance becomes property to which she has a limited interest which by virtue of the provisions of Act of 1956 is enlarged into an absolute title ;

(3) Section 14(2) applies only to cases where grant is not in lieu of maintenance or in recognition of pre-existing rights but confers a fresh right or title for the first time and while conferring the said title certain restrictions are placed by the grant or transfer. Where, however, the grant is merely in recognition or in implementation of a pre-existing right to claim maintenance, the case falls beyond the purview of Section 14(2) and comes squarely within the explanation to Section 14(1).

The Court dissented from the contrary view taken by the Orissa and Madras High Courts on this question. We find that the facts of this case are on all fours with the present appeal, and we are in complete agreement with the view taken and the reasons given by Palekar, J. Once it is recognised that right of maintenance is a pre-existing tangible right, it makes no difference whether a Hindu widow died before or after the enactment of Hindu Women's Rights to Property Act, 1937.

39. A similar view was taken by an earlier decision of the Andhra Pradesh High Court in *Gadem Reddayya v. Varapula Venkataraju*²⁴ where the Court held that the family settlement was only in recognition of the pre-existing right of the widow to maintenance and, therefore, was not covered by Section 14(2) of the Act of 1956. In our opinion, this case correctly states the law on the subject.

40. In *Sumeshwar Mishra v. Swami Nath Tiwari*²⁵, the High Court of Patna appears to have taken the same view, and in our opinion very correctly. The Patna High Court differed from the decision of the Madras High Court in *Thatha Gurunadhan Chetti v. Smt. Thatha Navaneethamma*²⁶, and in our opinion rightly. We are of the opinion, for the reasons that we have already given above, that the view of the Madras High Court was not legally correct. A later decision of the Patna High Court in *Lakshmi Devi v. Shankar Jha*²⁷ has also taken the same view. We, however, fully approve of the view expressed by the Patna High Court and Andhra Pradesh High Court referred to above.

41. Similarly in *H. Venkanagouda v. Hanamangouda*²⁸, the Mysore High Court adopted the view of the Bombay High Court in *B. B. Patil v. Gangabai* (supra) and dissented from the contrary view taken by the Madras and the Orissa High Courts. In our opinion, this decision seems to have correctly interpreted the provisions of Section 14(2) of the 1956 Act and has laid down the correct law. The view of the Madras High Court and the Orissa High Court which was dissented from by the Mysore High Court is, in our opinion, legally erroneous and must be overruled.

42. In *Smt. Sharbati Devi v. Pt. Hiralal*²⁹, the Punjab High Court clearly held that application of Section 14(2) was limited to only those cases where a female Hindu acquired a title for the first time, for otherwise the property acquired in lieu of maintenance even though conferring a limited estate fell clearly within the ambit of explanation to Section 14(1)

24. AIR 1965 AP 66 : (1964) 2 Andh I.T. 371 : (1964) 2 Andh WR 470.
25. AIR 1970 Pat 348 : 1970 BLJR 735 : 1970 Pat LJ 478.
26. AIR 1967 Mad 429 : (1967) 1 MLJ 454 : (1967) 30 MLW 253.

27. AIR 1974 Pat 87.
28. AIR 1972 Mys 286 : (1972) 1 Mys LJ 315.
29. AIR 1964 Punj 114 : 66 Punj LR 78 : 1964 Cur LJ 3.

of the Act and would, therefore, become the absolute property of the widow. Thus the Punjab High Court also fully favours the view taken by the Bombay, Patna, Mysore, Andhra Pradesh and other High Courts discussed above and has our full approval. The only distinction in the Punjab case is that here the widow got the properties after the coming into force of the Hindu Women's Rights to Property Act, 1937, but that, as we shall point out hereafter, makes no difference with respect to the legal right which a widow has to maintain herself out of the family property.

43. The Calcutta High Court has also taken the same view in *Sasadhar Chandra Day v. Smt. Tara Sundari Dasi*³⁰, which we endorse.

44. In *Saraswathi Ammal v. Anantha Shenai*³¹, the Kerala High Court, after a very detailed discussion and meticulous analysis of the law on the subject, pointed out that the right of a widow to maintenance was not a matter of concession but under the Shastri's Hindu Law it was an obligation on the heirs who inherited the properties of the husband to maintain the widow and any property which the widow got in lieu of maintenance was not one given purely as a matter of concession, but the widow acquired a right in such property. We fully agree with the view taken by the Kerala High Court in the aforesaid case.

45. In *Kunji Thomman v. Meenakshi*³², although the Kerala High Court reiterated its previous view, on the facts of that particular case the High Court held that under the family settlement the widow did not get any right to maintenance but was conferred a new right which was not based on her pre-existing right and on this ground the High Court felt that the widow would not get an absolute interest in view of the explanation to Section 14(1)

46. In *Chellammal v. Nallammal*³³ the facts were almost similar to the facts of the present case. A single Judge of the Madras High Court held that the case was clearly covered by the Explanation to Section 14(1) of the Act and the properties given to the widow in lieu of maintenance became her absolute properties and would not be covered by Section 14(2) of the Act. This decision appears to have been overruled by a later decision of the same High Court in *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal* (supra) which is the subject-matter of Civil Appeal 126 of 1972 and we shall discuss the Division Bench's decision when we refer to the authorities taking a contrary view. We find ourselves in complete agreement with the view taken by the single Judge in *Chellammal v. Nallammal*, and we overrule the Division Bench decision in *S. Kachapalaya Gurukkal's case*.

47. Thus all the decisions discussed above proceed on the right premises and have correctly appreciated the nature and incidents of a Hindu woman's right to maintenance. They have also properly understood

30. AIR 1962 Cal 438.

31. AIR 1966 Ker 66; 1965 Ker LJ 284
1965 Ker LT 141

32. ILR (1970) 2 Ker 45; AIR 1970 Ker
284; 1970 Ker LJ 730.

33. [1971] 1 MLJ 439 (Mad HC).

the import and applicability of Section 14(2) of the 1956 Act and have laid down correct law on the subject.

48. We now deal with the authorities taking a contrary view, which, in our opinion, does not appear to be the correct view.

49. In *Narayan Patra v. Tara Patrani*³⁴ the Orissa High Court, following a decision of the Andhra Pradesh High Court in *G. Kondiah v. G. Subbarayya*³⁵, held that since the widows were given only a restricted estate their case squarely fell within the ambit of Section 14(2) of the Act and their interest would not be enlarged. Reliance was also placed on a Madras decision in *Thatha Gurunadhan Chetty v. Thatha Navaneethamma* (supra). It is obvious that the conclusions arrived at by the High Court are not warranted by the express principles of Hindu Shastric Law. It is true that a widow's claim for maintenance does not ripen into a full-fledged right to property, but nevertheless it is undoubtedly a right which in certain cases can amount to a right to property where it is charged. It cannot be said that where a property is given to a widow in lieu of maintenance, it is given to her for the first time and not in lieu of a pre-existing right. The claim to maintenance, as also the right to claim property in order to maintain herself, is an inherent right conferred by the Hindu Law and, therefore, any property given to her in lieu of maintenance is merely in recognition of the claim or right which the widow possessed from before. It cannot be said that such a right has been conferred on her for the first time by virtue of the document concerned and before the existence of the document the widow had no vestige of a claim or right at all. Once it is established that the instrument merely recognised the pre-existing right, the widow would acquire absolute interest. Secondly, the Explanation to Section 14(1) merely mentions the various modes by which a widow can acquire a property and the property given in lieu of maintenance is one of the modes mentioned in the Explanation. Sub-section (2) is merely a proviso to Section 14(1) and it cannot be interpreted in such a manner as to destroy the very concept of the right conferred on a Hindu woman under Section 14(1). Sub-section (2) is limited only to those cases where by virtue of certain grant or disposition a right is conferred on the widow for the first time and the said right is restricted by certain conditions. In other words, even if by a grant or disposition a property is conferred on a Hindu male under certain conditions, the same are binding on the male. The effect of sub-section (2) is merely to equate male and female in respect of grant conferring a restricted estate. In these circumstances we do not agree with the views expressed by the Orissa High Court.

50. The other High Courts which have taken a contrary view are mainly the Andhra Pradesh, Allahabad and the Madras High Courts. In an earlier decision of the Patna High Court in *Shiva Pujan Rai v. Jamuna Missir*³⁶ the High Court seems to rally round the view taken by the Madras High Court.

34. (1970) 36 Cut L.J. 567; AIR 1970 Ori 131.

35. (1968) 2 Andh WR 455.
36. ILR 47 Pat 1118

51. We shall take up the decisions of the Andhra Pradesh High Court. As already indicated above, the earlier decision of the Andhra Pradesh High Court in *Gadem Reddayya v. Varapula Venkataraju* (supra) took the same view which was taken later by the Bombay High Court and held that in a case like the present, a Hindu female would get an absolute interest and her case would not be covered by sub-section (2) of Section 14 of the 1956 Act. In *Gopisetti Kondaiiah v. Gunda Subbarayudu*³⁷ another Division Bench of the same High Court appears to have taken a contrary view. Jaganmohan Reddy, C.J., speaking for the Court observed as follows :

In so far as the right of a Hindu woman to maintenance is concerned, it is necessary at this stage to point out one other basic concept. A Hindu woman has a right to be maintained by her husband or from her husband's property or Hindu joint family property. But that is merely a right to receive maintenance out of the properties without in any way conferring on her any right, title or interest therein. It is not a definite right, but is capable of being made a charge on specific properties by agreement, decree of Court or award, compromise or otherwise But this indefinite right, to be maintained from out of the properties of a Hindu joint family, does not, however, create in her a proprietary right in the property But if a restricted estate is given by any such instrument, even if it be in lieu of maintenance, which is inconsistent with an estate she would get under the Hindu Law, then sub-section (2) of Section 14 would operate to give her only a restricted estate. But if it is the latter, notwithstanding the fact that it was transferred in lieu of maintenance, if only a restricted estate was conferred by the instrument, then she would only have the restricted estate.

While we fully agree with the first part of the observations made by the learned Chief Justice, as he then was, that one of the basic concepts of Hindu Law is that a Hindu woman has right to be maintained by her husband or from her husband's property or the joint family property, we respectfully disagree with his conclusion that even though this is the legal position yet the right to receive maintenance does not confer on her any right, title or interest in the property. It is true that the claim for maintenance is not an enforceable right but it is undoubtedly a pre-existing right, even though no charge is made on the properties which are liable for her maintenance. We also do not agree with the view of the learned Chief Justice that if the property is given to the widow in lieu of maintenance she will get only a restricted estate. In our opinion, the High Court of Andhra Pradesh has proceeded on wrong premises. Instead of acknowledging the right of a Hindu woman to maintenance as a right to a right—or for that matter a pre-existing right—and then considering the effect of the subsequent transactions, the High Court has first presumed that the claim for maintenance is not a tangible right at all and, therefore, the question of a pre-existing right does not arise. This, as we have already pointed out, is against the consistent view taken by a large number of Courts for a very long period. Furthermore, this case does not appear to have noticed the previous Division Bench decision in *Gadem Reddayya's case* (supra) taking the contrary view, and on this ground alone the authority of this case is considerably weakened. At any rate, since we are satisfied that the claim of a Hindu woman for maintenance is a pre-existing right, any transaction which is in recognition or declaration of that right

37. ILR (1968) AP 621.

clearly falls beyond the purview of Section 14(2) of the 1956 Act and, therefore, this authority does not lay down the correct law. We, therefore, do not approve of the view taken in this case and overrule the same.

52. As regards the Madras High Court, the position appears to be almost the same. There also, while a single Judge took the same view as the Bombay High Court and held that Section 14(2) was not applicable, the Division Bench of the Court in an appeal against the order of another Single Judge took the contrary view. In *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal* (supra) the Court seems to draw an artificial distinction between a claim of a widow for maintenance and a pre-existing right possessed by her. According to the High Court, while a claim for maintenance *simpliciter* was not a right at all, the right to get a share in the husband's property under the Hindu Women's Rights to Property Act, 1937 was a pre-existing right. The Madras High Court appears to have fallen into an error by misconceiving the scope and extent of a Hindu woman's right to maintenance. Secondly, it appears to have interpreted the proviso in such a manner as to destroy the effect of the main provision, namely, Section 14(1) and the explanation thereto, for which there can be no warrant in law. The decision of Natesan, J., in *Gurunadham v. Sundrarajulu Chetty* (supra) which had been affirmed by this judgment also appears to have taken the same view and had fallen into the same error. Furthermore, the view of the learned Judge that on the interpretation given and the view taken by the Bombay High Court which we have accepted, Section 14 is intended to override lawful terms in contracts, bargains, bequests or gifts etc. is not correct, because the scope and area of sub-section (2) of Section 14 is quite separate and defined. Such a sub-section applies only to such transactions as confer new right, title or interest on the Hindu females. In such cases the titles created under sub-section (2) are left intact and Section 14(1) does not interfere with the titles so created under those instruments.

53. Thus, in short, these two decisions suffer from the following legal infirmities : (i) the Madras High Court has not correctly or properly appreciated the nature and extent of the widow's right to maintenance ; and (ii) the distinction drawn by the Court regarding the share given to the widow under the Hindu Women's Rights to Property Act allotted to her before the passing of the Act in lieu of maintenance is based on artificial grounds. In fact the Act of 1937 did not legislate anything new, but merely gave statutory recognition to the old Shastric Hindu Law by consolidating the same and clarifying the right of the widow which she already possessed in matter of succession under the Hindu Law. This being the position, the Act of 1937 makes no difference so far as the legal status of a widow in regard to her right to maintenance was concerned. The Act neither took away the right of maintenance nor conferred the same ; (iii) the Court appears to have given an extended meaning to sub-section (2) of Section 14 of the 1956 Act which has been undoubtedly enlarged so as to set at naught the express words in the Explanation to sub-section (1) of Section 14 which expressly exclude the property given to a widow in lieu of maintenance or at a partition from the ambit of sub-section (2).

In other words, such a property, according to the Explanation, is a property in which the widow would have undoubtedly a limited interest which by operation of law [i.e. force of Section 14(1)] would be enlarged into an absolute interest if the widow is in possession of the property on the date when the Act was passed ; (iv) similarly the Court failed to notice that sub-section (2) of Section 14 would apply only where a new right is created for the first time by virtue of a gift, will etc. or the like executed in favour of the widow in respect of which she had *no prior interest* in the property at all. For instance, a daughter is given a limited interest in presence of the widow. Here the daughter not being an heir in presence of the widow (before the Hindu Succession Act came into force) she had no right or share in the property, and if she was allotted some property under any instrument, a new and fresh right was created in her favour for the first time which she never possessed. Such a case would be squarely covered by Section 14(2) of the Act.

54. In *Ram Jag Misir v. The Director of Consolidation, U. P.*³⁸ the same view has been taken as the Madras High Court. This case does not discuss the various aspects which have been pointed out by us and proceeds purely on the basis that as the widow acquired a restricted estate under the compromise, Section 14(2) would at once apply. It has not at all considered the decision of this Court that a mere description of limited interest in a grant or compromise is not a restriction but may just as well be merely a statement of the law as it stood when the grant was made. The Court has also not considered the various incidents and characteristics of the widow's right to maintenance under the Hindu Law.

55. Reliance was also placed by the learned Counsel for the respondents on a Division Bench decision of the Patna High Court in *Shiva Pujan Rai v. Jamuna Missir* (supra) where the High Court held that the property given to a widow under a compromise in lieu of her maintenance was covered by sub-section (2) of Section 14. This decision was really based on the peculiar findings of fact arrived at by the Courts of fact. The High Court in the first place held that on the facts there was nothing to show that the widow acquired any interest independent of the compromise under which she was given the property. In these circumstances, it may be that the widow was given a fresh or a new title under the compromise in which case the matter would be clearly covered by Section 14(2) of the 1956 Act. Even if this case be treated as an authority for the proposition that any property allotted to a widow under a compromise in lieu of maintenance would be covered by Section 14(2) of the Act, then we dissent from this view. and for the reasons which we have already given we choose to prefer the view taken by the Patna High Court in a later case in *Sumeshwar Mishra v. Swami Nath Tiwari* (supra), which lays down the correct law on the subject.

56. Reliance was also placed on a Full Bench decision of the Jammu and Kashmir High Court in *Ajab Singh v. Ram Singh*³⁹. In this case also the various aspects which we have indicated and the nature and extent

38. AIR 1975 All 151 : 1975 All LJ 138.

39. AIR 1959 J & K 92.

of the Hindu women's right to maintenance were not considered at all and the Court proceeded by giving an extended meaning to the provisions of sub-section (2) of Section 14 which in that case was sub-section (2) of Section 12 of the Jammu & Kashmir Hindu Succession Act, 1956. It is true that the leading judgment was given by one of us (Fazal Ali, J.), but I must confess that the important question of law that has been argued before us in all its comprehensive aspects was not presented before me in that case and even the counsel for the respondents did not seriously contend that sub-section (2) of Section 14 was not applicable. For these reasons we are not in a position to approve of the Full Bench decision of the Jammu & Kashmir High Court in *Ajab Singh's case* which is hereby overruled.

57. Thus on a careful scrutiny and analysis of the authorities discussed above, the position seems to be that the view taken by the High Courts of Bombay, Andhra Pradesh, Patna, Mysore, Punjab, Calcutta and Kerala to the effect that the widow's claim to maintenance, even though granted to her subject to certain restrictions, is covered by Section 14(1) and not by sub-section (2) is based on the following premises :

(1) That the right of a Hindu widow to claim maintenance is undoubtedly a right against property though not a right to property. Such a right can mature into a full-fledged one if it is charged on the property either by an agreement or by a decree. Even otherwise, where a family possesses property, the husband, or in case of his death, his heirs are burdened with the obligation to maintain the widow and, therefore, the widow's claim for maintenance is not an empty formality by a pre-existing right.

(2) Section 14(2) which is in the nature of a proviso to Section 14(1) cannot be interpreted in a way so as to destroy the concept and defeat the purpose which is sought to be effectuated by Section 14(1) in conferring an absolute interest on the Hindu women and in doing away with what was heretofore known as the Hindu women's estate. The proviso will apply only to such cases which flow beyond the purview of the Explanation to Section 14(1).

(3) That the proviso would not apply to any grant or transfer in favour of the widow hedged in by limitation or restrictions, where the grant is merely in recognition or declaration of a pre-existing right ; it will apply only to such a case where a new right, which the female did not possess at all is sought to be conferred on her under certain limitations or exceptions. In fact in such a case even if a conditional grant is made to a male, he would be bound by the condition imposed. The proviso wipes out the distinction between a male and a female in this respect.

58. The contrary view taken by the Madras, Orissa, Andhra Pradesh, Allahabad and Jammu & Kashmir High Courts proceeds on the following grounds :

(1) That a widow's claim to maintenance is merely an inchoate

or incomplete right having no legal status ; unless the widow gets a property in lieu of maintenance or unless a charge is created in a particular property the claim for maintenance cannot be legally enforced. Thus, where under a grant, compromise, transfer or a decree, a property is allotted to the widow in lieu of maintenance, it is not the recognition of any pre-existing right but it amounts to conferment of a new right for the first time which in fact did not exist before the said demise. This view is really based on the provisions of the Hindu Women's Rights to Property Act, 1937, under which the widow has got the right to get a share of his son in lieu of partition and even otherwise she is entitled to her share in the joint Hindu family property on partition. These High Courts, therefore, seem to be of the opinion that in view of the provisions of the Hindu Women's Rights to Property Act, the widow in claiming a share in the property has a pre-existing right which is recognised by law, namely, the Act of 1937. The same, however, cannot be said of a bare claim to maintenance which has not been recognised as a legal right and which can mature into a legally enforceable right only under a grant or demise. This view suffers from a serious fallacy, which is based on a misconception of the true position of a Hindu widow's claim for maintenance. It has been seen from the discussion regarding the widow's claim for maintenance and her status in family that under the pure Shastric Hindu Law the widow is almost a co-owner of the properties with her husband and even before the Act of 1937 she was entitled to the share of a son on the death of her husband after partition according to some schools of Hindu Law. The Act of 1937 did not introduce any new right but merely gave a statutory recognition to the old Shastric Hindu Law on the subject. In this respect the Act of 1937 is very different from the Act of 1956. the latter of which has made a revolutionary change in the Hindu Law and has changed the entire complexion and concept of Hindu women's estate. In these circumstances, therefore, if the widow's claim for maintenance or right to get the share of a son existed before the Act of 1937, it is futile to dub this right as flowing from the Act of 1937. The second fallacy in this view is that Court failed to consider that the claim for maintenance is an important right which is granted to the widow under the Shastric Hindu Law which enjoins the husband to maintain his wife even if he has no property. Where he has a property the widow has to be maintained from that property so much so that after the death of her husband anyone who inherits that property takes the property subject to the burden of maintaining the widow. Even where the property is transferred for payment of family debts and the transferee has the notice of the widow's claim for maintenance, he has to discharge the burden of maintaining the widow from the property sold to him. Thus the nature and extent of the right of the widow to claim maintenance is undoubtedly a pre-existing right and it is wrong to say that such a right comes into

existence only if the property is allotted to the widow in lieu of maintenance and not otherwise.

(2) Another reasoning given by the courts taking the contrary view is that sub-section (2) being in the nature of a proviso to Section 14(1) all grants with conditions take the case out of Section 14(1). This, as we have already pointed out, is based on a wrong interpretation of the scope and ambit of sub-section (2) of Section 14.

(3) Lastly, the contrary view is in direct conflict with the observations made by this Court in the cases referred to above, where a grant in lieu of maintenance of the widow has been interpreted as being in recognition of a pre-existing right so as to take away the case from the ambit of sub-section (2).

59. For these reasons and those given hereto before we choose to prefer the view taken by Palekar, J., in *B. B. Patil v. Gangabai* (supra) which appears to be more in consonance with the object and spirit of the 1956 Act. We, therefore, affirm and approve of the decisions of the Bombay High Court in *B. B. Patil v. Gangabai*; of the Andhra Pradesh High Court in *Gadem Reddayya v. Varapula Venkataraju*; of the Mysore High Court in *H. Venkanagouda v. Hanamangouda*; of the Patna High Court in *Sumeshwar Mishra v. Swami Nath Tiwari*; of the Punjab High Court in *Smt. Sharbati Devi v. Pt. Hiralal* and Calcutta High Court in *Sasadhar Chandra Day v. Smt. Tara Sundari Dasi* (supra) and disapprove the decisions of the Orissa High Court in *Narayan Patra v. Tara Patrani*; Andhra Pradesh High Court in *Gopiseti Kondiah v. Gunda Subbarayudu* (supra); Madras High Court in *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal* (supra) and *Gurunadham v. Sundrarajulu*; of the Allahabad High Court in *Ram Jag Missir v. Director of Consolidation, U. P.*; and in *Ajab Singh v. Ram Singh* of the Jammu and Kashmir High Court.

60. Lastly strong reliance was placed by Mr. Natesan counsel for the respondents on a decision of this Court in *Smt. Naraini Devi v. Smt. Ramo Devi*⁴⁰ to which one of us (Fazal Ali, J.), was a party. This case is no doubt directly in point and this Court by holding that where under an award an interest is created in favour of a widow that she should be entitled to rent out the property for her lifetime, it was held by this Court that this amounted to a restricted estate under Section 14(2) of the 1956 Act. Unfortunately the various aspects, namely, the nature and extent of the Hindu women's right to maintenance, the limited scope of sub-section (2) which is a proviso to sub-section (1) of Section 14 and the effect of the Explanation, etc., to which we have adverted in this judgment, were neither brought to our notice nor were argued before us in that case. Secondly, the ground on which this Court distinguished the earlier decision of this Court in *Badri Pershad v. Smt. Kanso Devi* (supra) was that in the aforesaid decision the Hindu widow had a share or interest in the house of her husband under the Hindu Law as it was applicable then, and, therefore, such a share amounted to a pre-existing right. The

40. (1976) 1 SCC 574.

attention of this Court, however, was not drawn to the language of the Explanation to Section 14(1) where a property given to a widow at a partition or in lieu of maintenance had been placed in the same category, and, therefore, the reason given by this Court does not appear to be sound. For the reasons that we have already given, after taking an overall view of the situation, we are satisfied that the Division Bench decision of this Court in *Naraini Devi's case* was not correctly decided and is, therefore, overruled.

61. Indeed, if the contrary view is accepted, it will, in my opinion, set at naught the legislative process of a part of Hindu Law of the intestate succession and curb the social urges and aspirations of the Hindu women, particularly in the International Year of Women, by reviving a highly detestable legacy which was sought to be buried by the Parliament after independence so that the new legislation may march with the times.

62. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Section 14(1) and (2) of the Act of 1956. These conclusions may be stated thus :

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 applies to instruments.

decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

(6) The words "possessed by" used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee.

63. Applying the principles enunciated above to the facts of the present case, we find :

(i) that the properties in suit were allotted to the appellant Tulasamma on July 30, 1949 under a compromise certified by the Court ;

(ii) that the appellant had taken only a life interest in the properties and there was a clear restriction prohibiting her from alienating the properties ;

(iii) that despite these restrictions, she continued to be in possession of the properties till 1956 when the Act of 1956 came into force ; and

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(iv) that the alienations which she had made in 1960 and 1961 were after she had acquired an absolute interest in the properties

64. It is, therefore, clear that the compromise by which the properties were allotted to the appellant Tulasamma in lieu of her maintenance were merely in recognition of her right to maintenance which was a pre-existing right, and, therefore, the case of the appellant would be taken out of the ambit of Section 14(2) and would fall squarely within Section 14(1) read with the Explanation thereto. Thus the appellant would acquire an absolute interest when she was in possession of the properties at the time when the 1956 Act came into force and any restrictions placed under the compromise would have to be completely ignored. This being the position, the High Court was in error in holding that the appellant Tulasamma would have only a limited interest and in setting aside the alienations made by her. We are satisfied that the High Court decreed the suit of the plaintiffs on an erroneous view of the law.

65. The result is that the appeal is allowed, the judgment and decree of the High Court are set aside, the judgment of the District Judge, Nellore is hereby restored and the plaintiff's suit is dismissed. In the peculiar circumstances of this case and having regard to the serious divergence of judicial opinion of the various Courts in India, we would make no order as to costs in this Court.

BHAGWATI, J. (*for himself and Gupta, J.*) (concurring)—We have had the advantage of reading the judgment prepared by our learned brother S. Murtaza Fazal Ali and we agree with the conclusion reached by him in that judgment but we would prefer to give our own reasons. The facts giving rise to the appeal are set out clearly and succinctly in the judgment of our learned brother and we do not think it necessary to reiterate them.

67. The short question that arises for determination in this appeal is as to whether it is sub-section (1) or sub-section (2) of Section 14 of the Hindu Succession Act, 1956 that applies where property is given to a Hindu female in lieu of maintenance under an instrument which in so many terms restricts the nature of the interest given to her in the property. If sub-section (1) applies, then the limitation on the nature of her interest are wiped out and she becomes the full owner of the property, while on the other hand, if sub-section (2) governs such a case, her limited interest in the property is not enlarged and she continues to have the restricted estate prescribed by the instrument. The question is of some complexity and it has evoked wide diversity of judicial opinion not only amongst the different High Courts but also within some of the High Courts themselves. It is indeed unfortunate that though it became evident as far back as 1967 that sub-sections (1) and (2) of Section 14 were presenting serious difficulties of construction in cases where property was received by a Hindu female in lieu of maintenance and the instrument granting such property prescribed a restricted estate for her in the property and divergence of judicial opinion was creating a situation which might

well be described as chaotic, robbing the law of that modicum of certainty which it must always possess in order to guide the affairs of men, the legislature, for all these years, did not care to step in to remove the constructional dilemma facing the courts and adopted an attitude of indifference and inaction, untroubled and unmoved by the large number of cases on this point encumbering the files of different courts in the country, when by the simple expedient of an amendment, it could have silenced judicial conflict and put an end to needless litigation. This is a classic instance of a statutory provision which, by reason of its inapt draftsmanship, has created endless confusion for litigants and proved a paradise for lawyers. It illustrates forcibly the need of an authority or body to be set up by the Government or the Legislature which would constantly keep in touch with the adjudicatory authorities in the country as also with the legal profession and immediately respond by making recommendations for suitable amendments whenever it is found that a particular statutory provision is, by reason of inapt language or unhappy draftsmanship, creating difficulty of construction or is otherwise inadequate or defective or is not well conceived and is consequently counter-productive of the result it was intended to achieve. If there is a close inter-action between the adjudicatory wing of the State and a dynamic and ever-alert authority or body which responds swiftly to the drawbacks and deficiencies in the law in action, much of the time and money, which is at present expended in fruitless litigation, would be saved and law would achieve a certain amount of clarity, certainty and simplicity which alone can make it easily intelligible to the people.

68. Since the determination of the question in the appeal turns on the true interpretation to be placed on sub-section (2) read in the context of sub-section (1) of Section 14 of the Hindu Succession Act, 1956, it would be convenient at this stage to set out both the sub-sections of that section which read as follows :

14. (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.

Prior to the enactment of Section 14, the Hindu law, as it was then in operation, restricted the nature of the interest of a Hindu female in property acquired by her and even as regards the nature of this restricted interest, there was great diversity of doctrine on the subject. The Legislature, by enacting sub-section (1) of Section 14, intended, as pointed by this Court

in *S. S. Munna Lal v. S. S. Rajkumar*⁴¹ “to convert the interest which a Hindu female has in property, however, restricted the nature of that interest under the Shastric Hindu law may be, into absolute estate”. This Court pointed out that the Hindu Succession Act, 1958 “is a codifying enactment, and has made far reaching changes in the structure of the Hindu law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance and sweeps away the traditional limitations on her powers of disposition which were regarded under the Hindu law as inherent in her estate”. Sub-section (1) of Section 14, is wide in its scope and ambit and uses language of great amplitude. It says that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The words “any property” are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all comprehensive, the Legislature has enacted an explanation which says that property would include “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 the Act. Whatever be the kind of property, movable or immovable, and whichever be the mode of acquisition, it would be covered by sub-section (1) of Section 14, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Shastric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelage and to recognize her status as an independent and absolute owner of property. This Court has also in a series of decisions given a most expansive interpretation to the language of sub-section (1) of Section 14 with a view to advancing the social purpose of the legislation and as part of that process, construed the words ‘possessed of’ also in a broad sense and in their widest connotation. It was pointed out by this Court in *Gummalapura Taggina Matada Kotturuswami v. Satre Veerayya*⁴² that the words ‘possessed of’ mean “the state of owning or having in one’s hand or power”. It need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law. It may be actual or constructive or in any form recognised by law. Elaborating the concept, this Court pointed out in *Mangal Singh v. Rattno*⁴³ that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of the property, provided of course, that she has not parted with her rights and is capable of obtaining possession of the property. It will, therefore, be seen that sub-section (1) of Section 14 is large in its amplitude and

41. 1962 Supp 3 SCR 418 : AIR 1962 SC 1493.

42. 1959 Supp 1 SCR 968 : AIR 1959 SC

577 : 1959 SCJ 437.

43. AIR 1967 SC 1786 : (1967) 3 SCR 454 : (1968) 1 SCJ 468.

covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property.

69. Now, sub-section (2) of Section 14 provides that 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. This provision is more in the nature of a proviso or exception to sub-section (1) and it was regarded as such by this Court in *Badri Pershad v. Smt. Kanso Devi*⁴⁴. It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1). The language of sub-section (2) is apparently wide to include acquisition of property by a Hindu female under an instrument or a decree or order or award where the instrument, decree, order or award prescribes a restricted estate for her in the property and this would apparently cover a case where property is given to a Hindu female at a partition or in lieu of maintenance and the instrument, decree, order or award giving such property prescribes limited interest for her in the property. But that would virtually emasculate sub-section (1), for in that event, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument, order or award would be excluded from the operation of the beneficent provision enacted in sub-section (1), since in most of such cases, where property is allotted to the Hindu female prior to the enactment of the Act, there would be a provision, in consonance with the old Shastric law then prevailing, prescribing limited interest in the property and where property is given to the Hindu female subsequent to the enactment of the Act, it would be the easiest thing for the dominant male to provide that the Hindu female shall have only a restricted interest in the property and thus make a mockery of sub-section (1). The Explanation to sub-section (1) which includes within the scope of that sub-section property acquired by a female Hindu at a partition or in lieu of maintenance would also be rendered meaningless, because there would hardly be a few cases where the instrument, decree, order or award giving property to a Hindu female at a partition or in lieu of maintenance would not contain a provision prescribing restricted estate in the property. The social purpose of the law would be frustrated and the reformist zeal underlying the statutory provision would be chilled. That surely could never have been the intention of the Legis-

⁴⁴. (1970) 2 SCR 95; (1969) 2 SCC 586.

lature in enacting sub-section (2). It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the Statute so as, as far as possible, to make a consistent enactment of the whole statute. Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. This constructional approach finds support in the decision in *Badri Pershad's case* (supra) where this Court observed that sub-section (2) "can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property". It may also be noted that when the Hindu Succession Bill 1954, which ultimately culminated into the Act, was referred to a Joint Committee of the Rajya Sabha, clause 16(2) of the Draft Bill, corresponding to the present sub-section (2) of section 14, referred only to acquisition of property by a Hindu female under gift or will and it was subsequently that the other modes of acquisition were added so as to include acquisition of property under an instrument, decree, order or award. This circumstance would also seem to indicate that the legislative intentment was that sub-section (2) should be applicable only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right — a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.

70. This line of approach in the construction of sub-section (2) of Section 14 is amply borne out by the trend of judicial decisions in this Court. We may in this connection refer to the decision in *Badri Pershad's case* (supra). The facts in that case were that one Gajju Mal owning self-acquired properties died in 1947 leaving five sons and a widow. On August 5, 1950, one Tulsi Ram Seth was appointed by the parties as an arbitrator for resolving certain differences which had arisen relating to partition of the properties left by Gajju Mal. The arbitrator made his award on October 31, 1950 and under Clause 6 of the award, the widow was awarded certain properties and it was expressly stated in the award that she would have a widow's estate in the properties awarded to her. While the widow was in possession of the properties, the Act came into force and the question arose whether on the coming into force of the Act, she became full owner of the properties under sub-section (1) or her estate in the properties remained a restricted one under sub-section (2) of Section 14. This Court held that although the award gave a restricted estate to the widow in the properties allotted to her, it was sub-section (1) which applied and not sub-section (2), because inter alia

the properties given to her under the award were on the basis of a pre-existing right which she had as an heir of her husband under the Hindu Women's Right to Property Act, 1937 and not as a new grant made for the first time. So also in *Nirmal Chand v. Vidya Wanti (dead) by her legal representatives*⁴⁵, there was a regular partition deed made on December 3, 1945 between Amin Chand, a coparcener and Subhrai Bai, the widow of a deceased coparcener, under which a certain property was allotted to Subhrai Bai and it was specifically provided in the partition deed that Subhrai Bai would be entitled only to the user of the property and she would have no right to alienate it in any manner but would only have a life interest. Subhrai Bai died in 1957 subsequent to the coming into force of the Act after making a will bequeathing the property in favour of her daughter Vidyawanti. The right of Subhrai Bai to bequeath the property by will was challenged on the ground that she had only a limited interest in the property and her case was covered by sub-section (2) and not sub-section (1). This contention was negated and it was held by this Court that though it was true that the instrument of partition prescribed only a limited interest for Subhrai Bai in the property, that was in recognition of the legal position which then prevailed and hence it did not bring her case within the exception contained in sub-section (2) of Section 14. This Court observed :

If Subhrai Bai was entitled to a share in her husband's properties then the suit properties must be held to have been allotted to her in accordance with law. As the law then stood she had only a life interest in the properties taken by her. Therefore the recital in the deed in question that she would have only a life interest in the properties allotted to her share is merely recording the true legal position. Hence it is not possible to conclude that the properties in question were given to her subject to the condition of her enjoying it for her lifetime. Therefore the trial Court as well as the first appellate Court were right in holding that the facts of the case do not fall within Section 14(2) of the Hindu Succession Act, 1956.

It will be seen from these observations that even though the property was acquired by Subhrai Bai under the instrument of partition, which gave only a limited interest to her in the property, this Court held that the case fell within sub-section (1) and not sub-section (2). The reason obviously was that the property was given to Subhrai Bai in virtue of a pre-existing right inhering in her and when the instrument of partition provided that she would only have a limited interest in the property, it merely provided for something which even otherwise would have been the legal position under the law as it then stood. It is only when property is acquired by a Hindu female as a new grant for the first time and the instrument, decree, order or award giving the property prescribes the terms on which it is to be held by the Hindu female, namely, as a restricted owner, that sub-section (2) comes into play and excludes the applicability of sub-section (1). The object of sub-section (2), as pointed out by this Court in *Badri Pershad's case* (supra) while quoting with approval the observations made by the Madras High Court in *Rangaswami Naicker v. Chinnammal*⁴⁶, is "only to remove the disability of women imposed by law and not to interfere with contracts, grants or decrees etc. by virtue of which a

45. (1969) 3 SCC 628.

46. AIR 1964 Mad 387: ILR (1964) 1 Mad 570: 77 Mad LW 9.

woman's right was restricted" and, therefore, where property is acquired by a Hindu female under the instrument in virtue of a pre-existing right, such as a right to obtain property on partition or a right to maintenance and under the law as it stood prior to the enactment of the Act, she would have no more than limited interest in the property, a provision in the instrument giving her limited interest in the property would be merely by way of record or recognition of the true legal position and the restriction on her interest being a "disability imposed by law" would be wiped out and her limited interest would be enlarged under sub-section (1). But where property is acquired by a Hindu female under an instrument for the first time without any pre-existing right solely by virtue of the instrument, she must hold it on the terms on which it is given to her and if what is given to her is a restricted estate, it would not be enlarged by reason of sub-section (2). The controversy before us, therefore, boils down to the narrow question whether in the present case the properties were acquired by the appellant under the compromise in virtue of a pre-existing right or they were acquired for the first time as a grant owing its origin to the compromise alone and to nothing else.

71. Now, let us consider how the properties in question came to be acquired by the appellant under the compromise. The appellant claimed maintenance out of the joint family properties in the hands of the respondent who was her deceased husband's brother. The claim was decreed in favour of the appellant and in execution of the decree for maintenance, the compromise was arrived at between the parties allotting the properties in question to the appellant for her maintenance and giving her limited interest in such properties. Since the properties were allotted to the appellant in lieu of her claim for maintenance, it becomes necessary to consider the nature of the right which a Hindu widow has to be maintained out of joint family estate. It is settled law that a widow is entitled to maintenance out of her deceased husband's estate, irrespective whether that estate may be in the hands of his male issue or it may be in the hands of his coparceners. The joint family estate in which her deceased husband had a share is liable for her maintenance and she has a right to be maintained out of the joint family properties and though, as pointed out by this Court in *Rani Bai v. Shri Yadunandan Ram*⁴⁷, her claim for maintenance is not a charge upon any joint family property until she has got her maintenance determined and made a specific charge either by agreement or a decree or order of a court, her right is "not liable to be defeated except by transfer to a *bona fide* purchaser for value without notice of her claim or even with notice of the claim unless the transfer was made with the intention of defeating her right". The widow can for the purpose of her maintenance follow the joint family property "into the hands of anyone who takes it as a volunteer or with notice of her having set up a claim for maintenance". The courts have even gone to the length of taking the view that where a widow is in possession of any specific property for the purpose of her maintenance, a purchaser buying with notice of her claim is not entitled to possession of that property without first securing proper maintenance for her.

47. (1969) 3 SCR 789; (1969) 1 SCC 604.

Vide *Rachawa v. Shivayagoppa*⁴⁸ cited with approval in *Ranibai's case* (supra). It is, therefore, clear that under the Shastric Hindu Law a widow has a right to be maintained out of joint family property and this right would ripen into a charge if the widow takes the necessary steps for having her maintenance ascertained and specifically charged on the joint family property and even if no specific charge is created, this right would be enforceable against joint family property in the hands of a volunteer or a purchaser taking it with notice of her claim. The right of the widow to be maintained is of course not a *jus in rem* since it does not give her any interest in the joint family property but it is certainly *jus ad rem*, i.e., a right against the joint family property. Therefore, when specific property is allotted to the widow in lieu of her claim for maintenance, the allotment would be in satisfaction of her *jus ad rem*, namely, the right to be maintained out of the joint family property. It would not be a grant for the first time without any pre-existing right in the widow. The widow would be getting the property in virtue of her pre-existing right, the instrument giving the property being merely a document effectuating such pre-existing right and not making a grant of the property to her for the first time without any antecedent right or title. There is also another consideration which is very relevant to this issue and it is that, even if the instrument were silent as to the nature of the interest given to the widow in the property and did not, in so many terms, prescribe that she would have a limited interest, she would have no more than a limited interest in the property under the Hindu law as it stood prior to the enactment of the Act and hence a provision in the instrument prescribing that she would have only a limited interest in the property would be, to quote the words of this Court in *Nirmal Chand's case* (supra), "merely recording the true legal position" and that would not attract the applicability of sub-section (2) but would be governed by sub-section (1) of Section 14. The conclusion is, therefore, inescapable that where property is allotted to a widow under an instrument, decree, order or award prescribes a restricted estate for her in the property and sub-section (2) of Section 14 would have no application in such a case.

72. We find that there are several High Courts which have taken the same view which we are taking in the present case. We may mention only a few of those decisions. namely, *B. B. Patil v. Gangabai*⁴⁹, *Sumeshwar Misra v. Swami Nath Tiwari*⁵⁰, *Gadam Reddayya v. Varapula Venkataraju*⁵¹, *Thatha Gurunadham Chetti v. Thatha Navaneethamma*⁵², *H. Venkangouda v. Hanamangouda*⁵³, *Smt. Sharbati Devi v. Pt. Hiralal*⁵⁴, *Sasadhar Chandra Day v. Smt. Tara Sundari Dasi*⁵⁵, *Saraswathi Ammal v. Anantha Shenai*⁵⁶ and *Kunji Thomman v. Meenakshi*⁵⁷. It is not necessary to refer

48. ILR 18 Bom 679.

49. AIR 1972 Bom 16: 73 Bom LR 407: 1971 Mah LJ 657.

50. AIR 1970 Pat 348: 1970 BLJR 735: 1970 Pat IJR 478.

51. AIR 1965 AP 66: (1964) 2 Andh LT 371: (1964) 2 Andh WR 470.

52. AIR 1967 Mad 429: (1967) 1 MIJ 454: (1967) 30 MLW 253.

53. AIR 1972 Mys 286: (1972) 1 Mys LJ 315.

54. AIR 1964 Punj 114: 66 Punj LR 78: 1964 Cur LJ 3.

55. AIR 1962 Cal 438.

56. AIR 1966 Ker 66: ILR (1965) 1 Ker 420: 1965 Ker IJ 284.

57. ILR (1970) 2 Ker 48: AIR 1970 Ker 214.

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to these decisions since we have ourselves discussed the question of construction of sub-sections (1) and (2) of Section 14 on principle and pointed out what in our view is the correct construction of these provisions. We may only mention that the judgment of Palekar, J., as he then was, in *B. B. Patil v. Gangabai* is a well reasoned judgment and it has our full approval. The contrary view taken in *Gurunadham v. Sundrarajulu*⁵⁸, *Santhanam v. Subramania*⁵⁹, *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal*⁶⁰, *Shiva Pujan Rai v. Jamuna Missir*⁶¹, *Gopisatti Kondaiiah v. Guada Subbaravudu*⁶², *Ram Jag Misir v. The Director of Consolidation, U. P.*⁶³ and *Ajab Singh v. Ram Singh*⁶⁴ does not, in our opinion, represent the correct law on the subject and these cases must be held to be wrongly decided.

73. In the circumstances, we reach the conclusion that since in the present case the properties in question were acquired by the appellant under the compromise in lieu or satisfaction of her right of maintenance, it is sub-section (1) and not sub-section (2) of Section 14 which would be applicable and hence the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in the properties. We accordingly allow the appeal, set aside the judgment and decree of the High Court and restore that of the District Judge, Nellore. The result is that the suit will stand dismissed but with no order as to costs.

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(BEFORE P. N. BHAGWATI, A. C. GUPTA AND S. MURTAZA FAZAL ALI, JJ.)

SELLAMMAL AND OTHERS

.. Appellants ;

Versus

NALLAMMAL (DEAD) BY L. RS.

.. Respondents.

Civil Appeal No. 126 of 1972, decided on March 17, 1977

Hindu Succession Act, 1956 — Sections 14(1) and (2) — Held, case covered by Section 14(1) and not Section 14(2) — Tulasamma v. Sesha Reddy followed

Appeal dismissed

M/3529/S

The Judgment of the Court was delivered by

FAZAL ALI, J.—Palanisamy Gounder and Nallasamy Gounder were step brothers and the first respondent Nallammal was the wife of Palanisamy Gounder. Palanisamy Gounder died in 1936 Nallasamy Gounder died on March 11, 1949 leaving his widow Sellammal and two sons Periyasamy Gounder and Doraisami Gounder. Admittedly P. Gounder and N. Gounder were members of a joint family but the plaintiff Nallammal

58. ILR (1968) 1 Mad 487, 567: AIR

1967 SC 429: (1967) 1 MLJ 454.

59. ILR (1967) 1 Mad 68.

60. AIR 1972 Mad 279: 85 Mad LW 202.

61. ILR 1947 Pat 1118.

62. ILR 1968 AP 621.

63. AIR 1975 All 151: 1975 All LJ 138.

64. AIR 1959 J & K 92.

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(2025) 4 Supreme Court Cases 289

(BEFORE C.T. RAVIKUMAR AND RAJESH BINDAL, JJ.)

2J

a LEELA AND OTHERS . . . Appellants;

Versus

MURUGANANTHAM AND OTHERS . . . Respondents.

Civil Appeal No. 7578 of 2023[†], decided on January 2, 2025

b **A. Family and Personal Laws — Succession Act, 1925 — S. 63 — Will — Proof of its execution and its genuineness — Onus of proof on propounder**

— If objection raised on genuineness of will by pointing out suspicious circumstances, propounder has to remove them — Propounder has to establish that testator had signed the will in a sound disposing state of mind and understanding nature and effect of disposition — Circumstances surrounding the will in present case concurrently held suspicious by trial court and High Court — Held, in absence of any perversity in appreciation of evidence by courts below, Supreme Court's interference not called for

c **B. Family and Personal Laws — Hindu Law — Legitimacy of Children/ Family Property Rights/Other Entitlements — Partition of self-acquired property — Illegitimacy of wife and her children not relevant for allocation of shares**

e One *B*, the owner of the self-acquired property in question, had married *D-1* while marriage with the first wife was subsisting and as such *D-1* was an illegitimate wife and her two sons *D-2* and late *D-3* were illegitimate children of *B* through *D-1*. *B* partitioned his property during his lifetime. The properties were divided in the four schedules. The properties described in the first schedule were allotted to himself by *B*. The properties described in the remaining schedules were allotted to the share of his three sons (plaintiff-Respondents 1 to 3) through his first wife (*R-4*); to his first wife (*R-4*); and to his minor daughter *R-5* (died later) through his first wife, respectively. After death of *B*, dispute arose in respect of the first scheduled properties allotted to *B* himself. The trial court and the High Court concurrently found that the plaintiff-respondents were entitled to 5/7th share (1/7th each) and the two sons born through *D-1* were also entitled to 1/7th share each. However, the defendant-appellants claimed that *B* had executed an unregistered will giving the said properties to them. The trial court decreed the suit in favour of the plaintiff-respondents. The High Court declined to accept the will and dismissed the appeal preferred by the defendant-appellants.

g Therefore, the question is whether the appellants succeeded in proving the execution of the will and if so, whether the respondents who disputed its execution and also challenged the will on the ground of existence of suspicious circumstances would make the same unreliable and not worthy for proceeding further.

h [†] Arising from the Judgment and Order in *Leela v. Muruganantham*, 2019 SCC OnLine Mad 34583 (Madras High Court, Madurai Bench, AS No. 368 of 2002, dt. 15-11-2019) [Affirmed]

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(2025) 4 SCC

Dismissing the appeal, the Supreme Court

Held :

At the outset, it is to be stated that legitimacy or illegitimacy of the second wife and the children born through the second wife is not a matter of relevance for consideration in the case on hand as the question is not in relation to partition of ancestral properties. (Para 18)

As regards execution of a will, there is no doubt that mere registration of a will would not attach to it a stamp of validity and it must still be proved in terms of the legal mandates under the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act. It is the propounder to establish the execution of the will and once the same is discharged, it is for the objector to pinpoint the suspicious circumstances. Upon such objection, it is for the propounder to remove such suspicious circumstances. The propounder of the will has to establish by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound disposing state of mind and that he understood the nature and effect of the dispositions and put his signature out of his own free will. (Paras 22, 16 and 25)

Derek A.C. Lobo v. Ulric M.A. Lobo, (2024) 15 SCC 202 : 2023 SCC OnLine SC 1893; *Moturu Nalini Kanth v. Gainedi Kaliprasad*, (2024) 16 SCC 78 : 2023 SCC OnLine SC 1488, followed

In this case, the following suspicious circumstances were pointed out by the courts below in respect of the alleged will: (i) That the first appellant (DW 1) one of the beneficiaries and the mother of the other beneficiaries played active role in the execution of the will in question and concealed this fact before the Court; (ii) Contradictory recitals on the health of the testator in the will and the evidence of DW 1 herself strengthening the same; (iii) Non-matching of the signature of the testator in Ext. A-1, partition deed and Ext. B-2, will; (iv) Non-examination of the person who typed the will; (v) Non-examination of the scribe; (vi) Incongruity with respect to the place of execution of the will; (vii) Failure to prove that the testator executed the will after understanding its contents. (Para 17)

The first appellant, who was Defendant 1 and the propounder of the will, was examined as DW 1. Her deposition would reveal that she herself and her sons viz. Defendants 2 and 3 were the beneficiaries of the will. She deposed that she had no role in preparation of will. But the undisputed and proven fact is that two stamp papers on which the will was typed were brought in the name of the first defendant from Tenkasi where she resided. (Paras 26 and 27)

If DW 1 is to be believed, the testator's physical and also mental conditions were not in sound disposition, as held by the trial court and appreciating the evidence the Courts have found that there is no such circumstance of threat as alleged and attempted to be proved by the first defendant (DW 1) necessitating the testator to execute the will. Nothing is on record to show that the testator had executed the will after understanding its contents. Though DW 2 deposed that the notary public read over the will and then B signed it. But the fact revealed from the very will is that such noting that it was read over to the testator is absent there. Moreover, if the testator was in good health and will was prepared at his direction and he himself was able to dictate it why it should be read over to him before putting signature. (Paras 26 and 28)

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a Though in normal circumstances there was no necessity to examine the scribe and the non-examination of the scribe cannot be a suspicious circumstance, it was taken note of by the courts in the circumstances explained above. (Para 29)

The circumstances under which DW 2 came into the possession of the will is also a matter which was exponible either by DW 1 or DW 2. This is because according to DW 1, her brother, DW 2 gave the same to her in Tenkasi and the noting in the will and the evidence of DW 2 would go to show that it was executed at Madurai. (Para 30)

b The very case of the first defendant viz. DW 1 is that the testator was being looked after by her. She was residing at Tenkasi and if the testator used to stay there with her and her deposition is to the effect that she was not aware that her husband was going to execute a will at Madurai and then, the proven fact is that two stamp papers, on which 2 pages of the will were typed, were purchased in the name of the first defendant from Tenkasi, create some suspicion. The health of testator was in bad condition and if so, the case that the execution of the will was at a faraway place from Madurai is also a matter casting suspicion. Evidently, it was taking into consideration all the aforesaid and such other circumstances that the High Court arrived at the finding that the execution of the will itself was not proved. The circumstances surrounding the will were also concurrently held as suspicious. (Para 32)

d In the circumstances, the evidence of DW 2 cannot be taken sufficient to prove the execution of the will in question in the manner it is required to be proved and to accept it as genuine. It can only be held that the defendants have failed to prove that the testator executed the will by putting his signature after understanding its contents. In such circumstances, when the findings are concurrent how can the findings on the validity and genuineness of the will in question by the trial court and the High Court be interfered with. There is no reason to hold that the appreciation and findings are absolutely perverse warranting appellate interference by the Supreme Court. It is also to be noted that Defendants 2 and 3 also got 1/7th share each in the suit scheduled properties. (Para 33)

Leela v. Muruganantham, 2019 SCC OnLine Mad 34583, *affirmed*

R-D/72199/CV

f Advocates who appeared in this case :
A. Lakshminarayanan (Advocate-on-Record) and A.S. Raj Narayan, Advocates, for the Appellants;
Ms Abha R. Sharma (Advocate-on-Record), Advocate, for the Respondents.

Chronological list of cases cited

on page(s)

g	1. (2024) 16 SCC 78 : 2023 SCC OnLine SC 1488, <i>Moturu Nalini Kanth v. Gainedi Kaliprasad</i>	297a-b
	2. (2024) 15 SCC 202 : 2023 SCC OnLine SC 1893, <i>Derek A.C. Lobo v. Ulric M.A. Lobo</i>	295g, 297a-b
	3. 2019 SCC OnLine Mad 34583, <i>Leela v. Muruganantham</i>	292a-b, 294b, 299a

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The Judgment of the Court was delivered by

C.T. RAVIKUMAR, J.— The unsuccessful Defendants 1 to 3 in OS No. 142 of 1992 which is a suit for partition and allotment of 5/7th share filed by Respondents 1 to 5 herein, filed this appeal against the judgment dated 15-11-2019 passed by the High Court of Madras, Madurai Bench in *Leela v. Muruganantham*¹ whereby and whereunder the appeal was dismissed and the judgment and decree in OS No. 142 of 1992 dated 27-9-2001 on the file of the Additional Sub-Court, Tenkasi was confirmed. Essentially, the trial court and the High Court have concurrently declined to accept the case of the appellants based on the will dated 6-4-1990. Hereafter in this appeal, for the sake of convenience, the parties are referred to, in accordance with their rank and status in the original suit, unless otherwise specifically mentioned.

2. The plaint averments, in brief are as follows: The suit scheduled properties originally belonged to one Balasubramaniya Thanthiriyar. He married twice. Through his first wife, Rajammal (Plaintiff 4-Respondent 4), he got three sons, namely, Muruganandam (Plaintiff 1-Respondent 1), Ganesh Murthy (Plaintiff 2-Respondent 2) and Kannan (Plaintiff 3-Respondent 3) and one daughter by name Mahalakshmi (Plaintiff 5-Respondent 5). While the marriage with the first wife Rajammal was subsisting, Balasubramaniya married Leela (Petitioner 1-Defendant 1) and as such, she is an illegitimate wife. Sivakumar (Petitioner 2-Defendant 2) and late Mageshwaran (Petitioner 2-Defendant 3) are the illegitimate sons of Balasubramaniya through Leela.

3. Earlier, Balasubramaniya Thanthiriyar instituted OS No. 504 of 1986 against his first wife and children through her viz. Plaintiffs 4, 1 to 3 and 5, respectively. Later, it was compromised at the instance of the elderly villagers and partition of properties effected between them as per the partition deed dated 4-12-1989. As per the partition deed, his properties were divided into four schedules. Properties described and contained in the first schedule were allotted to himself by Balasubramaniya Thanthiriyar. The second scheduled properties consisting of 22 items were allotted to the share of plaintiffs-Respondents 1 to 3 herein viz. his sons through his first wife and the third scheduled properties were allotted to his first wife viz. plaintiff-Respondent 4. The fourth scheduled properties were allotted in the name of his minor daughter viz. plaintiff-Respondent 5. Balasubramaniya died on 28-11-1991.

4. In fact, the *lis* in the present suit viz. OS No. 142 of 1992 is with respect to the several properties left to the share of Balasubramaniya Thanthiriyar as per the aforesaid partition deed and described as suit scheduled properties. According to the plaintiffs, Defendant 1 is not entitled to any share in the property of deceased Balasubramaniya Thanthiriyar being an illegitimate wife, in the sense that they married when the first wife was alive and that marriage was subsisting. It is the contention of the plaintiffs that they each have 1/7th share and thus, totalling 5/7th share in the properties of Balasubramaniya Thanthiriyar and Respondents 2 and 3 too got 1/7th share each only in such properties. The first item of the scheduled properties is shops,

1 2019 SCC OnLine Mad 34583

- a buildings occupied by Defendants 4 to 12, the tenants. Conspiring with them Defendants 1 to 3 attempted to get the entire amount of rent from Defendants 4 to 12 and to withdraw the bank deposit. Upon such developments the plaintiffs issued notices to Defendants 4 to 12 and then, filed HRCOPs Nos. 2 to 10 of the year 1992 in the Court of Tenkasi Rent Controller and deposited the rent amount. As relates to plucking of coconuts from the groves mentioned as Items 18 to 21, Defendants 1 to 3 created problems and were trying to appropriate the harvest with the help of the police. In short, Defendants 1 to 3 are trying
- b to create prejudice to their shares and also to create encumbrance on the shares of the plaintiffs. They also pleaded that Defendants 1 to 3 claimed execution of a will in their favour by Balasubramaniya Thanthiriyar and if they created any such record, it is a wilful forgery. In short, according to the plaintiffs they and Defendants 2 and 3 are in joint possession of the suit scheduled properties as co-owners.
- c **5.** The first defendant-first respondent filed a written statement which was adopted by Defendants 2 and 3-Respondents 2 and 3. Now, Respondent 3 is no more and he is represented by his legal heirs.
- d **6.** In the suit, the appellants herein-defendants produced the will dated 6-4-1990 which is an unregistered one. They filed a written statement stating that Balasubramaniya was being harassed and assaulted by the plaintiffs and it is due to that harassment that the partition deed dated 4-12-1989 was executed. The plaintiff-respondents herein could not claim any right over the properties based on the partition deed. The plaintiffs got no right over the first scheduled properties which were allotted to Balasubramaniya. It is their contention that the first scheduled properties belonged to Balasubramaniya and,
- e therefore, after his demise only the second and third defendants got entitlement.
- 7.** Based on the rival pleadings, the trial court framed the following issues:
- “(I) Whether the plaintiffs are entitled to a share in the first scheduled of the properties?
- (II) Whether the will dated 6-4-1990 is valid?
- f (III) Whether the plaintiffs and Defendants 2 and 3 are in joint enjoyment of the suit properties?
- (IV) Whether the plaintiffs are entitled to 5/7th share in the property?
- (V) What are the reliefs available to the plaintiffs?”
- g **8.** On the side of the plaintiffs, PW 1 was examined and Ext. A-1 was marked. On the side of the defendants, DWs 1 and 2 were examined and Exts. B-1 and B-2 were marked. The trial court decreed the suit in favour of the plaintiff and against which the defendant-Appellants 1 to 3 preferred first appeal. It is contended that the trial court failed to recognise the significance of Ext. A-1 which clearly reveals absence of joint family consisting of father and the plaintiffs. It was also the contention that the trial court failed to attach
- h due importance to Ext. B-2, will.

9. Based on such pleadings the appellate court framed the following issues:

“(I) Whether the will dated 6-4-1990, is valid?

(II) Whether the respondents are entitled for 5/7th share in the suit properties? a

(III) Whether the appeal is to be allowed?”

10. The High Court considered the materials on record and after hearing the parties declined to accept the will and dismissed the appeal. In this appeal the appellant assails the judgment¹ of the High Court as also the judgment and decree of the trial court which was confirmed by the High Court, raising various grounds. b

11. As noticed hereinbefore, deceased Balasubramaniya Thanthiriyar, while alive, effected a partition on 4-12-1989. The bone of contention in the appeal is with respect to the shares allotted thereunder in favour of Balasubramaniya Thanthiriyar by himself. When the partition is not in dispute and also the factum of allotment of the properties under the first schedule thereunder to Balasubramaniya Thanthiriyar, it has to be treated that the properties allotted to him were his self-acquired properties. Even otherwise, with respect to his exclusive title and ownership over the properties, none of the parties raised any dispute. While the plaintiffs contend that they are to partition 1/7th each among them, five in number and the two children of Balasubramaniya Thanthiriyar through the first appellant/first defendant, Leela; concurrently, it was found that the plaintiffs are entitled to 5/7th shares (1/7th each) and the two sons born to Balasubramaniya Thanthiriyar through Leela, though illegitimate, are entitled to 1/7th share each. The concurrent finding in that regard requires interference if only the finding on the validity and enforcement of the alleged will dated 6-4-1990 is interfered with in this proceeding. c
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12. The learned Senior Counsel appearing for the appellants would contend that the courts below have erred in arriving at the finding that the said will is not genuine and shrouded with suspicious circumstances. It is the submission that the appellants-Defendants 1 to 3 had succeeded in establishing its execution in terms of Section 63 of the Succession Act, 1925, by examining two attesting witnesses and Section 68 of the Evidence Act, 1872. f

13. It is also the contention that both the trial court and the High Court have failed to consider that initially there was a dispute on the entire property belonging to Balasubramaniya Thanthiriyar between him, on the one side and his first wife and children through her born to him on the other side viz. OS No. 504 of 1986 filed by Balasubramaniya Thanthiriyar himself. It is the further contention that later, he effected a partition of the said properties through a partition deed dated 4-12-1989 into four schedules and except the first schedule the others were given in favour of the plaintiffs and only thereafter the property g
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¹ *Leela v. Muruganantham*, 2019 SCC OnLine Mad 34583

a allotted to him was bequeathed as per the will dated 6-4-1990 to the appellants herein. The said will was attested by two witnesses, satisfying the statutory requirement under Section 63 of the Succession Act. In such circumstances, according to the learned Senior Counsel the irresistible conclusion could have been and should have been that Balasubramaniya Thanthiriyar wanted to give properties to his second wife and the children born through her and it is the realisation of his intention in that regard which resulted in execution of the said will dated 6-4-1990.

b 14. It is also the contention that a scanning of the suspicious circumstances in the light of the innumerable decisions on the validity of will, especially touching the question of suspicious circumstances which would make a proven will in the sense, as executed unworthy to act upon, would reveal that the circumstances relied on by the courts in the case in hand to hold the will as not genuine being shrouded with suspicions are absolutely unsustainable as they were not sufficient to cast a suspicion on the genuineness of the validly executed will dated 6-4-1990.

c 15. The learned counsel appearing for the respondents would submit that there cannot be any doubt with respect to the settled position that mere proof of an execution of a will in terms of the requirement under Section 63 of the Succession Act and Section 68 of the Evidence Act, though would go to show that the will concerned was executed but, that by itself cannot make the said will genuine and worthy for acting upon. It is further submitted that the courts below have rightly found concurrently that the said will is not genuine as it is shrouded with suspicious circumstances.

d 16. We are of the considered view that the fate of this appeal depends upon the decision on the genuineness and the question whether the suspicious circumstances are removed/explained to the satisfaction of this Court. The will is executed on the stamp papers bought in the name of Petitioner 1, who was examined as DW 1. Still, DW 1 categorically denied the case of having played a role in the execution of the said will. Before looking into the alleged and upheld suspicious circumstances, it is only apposite to refer to the settled position that though it is the propounder to establish the execution of the will and once the same is discharged, it is for the objector to pinpoint the suspicious circumstances. It is also the settled position that upon such objection, it is for the propounder to remove such suspicious circumstances. [See the decision of this Court in *Derek A.C. Lobo v. Ulric M.A. Lobo*², in which one among us (C.T. Ravikumar, J.) is a party.]

g 17. Now, we will refer to the suspicious circumstances pointed out by the courts below:

h (i) That the first appellant (DW 1) one of the beneficiaries and the mother of the other beneficiaries played active role in the execution of the will in question and concealed this fact before the Court;

(ii) Contradictory recitals on the health of the testator in the will and the evidence of DW 1 herself strengthening the same;

(iii) Non-matching of the signature of the testator in Ext. A-1, partition deed and Ext. B-2, will dated 6-4-1990; a

(iv) Non-examination of the person who typed the will;

(v) Non-examination of the scribe;

(vi) Incongruity with respect to the place of execution of the will;

(vii) Failure to prove that the testator executed the will after understanding its contents. b

18. At the outset, it is to be stated that legitimacy or illegitimacy of the second wife and the children born through the second wife is not a matter of relevance for consideration in the case on hand as the question is not in relation to partition of ancestral properties. So also, the fact of non-inclusion of the first wife and children through her is not of much relevance in view of the admitted position that Balasubramaniya Thanthiriyar on 4-12-1989 partitioned his entire properties into four schedules and allotted three out of the four schedules to them and allotted on the first schedule to himself. Therefore, the first question is whether the appellants who claimed under the will dated 6-4-1990 proved its execution in accordance with law and if so, still the question is whether it is shrouded with suspicious circumstances. c

19. There is a concurrent version with respect to the place of the execution of the will. Though, the recitals in the will would show that with respect to the health of Balasubramaniya Thanthiriyar contradictory versions appear in the said will. In one part of the will it is stated, “*with full conscious, with good memory and without instigation by anyone*” and at the same time in another part it is stated, “*I suffer from heart disease and got treatment from several doctors*”. The Court also took note of the fact that Defendant 1 herself stated that the health of her husband was in bad condition and as there was a danger to his life, he executed the will at Madurai and had no role in the preparation of the will. The courts found that two pages of the stamp papers were bought in the name of Defendant 1 from Tenkasi and still Defendant 1 contended that she did not participate in the execution of the will. DW 1 stated in her written statement that till the partition in 1989, when the properties were enjoyed jointly, no problem had occasioned to him. It is taken that the said statement of DW 1 itself would reveal that the properties were jointly enjoyed. d

20. The courts below on appreciation of the evidence concurrently found that the version of DW 1 that she had not participated in the execution of the will and that she was not aware of the execution of the will, is incorrect. e

21. In the light of the rival contentions and the evidence discussed in detail by the trial court and then by the High Court, the question is whether the appellant succeeded in proving the execution of the will and if so, whether the appellants who disputed its execution and also challenged the will on f

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the ground of existence of suspicious circumstances would make the same unreliable and not worthy for proceeding further.

- a* **22.** There can be no doubt with respect to the manner in which execution of a will is to be proved. In the light of plethora of decisions including the decisions in *Moturu Nalini Kanth v. Gainedi Kaliprasad*³ and in *Derek A.C. Lobo case*² this position is well settled that mere registration of a will would not attach to it a stamp of validity and it must still be proved in terms of the legal mandates under the provisions of Section 63 of the Succession Act and
- b* Section 68 of the Evidence Act. It is not the case of the appellant that the will dated 6-4-1990 is a registered one.

23. Now, Section 63 of the Succession Act reads thus:

- c* “**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.
- d* (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 of the signature of such other person; and each of
- e* 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.”

- f* **24.** Section 68 of the Evidence Act makes it clear that at least one attesting witness has to be examined to prove execution of a will. It is true that in the case at hand DW 2 was the attesting witness who was examined in Court. Therefore, the question is whether they had deposed to the effect that the will in question was executed in accordance with sub-rules (a) to (c) thereunder.

- g* **25.** The trial court rightly held that the propounder of the will has to establish by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound disposing state of mind and that he understood the nature and effect of the dispositions and put his signature out of his own free will.

h 3 (2024) 16 SCC 78 : 2023 SCC OnLine SC 1488 : 2023 INSC 1004
2 *Derek A.C. Lobo v. Ulric M.A. Lobo*, (2024) 15 SCC 202 : 2023 SCC OnLine SC 1893 : 2023 INSC 1093

26. The first appellant, who was Defendant 1 and the propounder of the will, was examined as DW 1. Her categorical case is that Balasubramaniya Thanthiriyar was not living with the plaintiffs. In her written statement she stated that he had executed the unregistered will dated 6-4-1990 without instigation from anyone when he had good memory. Her deposition would reveal that she herself and her sons viz. Defendants 2 and 3 were the beneficiaries of the will. She did not divulge the fact that two pages on the stamp papers on which the will was typed were bought in her name from Tenkasi. Still, she deposed that she had not played any role in the execution of the will. DW 2 who is the attesting witness to the will in question is the brother of DW 1, the first appellant. Going by her oral evidence, it was DW 1, her brother who had brought the same to her. She had also deposed that in 1990 her husband, the testator was unwell and was under treatment in Madras and his health was in bad condition. Add to it, she deposed that his and her life was in danger from the sons of his first wife. Thus, if DW 1 is to be believed the testator's physical and also mental conditions were not in sound disposition, as held by the trial court and appreciating the evidence the Courts have found that there is no such circumstance of threat as alleged and attempted to be proved by the first defendant (DW 1) necessitating the testator to execute the will.

27. Now, going by DW 1, she had no role in the preparation of the will. But the undisputed and proven fact is that two stamp papers on which the will was typed were brought in the name of the first defendant from Tenkasi. In this context, it is also to be seen that the attesting witness who was examined as DW 2 in court is admittedly the brother of the first defendant viz. DW 1 and further that it is her case that the will in question was given to her by DW 2 in Tenkasi.

28. Now, another circumstance which was taken into account by the courts below is that nothing is on record to show that the testator had executed the will after understanding its contents. Though DW 2 deposed that the notary public read over the will and then Balasubramaniya signed it. The courts below correctly took note of the fact revealed from the very will that such noting that it was read over to the testator is absent there. Another situation crops up for consideration if DW 2 is believed. If the testator was in good health and will was prepared at his direction and he himself was able to dictate it why it should be read over to him before putting signature. The deposition of DW 2 was thus:

“... the notary public read it over and Balasubramania Thanthiriar signed it.”

29. Though in normal circumstances there was no necessity to examine the scribe and the non-examination of the scribe cannot be a suspicious circumstance, it was taken note of by the courts in the circumstances explained above.

30. The circumstances under which DW 2 came into the possession of the will is also a matter which was exponible either by DW 1 or DW 2. This is because according to DW 1, her brother, DW 2 gave the same to her in Tenkasi

and the noting in the will and the evidence of DW 2 would go to show that it was executed at Madurai.

- a** **31.** In the circumstances, para 23 of the impugned judgment¹ also assumes relevance. It reads thus: (*Leela case*¹, SCC OnLine Mad para 23)

b “23. On the side of the respondents, it is stated that the will executed in a faraway place from where the testator used to reside and the attesting witness not known to the testator are suspicious circumstance to disprove the will. It is stated that the will is stated to have been executed at Madurai whereas the testator’s residence was at Tenkasi and that the evidence of DW 1 and DW 2 was that DW 1 was not present at Madurai and the evidence of DW 1 was that she was not aware that her husband was going to execute a will at Madurai and that the stamp papers were purchased in the name of the first defendant at Tenkasi and these circumstances create suspicion regarding the execution of the will.”

c **32.** The very case of the first defendant viz. DW 1 is that the testator was being looked after by her. She was residing at Tenkasi and if the testator used to stay there with her and her deposition is to the effect that she was not aware that her husband was going to execute a will at Madurai and then, the proven fact is that two stamp papers, on which 2 pages of the will were typed, were purchased in the name of the first defendant from Tenkasi, create some suspicion. As noted earlier, the health of the testator was in bad condition and if so, the case that the execution of the will was at a faraway place from Madurai is also a matter casting suspicion. Evidently, it was taking into consideration all the aforesaid and such other circumstances that the High Court arrived at the finding that the execution of the will itself was not proved. The circumstances surrounding the will were also concurrently held as suspicious.

d **33.** In the circumstances, the evidence of DW 2 cannot be taken sufficient to prove the execution of the will in question in the manner it is required to be proved and to accept it as genuine. It can only be held that the defendants have failed to prove that the testator executed the will by putting his signature after understanding its contents. In such circumstances, when the findings are concurrent how can the findings on the validity and genuineness of the will in question by the trial court and the High Court be interfered with. There is no reason to hold that the appreciation and findings are absolutely perverse warranting appellate interference by this Court. It is also to be noted that Defendants 2 and 3 also got 1/7th share each in the suit scheduled properties.

e **34.** For all these reasons the appeal has to fail. Consequently, it is dismissed. In the circumstances, there is no order as to costs.

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1 *Leela v. Muruganantham*, 2019 SCC OnLine Mad 34583

1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC
443

In the Supreme Court of India

(BEFORE T.L. VENKATARAMA AYYAR, P.B. GAJENDRAGADKAR AND A.K. SARKAR,
JJ.)

H. VENKATACHALA IYENGAR ... Appellant;

Versus

B.N. THIMMAJAMMA AND OTHERS ... Respondent.

Civil Appeal No. 18 of 1955*, decided on November 13, 1958
Advocates who appeared in this case:

S.K. Venkataranga Iyengar and K. Keshava Iyengar, for the
Appellant;

A.V. Viswanatha Sastri and K.R. Choudhry, for the Respondents.

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, J.— This appeal arises from a suit brought by the appellant in the Court of the Subordinate Judge, Mysore, as the sole executor of the will alleged to have been executed by one Lakshmamma on August 22, 1945, (Ex. A). In this suit the appellant claimed a declaration that the said Lakshmamma was the owner of the properties mentioned in the schedule attached to the plaint and as such was entitled to dispose of them by a will; and he asked for consequential reliefs purporting to give effect to the bequests made by the said will. The schedule attached to the plaint describes the properties covered by the will under five items. First three items in the schedule refer respectively to 5, 4 and 4 agricultural lands at Hampapura village, whereas the fourth item includes 9 lands at Arjunahalli village and the last item is vacant site in Hampapura village. According to the plaint, under the will Respondent 1 was entitled only to a life interest in Items 1 and 2 and that on her death the said items would vest in Respondents 2 to 4 and Respondent 5 respectively. Since Respondent 1 was in possession of all the five items, the appellant claimed a decree for possession against Respondent 1 in respect of Items 3, 4 and 5 and a declaration that Respondent 1 was to have only a life interest in Items 1 and 2. By his plaint the appellant also claimed to recover Rs 2100 which had been collected by Respondent 1 by way of income from the suit lands and a further prayer was made for the payment of current mesne profits by Respondent 1.

2. Before referring to the pleadings of the parties it would be relevant to mention the material facts in regard to their relationship

which are not in dispute. One Annaji Iyengar who died in July 1903 left behind him his adopted son, the appellant, and two daughters Gundamma alias Ranganayakamma who is still alive and Lakshmamma alias Achamma who is alleged to have executed the will in suit and died thereafter on September 26, 1945, at Mandya. Respondents 2 to 4 are the sons of the appellant. Lakshmamma was married to Sadagopalachar who died in December 1908. The couple had three children, a son named Narayana Iyengar who died on January 14, 1944, without any issue and left behind him his widow Respondent 1; and the two remaining children of Lakshmamma were daughters Thirumalamma and Yadugiramma. Both of them are dead. Thirumalamma was married to one G. Parthasarathy Iyengar by whom she had a son of weak intellect, who died pending litigation, and three daughters Neelu, Jaya and Padmini. Yadugiramma was married to Kalbagal Garudachar and by him she had a son Narasimha Iyengar, Respondent 5, and daughter Lilly. Kalbagal Garudachar had a son S.G. Kalbagal, (hereinafter described as Junior Kalbagal) from his first wife. Jaya was married to Kalbagal Junior. The claim made by the appellant under the will is resisted by Respondent 1. Respondents 2 to 5 have not appeared in the proceedings.

3. According to the case set out by the appellant in his plaint Annaji Iyengar had made a gift of properties, Items 1 and 2, in favour jointly of Lakshmamma and Sadagopalachar under a registered deed of gift on February 16, 1902 (Ex. D). It was also alleged that the said Annaji Iyengar had executed a will on August 31, 1901 [Ex. B-2(a)] under which he had bequeathed in favour of Lakshmamma and Sadagopalachar hypothecation bonds to the extent of Rs 10,320 as gift with the express stipulation that the survivor of the legatees should take the whole of the bequest by survivorship. The appellant alleged that Sadagopalachar was a man of very moderate means and had given up his petty job in the Registration Department in order to manage the properties received by him and his wife from Annaji Iyengar. During the course of the management Sadagopalachar used the cash of Rs 10,320 received by bequest under the will of Annaji Iyengar to buy some immovable properties including Items 3 and 4. Since Sadagopalachar pre-deceased his wife Lakshmamma, all his rights in the properties acquired under the gift deed as well as those subsequently purchased devolved on Lakshmamma alone by survivorship. That is how she became the absolute owner of the said properties. Alternatively it was alleged by the appellant that even if survivorship did not apply and so her son Narayana Iyengar acquired interest to half the share in the properties covered by the gift deed, he had during his lifetime sold away considerable properties of his father and mother much above the value of his half share and in consequence the remaining properties

which represent Lakshmamma's half share became her absolute properties. On this alternative ground the absolute title of Lakshmamma with regard to all the properties in suit was set up. The appellant thus claimed that Lakshmamma was entitled to make a will and asked for a declaration in that behalf and consequential reliefs so as to give effect to the terms and dispositions of the will. According to the appellant the will propounded by him was the last testament of Lakshmamma and it had been executed by her voluntarily and of her own free will while she was in a sound and disposing state of mind.

4. Respondent 1 disputed the appellants claim. She denied that Annaji Iyengar had made a will on August 31, 1901, or that Lakshmamma and Sadagopalachar had received the movables of the value of Rs 10,320 under it. According to her, the gift deed (Ex. D) did not provide for devolution of interest by survivorship; she pleaded that Lakshmamma had transferred all her interests in the properties comprised in the gift deed in favour of her husband Sadagopalachar who then became their sole owner. Respondent 1 did not admit that the properties subsequently purchased by Sadagopalachar including Items 3 to 5 were purchased with any monies bequeathed to him and his wife by Annaji Iyengar; according to her, Sadagopalachar had made these purchases with his own funds. Respondent 1's case was that, after the death of his father Sadagopalachar, her husband Narayana Iyengar became the absolute owner of all the properties and so Lakshmamma was not competent in law to make a will in respect of any of them. She further alleged that the will set up by the appellant was not genuine or valid and that at the material time Lakshmamma was not in a sound and disposing state of mind. She contended that the will had been brought into existence through the machinations of the appellant and she disputed the appellant's right to bring the present suit.

5. On these pleadings the learned trial Judge framed fifteen issues. He found that the will executed by Annaji Iyengar on August 31, 1901, was genuine and valid; and that the rule of survivorship was applicable as between the legatees inter se in respect of the properties conveyed by the said will. It was, however, held that the rule of survivorship did not apply to the properties gifted to Sadagopalachar and Lakshmamma under Annaji's deed of gift (Ex. D) which was held to be genuine and valid. In regard to the properties subsequently purchased by Sadagopalachar the learned Judge said that "in fairness to the parties he would like to hold that various survey numbers in Items 3 and 4 had been purchased by Sadagopalachar out of the joint income from the properties bequeathed to him and his wife by Annaji as also from the properties and through income which he got at a partition between himself and his coparceners" (Ex. F). The purchases made by Narayana

Iyengar were held to have been made out of the income of the properties of, his father and of his mother. The learned Judge rejected the plaintiffs case that Narayana Iyengar had disposed of his properties equivalent to his right under the gift deed of Annaji (Ex. D) and held that he was the owner of the properties which had vested in his father. In the result, according to the learned Judge, Lakshamma had a half share in all the properties in suit and so she was competent to make the will in respect of the said share. The learned Judge then considered the question as to the execution of the will set up by the appellant and came to the conclusion that the will (Ex. A) was genuine and valid to the extent of the share belonging to the testatrix. The learned Judge also found that the suit was maintainable, was not barred by time and had been properly filed. As a result of these findings the learned Judge declared that Lakshamma was the full owner of half the share in the scheduled properties and that Respondent 1 under the will had only a life interest in respect of the said half share in Items 1 and 2. As a consequence of this declaration the decree passed by the learned Judge directed Respondent 1 to put the appellant in possession of Lakshamma's half share in Items 3, 4 and 5; it also ordered Respondent 1 to pay to the appellant a sum of Rs 1050 out of the past mesne profits recovered by her. An enquiry into future mesne profits was also directed under Order 20 Rule 12. In view of the fact that the appellant had succeeded only in regard to half the properties in suit the decree asked the parties to bear their own costs.

6. Against this decree Respondent 1 preferred an appeal in the High Court of Mysore; and the appellant filed cross objections. The High Court held that the appellant had not established that when Lakshamma was alleged to have executed the will she was in a sound and disposing state of mind or that it was her will in the sense that it represented her intentions. According to the High Court, in the light of this finding "it might be unnecessary to consider the other issues in the case". Even so the High Court proceeded to indicate its conclusions on two of such issues. It held that the appellant had entirely failed to prove that the money for the purchase of Items 3, 4 and 5 came out of any bequest under Annaji's will [Ex. B-2(a)] or the incomes from the properties covered by the gift deed (Ex. D) and so in its opinion Lakshamma could not claim any share in the said properties. On the other hand, the High Court indicated that it was inclined to accept the plea raised by Respondent 1 that Lakshamma had transferred all her interest in the properties comprised in the said deed of gift in favour of her husband Sadagopalachar; and since in its opinion "Lakshamma at no time appears to have claimed that she had any interest in those properties, there was considerable force in the argument urged by Respondent 1 that Lakshamma must have relinquished her interest in

the said properties and waived her rights in favour of her husband". The High Court thought that the learned trial Judge had not fully considered all the material bearing on this point and so was in error in holding that at the relevant date Lakshmamma had a subsisting interest in half the share even in the suit properties, Items 1 and 2. Having thus indicated its decision on the two issues the High Court has observed that even if it had found in favour of the appellant on these two points it would not have been of any help to him because his case must inevitably fail when it is held that the will set up by him was not proved to be the last will and testament of Lakshmamma. In the result the appeal preferred by Respondent 1 was allowed, the cross-objections filed by the appellant were rejected and his suit was dismissed. In the circumstances of the case the High Court made no orders as to costs.

7. The appellant then applied for and obtained a certificate from the High Court that the decision under appeal is one of reversal and it involves a claim respecting properties of the value of not less than Rs 20,000. In pursuance of this certificate the High Court ordered that the appeal to this Court should be admitted; and so this appeal has come to this Court. Since the main contention raised by the appellant is directed against the finding of the High Court that the will in question is not proved to be the last will and testament of Lakshmamma, it would be necessary to refer to the broad features, and dispositions, of the will and the evidence adduced by the appellant to prove its execution. At the material time Lakshmamma was about 64 years of age. She usually resided at Hampapur; but about a month before the execution of the will she had gone to Mandya to attend the marriage in the house of Junior Kalbagal. After the marriage was over she would normally have returned to Hampapur but she fell ill and had to extend her stay with Junior Kalbagal. The appellant's case is that she had told him that she wanted to execute a will and had given him instructions in that behalf. This talk had taken place between her and the appellant about a year before the execution of the will. The appellant, however, did not find time to get the will written. When Lakshmamma fell ill at Mandya the appellant had gone to visit her and she pressed the appellant to prepare the draft of her will in accordance with her instructions. So the appellant prepared a draft at Mysore a day prior to the execution of the will. He then went to Mandya by the morning train on August 22, 1945, and the will was got written about 11 or 11.30 a.m. The appellant had the draft in his hand from which he dictated to the scribe Chokkanna (PW 3) who wrote the will. After the will was written the scribe took it to the adjoining room where Lakshmamma was lying in bed. The will was then read out to her and was signed by her in five places (Exs. A-1 to A-5). Subsequently it was attested by two witnesses Krishnamurthy Rao (PW 1) and Narasimha Iyengar (PW

2). Some time later during the course of the day the Sub-Registrar came to the house of Junior Kalbagal and in his presence the will (Ex. A) was duly registered. On the same day at about the same time Lakshmamma executed a power of attorney in favour of the appellant (Ex. EE) and this document was also duly attested and registered. The appellant has examined himself (PW 7), the two attesting witnesses (PW 1 and PW 2), the scribe (PW 3) and Junior Kalbagal (PW 4) in support of his case that the will was duly and validly executed by Lakshmamma.

8. The will is a fairly long document and its English translation spreads over eight printed pages. Though the dispositions in the will have occupied a small portion of the document it contains elaborate arguments in support of the averment of the testatrix that she was entitled to make a will in respect of all the properties mentioned in the will. The will begins with the recital about the illness of the testatrix and says "as I have felt in my mind that it is necessary to mention here certain matters clearly so that there may not be any kind of obstacles and obstruction at the instance of any in respect of my purposes coming into effect after my death I have got them written in detail". Then, the will refers to the gift deed executed by Annaji jointly in favour of the testatrix and her husband Sadagopalachar as well as to Annaji's will under which hypothecation bonds of the value of Rs 10,000 were bequeathed to both of them. The will then refers to the fact that Sadagopalachar was possessed of only a house and a carriage shed and owned no other ancestral property. Even the said house was of "very ancient times and was in a dilapidated condition". According to the will Sadagopalachar held a small government job which he resigned in order to live in Hampapur and to look after the property obtained by gift from Annaji. "It was my opinion", says the will, "that he was probably looking after my share of the property in addition to his own and was improving the same. It is but natural to think in this manner mutually in respect of husband and wife". Then the will refers to the subsequent purchase of certain lands and avers that the amounts received by the couple from Annaji were utilised for the said purchase. The will then refers to the death of Sadagopalachar in 1908 and describes the management of the properties during the lifetime of Narayana Iyengar the son of the testatrix. It says that during Narayanan's minority the testatrix sold some properties at the advice and with the help of her brother-in-law Srinivasa Iyengar for debts "without considering whether it was my share or my husband's share"; she also sold gold and diamond ornaments to meet the urgent needs of the family. After Narayanan became a major he began to manage the property in constitution with Srinivasa Iyengar. Narayanan wanted to build a house for residence in Mysore and so he sold some wet lands

situated at Sarvamanya Gaudhanahalli village. Narayanan had no issue and so he spent generously at the time of the marriage of the three daughters of his younger sister Thirumalamma. Besides he got ornaments prepared moderately for all of them and purchased and gave them as pin money some wet lands situated at Arjunahalli village. Narayanan purchased and gave some wet lands at the same village to the son of his second younger sister Kalbagal Narasimha Iyengar and to Singamma and Lalithamma. Then the will refers to certain purchases made by Narayanan and adds that the purchase of the said lands nominally stands in his name though the right to the property vested in the testatrix. The will then states that Narayanan had no issue and so he treated his younger sister's children as his own, attended to their education, marriage and other auspicious functions with great zeal. Having disposed of his properties for the benefit of the said children Narayanan considered that since he was the only son of the testatrix her share of the property was sufficient for the maintenance of himself and his wife and so he had no worry on that account. In other words, the will alleges that as a result of the alienations made by Narayanan he ceased to have any share in the properties that remained and in consequence the said properties belonged exclusively and solely to the testatrix. Then the will refers to the insurance amount of Rs 4000 which was paid to Respondent 1 on Narayanan's death; and in regard to Narayanan's illness which ultimately resulted in his death the will adds that the testatrix herself had provided separate money for his medicinal and family expenses and that she had given Narayanan Rs 3000 which had been deposited with her brother-in-law and Reserve Bank share of Rs 500 to enable him to purchase a house at Mysore. The will then refers to respondent in terms of affection and states that the testatrix was making a bequest for life of Items 1 and 2 in her favour in order that she may lead her life without any difficulty. "Except me", says the will, "no one has any right whatever to the scheduled properties. They should go only to those for whom it is intended here according to my desire after my death but there is no reason whatsoever for their going to my agnates or any others. I am at full liberty to make dispositions hereby according to my desire."

9. After making these elaborate averments the will proceeds to make dispositions of Items 1 to 5. Items 1 and 2 are given to respondent for life. "She shall have no right such as hypothecation, sale, gift, exchange etc. of the said properties nor has she any right whatever to create liability in any way in favour of others". After her death Respondents 2 to 4 are given Item 1 and Item 2 is bequeathed to Respondent 5. Respondent 5 is described as an heir by the testatrix after her death and has been authorised to perform all her ceremonies. Item 3 is bequeathed to Respondent 5 and Item 4 to Respondents 2, 3

and 4. Out of the 15 acres of land included in Item 4, the bequest in regard to 9 acres is burdened with a charge in favour of certain legacies and charities mentioned in the will. The recipients of the legacies who are the relatives of the testatrix are named, and the charities are also specifically mentioned. Rs 500 each have to be paid to her eldest daughter's third daughter Padminiamma, to her eldest daughter's son Thirumalachar and to Sudhakalyani, the daughter of her eldest daughter's second daughter Jaya and to Nagendra, son of Neelamma, the eldest daughter of her eldest daughter. Besides, Rs 1000 had to be used for conducting service in the Sannadi of Lakshminarayanawamy at Hampapur on the respective dates of death of her husband, her son and herself. A sum of Rs 500 has to be endowed for the Nandadipa service in the name of Narayanan in the Sannadi of Thirupati Venkataramanaswami, and Rs 500 for similar service in the name of Sadagopalachar in the Sannadi of Channakeshavaswami, Belur, the place of the family in Hassan District. An amount of Rs 1000 has to be utilised for scholarship to poor students. In all Rs 5000 have to be spent for these legacies and charities. The will directs that if Respondents 2 to 4 fail to make these payments within three years after the death of the testatrix the appellant who is appointed the executor under the will should, after the expiry of the said three years, sell for reasonable price the lands charged in that behalf and should pay the full amount realised by such sale to carry out the aforesaid charitable works and to give effect to the legacies mentioned in the will. The will then avers that after her death the document would remain with the appellant and it adds that the testatrix has not executed any prior will but that in case any such will has been executed by her the same stood cancelled by the execution of the present will. The will then repeats the averment about the title of the testatrix and states that when Narayana Iyengar was alive he had sold about 17 acres of land situate at Adagur and other places for purchasing lands at Arjunahalli village for his sisters' children and so the testatrix had full liberty to make a disposition in respect of the scheduled properties which were her own. The will also adds that though the said properties stand in the name of her son and rent notes in respect of them are similarly executed in favour of her son that does not affect her title to the said properties in any way. These are the broad features, and dispositions, of the will in question.

10. We would now indicate briefly the evidence led by the appellant on the question about the valid execution of the will. We have already mentioned that the two attesting witnesses, the scribe and the appellant himself have given evidence in support of the will. Mr Krishnamurthy Rao (PW 1) was a Medical Officer to the Mysore Sugar Company, Mandya, and he knew the Junior Kulbagal who was working

as a Cane Superintendent in the said factory. This witness was called by Kalbagal to attest the will and so he went to his house and saw that Lakshmamma was lying in her bed since she had an attack of paralysis on her left side. According to the witness her mind was clear and he attested the will after ascertaining from her that the document had received her approval. The witness was cross-examined in regard to his statement that he had treated Lakshmamma and it was brought out in his answers that though she may have been under his treatment for about a week he could not say if her name found a place in the hospital register. He, however, added that even patients who are treated in their houses would be mentioned in the hospital register if they come and take medicine from the hospital. The witness admitted that the will was not written in his presence and that it was already written before he went to attest it. When the witness was asked about the details of his signature on the will he gave answers which showed that he did not have any clear recollection as to what happened on that date. First he stated that he had put one signature but ultimately admitted that he had signed twice, once while he attested the will and also when the Sub-Registrar registered it in his presence. In fact some of his answers suggest that the witness did not even remember that he was present when the Sub-Registrar arrived and registered the document. The witness stated that the will was read in his presence but he did not know if the whole was read or only a few portions of it.

11. The next attesting witness is Narasimha Iyengar (PW 2). He was employed in Mandya Sugar Company Distillery. According to him the will was written in his presence and Lakshmamma put her signature on it also in his presence. In cross-examination, however, it appeared that his statement that he was present when the will was written may not be accurate. He did not know whether there was any draft already prepared and he saw none. According to him, after the will was written the appellant read out the will to Lakshmamma but according to the appellant the will was read out by the scribe. He stated that after the will was attested both he and PW 1 left the place but it is clear that PW 1 was present at the time of registration. The witness even did not know whether Lakshmamma had any attack of paralysis. The evidence of the scribe (PW 3) and of the appellant (PW 7) clearly negated Mr Iyengar's statement that he was present at the time the will was written. The evidence of both the scribe and the appellant unmistakably shows that Mr Iyengar was not present when the will was written.

12. Chokkanna (PW 3) the scribe is a relative of Kulbagal. The mother of Chokkanna and Kulbagal's mother are sisters. He has written the will. According to him Lakshmamma stated that she wanted to execute a will and that she would agree to what the appellant would get written. The witness stated that the will was written according to

the dictation of the appellant in the presence of Lakshmamma. The appellant had a draft with him. Except the appellant, Lakshmamma and the scribe none else was present when the will was written. The attesting witnesses came after the will was written. The witness then read the will to Lakshmamma who consented to the recitals and signed it. It may be pointed out that the account given by the scribe in respect of the writing of the will is somewhat different from the account given by the appellant. The appellant has stated that the will was written in one room and Lakshmamma was lying in the adjoining room and it was after the will was written that the scribe went into the adjoining room and read the will to her so that the statement of the scribe that the will was written in the presence of Lakshmamma is not supported by the appellant. In fact the appellant's statement is corroborated by the evidence of Junior Kulbagal in this matter.

13. Mr Kalbagal (PW 4) does not seem to know about the intention of the testatrix to execute the will. It was when plaintiff asked him to get some attesting witnesses that he came to know that a will was going to be executed. He then went and brought PW 1 and PW 2 for attestation. This witness admitted that Lakshmamma was ill and was unable to get up and leave her bed. He heard about her intention to execute the will about 9 a.m. in the morning. He was not present when the will was written. He was, however, present when the will was read out by the scribe to Lakshmamma. His father Kalbagal Garudachar and his wife Jaya were also present. The witness then stated that the appellant brought the Sub-Registrar at about 5.30 p.m. and the Sub-Registrar registered the will. It would, however, appear from the application (Ex. VI) made to the Sub-Registrar inviting him to come to Kalbagal's house to register the will that it was not the appellant but the witness himself who had brought the Sub-Registrar.

14. The last witness in support of the will is the appellant himself, (PW 7). He has spoken to the instructions received by him from Lakshmamma a year before the date of the execution of the will and he has stated that he prepared a draft at Mysore a day before the will was executed and that the will was written by the scribe as he dictated the contents from the said draft. He had told Lakshmamma about what the draft contained but he admitted that the draft was not read out to her. The witness has then referred to the fact that the will was read out by the scribe to Lakshmamma and she consented to it, whereupon it was signed by her and subsequently attested by the two attesting witnesses. Then the witness refers to the registration of the document at about 5.30 p.m. On the morning of the day when the will was executed the witness was told by Lakshmamma that she would execute a power of attorney though the witness had not asked for it. A power of attorney was accordingly prepared and duly executed and registered.

That in brief is the evidence on which the appellant relies.

15. It would be convenient at this stage to refer briefly to the reasons given by the courts below in support of their respective findings. The learned trial Judge put the onus of proving the will on the appellant but he observed that “the proof that is necessary to establish a will is not an absolute or a conclusive one. What is required is only such proof as would satisfy a prudent man”.

16. The learned Judge then considered the evidence of the two attesting witnesses and the scribe and observed that “there can absolutely be no doubt that PW 3 wrote Ex. A at the time when it is said to have been written”. He was of the opinion that the evidence of the scribe fully corroborates the evidence of PW 1 and PW 2. The learned Judge then mentioned the fact that PW 4 who supported the appellant is no other than the husband of Lakshmamma's granddaughter. The evidence of the appellant himself was considered by the learned Judge and his conclusion was that “it had to be taken that Ex. A is a will executed by Lakshmamma and the signatures, Exs. A-1 to A-5 are those of Lakshmamma”. The argument urged by Respondent 1 that Lakshmamma could not have understood the contents of Ex. A was rejected by the learned Judge and he observed that “when it is proved that Exs. A-1 to A-5 are signatures of Lakshmamma and that she executed Ex. A, it is to be presumed that the testatrix had the knowledge of the contents of the will”. In the end the learned Judge thus recorded his finding: “In view of the evidence and the presumption referred to above I think we need not have any hesitation in holding that Lakshmamma executed Ex. A having fully understood the nature of Ex. A and the recitals made therein.”

17. The High Court, on the other hand, has taken a contrary view. The High Court thought that the evidence adduced by the appellant to prove the execution of the will was not satisfactory. It then examined the said evidence in some detail, criticised the discrepancies appearing in the said evidence, considered the probabilities and concluded that, on the whole, the said evidence would not justify the finding that the will had been duly executed by the testatrix. The High Court also thought that the appellant's version about the instructions given by Lakshmamma to him in the matter of the execution of the will was highly improbable; and, according to the High Court, the whole evidence of the appellant appeared to be unsatisfactory. The High Court then considered the question of onus and observed that since the appellant's sons had received a substantial benefit under the will and since he had taken a leading part in its execution, the onus was heavy on him to remove the suspicions attending the execution of the document and to establish that Lakshmamma had really understood its contents, had approved of them and had put her signatures on it when

she was in a sound and disposing state of mind. It appears that the High Court also felt that the dispositions made by the will were unnatural and improbable; in particular it took the view that since the appellant had come into the family of Annaji by adoption it was very unlikely that his sons should have received such a substantial benefit under the will. In fact the judgment of the High Court appears to indicate that The High Court was inclined to hold that the testatrix may not have been in a sound and disposing state of mind at the material time. It is on these findings that the High Court reached its final conclusion that the appellant had failed to prove the due and valid execution of the will.

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 proved 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 free will 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.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally 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. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word “conscience” in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parc in *Harmes v. Hinkson*¹ “where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion,

a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

23. It is in the light of these general considerations that we must decide whether the appellant is justified in contending that the finding of the High Court against him on the question of the valid execution of the will is justified or not. It may be conceded in favour of the appellant that his allegation that Lakshmamma has put her signatures on the will at five places is proved; that no doubt is a point in his favour. It may also be taken as proved that Respondent 1 has failed to prove that Lakshmamma was unconscious at the time when the will is alleged to have been executed. It is true she was an old woman of 64 years and had been ailing for some time before the will was executed. She was not able to get up and leave the bed. In fact she could sit up in bed with some difficulty and was so weak that she had to pass stools in bed. However, the appellant is entitled to argue that, on the evidence, the sound and disposing state of mind of Lakshmamma is proved. Mr Iyengar, for the appellant, has strongly urged before us that, since these facts are established, the court must presume the valid execution of the will and in support of his contention he has invited our attention to the relevant statements on the point in the text books dealing with the subject. Jarman on *Wills*² says that "the general rule is 'that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator'". He adds that, "if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid". Similarly, Williams on *Executors and Administrators*³ has observed that, "generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator or of instructions having been given is not necessary". On the other hand, Mr Viswanatha Sastri, for Respondent 1, contends that the statements on which the appellant has relied refer to wills which are free from any suspicions and they cannot be invoked where the execution of the will is surrounded by suspicious circumstances. In this connection, it may be pertinent to point out that, in the same text books, we find another rule specifically mentioned. "Although the rule of Roman Law", it is observed in Williams, "that '*Qui se scripsit haeredem*' could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to

excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased"⁴.

24. It would, therefore, be necessary at this stage to decide whether an execution of the will in the present case is surrounded by any suspicious circumstances. Does the will appear to be on the whole an improbable, unnatural and unfair instrument as held by the High Court? That is the first question which falls to be considered. We have already indicated that the preamble to the will contains many argumentative recitals. Indeed it would not be unjust to say that the preamble purports to meet by anticipation the main objections which were likely to be raised to the competence of Lakshamma to make a will in regard to the properties covered by it. The preamble in great detail makes out a case that the properties received by the testatrix and her husband under the gift deed (Ex. D) devolved upon her by survivorship after her husband's death, a plea which has not been accepted even by the trial court. It also seeks to prove that the subsequent purchases made by her husband were in law the joint acquisitions of her husband and herself, a point on which the two courts below have differed. It sets out in detail the theory that the son of the testatrix has lost his right, title and interest in the properties which devolved on him after his father's death because he had alienated more than his share in the said properties during his lifetime; and it even suggests that during his illness and to help him to build a house in Mysore the testatrix had advanced him money from her separate funds, pleas which have not been accepted by either court below. It seems to us that the elaborate and well-considered recitals which have been deliberately introduced in the preamble cannot possibly be the result of corresponding instructions given by the testatrix to the appellant for preparing the draft of her will. In the context these recitals sound artificial and unnatural and some of them at any rate are untrue. The draftsman of the will has tried to be overwise and that itself is a very serious infirmity in the appellant's case that the instrument represents the last will and testament of the testatrix. Take for instance the statement in the will that the testatrix had advanced Rs 3000 to her son to enable him to purchase a house at Mysore. By itself this is not a matter of very great importance; but this detail has been introduced in the will in order to make out a strong case that all the properties mentioned in the will were the separate properties of the testatrix and so it would be relevant to consider what the appellant himself has to say about this recital. In regard to the Rs 3000 in cross-examination the appellant has stated that Mr B.G. Ramakrishna Iyengar had sent this amount to the

husband of Respondent 1 in 1942 or so. It was sent by cheque on Mysore Bank. The appellant then added that the husband of Respondent 1 had deposited this amount with B.G. Ramakrishna Iyengar's father-in-law after selling Goudanahalli lands with intent to purchase lands at Mysore; so that the claim made in the will that the testatrix had given this amount to her son out of her separate funds is inaccurate. The manner in which the several recitals have been made in the will amounts to a suspicious circumstance which must be satisfactorily explained by the appellant.

25. The next circumstance which calls for an explanation is the exclusion of the grand children of the testatrix from any substantial legacies under the will. It is true that a bequest of Rs 500 each is given to them but that can hardly be regarded as fair or just to these children. It was, however, urged by Mr Iyengar before us that Narayana Iyengar had, during his lifetime, given lands to his sister's daughters. He had also spent considerable amounts on the occasion of their marriages and had given them each valuable ornaments. In this connection, he referred us to certain documents exhibited under Ex. 'G' and attempted to show that the lands given to his sisters' daughters were of the value of Rs 1500 to Rs 2000 each. Apart from the fact that the value of these lands is not clearly proved nor are the circumstances under which they came to be gifted to the donees, we do not think it would be possible to accept the argument that even with these gifts the testatrix would not have thought of making more substantial bequests to her grandchildren. It is not suggested that the relations between the testatrix and these grandchildren were not cordial and affectionate and so it would be reasonable to assume that they would have been the objects of her bounties in a more liberal measure in ordinary circumstances.

26. There is one more point which must be considered in this connection. As we have already mentioned the appellant's sons have received substantial bounties under the will. Are these bequests probable and natural? It must be remembered that the appellant came into the family of Annaji by adoption long after the testatrix was married. The record does not show that the testatrix was on such affectionate terms with the appellant that she would have preferred to make a bequest to his sons rather than to her own grandchildren. Indeed the appellant admitted that, at the relevant time, he was in straightened circumstances and was indebted to the extent of nearly Rs 30,000; and it does not appear that when he was faced with financial difficulties of this magnitude he asked for or obtained any assistance from his adoptive sister. That is why the bequests to the appellant's sons also amount to a suspicious circumstance which must be clearly explained by the appellant. We cannot easily reject the argument urged

on behalf of Respondent 1 that the bequests have been made in the names of the appellant's sons because, if they had been made in his own name, the properties bequeathed would have been attached and sold at the instance of his numerous creditors. We do not propose to measure precisely the value of the properties bequeathed to the appellant's sons. It would be enough to say that the said bequests are by no means insignificant or unsubstantial. Therefore, we are unable to see how the appellant can successfully challenge the finding of the High Court that some of the broad features of the will appear to be improbable and unfair; and if that be so, the appellant will have to remove the suspicions arising from these features before he can persuade the court to accept the instrument as the last will and testament of the testatrix.

27. In this connection it is necessary to bear in mind that the appellant whose sons have received the said bequests has admittedly taken a very prominent part in bringing about the execution of the will. He has prepared the draft and it was at his dictation that the scribe wrote the will. Indeed on the important question as to when and how instructions were given by the testatrix and whether or not in preparing the draft those instructions have been faithfully carried out, the only evidence adduced in the case is that of the appellant and no one else. Thus, the very important, if not the decisive, part played by the appellant in the execution of the will cannot at all be disputed in the present case.

28. Mr Iyengar, for the appellant, strenuously contended that, in deciding whether the suspicions attending the execution of the will have been removed or not, it would be necessary to remember that the whole of the relevant evidence is all one way and there is no evidence in rebuttal led by Respondent 1. His argument is that the evidence adduced by the appellant is satisfactory and the conclusion of the trial court which was well-founded need not have been reversed by the High Court. In support of this argument, Mr Iyengar referred us to several judicial decisions and suggested that we should consider the evidence in the light of these decisions. According to him, these decisions would afford us considerable assistance and guidance in appreciating the evidence in the present case. That is why we would now briefly refer to some of the decisions cited before us.

29. According to the decisions in *Fulton v. Andrew*⁵ “those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction”. “There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further

enquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of *Barry v. Butlin*⁶. The two rules of law set out by Baron Parke are: "first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator"; "the second is, that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased". It is hardly necessary to add that the statement of these two rules has now attained the status of a classic on the subject and it is cited by all text books on wills. The will propounded in this case was directed to be tried at the Assizes by the Court of Probate. It was tried on six issues. The first four issues referred to the sound and disposing state of the testator's mind and the fifth to his knowledge and approval of the contents of the will. The sixth was whether the testator knew and approved of the residuary clause; and by this last clause the propounders of the will were made the residuary legatees and were appointed executors. Evidence was led at the trial and the Judge asked the opinion of the jurors on every one of the issues. The jurors found in favour of the propounders on the first five issues and in favour of the opponents on the sixth. It appears that no leave to set aside the verdict and enter judgment for the propounders notwithstanding the verdict on the sixth issue was reserved; but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally and have a new trial or to set aside the verdict on the sixth issue for misdirection. It was in dealing with the merits of the finding on the sixth issue that the true legal position came to be considered by the House of Lords. The result of the decision was that the rule obtained for a new trial was discharged, the order of the Court of Probate of the whole will was reversed and the matter was remitted to the Court of Probate to do what was right with regard to the qualified probate of the will.

30. The same principle was emphasized by the Privy Council in *Vellasawmy Servai v. Sivaraman Servai*⁷ where it was held that, where a will is propounded by the chief beneficiary under it, who has taken a leading part in giving instructions for its preparation and in procuring its execution, probate should not be granted unless the evidence removes suspicion and clearly proves that the testator approved the will.

31. In *Sarat Kumari Bibi v. Sakhi Chand*⁸ the Privy Council made it clear that “the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator”. This view is supported by the observations made by Lindley and Davey, L. JJ., in *Tyrrell v. Painton*⁹. “The rule in *Barry v. Butlin*⁶, *Fulton v. Andrew*⁵ and *Brown v. Fisher*¹⁰, said Lindley, L.J., “is not in my mind confined to the single case in which the will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicions of the court”.

32. In *Rash Mohini Dasi v. Umesh Chunder Biswas*¹¹ it appeared that though the will was fairly simple and not very long the making of it was from first to last the doing of Khetter, the manager and trusted adviser of the alleged testator. No previous or independent intention of making a will was shown and the evidence that the testator understood the business in which his adviser engaged him was not sufficient to justify the grant of probate. In this case the application for probate made by the widow of Mohim Chunder Biswas was opposed on the ground that the testator was not in a sound and disposing state of mind at the material time and he could not have understood the nature and effect of its contents. The will had been admitted to the probate by the District Judge but the High Court had reversed the said order. In confirming the view of the High Court the Privy Council made the observations to which we have just referred.

33. The case of *Shama Charn Kundu v. Khetromoni Dasi*¹² on the other hand, was the case of a will the execution of which was held to be not surrounded by any suspicious circumstances. Shama Charn, the propounder of the will, claimed to be the adopted son of the testator. He and three others were appointed executors of the will. The testator left no natural son but two daughters and his widow. By his will the adopted son obtained substantial benefit. The probate of the will with the exception of the last paragraph was granted to Shama Charn by the trial Judge; but, on appeal the application for probate was dismissed by the High Court on the ground that the suspicions attending on the execution of the will had not been satisfactorily removed by Shama Charn. The matter was then taken before the Privy Council; and Their Lordships held that, since the adoption of Shama Charn was proved, the fact that he took part in the execution of the will and obtained

benefit under it cannot be regarded as a suspicious circumstance so as to attract the rule laid down by Lindley, L.J., in *Tyrrell v. Painton*⁹. In *Bai Gungabai v. Bhugwandas Valji*¹³ the Privy Council had to deal with a will which was admitted to probate by the first court, but on appeal the order was varied by excluding therefrom certain passages which referred to the deed-poll executed on the same day by the testator and to the remuneration of the solicitor who prepared the will and was appointed an executor and trustee thereof. The Privy Council held that “the onus was on the solicitor to satisfy the court that the passages omitted expressed the true will of the deceased and that the court should be diligent and zealous in examining the evidence in its support, but that on a consideration of the whole of the evidence (as to which no rule of law prescribed the particular kind required) and of the circumstances of the case the onus was discharged”. In dealing with the question as to whether the testator was aware that the passages excluded by the appeal court from the probate formed part of the instrument, the Privy Council examined the evidence bearing on the point and the probabilities. In conclusion Their Lordships differed from the view of the appeal court that there had been a complete failure of the proof that the deed-poll correctly represented the intentions of the testator or that he understood or approved of its contents and so they thought that there were no grounds for excluding from the probate the passages in the will which referred to that deed. They, however, observed that it would no doubt have been more prudent and business-like to have obtained the services of some independent witnesses who might have been trusted to see that the testator fully understood what he was doing and to have secured independent evidence that clause 26 in particular was called to the testator's attention. Even so, Their Lordships expressly added that in coming to the conclusion which they had done they must not be understood as throwing the slightest doubt on the principles laid down in *Fulton v. Andrew*⁵ and other similar cases referred to in the argument.

34. In *Perera v. Perera*¹⁴ it was held that when the testator is of sound mind when he gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, he must be deemed to be of sound mind when it is executed. The will of Perera with which the court was concerned in this case was signed with a cross by the testator in the presence of five witnesses present at the same time who duly subscribed the will in the presence of the testator. The Notary Public was also among the persons present but he did not attest the will. No objection was taken in the court of first instance on this ground, but, in the Court of appeal, the said objection was raised and it was held that

the will was invalid on the ground that though the Notary Public was present he had not attested the instrument. The case was then taken to the Supreme Court in its collective capacity on review preparatory to an appeal to Her Majesty. The Supreme Court reversed the judgment under appeal and then proceeded to determine the case on the merits. The Court held by a majority decision that the testator was of sound and disposing state of mind and restored the order of the Primary Judge. Against this decision there was an appeal. In this case, the evidence about the instructions given by the testator was very clear; and there was not the slightest reason for disbelieving the statement of Gooneratne that he had drawn the will faithfully in accordance with the details of instructions given to him. The will prepared from the said instructions seemed to be fair and just disposition of the testator's property. There was no concealment about the preparation of the will. The instructions were given on June 1 and it was in the evening of June 4 that the will was brought to the testator for execution. It is on these facts that it was held, following the observations of Sir James Hannen in *Parker v. Felgate*¹⁵ that if a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will if executed by the testator is that he should be able to think thus far: "If I gave my solicitor instructions to prepare a will making certain dispositions about my property I have no doubt that he has given effect to my intention and I accept the document which is put before me as carrying it out". We would again like to emphasize that the evidence about the instructions was very clear and definite in this case and it was also clearly established that the will which was just and fair was executed faithfully in accordance with the said instructions given by the testator. In such a case whether or not the will should be admitted to probate would depend upon the opinion which the court may form about the relevant evidence adduced in support of the will. It would be difficult to deduce any principle from this decision and to seek to apply it to other cases without reference to their facts.

35. The last case to which reference must be made is the decision of the Privy Council in *Harmes v. Hinkson*¹. It appears that, in this case, the testator George Harmes died in the city of Regina on April 4, 1941. Two days later Mr Hinkson brought to the manager of the Canada Permanent Trust Company at its office in Regina a document which purported to be the will of the said Harmes. It was dated April 3, 1941, and named the Trust Company as executor. Under the will Mr Hinkson by a devise and bequest of the residue was to benefit to a sum of more than £ 50,000. Mr Hinkson was by profession a barrister and solicitor and had drawn the will with no witness present until after the body of the document was complete. Then two nurses were called in to witness

its due execution. The learned Judge of the Surrogate Court, after a lengthy trial affirmed the will and decreed probate in solemn form. On appeal, by a majority decision the order of the trial court was reversed. Then there was a further appeal to the Supreme Court of Canada. It was heard by five learned Judges. By a majority (Hudson, J., alone dissenting) the appeal was allowed and the decree of the Surrogate Court was restored. Against this decision the appellant obtained special leave to appeal to His Majesty-in-Council and it was urged on his behalf that, since the document was charged with suspicion from the outset, probate should not have been granted to the respondent Hinkson. The Privy Council did not accept this contention and dismissed the appeal. It was in dealing with the appellant's contention about the suspicions surrounding the execution of the will that Lord Du Parc made the observations which we have already quoted. Prima facie the facts on which the appellant relied were strong enough; but the question which according to Their Lordships fell to be decided in the appeal was whether the learned trial Judge's decision on the facts was erroneous and so manifestly erroneous that an appellate court ought to set it aside. Their Lordships then referred with approval to the principles which had been frequently enunciated as to the respect which the appellate court ought to pay to the opinion which a Judge who has watched and listened to the witness has formed as to their credibility (*Powell v. Streatham Manor Nursing Home*¹⁶). Their Lordships then briefly referred to the evidence led in the case and observed that it was impossible for them judging only from the printed page to decide between the various opinions of Mr Hinkson's character which its perusal may leave open for acceptance by different minds. In the result they came to the conclusion in agreement with the Supreme Court that the trial court's decision on the facts must stand. It would thus be noticed that the decision of the Privy Council proceeded more on the basis that there was no justification for interfering with a finding of fact recorded by the trial Judge particularly when the said finding rested on his appreciation of the evidence given by several witnesses before him. In this connection it is significant to note that the allegation of the appellant that Mr Hinkson had exercised undue influence on the testator was repelled by the Privy Council with the observation that their acceptance of the Judge's findings of fact leaves them no alternative but to reject it. Thus this decision merely serves to illustrate the importance which the Privy Council attached to the finding of fact recorded by the trial court in this case.

36. It is in the light of these decisions that the appellant wants us to consider the evidence which he has adduced in the present case. It would be convenient to begin with the appellant's story about the instructions given by the testatrix for preparing the will. In the plaint

the appellant has referred to the sudden illness of the testatrix at Mandya and it is alleged that when she took ill the testatrix sent for him with the obvious intention of making arrangements regarding her properties. Accordingly when he met her at Mandya she explained all her intentions to him in the matter of disposing all her properties and her rights thereto. In other words, the case made out in the plaint clearly and specifically is that when the testatrix was ill at Mandya she sent for the appellant and gave him instructions for preparing a draft of her will. However, when the appellant gave evidence he made a material improvement in his story. According to his evidence, the appellant had received instructions from the testatrix a year before the will was actually drafted. It was then that the testatrix had given him the gift deed (Ex. D) and asked him to prepare the draft. Consistently with this new version the appellant has added in his evidence that when he met her at Mandya during her illness she reminded him that she had asked him to make a will for quite some time and she insisted that the draft should be prepared without any delay. In our opinion, the evidence given by the appellant on this point is clearly an after-thought and his story that he had received previous instructions cannot be accepted as true. Besides, it is somewhat remarkable that, on both the occasions when the testatrix talked to the appellant and gave instructions to him, no one else was present; and so the proof of this part of the appellant's case rests solely on his own testimony. If the testatrix had really thought of making a will for over a year before it was actually executed, it is unlikely that she would not have talked about it to other relatives including Kalbagal with whom she was actually staying at the material time.

37. Then it would be necessary to enquire whether the draft which the appellant prepared was consistent with the instructions alleged to have been given by the testatrix. The draft, however, has not been produced in the case on the plea that it had been destroyed; nor is it specifically stated by the appellant that this draft was read out fully to the testatrix before he dictated the contents of the will to the scribe. Thus even the interested testimony of the appellant does not show that he obtained approval of the draft from the testatrix after reading it out fully to her clause by clause. It is common ground that Mandya where the testatrix was lying ill is a place where the assistance of local lawyers would have been easily available; and in ordinary course the testatrix would have talked to Kalbagal and the appellant and they would have secured the assistance of the lawyers for drafting the will; but that is not what the appellant did. He went to Mysore and if his evidence is to be believed he prepared the draft without any legal assistance. Having regard to the nature of the recitals contained in the will it is not easy to accept this part of the appellant's case. Besides, as

we have already indicated, we find great difficulty in believing that the elaborate recitals could have been the result of the instructions given by the testatrix herself.

38. It is in the light of these circumstances that the direct evidence about the execution of the will has to be considered. The evidence of PW 1 is really inconclusive on the point about the execution of the will. Apart from the fact that he had no clear recollection as to what happened on the day when he attested the will, this witness has frankly stated that he could not state definitely whether the whole of the document was read over to the testatrix before he put the attesting signature; and it was naturally of very great importance in this case to produce satisfactory evidence that the will was read to the testatrix and she understood the nature and effect of its contents. On this point even if PW 1 is believed it does not help the appellant's case. The evidence of PW 2 cannot carry much weight because his main story that he was present at the time when the will was written is wholly inconsistent with the evidence of PWs 3, 4 and 7. That leaves the evidence of the scribe and the appellant himself. The scribe (PW 3) is a near relation of Kalbagal and even he does not at all support the appellant's case about previous instruction because, according to him, the testatrix said that she would agree to whatever the appellant would get written. The relevant evidence of this witness is clearly inconsistent with the appellant's case about previous instructions and so it would be difficult to treat the evidence of this witness as sufficient to prove that the testatrix fully understood the nature of the recitals in the preamble and the effect of the dispositions before she put her signature to the will. The evidence of the appellant (PW 7) cannot obviously be useful because it is the evidence of an interested witness and is besides not very satisfactory. On behalf of the appellant it was urged before us by Mr Iyengar that the evidence of Kalbagal (PW 4) is disinterested and so it should be believed. That also appears to be the view taken by the trial court. In our opinion, however, it would not be right or correct to describe Kalbagal as wholly disinterested. Respondent 5 who is the step-brother of Kalbagal and who stays with him in the same house along with their father has admittedly received substantial benefit under the will. If an undivided brother of PW 4 has received this benefit it would not be accurate to say that the witness is wholly disinterested. Besides, it appears from the evidence of Kalbagal that he knew nothing about the execution of the will until the appellant asked him to get some attesting witnesses for the will. This evidence does not strike us as natural or probable; but apart from it, even Kalbagal's evidence does not show satisfactorily that the will was read out to the testatrix so as to enable her to understand its full effect before it was signed by her. That is the whole of the evidence led by the appellant on the question

of the execution of the will. On this evidence we are not prepared to hold that the High Court was in error in coming to the conclusion that it was not shown that the testatrix fully understood the contents of the will and put her signature on the instrument intending that the recitals and the dispositions in the will should be her recitals and dispositions.

39. In this connection we would like to add that the learned trial Judge appears to have misdirected himself in law inasmuch as he thought that the proof of the signature of the testatrix on the will raised a presumption that the will had been executed by her. In support of this view the learned Judge has referred to the decision of the Calcutta High Court in *Surendra Nath Chatterji v. Jahnavi Charn Mukerji*¹⁷. In this case no doubt the Calcutta High Court has held that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but Mr Justice B.B. Ghose, in his judgment, has also added that the said presumption is liable to be rebutted by proof of suspicious circumstances and that undoubtedly is the true legal position. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case. Unfortunately the learned trial Judge did not properly assess the effect of suspicious circumstances in the present case to which we have already referred and that has introduced a serious infirmity in his final conclusion. Incidentally we may also refer to the fact that the appellant obtained a power of attorney from the testatrix on the same day; and that has given rise to the argument that the appellant was keen on taking possession and management of the properties under his control even before the death of the testatrix. There is also another circumstance which may be mentioned and that is that the Sub-Registrar, in whose presence the document was registered on the same day, has not been examined though he was alive at the date of the trial. On these facts then we are inclined to hold that the High Court was justified in reversing the finding of the trial court on the question of the due and valid execution of the will.

40. Before we part with this case, however, we would like to add that the High Court was not justified in recording its findings on two other issues in the present appeal. As we have already indicated, the High Court itself has observed that, once it was held that the will had not been proved by the appellant, no other issue survived for decision. Even so, the High Court has expressed its conclusions in favour of Respondent 1 on the question about the character of the subsequent acquisitions of Items 3, 4 and 5 and about the subsisting title of the testatrix in respect of all the properties covered by the will. Having regard to the relationship between the parties it is difficult to understand how mere entries in the revenue record made in the name

of Sadagopalachar or the long possession of Sadagopalachar and, after his death, of Narayana Iyengar can prove the transfer of Lakshmamma's title or its extinction by adverse possession respectively. It is apparent that, in recording these conclusions, the High Court has not fully or properly considered all the relevant evidence; and consequently, the reasons given by it are open to serious challenge on the merits. Indeed Mr Viswanatha Sastri did not appear to be inclined to support the said findings. We do not, however, propose to decide these questions on the merits because in view of our conclusion on the principal issue it is unnecessary to consider any other points. We would, therefore, like to make it clear that the said two issues are not decided in the present proceedings and may have to be considered afresh between the parties if and when they arise.

41. The result is the appeal fails and must be dismissed but there will be no order as to costs in this Court.

* Appeal from the judgment and decree dated March 20, 1951, of the Mysore High Court in RA No. 155 of 1947-48, arising out of the judgment and decree dated December 19, 1947, of the Court of Sub-Judge, Mysore in OS Suit No. 44 of 1946-47.

¹ (1946) 50 CWN 895

² *Jarman on Wills*— Vol. I, 8th Edn., p. 50

³ *Williams on Executors and Administrators*— Vol. I, 13th Edn., p. 92

⁴ *Williams on Executors and Administrators*, Vol. I, 13th Edn., p. 93

⁵ (1875) LR 7 HL 448

⁶ (1838) 2 Moo PC 480, 482

⁷ (1929) LR 57 IA 96

⁸ (1928) LR 56 IA 62

⁹ (1894) P 151, 157, 159

¹⁰ (1890) 63 LT 465

¹¹ (1898) LR 25 IA 109

¹² (1899) ILR 27 Cal 522

¹³ (1905) ILR 29 Bom 530

¹⁴ (1901) AC 354

¹⁵ (1883) 8 PD 171

¹⁶ (1935) AC 243

¹⁷ (1928) ILR 56 Cal 390

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2026 SCC OnLine SC 1266

In the Supreme Court of India
(BEFORE MANOJ MISRA AND K.V. VISWANATHAN, JJ.)

Sardari Lal ... Appellant;

Versus

Bishan Dass and Others ... Respondents.

Civil Appeal No. 10990 of 2016¹

Decided on July 6, 2026

Advocates who appeared in this case:

Ms. Radhika Gautam, AOR, For Appellant(s)

Mr. Rajesh Gupta, Adv., Mr. Harpreet Singh, Adv., Mr. Sumit R. Sharma, AOR, For Respondent(s)

The Judgment of the Court was delivered by

MANOJ MISRA, J.:— This is plaintiff's appeal against the judgment and order of the High Court of Himachal Pradesh at Shimla¹ dated 18.07.2016 in Regular Second Appeal (for short, RSA) No. 475/2003, whereby, the second appeal of the defendants² was allowed and the judgment and decree of the First Appellate Court, affirming the decree passed by the Trial Court, was set aside and the suit was dismissed.

The Suit

2. Predecessor-in-interest of the appellant, namely, Bhambo Devi wife of Chhajju, instituted Civil Suit No. 51/1993 against Bishan Dass (Respondent No. 1)³ and Ram Singh, who is represented by his legal representatives i.e., Respondent Nos. 2 to 5⁴, for declaring plaintiff the sole owner and in possession of the suit schedule property left by her husband, late Chhajju Ram. Plaintiff also sought the relief of prohibitory injunction and, in the alternative, in the event of being found dispossessed, possession.

3. Plaint, in short, states as follows: Chhajju, the plaintiff's husband, was an illiterate agriculturist; he was the sole owner of the suit schedule property; he died intestate on 05.02.1992, leaving no issue; the plaintiff is his sole heir; defendants have no right, title or interest over the suit schedule property; yet, basis a forged will dated 06.11.1974, the defendants got the revenue records mutated in their favour *vide* mutation no. 66 dated 14.08.1992; Chhajju never executed any will; the Will is an act of fraud/undue influence and as such void; besides, Chhajju had no reason to disinherit his wife (i.e., the plaintiff); the plaintiff is in possession of the suit schedule property; cause of

action arose when the defendants interfered in the possession of the plaintiff based on the mutation, and again when the defendants declined to admit the plaintiff's right over the suit schedule property.

4. Defendants contested the suit by claiming, *inter alia*, that though Chhajju was the owner of the suit schedule property, on 06.11.1974 he executed a registered will of his entire movable and immovable properties in favour of the defendants; the will was executed in a sound state of mind, out of love and affection and as a reward for the services rendered by them to the testator and the plaintiff, and they are still rendering service to the plaintiff by providing her food, residence and other necessities of life; besides, the plaintiff was throughout aware of the will and she raised no objection; in fact, the suit has been instituted at the instigation of her relatives, namely, Sri Ram Dass, Shri Surat Ram and Lakhu Ram, who want to grab the property by hook or crook; based on the will, mutation was sanctioned on 14.08.1992 in presence of the plaintiff, then the plaintiff raised no objection, rather she admitted the will; hence, the suit is liable to be dismissed.

Facts on which there was no dispute

5. A close look at the pleadings would reflect that there is no challenge to the suit being instituted by the plaintiff and there is no *lis* between the parties on the following facts:

- a) that the original owner of the suit schedule property was Chhajju Ram, who was an illiterate agriculturist; and
- (b) Chhajju Ram died, leaving no issues, therefore the plaintiff, in absence of a testamentary disposition, would be the sole successor to the estate of late Chhajju Ram.

Main Issue before the Trial Court & the Evidence led

6. As the impugned judgment is of reversal, we will look at the main issue and the evidence led by the parties. Though multiple issues were framed by the Trial Court, the main issue was as regards execution of the will by Chhajju Ram in favour of the defendants. To prove execution of the will, the defendants produced three witnesses, namely:

- (i) Ram Singh-DW-1 (i.e., defendant no. 2) deposed that the property in suit was owned and possessed by Chhajju Ram, who was his paternal uncle. Chhajju had executed the registered Will out of free will, during his lifetime, on 06.11.1974, and he died in the month of April 1992. Both, Chhajju and the plaintiff were served by the defendants. Last rites of Chhajju were performed by the defendants. Even during the lifetime of Chhajju, the land in the suit was cultivated by the defendants as Chhajju had no issues and after his death, the defendants are owners and in possession of the suit land. The plaintiff was not willing to institute the suit; in fact, the suit has been instituted at the

instigation of Sant Ram and Lakhu. During cross-examination, DW -1 admitted that his father's father is Sunder whereas Chhajju's father is Baisakhi; he also admitted that when the Will was executed, he was a student and his brother Bishan Dass was in service. He, however, denied the suggestion that Chhajju had a separate house. He also denied the suggestion that the plaintiff has been residing separately. He also denied the suggestion that his father had got a forged will prepared. He also denied the suggestion that the plaintiff is in possession of the suit land.

(ii) Hariram (DW-2) - Attesting witness to the Will. DW-2 deposed that he had been the Pradhan of Gram Panchayat Behri for about 20-25 years. He knew Chhajju personally. Chhajju was in his senses when the Will was scribed at his instance. The deed writer had read over the Will to him and, thereafter, Chhajju had put his thumb impression in his presence and at the insistence of Chhajju, DW-2 had also signed as a witness. Besides, one Jagdish Ram (i.e., the other attesting witness) had also signed as a witness. He stated that Chhajju had brought the Will to the Tehsildar; they had accompanied Chhajju for registration of the Will. He proved attestation of the Will. He admitted that Jagdish, the other attesting witness, is alive and managing a shop. During cross examination, he admitted that Chhajju was illiterate, though clever. He denied the suggestion that he has deposed as a witness in a number of cases. However, he admitted of having deposed as a witness in case of one *Kartar Singh*, which was about a will. He denied the suggestion that he was a witness in another case of one Shakti Singh. He, however, admitted that Chhajju was dependent on agriculture and used to cultivate his land. He also admitted that he had good relations with his wife i.e., the plaintiff and that plaintiff used to attend to the deceased. However, sometimes sons of Natha (i.e., the defendants) used to prepare meals for Chhajju. He also stated that one of the sons of Natha (i.e., one of the beneficiaries of the Will) at the time of execution of the Will was aged between 8 and 10 years. He, however, could not tell the age of the other son of Natha. He also could not disclose as to how many sisters Chhajju had. As regards the day when the will was executed, he stated that they had all assembled at the village and from there they proceeded to Amb. The Will was scribed by Somnath at the instruction of Chhajju. He stated that judicial paper was purchased by Chhajju from a stamp vendor. He, however, denied the suggestion that Natha (i.e., father of the defendants) was his relative. He also denied the suggestion that Chhajju was not known to him.

(iii) Shanti Lal (DW-3) - Examined to prove signature of Som Nath

i.e., the scribe of the Will. DW-3 stated that Som Nath, who is now dead, was his nephew. He used to sell stamp paper. He saw Som Nath writing deeds and is aware of his signatures. He stated that the signature on the Will appears to be that of Som Nath. In his cross examination, he denied the suggestion that Som Nath was not related to him.

Trial Court Finding / Observations

7. After considering the evidence led by the parties and perusing the Will (Ex. DW-2/A), the Trial Court held as follows:

“10. I have perused Will (Ex. DW2/A). Perusal of which goes to show that when it was executed, Chhajju had excluded plaintiff from succession on the ground that she had sufficient ornaments and cash and therefore nothing was required to be given to her. This Will was executed in the year 1974 and is without details of value of ornaments and cash. There being no details of property which she had with her, exclusion cannot be said to be bona fide, but smacks of suspicion in the transaction. Had Chhajju intended to exclude the plaintiff from his estate despite the fact that she was having good relations with him and was putting up with him, details of ornaments or cash should have been given or some other provision for her maintenance should have been made, but the provisions disclosed in the will do not go to establish that she was excluded on some genuine grounds. Thus, this exclusion which remains unexplained does not appeal to the conscience of the court and is a suspicious circumstance *qua* validity of the Will in question or its execution. Perusal of this Will from its backside where endorsement has been made by Sub-Registrar makes it more suspicious. In place of name of Chhajju Ram, firstly, name of someone else i.e. Laxmi Kant Bassi had been written which has thereafter been tampered and then Chhajju Ram has been entered. This cutting does not bear signatures of Sub-Registrar who had done the cutting. Had the cutting been effected at the office of Sub-Registrar, he ought to have put his initials over this cutting. Name which has been cut seems to be Laxmi Kant Bassi which after cutting has been replaced by the name of Chhajju. Such cutting is at three places. Endorsement has been made by some official and not by Sub-Registrar who appears to have put his signatures only at the stamps affixed by the official concerned and seems not have gone through the will. Had it been not so, he must have made some proper endorsement. Regarding this cutting and deletion of name is again a suspicious circumstance which has not been explained by anyone. To remove this doubt, the then Sub-Registrar ought to have been examined, but that has not been opted for.....nor report from the office of Sub-Registrar has been called as to who Laxmi Kant was and why this cutting was

made. Thus, as per perusal of record, there are number of suspicions which are emerging. Firstly, it is statement of defendant who claimed that he was rendering services along with his brother without explaining nature of those services and as to what made them to go for these services when he was a school student and his parents were alive and they were joint with Chhajju. It has not been pointed out as to whether father of the defendants was also putting up with Chhajju, if so, why, and in case it was so, as to why complete details have not been provided. Statement of DW2 and DW3 also create suspicion. Another suspicious circumstance is exclusion of plaintiff who was sole heir to have survived the deceased and the most serious suspicious circumstance is cutting made on the endorsement made by Sub-Registrar Amb. All these suspicious circumstances have not been explained and, I feel that the will falls in the category of suspicious documents. At the same time, there is nothing on the file to suggest that there was any occasion for Chhajju Ram to execute will in the year 1974 whereas he survived up to the year 1992. Thus, taking into consideration all these suspicious circumstances, the only conclusion which could be reached at is that deceased Chhajju had not executed a valid will of his estate on 06.11.1974 in sound state of mind. Defendants have also not been established to be in possession of suit land on the basis of this will. The issue is disposed of accordingly.”

8. After holding as above, the Trial Court proceeded to decide the other issues. In respect of the issue as to whether the plaintiff is the owner and in possession of the suit property, the Trial Court held that though the plaintiff did not appear as a witness, the site plan (Ex. DW-1/A), which disclosed *Abadi* of the plaintiff, as per spot position, was duly proved. Besides, Chhajju's ownership of the house was not disputed; rather, it was admitted by the defendants. Therefore, by virtue of intestate succession, the plaintiff would be the owner in possession thereof. The relevant observations of the Trial Court are extracted below:

“Since defendants have not adduced any evidence or even deposed clearly that suit land along with house was put into their possession by deceased Chhajju during his lifetime, I feel it cannot be presumed that possession is with the defendants. Had the possession been delivered, in that respect specific plea ought to have been raised and evidence should have been adduced, but defendants have failed to do so. The revenue record is depicting Chhajju to be owner in possession of suit land and after death of Chhajju there being no evidence to this fact that possession was taken by defendants at any stage out of free will of the plaintiff or someone it was handed over at any later stage. Thus, it cannot be

presumed in any manner that the defendants are in possession of the suit land.”

9. The Trial Court also considered *Jamabandi* entries and, thereafter, observed:

“As per the perusal of the Ex. P-1, copy of *Jamabandi* for the year 1986-87, Chhajju has been recorded the owner in possession and in the column of remarks, it has been recorded that mutation on 14.08.1992 of the estate of Chhajju had been attested in the favour of defendants and, at the same time, in remarks column, it has been recorded that redemption of mortgage by State of HP has been done in the name of Bhambo meaning thereby that the mortgage created by Chhajju was redeemed by her and mutation was attested accordingly. Had the possession been that of the defendants, in that respect, some remarks ought to have been given in this column, but perusal of entries make it clear that earlier land was mortgaged with State on account of loan taken by Chhajju and thereafter, it was redeemed by plaintiff and in this respect, mutation was also attested on 14.08.1992. The same day, mutation was attested in the name of defendants on the basis of Will. When both mutations were attested at the same day, it was incumbent upon the revenue authorities to make clear factum of possession, but that has not been done. Same authority had sanctioned mutation of succession in favour of defendants and in the next mutation no. 67 land has been mutated to have been redeemed by plaintiff from the State of HP meaning thereby that title came to plaintiff after death of her husband and she got it redeemed and question of mutation in favour of defendants does not arise and it ought to have been decided by the revenue officer properly, but that has not been done. Perusal of remarks column militates against plea of possession which at that time is claimed to be that of the defendants and even today they claim to be in possession, but possession can be presumed to be with the plaintiff. Ex. P-2, copy of *Jamabandi* for the year 1989-90 again records Chhajju to be the owner in possession. In remarks column, it has been recorded that correction has been ordered by the settlement authorities i.e. by Naib Tehsildar. Again, note was given that decision *qua* Will executed by Chhajju in favour of defendants is pending. Thus, perusal of these documents goes to establish that possession is that of the plaintiff. Perusal of Ex. P-1/A goes to show that Smt. Bhambo is in possession of house, which is adjoining to house of defendants. There is nothing on record to rebut contents of Ex. P-1/A. Thus, I feel that the site plan Ex. P-1/A cannot be treated to be a wrong site plan. Thus, the only conclusion which could be reached at is that plaintiff is in possession of the suit land along with house as owner.”

10. Based on the above findings, the Trial Court decreed the suit, thereby declaring the plaintiff as owner in possession of the suit schedule property, and issued permanent prohibitory injunction restraining the defendants from interfering with the possession of the plaintiff over the suit property.

Impleadment of Appellant as Plaintiff's L.R. in First Appeal

11. Aggrieved by Trial Court's decree, the defendants filed Civil Appeal no. 144/1996. During pendency of the appeal, the original plaintiff died. One Prakash Chand, who claimed to have succeeded to the estate of the original plaintiff, got himself impleaded and accepted the defendants' case. However, on the next day, an application for impleadment was filed by Sardari Lal (the appellant herein) claiming himself to be the legal representative of the deceased plaintiff. However, as the appeal had already been disposed of, consequent to acceptance of the defendants' claim by Prakash Chand, the prayer for impleadment was rejected. As a result, Sardari Lal filed RSA No. 295/2002 before the High Court. The High Court, *vide* order dated 08.11.2002, set aside the judgment and decree passed by the appellate court, restored the appeal to its original number and ordered for its fresh consideration. Thereafter, the first appellate court heard parties on the issue as to who could be considered the legal representative of the original plaintiff and, *vide* order dated 14.08.2003, allowed the application of Sardari Lal, thereby bringing him on record as legal heir of the original plaintiff.

First Appellate Court's Decision

12. Before the Appellate Court, one of the submissions on behalf of the appellant was that no witness appeared on behalf of the plaintiff to raise a doubt in respect of valid execution of the Will and therefore, once the execution of the Will was proved, there was no occasion to reject the Will. The court also noticed another submission on behalf of the defendants, which was that since the issue of the Will being vitiated by fraud and undue influence was decided in favour of the defendant, for want of evidence led by the plaintiff, the Will ought to have been accepted. Negating both the submissions, the first appellate court held that will is a solemn document and judicial conscience of the court must be satisfied as to its execution, and where the will is shrouded in suspicious circumstances, the propounder of the will must explain the same and dispel the doubts.

13. The first appellate court, after considering the evidence on record enumerated the suspicious circumstances for its consideration, as under:

- (i) The plaintiff, being the only legal heir and legally wedded wife of the testator was disinherited without any rhyme or reason.
- (ii) Relationship of the beneficiary as nephew of the testator.

mentioned in the Will, was not made out.

- (iii) Execution of the Will in the year 1974 itself creates a doubt when the testator lived till the year 1992.
- (iv) There is no witness of the Will from the village of the testator.
- (v) The unwarranted cuttings at the time of registration of the Will remain unexplained, and the cumulative effect of all the above circumstances would result in an inference that the Will is not proved to be a valid document.

14. The first appellate court thereafter proceeded to discuss each of the above circumstances separately. The reasons recorded by the first appellate court for affirming the trial court decree, and in discarding the Will, could be summarized as under:

- (i) No cogent reason, except a bald statement in the Will that the testator had made provisions for his wife in the form of jewellery and cash, was forthcoming to deprive the testator's wife of her right to succeed to the estate of the deceased. DW-2, the marginal witness of the Will, had deposed that so long Chhajju Ram (i.e., the testator) remained alive, he was looked after by his wife. Thus, there was no plausible reason to disinherit her. In absence of any cogent reason to disinherit her, the suspicious circumstance in that regard remained unexplained.
- (ii) Relationship of the testator with the legatee as one of uncle and nephew was not established. The witnesses had failed to prove that there was any such relationship between the testator and the legatee. Moreover, it was noticed that the beneficiary was a mere student at the time of execution of the Will. Therefore, the plea that the propounder of the Will was taking care of the testator at the time of its execution appears doubtful. More so, when the testimony of DW-2 discloses that the original plaintiff i.e., wife of the testator had been taking care of her husband till his last breath. Thus, in the first appellate court's view, this too remained an unexplained suspicious circumstance.
- (iii) There was no good reason to execute the Will in the year 1974 when the testator was hale and hearty and had survived up to 1992. Besides, there was nothing on record to demonstrate that the testator was not keeping good health, or was in any manner dissatisfied with his wife, or was so dependent on the legatees for his living that he decided to execute the Will in their favour. Further, there was no evidence on record to show that the testator, during his lifetime, was provided any financial assistance by the legatees, or that he was residing with them in their house.
- (iv) In respect of the witness to the Will not being a resident of the village where the testator resided, the first appellate court

observed that, admittedly, the marginal witnesses to the Will were residents of other village and there was no reason shown as to why any member of testator's own village was not made a witness to the Will. This, in the view of the first appellate court, was a suspicious circumstance, not satisfactorily explained. The appellate court also observed that though there is no such rule of law or procedure that a marginal witness should be from the same village, the omission in that regard generates suspicion in the peculiar facts of the case.

- (v) Though it is not a requirement of the law that both the attesting witnesses must be examined, in the facts of the case, non-examination of the other witness, though alive, raised a suspicion and, therefore, required an explanation.
- (vi) Cuttings at the back of the Will changed the name of the person who presented/executed the document from Laxmi Kant to Chhajju Ram. Such cuttings had no explanation. The first appellate court noticed that there is no explanation for cutting the father's name of the testator. Besides, the age was first mentioned as 50 years and later zero was crossed to make it 55. These cuttings raised a serious doubt as regards the valid execution of the Will, particularly when there was no explanation for those cuttings coming from any of the witnesses examined by the propounder of the Will. According to the first appellate court, the propounder was required to at least get the Sub Registrar, in whose presence the Will was registered, examined, or to examine the clerk in whose presence and handwriting the certificate of registration was endorsed. Based on the aforesaid analysis, the court concluded that there was some '*hanky-panky*' in the execution of the Will. The relevant observations of the first appellate court in this regard are found in paragraph 19 of its judgment, which is reproduced below:

"19. The close scrutiny of the back of Will Ext. DW-2/A goes to show that there are cuttings at least on 7-8 places. Suffice it to say it does not appeal to reason that the entire process of registration *qua* the Will was effected in the name of Laxmi Kant and later on name of Chhajju was incorporated by cutting the name of Laxmi Kant. Even with respect to the presentation of the Will there is name of Laxmi Kant aged 50 years and the contents of the Will were also stated to have been read over to said Laxmi Kant. Though Hari Ram, one of the marginal witness, stated that thumb marks were put by Chhajju Ram in his presence at the time of the registration of the Will, but if that be so why name of Laxmi Kant Bassi was mentioned on both the places as well as *qua* the presentation of the said Will. As pointed out earlier the discrepancy thus could have been

explained either by the Sub-Registrar or by the marginal witnesses to the Will Hari Ram and Jagdish Ram. As regard Hari Ram DW-2, I have pointed out that he has failed to utter even a single word in his examination-in-chief in this regard and the other marginal witness of the Will Jagdish Ram despite his availability was not examined which thus raises a material doubt in the valid execution of the Will. Apart from, be it stated even the scribe of the Will could not be examined as he had died by then and in his place DW-3 Shanti Lal was examined. Thus, I have purposely mentioned as the scribe of the will could have thrown light *qua* the valid execution of the Will more so *qua* the discrepancy noted. The fact that the Sub Registrar had merely appended his signatures on a stamp which goes to show that the thumb impressions as well as the signatures are taken in his presence rather goes to postulate that the attestation of the will as such was done by the Sub-Registrar in a most casual and mechanical manner. In case there had been due application of mind at the time of attestation of the Will by the Sub Registrar, he would have noticed discrepancy *qua* the cuttings effected and to initial the same. Needless to say in the absence of any initials of the Sub Registrar on the cuttings so effected, and for want of positive evidence with respect to the said cuttings being effected at the time of its registration, possibility cannot be ruled out that these cuttings were made conveniently at a later time or the testator had not at all appeared before the Sub Registrar when the said registration was done. At the cost of repetition be it stated there remains every possibility that a person of the name of Laxmi Kant Bassi might have appeared before the Sub Registrar and afterwards in order to show that the Will was registered and got executed by the testator Chhajju Ram these cuttings were effected or else there would have been no reason for not appending a note *qua* the said cuttings and to have initialed duly by the Sub Registrar. Consequently, the said circumstance which was also dealt with at length by the Id. trial court and was rightly held to be suspicious one in the valid execution of the will thus is proved to be so and is reaffirmed by this court accordingly.”

15. Predicated on the observations and findings delineated above, the first appellate court concluded that the propounder has failed to discharge its onus to explain the suspicious circumstances and dispel the doubts shrouding the valid execution of the Will. In consequence, the Will was discarded and the trial court decree was affirmed.

High Court's View in Second Appeal

16. Aggrieved by the judgment and decree of the two courts below, the defendants preferred a second appeal before the High Court. The High Court framed the following substantial question of law for its

consideration:

“Whether the suspicious circumstances relied upon by two courts below in declaring the impugned will Ex. DW-2/A as invalid are suspicious circumstances surrounding the execution of said Will, and, if so, whether the suspicious circumstances had been satisfactorily explained?”

17. The High Court set aside the judgment and decree passed by the courts below and dismissed the suit. In its judgment, the High Court observed that though other attesting witness was not examined, DW-2, as an attesting witness, proved the execution of the will. It was observed that the requirement of the law is not that both attesting witnesses must be examined. Besides, the mere fact that the attesting witness/witnesses is/are not from the same village is not a ground to discard his/their testimony, particularly when no evidence was led by the plaintiff to discredit the testimony of the witness. The High Court also observed that the testator is free to choose his witnesses and if he reposes trust in a particular witness, his testimony cannot be discredited merely on the ground that he resides in some village other than where the testator resides. According to the High Court, the attesting witness produced had proved due execution of the Will in terms of Section 63⁵ of the Succession Act. Besides, once attestation and execution of the will was proved by DW-2, cuttings existing on the back of the Will, even if they remained uninitialed by the Registering Officer would not discredit the testimony of the attesting witness so as to disprove the due execution of the Will, more particularly, when there appears no cutting on the front page of the will. The High Court further observed that the trial court and the first appellate court should not have laid much emphasis on absence of details of the service allegedly rendered by the legatees to the testator which constituted a motive for execution of the Will.

18. In a nutshell, the High Court took the view that when attestation of the Will is duly proved by the attesting witness, the execution of the Will would stand proved, and the Will, being a registered document, ought not to have been discarded for the reasons assigned by the courts below.

19. Aggrieved by the judgment and order passed by the High Court, the legal representative of the plaintiff is in appeal before us.

20. We have heard Ms. Radhika Gautam, learned counsel for the appellant; and Shri Rajesh Gupta, learned counsel for the respondents.

Submissions on behalf of the Appellant

21. Learned counsel for the appellant submitted as follows:

(i) Plaintiff's case that the suit schedule property was that of Chhajju Ram and on his death, the plaintiff, as his widow, was the sole

surviving legal heir is not denied in the written statement. Once those basic facts are admitted, they stand proved, and therefore, no evidence was required from the plaintiff's side. Besides, there is no claim that there are other class one heirs of the deceased. In such circumstances, even if no witness of fact was examined by the plaintiff, merely on that ground, the suit cannot be defeated.

- (ii) As far as execution of the Will is concerned, the burden of proof lay on its propounder. Besides, a will being a solemn document, its execution must be proved to the satisfaction of the court's judicial conscience. Here, the Will was shrouded in suspicious circumstances such as:
 - (a) there being no reason for the testator either to execute a will in favour of the defendants or to disinherit his own wife who had been with the testator throughout, taking care of him;
 - (b) there being no reason to execute a will in 1974 when the testator was hale and hearty and there was no moral obligation to recompense the legatees;
 - (c) the legatees could not have served the testator when the Will was executed and therefore, there was no basis to recompense them for their services rendered to the testator;
 - (d) neither of the witnesses to the Will were residents of the village where the testator resided nor were persons of his confidence, therefore, absence of explanation as to why they were chosen to witness its execution raises doubt about the Will;
 - (e) the back page of the Will, where the Registrar had made an endorsement, had cuttings to the extent that the name of the presenter/executor of the document stood changed, and such changes were not initialled, in such circumstances, the benefit of certificate of registration is not available.
- (iii) Whether execution of the Will had been duly proved and/or the Will is genuine, is a question of fact. Likewise, the existence of suspicious circumstances and their explanation are essentially a question of fact. Once the trial court and the first Appellate court enlisted those suspicious circumstances and, after discussing them in detail, found them not satisfactorily explained to the satisfaction of the court's conscience, the finding so returned was not amenable to interference in exercise of the power under Section 100 of the Civil Procedure Code, 1908⁶.
- (iv) The High Court exceeded its jurisdiction by overturning well considered findings of facts returned by the trial court and the first appellate court and, therefore, the High Court's order is liable to be set aside.

22. In support of her submissions, learned counsel for the appellant relied on the following precedents:

- (a) *H. Venkatachala Iyengar v. B.N. Thimmajamma*⁷;
- (b) *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.*⁸;
- (c) *Rani Purnima Debi v. Kumar Khagendra Narayan Deb*⁹;
- (d) *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*¹⁰;
- (e) *Veerayee Ammal v. Seenii Ammal*¹¹;
- (f) *Rur Singh (Dead) Thru LRs v. Bachan Kaur*¹²;
- (g) *Kavita Kanwar v. Pamela Mehta*¹³;
- (h) *Shivakumar v. Sharanabasappa*¹⁴; and
- (i) *Meena Pradhan v. Kamla Pradhan*¹⁵

Submissions on behalf of the Respondents

23. On behalf of the respondents, it was submitted:

- (i) The testator and his wife (i.e., the plaintiff) were a childless couple. They used to reside in a common village house with the defendants, who used to serve and take care of them, and also cultivate their fields. Though Chhajju is distantly related to the defendants, he was given affection as an elderly figure and therefore, Chhajju decided to execute a Will in their favour. Mere disinheritance of near and dear ones is not sufficient to discard an otherwise validly executed Will.
- (ii) Plaintiff has self-contradictory pleas. At one place, the Will is called a bogus document, and at another, it is claimed to be a result of fraud, undue influence and importunity. To substantiate the plea of fraud, undue influence and importunity, no evidence has been led. As far as execution of the Will is concerned, it is proved by the attesting witness. Therefore, there was no justification for the trial court and the first appellate court to discard the Will. Hence, the High Court was justified in reversing the decision of the courts below.
- (iii) Plaintiff had examined only one witness i.e., PW-1, who is a formal witness, to prove the site plan. His evidence is otherwise of no use. In the circumstances, there is no evidence to doubt the execution of the Will. Besides, there is no proper cross examination to discredit the testimony of DW-2 regarding execution of the Will.
- (iv) Cuttings on the back side of the Will would have no material bearing as the Will is recorded on the front page, which has no cuttings and it bears the thumb impression of the testator as well

as signatures of the attesting witness. Therefore, execution of the Will, which is not a compulsorily registerable document, cannot be doubted merely because those cuttings were not initialled by the Sub-Registrar at the time of registration.

- (v) The High Court while exercising powers under Section 100 of CPC did not exceed its jurisdiction as the question whether suspicious circumstances exist, and/or are duly explained, is a mixed question of law and fact. Likewise, if the burden of proof is placed on a wrong party, the second appellate court can always interfere. In such circumstances, since the two courts below had erred in placing burden of proof on the defendants, when due execution of the Will was proved as per Section 63 of the Succession Act, the High Court was justified in reversing the lower courts' verdict.

24. In support of his submissions, learned counsel for the respondent relied on the following precedents:

- (a) *Madhukar D. Shende v. Tarabai Aba Shedage*¹⁶;
- (b) *Sridevi v. Jayaraja Shetty*¹⁷;
- (c) *Mohd. Yunus v. Gurubux Singh*¹⁸;
- (d) *Krishna Mohan Kul v. Pratima Maity*¹⁹;
- (e) *Sebastiao Luis Fernandes (Dead) Thru LRs. v. K.V.P. Shastri (Dead) Thru LRs*²⁰; and
- (f) *Hafazat Hussain v. Abdul Majeed*²¹

Issues

25. Upon consideration of the submissions and perusal of the record, in our view, the following issues arise for our consideration:

1. Whether the pleadings of the plaintiff were deficient and self-contradictory as to lay a proper challenge to the Will? If so, its consequence?
2. Whether non-examination of the plaintiff, or any witness of fact on its behalf, was sufficient to dismiss the suit?
3. Whether there were suspicious circumstances shrouding the execution of the Will? If so, whether those suspicious circumstances were explained, and doubts dispelled, to the satisfaction of the Court's conscience?
4. Whether the High Court exceeded its jurisdiction under Section 100 of CPC in interfering with the concurrent findings of fact of the two courts that the Will was shrouded in suspicious circumstances which its propounder failed to explain so as to dispel the doubts about its valid execution to the satisfaction of the Court's judicial conscience?

Discussion / Analysis

26. Before we take up the issues for discussion, a general survey of the law regarding proof of Wills would be necessary.

Law regarding proof of Wills

27. In *Rani Purnima Debi* (supra), a three-Judge Bench of this Court, after considering another three-Judge Bench decision rendered in *H. Venkatachala Iyengar* (supra), summarized the law as under: The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, and its mode of proof as prescribed in Section 68 of the Indian Evidence Act, 1872²². 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 signature of the testator as required by law is sufficient to discharge the onus. Where, however, 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. If the caveator alleges undue influence, fraud or coercion, the onus is on him to prove the same. Even where there are no such pleas, but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances might be as to: (a) the alleged signature of the testator; (b) the condition of the testator's mind; (c) the dispositions made in the Will, which may appear unnatural, improbable or unfair in the light of relevant circumstances; or the Will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind; and (d) the propounder taking a prominent part in the execution of the Will which confers substantial benefits upon him. 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 relations²³.

28. In *Smt Jaswant Kaur v. Smt. Amrit Kaur*²⁴, a three-Judge Bench decision of this Court, it was held:

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple *lis* between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

(Emphasis supplied)

29. In *Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur v. Smt. Chhoti*²⁵, a three-Judge Bench of this Court held:

“20. ...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 demeanor. 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.”

(Emphasis supplied)

What could be considered ‘suspicious circumstance’

30. Elaborating upon as to what could be considered ‘suspicious circumstance’ in the context of a will, in *Shivakumar* (supra), a three-Judge Bench of this Court held:

“12.6. 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”.

12.7. 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 dependents; an active or leading part in making of the will by the beneficiary thereunder etcetera are some of the circumstances which may give rise to suspicion. These 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 a legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof and sound

and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. 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 nature and effect of the dispositions in the will.

12.9. 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 will."

(Emphasis supplied)

31. In *Lilian Coelho v. Myra Philomena Coelho*²⁶, while laying stress on the obligation of the propounder to explain the suspicious circumstances so as to satisfy the conscience of the Court, it was observed:

"13. At the same time, if it is taken that the learned Single Judge had only recorded that the plaintiff had succeeded in proving the execution in terms of the provisions under Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872 in the light of well-nigh settled position of law, it would be open to the court to consider, rather, it is the irrecusable duty of the Court in case the objector raises suspicious circumstances, to call upon the propounder to remove such suspicious circumstances to satisfy its conscience."

32. Survey of judicial precedents makes it clear that the burden to prove the Will lies on its propounder. Besides, the exercise of proving the Will is not confined to proving its execution in terms of Section 63 of the Succession Act by the mode prescribed by Section 68 of the Evidence Act. This is just the first step in that exercise. The exercise is complete when the propounder satisfies the Court's conscience that the testator had signed the Will with free will, being aware of its contents, and after understanding the nature and effect of the dispositions in the Will. And, if there are suspicious circumstances raising doubts about the Will, it is the duty of the propounder to explain those suspicious circumstances to dispel the doubts and satisfy the Court's conscience. As to what would be considered a 'suspicious circumstance' depends on the facts and circumstances of each case. Broadly, any circumstance, or set of circumstances, which gives rise to a legitimate suspicion about the valid execution of the Will could be considered a suspicious circumstance. However, those suspicions must not be a figment of

imagination or fantasy of a doubting mind.

Issue Nos. 1 & 2

33. As issues 1 & 2 are interrelated, we propose to address them together.

34. Plaintiff's suit is essentially for declaration that she is the sole owner in possession of the suit schedule property being the only surviving class I heir of her late husband who, admittedly, was the sole owner thereof. Other reliefs such as for permanent prohibitory injunction and declaration that mutation entry is void are ancillary.

35. For seeking such relief(s), the plaintiff, *inter alia*, pleaded that she is the lawfully wedded wife of Chhajju i.e., the sole owner of the suit schedule property; Chhajju died intestate, issueless, leaving the plaintiff as his sole Class I heir; the defendants had obtained mutation behind her back by setting up a will of Chhajju; the said Will is bogus, Chhajju had never executed any Will; and that the Will is an outcome of fraud, undue influence and importunity.

36. The plea that the Will is an outcome of fraud, undue influence, etc. is in addition to the main pleas that Chhajju never executed any will, and the Will set up is bogus. The respondents, however, latched on to this alternative/additional plea of the plaintiff to submit that,- (a) it is inconsistent with the plea that no will was executed, and amounts to admitting execution of the Will; and (b) once execution of the Will is admitted, the burden to prove that the Will is an outcome of fraud, undue influence, etc. lies on the plaintiff and since the plaintiff neither examined herself nor any witness on its behalf to prove fraud, undue influence, etc., the suit had to fail.

37. In our view, the aforesaid argument on behalf of the respondents is misconceived for the following reasons:

- (i) A plaintiff may rely upon different rights alternatively and there is nothing in the Code of Civil Procedure to prevent a party from making two or more inconsistent sets of allegations for claiming relief thereunder in the alternative²⁷.
- (ii) A plea in the alternative to assail the Will on grounds of fraud, undue influence, etc., without admitting that the Will was signed or executed by the testator, does not amount to admitting execution of the Will by the testator because to constitute an admission, the statement must be clear, unequivocal and unconditional²⁸.
- (iii) Before a statement in a pleading is construed as an admission of a fact in issue, the pleading must be read in its entirety to find out whether the statement is unequivocal, unambiguous and unconditional regarding that fact in issue. A plea in the alternative, to raise a doubt about the Will, cannot, on its own, be

construed as an admission regarding execution of the Will by the testator particularly when there exists a categoric plea that the Will was never executed by the testator.

(iv) Non-examination of the plaintiff, or any other witness of fact on its behalf, by itself, is not sufficient to dismiss the present suit for the following reasons:

(a) Suit is based on intestate succession to the estate of her late husband.

(b) Plaintiff's plea that she is the legally wedded wife of late Chhajju who was the exclusive owner of the suit schedule property and that the plaintiff is his sole surviving class I heir is not traversed in the written statement. Therefore, those facts stand admitted by 'doctrine of non-traverse' enshrined in Order VIII Rule 5 of CPC²⁹.

(c) Facts admitted need not be proved.³⁰ Therefore, non-examination of a witness would not make a material difference.

(d) In the circumstances, to deprive the plaintiff of her right to the suit schedule property, testamentary disposition set up by the defendants had to be proved. Burden to prove execution of a testamentary disposition lies on its propounder. No doubt, burden to prove fraud, undue influence, etc. vitiating execution of the Will lies on the plaintiff/challenger of the Will. However, failure to lead evidence in that regard by the plaintiff is not sufficient to defeat the suit because, in any case, the propounder of the Will would have to prove due execution of the Will. If due execution of the Will is not proved, the plaintiff would be entitled to the relief sought based on the admitted case.

(e) In the present case, the plaintiff had challenged the execution of the Will, therefore, the burden to prove due execution of the Will lay on its propounder regardless of their being no evidence to substantiate the alternative plea of fraud, undue influence, etc. taken in the plaint.

We, therefore, do not find any reason to dismiss the plaintiff's suit merely on the ground that there were inconsistent pleas in the plaint and that neither she, nor any witness of fact on her behalf, entered the witness box. Issue Nos. 1 & 2 are decided in the above terms.

Issue No. 3

38. Proof of will is not just an exercise to prove the signature of the testator on the Will and its attestation in terms of Section 63 of the Succession Act; rather it is an exercise to satisfy the Court's conscience that the testator had signed the Will with free will being aware of its contents and after understanding the nature and effect of the

dispositions in the Will. Where there are suspicious circumstances regarding the execution of the Will, the propounder must explain those circumstances and dispel all reasonable doubts regarding its execution. Judicial pronouncements have left the phrase 'suspicious circumstances' open-ended so as to encompass any circumstance which creates doubt about the Will being expression of the free will of the testator, though it would not include a figment of imagination or fantasy of a doubting mind. Such doubt may arise from a shaky or doubtful signature of the testator; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs, particularly the dependents; active or leading part played by the beneficiary in making of the will etcetera.

39. In *Kalyan Singh* (supra), this Court went to the extent of observing that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by its propounder. To assess the credibility of witnesses and disengage the truth from falsehood, it is 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 also be open to the court to look into the surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion.

40. In that light, we shall consider the suspicious circumstances considered by the first appellate court to discard the Will set up by the defendant-respondents. The first appellate court found: (a) no cogent reason for the testator to disinherit his wife who had been, all throughout, taking care of him; besides, the reason mentioned in the will that she had been well provided with jewellery and cash appeared flimsy; (b) no cogent reason for the testator to bequeath property in favour of the beneficiaries, and the reasons mentioned in the Will, namely, that the beneficiaries had served the testator for long and were nephews of the testator, were found not correct by the evidence on record; (c) no cogent reason for the testator to execute the Will in 1974 when admittedly he lived up to 1992; (d) attesting witnesses were not of the village where the testator resided; besides, out of the two surviving witnesses, only one was examined; and (e) the execution of the Will by Chhajju was doubtful inasmuch as at the back of the Will, where the sub-registrar had made his endorsement, the testator's name, at multiple places, was mentioned Laxmi Kant, and Chhajju's name was entered by cutting the name of Laxmi Kant but such cuttings were not initialled by the sub-registrar. Besides, there was no explanation for such cuttings and overall the evidence did not inspire confidence that the will was duly executed.

Circumstance of Disinheriting the wife

41. The circumstance of disinheriting a wife may or may not be

considered suspicious. It all depends on the facts of a case. Ordinarily, where beneficiaries under the Will are other class I heirs of the testator, such as son or daughter, a bequest made in their favour by depriving the wife, by itself, may not raise suspicion as the testator may be contemplating arranging his estate for the future with the hope that those beneficiaries would take care of his wife. But disinheriting a wife, who had all throughout been with the testator and had cordial relations with him, in favour of a stranger, or a distant relative, raises suspicion, thereby creating a doubt whether the Will is free expression of will of the testator made with full understanding of the disposition made therein.

42. In the present case, the beneficiaries under the Will are not the natural heirs of the testator. Therefore, on the face of it, the disposition appears abnormal and creates doubt. In such circumstances, to satisfy the judicial conscience of the Court that the Will is an expression of free will of the testator and has been executed with full understanding of the nature of disposition made therein, an explanation was required. The explanation offered in the Will is two-fold. One, that the testator's wife had jewellery and sufficient cash for her living; and, second, the testator had no issues, and the legatees had not only been looking after his estate but also providing food and clothes to him and his wife, therefore, to recompense them, the bequest was made so that the testator did not carry a burden on his conscience.

43. There is no rule of law that a will must assign reasons for the bequest. But where reasons are provided in the Will, the Court may consider whether those reasons are truthful or just moonshine, put forth only to justify the preparation of the Will. If they are found not truthful, it may raise a doubt as to whether the testator executed the Will with free will and full understanding of the nature and effect of the disposition made therein.

44. In the present case, the explanation offered for the disposition has been found to be untenable by the first appellate court for the following reasons: (a) cash and jewellery with wife is no ground to disinherit her, more so, when its extent is not disclosed; (b) site plan on record depicts that the testator and his wife resided together, separate from the legatees; (c) the evidence on record indicated that the testator had a caring wife who took care of the testator till his death; and (d) the legatees were not in a position to serve the testator and his wife on or about the date of the alleged execution of the Will as one of them had to remain out of station in connection with his service and the other was too young, just a student. Besides, the statement in the Will that legatees were the nephews of the testator could not be substantiated by the respondents. Importantly, the correctness of these reasons recorded by the first appellate court have not been doubted by

the High Court. Though, the High Court was of the view that these reasons do not have a material bearing on the validity of the Will as its execution was duly proved by the attesting witness.

45. In our view, the first appellate court, for the reasons recorded by it, was justified in holding that disinheritance of the testator's wife while making a disposition in favour of the defendant-respondents, who were not close relatives, was a suspicious circumstance which remained unexplained.

46. At this stage, we propose to consider the decision of this Court in *Madhukar D. Shende* (supra) cited by the learned counsel for the respondent(s). In that case, a two-Judge Bench of this Court was dealing with an appeal where the plaintiff's suit based on a Will was dismissed by all three courts below, holding the Will to be shrouded in suspicion. The question before this Court was whether the approach of the courts below in holding the Will not proved was vitiated by error of law. The High Court had summarized the suspicious circumstances centering around the execution of the Will, as under: (a) at the time of execution of the Will, the testator was aged 80 years and there was no medical evidence to show that the testator had a sound mind; (b) the Will was executed on 22.09.1963 and within two days thereafter, on 24.09.1963, the testator expired; (c) the sub-registrar went to the house of the testator for registration of the Will though his office was situated only half a furlong away from the residence of the testator and no reason was assigned as to why the testator could not have gone to the office of the sub-registrar if the testator was in a sound mental and physical state; (d) the plaintiff i.e., beneficiary under the Will, was not examined and his son, who was examined in evidence was not a witness to the execution of the Will; and (e) the two attesting witnesses to the Will, examined in court, were classmates of the beneficiaries' son. In that context, this Court surveyed the evidence and while discarding the findings of the courts below reasoned thus:

"10. The factum of will having been executed by Bhagubai in favour of Chingubai, the sister's daughter, bequeathing the suit property is specifically alleged in the plaint. In the written statement excepting for a bare dial, there is no other pleading raised questioning the sane disposing capacity of Bhagubai at the time of execution of the will. It is true that the plaintiff Chingubai did not appear in the witness box but that is because she was indisposed. Her son has appeared in the witness box. The two attesting witnesses on account of being known to Chingubai's son, being his classmates, were known to the family, and therefore, were natural witnesses to be called to attest to the execution of the will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of

being classmates they would be interested in obliging their classmate's mother so as to benefit her and go to the extent of falsely deposing is too far-fetched an inference to draw. The contents of the will, coupled with oral evidence, show that for the last 25/30 years, Chingubai had taken care of Bhagubai and it was due to love and affection of Bhagubai for Chingubai that the former was bequeathing her properties in favor of Chingubai. Chingubai is none other than Bhagubai's sister's daughter and probably the only heir. There is nothing to suggest that Bhagubai had anyone else than Chingubai who could be closer heir or relation of Bhagubai and with whom Bhagubai could have spent her last days. No other relation of Bhagubai, who would have succeeded to the estate of Bhagubai if the will would not have been there, has come forward to dispute or to object to the will. The challenge is thrown by a stranger to the family and one who has trespassed upon the property.

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15. Other reasonings of the trial court and the first appellate court, for holding the will not proved, too, to say the least, verge on absurdity. Bhagubai died a day after the execution and registration of the will. There is nothing to show that Bhagubai was physically or mentally incapacitated from executing the will. On the one hand, the courts below have questioned the propriety of the sub registrar having come to the house of Bhagubai for registering the will on the ground as to why Bhagubai could not have gone to the office of the registrar on an assumption that she was fit to do so and yet the mental capacity of Bhagubai to execute the will has been doubted. The two attesting witnesses have been held to be interested on the ground of their being class fellows of Chingubai's son and on the other hand, it has been doubted whether they would have known and identified the executant. There is nothing to doubt the mental and physical capacity of Bhagubai but the same has been suspected because of 'complete absence of any medical evidence, of a doctor which would show that the testator was in a sound and disposing state of mind'. There is no rule of law or of evidence which requires a doctor to be kept present when a will is executed. In short, the courts below have allowed their findings to be influenced by such suspicion and conjectures as have no foundation in the evidence and have no relevance in the facts and circumstances of the case and unwittingly allowed their process of judicial thinking to be vitiated by irrelevant reasonings and considerations. The weighty factor that the factum of execution of the will by Bhagubai was being denied by a rank trespasser without raising any specific pleadings and the fact that no relation of Bhagubai has chosen to lay a challenge to the will, have been simply overlooked. In our opinion the High Court ought

not to have sustained such a perverse finding which would result in the property of a rightful owner being lost to a trespasser.”

. (Emphasis supplied)

47. While holding so, in *Madhukar D. Shende* (supra), on the law regarding proof of will, this Court observed as under:

“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 Indian Succession Act, 1925 and Section 68 of the Indian 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 was 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 ingenuous 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."

(Emphasis supplied)

48. Relying on the observations of this Court in *Madhukar D. Shende* (supra), learned counsel for the respondents strenuously argued that since the respondents had examined the attesting witness of the Will to prove its execution by the testator, the burden shifted on the plaintiff to prove that its execution was vitiated by fraud, undue influence, etc. and, since no witness of fact was examined by the plaintiff, that burden was not discharged; therefore, the High Court was justified in overturning the decision of the two courts below.

49. We do not find much substance in the aforesaid submission. Firstly, because, the law is consistent that where there are suspicious circumstances shrouding the execution of the Will, the propounder of the Will must explain those circumstances to satisfy the judicial conscience of the Court and, secondly, in *Madhukar D. Shende* (supra), the legatee was none other than the sister's daughter of the testator and probably the only heir of the testator. Besides, no challenge was laid to the Will by any of the heirs of the testator. There, in fact, the challenger was a stranger and a trespasser to the property left by the testator. In such circumstances, the Court observed that suspicious circumstances enlisted by the High Court were imaginary and, consequently, the Will which was proved by the attesting witnesses was liable to be accepted.

50. In the present case, the testator is an illiterate agriculturist who could only thumb-mark a document. The challenge to the Will is by the only surviving class I heir of the testator, namely, his wife, and the legatee happens to be a non-relative. Therefore, here, the bequest appears unnatural and pinches the Court's conscience. As a result, the Court needed to be circumspect and cautious in testing the evidence led by the propounder to find out whether the Will was executed by the

testator with free will and full understanding of the nature of dispositions being made by him.

51. The other decision relied by the respondent is rendered by this Court in *Sridevi v. Jayaraj Shetty* (supra), where this Court reiterated the settled legal position as under:

11. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of each particular case.”

(Emphasis supplied)

52. In *Sridevi* (supra), by the will in question, the testator had bequeathed certain properties in favour of his two sons and had given other heirs the right to receive compensation of properties which had vested in the State Government. In that context, while upholding the Will, it was observed:

“15. ... It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the properties in favor of all his children.”

53. The facts in *Sridevi* (supra) are in stark contrast with the present case. Here, the sole Class I heir, namely, the wife of the testator, has been completely deprived of her right to succeed to the estate of her husband by the Will which is in favour of non-relative(s). This, being an unnatural disposition raises suspicion and, therefore, solicited an explanation from the propounder of the Will.

Execution of Will in 1974

54. Though the first appellate court found execution of the Will in 1974 a suspicious circumstance because the testator survived till 1992, in our view, the timing of executing a will is the prerogative of the testator and, therefore, timing of its execution may by itself not be a ground to doubt the Will. However, here the timing assumes importance when considered in conjunction with other circumstances such as disinheritance of a caring wife who had many years to live.

Because when a person has a dependent with whom he has no grudge, and that dependent has many years to live, there is a high probability that some arrangement would be made in the testamentary disposition for that dependent before bequeathing the estate to a person who is under no legal obligation to take care of the testator's dependent. Therefore, in our view, though the timing of execution of the Will on its own might not be sufficient to doubt the Will, it becomes a factor in conjunction with the other circumstances to doubt valid execution of the Will.

Attesting witness not resident of the village

55. While considering the circumstance that the attesting witnesses were not residents of the village of the testator, the first appellate court accepted the legal position that there is no requirement of law that a marginal witness to a will must be from the same village to which the testator belongs. This view, according to us, is correct. However, in the opinion of the first appellate court, this was an important circumstance when considered along with other circumstances of the case. In our view, choice of an attesting witness depends on multiple factors. If the testator wishes to secret the Will from his natural heirs, who are being deprived by the disposition, he may choose a person in whom he could repose confidence, and such person may be a resident of some place out of the influence of the testator's natural heirs. There may also be a situation where the testator may choose one or more of his natural heirs or relatives to the exclusion of others to bequeath his property, yet he may choose those excluded to be a witness to the Will to obviate a dispute in the future. Therefore, nothing turns on the choice of an attesting witness or the place of residence of an attesting witness unless it is shown that that witness has been chosen deliberately to prepare a bogus will, or that the witness does not know the testator/executant.

56. In the present case, nothing could be elicited from the attesting witness to show that he did not know the testator or that he was the beneficiaries' pocket witness. Therefore, in our view, the place of residence of the attesting witness was not a material circumstance, and to this extent, the first appellate court was not justified in raising suspicion.

Cuttings on the Will

57. Both the trial court and the first appellate court found cuttings on the Will a suspicious circumstance of a grave nature, which demolished the execution of the Will by the testator. It is for this reason we had called for the original records. The Will is executed on a '*Himachal Government Judicial Paper*'. The front page of the same bears a hand-written will carrying a thumb mark, alleged to be of "Chhajju", the testator, and signatures of Jagdish and Hari Ram, the two attesting

witnesses. What is interesting is the back of the Will, which bears endorsement of the Sub-Registrar before whom the Will was presented for registration. At the back of the Will, the name of the person who presented the Will, as '*Vasiyat Karta*' i.e., the testator, is mentioned as Laxmi Kant Basi. However, name of Laxmi Kant Basi has been cut at multiple places and by hand '*Chhajju*' is written. What is important is that there are no initials/endorsements of the Sub Registrar over any of the cuttings. This creates an impression that the cutting was done after the Sub Registrar had made his endorsement. The first appellate court, in paragraph 19 of its judgment, took this circumstance as indicative of the Will being presented by Laxmi Kant for registration and, later, name of '*Chhajju*' was added by interpolation.

58. The argument on behalf of the respondent is that there is no cutting in the body of the Will. The cutting is only at the back page of the Will. Since the front page of the Will does not have any cutting and it bears thumb impression of the testator as also signatures of the attesting witnesses, the execution of the Will cannot be doubted merely on the ground that cuttings/overwriting at the back of the Will have not been initialed by the Sub-Registrar. Besides, registration of a will is optional, and the Will, the original of which was produced, has been proved in terms of Section 63 of the Succession Act by examining the attesting witness as is required by Section 68 of the Evidence Act. It is argued that a duly registered will cannot be obliterated by a faulty registration.

59. No doubt, a will is not a compulsorily registerable document. Registration of a will is optional. Execution of the Will and its registration are two separate events unless they are so inextricably linked to each other that if one is not proved, the other would fail automatically. Therefore, to test the aforesaid submission, we have carefully read the testimony of DW-2 Hari Ram i.e., the attesting witness, and have carefully examined the original will which is part of the record as Ex. DW-2/A.

60. According to DW-2, the Will was prepared on a paper purchased by Chhajju from a stamp vendor; after purchase of the paper, the Will was scribed by Som Nath, the deed writer, at the instructions of Chhajju, and the same was read over to Chhajju; whereafter, Chhajju put his thumb impression on it in the presence of the two witnesses, and the two witnesses signed the Will in Chhajju's presence. Thereafter, Chhajju took the Will to the Tehsildar (i.e., the Sub Registrar) for registration; where again, the Will was read over to Chhajju; he endorsed the Will by putting his thumb mark on the Will and there, the witnesses again signed the Will.

61. During cross-examination, DW-2 admitted that Chhajju was illiterate, though clever. According to respondents, Chhajju had thumb-

marked the Will. These two circumstances indicate that Chhajju himself could not have read and understood the contents of the Will unless it was read over and explained to him. Now, comes the crucial question. If the will was drafted as per the instructions of Chhajju, would it contain facts that are incorrect to his knowledge? If it would not, could it be said that Chhajju executed the Will after fully understanding the nature of the dispositions made therein.

62. There are two material statements in the Will which have been found incorrect, namely, that the beneficiaries are the testator's nephews and that the testator resides with them, and that they had been providing food and clothing to the testator and his wife. Both these statements were found incorrect, in as much as, (a) there is no worthwhile evidence to show that the legatees' father and the testator were brothers or close relatives; and (b) DW-2 admitted that the testator had his own separate house. Besides, the site plan proved by PW-1 disclosed that the testator and the so-called beneficiaries had separate residences. Moreover, DW-2 admitted that Chhajju's wife had been taking care of him.

63. Once the aforesaid circumstance is considered in conjunction with the circumstance that the testator was an illiterate agriculturist, the whole perception about the Will changes. In our view, illiteracy of the testator coupled with incorrect statements in the Will raises a serious doubt as to whether the testator executed the Will after fully understanding its content. In such circumstances, registration of the Will with proper endorsement of the Sub-Registrar would have been of some help to the propounder, but there are cuttings at the back of the Will where endorsement of the Sub-Registrar is recorded and there is no initial of the Sub-Registrar against those cuttings, which make things worse for the propounder.

64. At this stage, we may have a look at the relevant provisions of the Registration Act, 1908. Section 32 describes the persons who may present documents for registration. Section 34 (3) enjoins upon the registering officer a duty to enquire whether, or not, such document was executed by the person(s) by whom it purports to have been executed. Clause (b) of sub-section (3) of Section 34 requires the registering officer to satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document. Section 35 provides that if all persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are persons they represent themselves to be, and if they all admit the execution of the document, the registering officer shall register the document as directed in Sections 58 to 61. Section 52 casts a duty on the registering officer to, *inter alia*, ensure that the signature of every

person presenting a document for registration is endorsed on the document at the time of its presentation. Section 58 requires that on every document admitted to registration, *inter alia*, following particulars shall be endorsed: (a) signature of every person admitting the execution of the document, (b) signature of every person examined in reference to such document; and (c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution. Section 59 provides that the registering officer shall affix the date and his signature to all endorsements made under Sections 52 and 58, relating to the same document and made in his presence on the same day. Section 60, *inter alia*, provides that after the procedure contemplated in Sections 34, 35, 58 and 59 as applicable to any document presented for registration has been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered'. Sub-section (2) of Section 60 provides that such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided under the Act, and that the facts mentioned in the endorsement referred to in Section 59 have occurred as therein mentioned. Section 2(5) defines 'endorsement' and 'endorsed'. It states 'endorsement' and 'endorsed' include and apply to any entry in writing by registering officer on a rider or covering slip to any document tendered for registration under this Act.

65. A reading of the relevant provisions of the Registration Act would make it clear that the executant of a document or his agent or representative or assignee can alone present a document for registration. Further, the document so presented must be duly endorsed by the presenter, and the registering officer would have to not only enquire whether or not such document was executed by the persons by whom it purports to have been executed but also satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document. In the context of the aforesaid provisions, when we see the endorsement at the back of the Will before us, we find that the executant of the Will was mentioned 'Laxmi Kant Bassi', though, later, this name was struck off and replaced by 'Chhajju'. When was it struck off and who struck it off is not clear from the evidence. Most importantly, there is no initial or signature against the name of 'Chhajju'. In such circumstances, it cannot be said with certainty that while issuing the certificate of registration, the registering officer followed the requisite procedure as contemplated under the Registration Act. In consequence, the benefit of the

presumption that the Will was read out to 'Chhajju' by the registering officer or that Chhajju admitted execution of the Will before the registering officer is not available. Therefore, to this extent, the uninitialed cuttings at the back of the Will assume importance because it deprives the propounder of the Will the benefit of its registration which would have otherwise raised a presumption that the contents of the Will were read over to its executant. In effect, the doubt as regards valid execution of the Will by Chhajju arising from suspicious circumstances dealt with above is not dispelled by the registration of the Will.

66. We, therefore, summarize our analysis on Issue No. 3 as follows:

- (a) Chhajju i.e., the testator was an illiterate person, therefore, the burden was heavy on the propounder of the Will to satisfy the judicial conscience of the Court that the Will was executed by the testator with free will and full understanding of its contents.
- (b) Disposition in favour of the respondents, who were not close relatives, while disinheriting the widow i.e., the sole Class I heir of the testator, was unnatural and raised suspicion and, therefore, the Court had to be circumspect while testing the evidence led by the propounder of the Will to satisfy its conscience as to whether the Will was executed by the testator with free will and full understanding of the nature and effect of the dispositions made therein.
- (c) Based on the evidence led by the propounder of the Will, the first appellate court found that the explanation offered in the Will to disinherit the sole Class I heir (i.e., the wife of the testator) was incorrect. This essentially is a finding on a question of fact.
- (d) Incorrect statement in the Will, alleged to be scribed on the instructions of the testator, coupled with the fact that the testator was an illiterate person, who could only use his thumb impression to execute a document, raises serious doubt as to whether the Will was executed by the testator with free will and full understanding of the nature and effect of the dispositions made therein. This doubt could not be dispelled by registration of the document because of uninitialed cuttings at the back of the Will which raises a serious doubt as to who presented the Will for its registration.
- (e) In a nutshell, there were suspicious circumstances shrouding the execution of the Will which remained unexplained by its propounder to dispel the doubts regarding its valid execution by the testator. Once that is the position, the finding of the first appellate court discarding the Will as one which fails to satisfy its judicial conscience, is a finding which cannot be said to be perverse or irrational. Issue No. 3 is decided accordingly.

Issue No. 4

67. In *H. Venkatachala Iyengar* (supra), this Court had observed that what circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. More so, that inevitably is a question of fact. Similar view is taken by this Court in *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria*³¹

68. In *Mansingh Rao Yeshwant Rao Patil v. Ramchandra Govindrao Patil*³² a three-Judge Bench of this Court had observed that use of time-honored phrases like “the conscience of the Court being satisfied” cannot convert a question of fact into one of law. The relevant observations are extracted below:

“7. ... The use of time-honored phrases like “the conscience of the Court being satisfied” cannot convert a question of fact into one of law. The phrase is only a rule of prudence and is nothing more than a picturesque way of saying that when the legal heirs to property are being divested in whole, or in part, of their inheritance by a man who is no longer available for examination as a witness great caution should be employed before upholding such an act. But despite all this the question remains one of fact.”

69. Where, however, a court of fact rejects the Will by taking into consideration such circumstances as suspicious, which are figments of imagination or fantasy of a doubting mind and are not real or germane to the valid execution of the Will, a question of law may arise, and the decision may be interfered with in a second appeal, like in *Madhukar D. Shende* (supra). Similarly, if the decision of a court of fact is vitiated by an erroneous approach in law, like placing onus to establish allegations of fraud, undue influence etc. on the caveator, the Court may interfere with the finding of fact.

70. However, here, as we have discussed above, the testator was an illiterate agriculturist, who could just thumb-mark a document, and the Will deprived his sole Class I heir in favour of persons who were not his close relatives, and the Will contained incorrect recitals *qua* (a) relationship of legatee(s) with the testator and (b) the testator's food and lodging with the legatees. All these circumstances put together raised a serious doubt that the Will was executed by the testator with free will and full understanding of the nature and effect of the dispositions made therein. In that context, if the judicial conscience of a final court of fact is not satisfied about the valid execution of the Will, it raises no substantial question of law for the second appellate court to interfere with the findings returned by the first appellate court. We are, therefore, of the considered view that the High Court exceeded its jurisdiction under Section 100 of CPC in interfering with a well-reasoned order of the first appellate court. Issue No. 4 is decided in the

aforesaid terms.

Conclusion & Order

71. Having regard to our conclusions on the issues discussed above, we hold that the Will was rightly discarded by the first appellate court and the trial court. Therefore, taking into consideration the finding of the trial court and the first appellate court that the plaintiff was in possession, which remain undisturbed by the High Court, in our view, the decree passed by the trial court as affirmed by the first appellate court was not liable to be interfered with in exercise of powers under Section 100 of CPC. Consequently, the appeal is allowed. The impugned judgment and order of the High Court is set aside. The decree passed by the trial court as affirmed by the first appellate court is affirmed. There is no order as to costs.

72. All pending applications, if any, shall stand disposed of.

¹ The High Court

² Respondents herein

³ For short, R-1

⁴ For short, R-2 to R-5

⁵ 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 be present at the same time, and no particular form of attestation shall be necessary.

⁶ CPC

⁷ 1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC 443

⁸ 1962 SCC OnLine SC 57 : 1962 Supp (3) SCR 549 : AIR 1962 SC 1314

⁹ 1961 SCC OnLine SC 89 : (1962) 3 SCR 195 : AIR 1962 SC 567

¹⁰ (1999) 3 SCC 722

¹¹ (2002) 1 SCC 134

¹² (2009) 11 SCC 1 : (2009) 4 SCC (Civ) 387

¹³ (2021) 11 SCC 209

¹⁴ (2021) 11 SCC 277

¹⁵ (2023) 9 SCC 734

¹⁶ (2002) 2 SCC 85

¹⁷ (2005) 2 SCC 784

¹⁸ 1995 Supp (1) SCC 418

¹⁹ (2004) 9 SCC 468

²⁰ (2013) 15 SCC 161 : (2014) 5 SCC (Civ) 180

²¹ (2001) 7 SCC 189

²² See also: *Bhagwan Kaur v. Kartar Kaur*, (1994) 5 SCC 135, paragraph 4

²³ See also: Constitution Bench decision of this Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee (since deceased) through LRs*, 1963 SCC OnLine SC 114 : AIR 1964 SC 529, paragraph 5

²⁴ (1977) 1 SCC 369

²⁵ (1990) 1 SCC 266

²⁶ (2025) 2 SCC 633

²⁷ *Srinivas Ram Kumar Firm v. Mahabir Prasad*, 1951 SCC 136, paragraph 12

²⁸ *Vikrant Kapila v. Pankaja Panda*, (2024) 18 SCC 695, paragraph 32.

²⁹ Order VIII Rule 5

Specific denial.- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the court main its discretion require any fact so admitted to be proved otherwise than by such admission.

³⁰ Section 58 of the Indian Evidence Act, 1872:

Facts admitted need not be proved.- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

³¹ (2008) 15 SCC 365, paragraph 20

³² (1954) 1 SCC 688

[§] 2026 INSC 669

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SHIVAKUMAR v. SHARANABASAPPA

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(2021) 11 Supreme Court Cases 277

(BEFORE A.M. KHANWILKAR, HEMANT GUPTA AND DINESH MAHESHWARI, JJ.)

3J

a

SHIVAKUMAR AND OTHERS

.. Appellants;

Versus

SHARANABASAPPA AND OTHERS

.. Respondents.

Civil Appeal No. 6076 of 2009[†], decided on April 24, 2020

b

A. Family and Personal Laws — Will — Validity of will — Proof and satisfaction of court — Principles governing adjudicatory process concerning proof of will — Law summarised

c

B. Family and Personal Laws — Will — Suspicious circumstances/ Undue influence re making of will/Substance of will if arouses suspicion — Though fishing enquiry is to be avoided while examining will, but real and valid suspicion cannot be ignored — As the suspicious and unexplained circumstances in the present case remained unexplained, held, High Court was justified in not accepting alleged will dt. 20-5-1991 as genuine document

d

— The unexplained and suspicious circumstances were: (i) Three different sheets of papers were used for typing document of will running into 5 pages; (ii) Placing of signatures of testator on pages was not uniform and excessive space was seen between typewritten contents and signatures on pp. 1 and 5; (iii) Different pens/ballpen were used for making signatures; (iv) pp. 1, 3 and 5 were allegedly signed by testator while pp. 2 and 4 were not; (v) Several blank spaces were found in relation to particulars of properties and even some properties were not correctly described; (vi) Dates mentioned in document with reference to Hindi and English calendar not matching; (vii) Recital of past event in document in manner that such event shall happen in future; (vi) In opening passage recital to effect that testator was making will because many accidents occur; testator and his wife actually dying in car accident three years later — Thus, document in question cannot be accepted as last will of testator

f

— Succession Act, 1925 — S. 63 — Evidence Act, 1872, S. 68

g

C. Family and Personal Laws — Will — Validity of will — Contention that using of blank papers for making will was not objected to by defendant — Rejected, since defendants had definitely asserted that alleged will was a fabricated document — Likelihood of it being drawn on available blank papers with signatures of testator is a logical deduction that comes from examining document in question

h

[†] Arising from the Judgment and Order in *Sharanabasappa v. Shivakumar*, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160 (Karnataka High Court, RFA No. 910 of 2001, dt. 26-10-2007)

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SUPREME COURT CASES

(2021) 11 SCC

D. Family and Personal Laws — Will — Technical requirements: Execution, Attestation and Mode of Proof — Execution of will — Proof — Submission that execution of will has been duly established with testimony of attesting witnesses as also witness with whom will along with handwritten draft of will was deposited by testator

a

— Held, mere proof of document in accordance with statutory requirements is not final and conclusive for accepting document in question as valid will

— Even aspect suggested by plaintiffs that document in question (Ext. P-4) was drawn up as will and placed in sealed cover with handwritten draft (Ext. P-3) has its own shortcomings and abnormalities — Placing an incomplete handwritten draft with alleged typed will in sealed cover to be opened up before Swamiji would only create confusion — Preponderance of probability is only to effect that entire story about execution of will by deceased was cooked up with use of readily available signed papers and in order to bring in authenticity, story of sealed cover and leaving it with PW was created — Besides, statement of Swamiji was never recorded though all material witnesses spoke about him as person before whom alleged will was opened — Succession Act, 1925 — S. 63 — Evidence Act, 1872, S. 68

b

c

E. Civil Procedure Code, 1908 — Or. 41 Rr. 23. 23-A, 24 and 25 — Remand by appellate court — Scope of — When permissible and warranted — Principles summarised — Where decree under challenge is reversed in appeal and retrial is considered necessary, appellate court shall remand case — Order of remand not to be passed in routine manner since unwarranted remand order merely elongates life of litigation without serving cause of justice

d

— Order of remand only on ground that points touching appreciation of evidence were not dealt with by trial court may not be proper because first appellate court is itself possessed of jurisdiction to enter into facts and appreciate evidence — Further, retrial for granting adequate opportunity of leading sufficient evidence to party stand on entirely different footing where evidence is already adduced and decision rendered on appreciation of evidence — Order of remand cannot be passed merely for purpose of allowing party to fill-up lacuna — In instant case, parties had adduced all their evidence and there was no reason for High Court to remand case

e

f

A civil suit was filed by the appellant-plaintiffs' for declaration and injunction alleging that they had acquired ownership rights in the suit properties on the basis of will dated 20-5-1991 executed by deceased S owner of the said properties and that trust created by the defendants on 28-5-1994 in relation to the suit properties was illegal, void and not binding on the plaintiffs. The contesting defendants i.e. Defendants 1 to 5 refuted the claim of the plaintiffs while questioning the genuineness of the alleged will dated 20-5-1991. The trial court decreed the suit. However, the High Court vide impugned judgment allowed the appeal finding the will not a genuine document since there were several unexplained suspicious circumstances as also discrepancies in the will. Hence, the instant appeal.

g

h

The points for determination before the Supreme Court were:

- a (i) Whether the High Court was right in reversing decision of the trial court finding the contested will was not a genuine document? and
- (ii) Whether the High Court ought to have remanded the case to the trial court?

Dismissing the appeal, the Supreme Court

Held :

- b The will being a solemn document that comes into operation after the death of the testator, special provisions are made in the statutes for making of a will and for its proof in court of law. The elaborate provisions made for construction of wills further make the intention of the legislature clear that any irrelevant misdescription or error is not to operate against the will and the approach is to give effect to will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, when the will
- c is surrounded by suspicious circumstances, the Court would expect the legitimate suspicion be removed before the document in question is accepted as the last will of the testator. (Paras 11.1 and 11.3)

The relevant principles governing the adjudicatory process concerning proof of will can be broadly summarised as follows:

- d (i) 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 and proof with mathematical accuracy is not to be insisted upon.
- (ii) 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.
- e (iii) 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
- f on proof of the essential facts which go into the making of a will.
- (iv) The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing and makes the onus heavier on the propounder. The propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.
- g (v) 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 on the propounder to remove all reasonable
- h doubts in the matter.

(vi) 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”. The suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”. a

(vii) 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 abovenoted 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 circumstances 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. b
c

(viii) 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? d

(ix) 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. (Para 12) e

Indu Bala Bose v. Manindra Chandra Bose, (1982) 1 SCC 20; *H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443; *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar*, 1995 Supp (2) SCC 664; *Uma Devi Nambiar v. T.C. Sidhan*, (2004) 2 SCC 321; *Jaswant Kaur v. Amrit Kaur*, (1977) 1 SCC 369; *Mahesh Kumar v. Vinod Kumar*, (2012) 4 SCC 387; (2012) 2 SCC (Civ) 526; *K. Laxmanan v. Thekkayil Padmini*, (2009) 1 SCC 354; (2009) 1 SCC (Civ) 158; *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529, summarised and applied f

Harmes v. Hinkson, 1946 SCC OnLine PC 20 : (1945-46) 50 CWN 895; *Purnima Debi v. Khagendra Narayan Deb*, AIR 1962 SC 567 : (1962) 3 SCR 195 : (1962) 1 SCJ 725; *Rabindra Nath Mukherjee v. Panchanan Banerjee*, (1995) 4 SCC 459; *Vinod Kumar v. Mahesh Kumar*, FA No. 118 of 2003, order dated 22-7-2004 (MP); *Surjitinder Singh v. Jaswant Kaur*, 1975 SCC OnLine P&H 48 : AIR 1975 P&H 377, cited

Having considered the present matter in its totality while keeping the principles aforesaid in view there is no iota of doubt that the High Court was justified in reversing the judgment of the trial court. (Para 13) g

Sharanabasappa v. Shivakumar, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160, affirmed

It is undisputed that will in question is in 5 typed pages, on 3 different sheets of papers which are not of the same colour i.e. they have not been picked up from the same stack. Use of 3 different sheets of paper for typing a document of will running in 5 pages (with first and second paper being typed on both sides) is, in any case, not a normal action by a normal person in normal circumstances. True it is that this aspect could have been cleared only by the typist and the h

a propounders are not expected to know the typist, particularly when they had not participated in execution and attestation of the document but, this circumstance is enough to indicate that the matter calls for closer scrutiny with due regard to all the surrounding factors because, ordinarily, such document would be typed in one sitting and on the papers drawn from the same stack. Further, from the placement of the signatures of the testator on 3 pages it is apparent that on the first and the last page, the distance of signatures from the typewritten contents is excessive than usual or natural. Furthermore, though the document carries 3 signatures of the testator, the same are not made from the same pen. The signature of the testator at p. 1 is from an ink pen, that at p. 3 is from a ballpoint pen and then, again at p. 5, it is from an ink pen. The witness PW 4 has attempted to say that for the ink pen being not working properly, ballpoint pen was used. It sounds utterly unnatural and remains inexplicable that if the ink pen was not working and the second signature was made from a ballpoint pen, as to how and why the third signature, that is, the last one, was again made from another ink pen? It had not been the explanation of the attesting witnesses that after making the signature at p. 3, the ballpoint pen also stopped working and, therefore, another ink pen was used for making the third signature. Even when the possibility of the testator using different pens or instruments for his signatures on different pages of the same document is not ruled out altogether and even this fact, by itself, may not be decisive of the matter but, this much is certain that such happening cannot be categorised as normal or natural in the course of execution of a document of will. (Paras 16, 16.1 and 16.2)

d Another major feature which is noticed is that the purported will running in 5 pages which is typed (in Kannada script) on 3 sheets of papers with the first and second sheets carrying the typewritten contents on both sides, p. 2 and p. 4 of the document carry no signature at all. When this material aspect is added to the above-referred three unusual features, the probative value of this document, Ext. P-4 is shaken to the core and it becomes a serious question as to whether this document could be considered to be a will that was got typed and signed by the testator in the presence of the alleged attesting witnesses. (Paras 16.4 and 16.4.1)

f Besides, as per the requirement of clause (b) of Section 63 of the Succession Act, the signature or mark of the testator is to be so placed that it shall appear that by such signature or mark, the intention was to give effect to the writing as a will. Of course, when no specific form of making a will is provided, in a given case, depending on the relevant facts and circumstances, a document drawn on several sheets but carrying signature only at the end may also be accepted as a genuine will where the document was authenticated by only one signature. However, the scenario like the present one, where the executant had purportedly signed 3 out of 5 typewritten pages while omitting to sign the other 2, definitely stands at contradistinction to the dealing of any normal person in normal way. (Para 16.4.2)

g The aforesaid abnormal features get further confounded with other unusual features available in the contents of the document. Indisputably, several blank spaces are found in relation to the particulars of the properties and even some of the properties are not correctly described. Yet further, the dates mentioned in the document with reference to Hindi calendar and English calendar do not match. Another curious feature is the recital in the document of a past event (about vacating of the shop by the tenant in the year 1990) in the manner that such event shall happen in future. Therefore, the abnormalities relating to paper, pen and signature get magnified with blank spaces in the document as also with incorrect and inexplicable recitals. (Para 17)

Furthermore, in the opening passage of this document, the recital is to the effect that the testator was making the will because so many accidents do happen. The fact remains that the testator and his wife both died in the car accident on 20-5-1994 but, it would require travelling into an entirely mystical region to accept that while making the will on 20-5-1991, the testator had the premonition that he would perish in a vehicular accident. (Para 18)

Even when a fishing enquiry for digging of the faults and lacuna is not to be resorted to while examining a will but, and at the same time, the real and valid suspicions which arise because of anything standing beyond normal happening or conduct cannot be ignored either. It needs hardly any emphasis that examination of a document propounded as will has to be on the norms of reality as also normalcy; and the overall effect of all the features and circumstances is required to be examined. When all the aforesaid abnormal, curious and rather mysterious circumstances are put together, the inescapable conclusion is that the document in question cannot be accepted as the last will of the testator. (Paras 19 and 20)

It is sought to be contended on behalf of the appellants that using of blank papers had not been the objection taken by the defendants. The contention remains bereft of substance for the simple reason that the defendants indeed asserted that the document in question was a fabricated one. The likelihood of it being drawn on the available blank papers with signatures of the testator is nothing but a deduction that logically comes out of the examination of the document in question. (Para 20)

It was further submitted that execution of the will in accordance with the requirements of Section 63 of the Succession Act and Section 68 of the Evidence Act has been duly established on record with the testimony of the attesting witnesses as also the witness with whom the will along with the handwritten draft of the will had been deposited by the testator. The submission cannot be accepted for the reason that mere proof of the document in accordance with the requirements of Section 68 of the Evidence Act is not final and conclusive for acceptance of a document as a will. When suspicious circumstances exist and the suspicions have not been removed, the document in question cannot be accepted as a will. (Para 21)

Even the aspect suggested on behalf of the plaintiffs and their witnesses that the document in question (Ext. P-4) was drawn up as a will and was placed in a sealed cover with the handwritten draft (Ext. P-3) has its own shortcomings and the share of abnormalities. It remains indisputable that the said draft (Ext. P-3) had remained incomplete. It may be assumed that the same was being drawn up by the testator in his own handwriting for finally making his last will after he had revoked the earlier will but, it had remained incomplete draft only. If the testator himself had got his will typed and then, took care to have it executed in the presence of 4 attesting witnesses; and if he intended such executed document to operate as his will; and also had the intention that his will be kept in a sealed cover to be opened before Swamiji, in the ordinary course of dealings, it was least expected of him to put the said incomplete draft also in the envelope because placing of such incomplete draft could have only created confusion in regard to the actual will, if there were any. Taking an overall view of the matter, the preponderance of probability is only to the effect that the entire story about execution of will by the deceased S has been cooked up with use of readily available signed papers (though of different sheets of paper and with signatures with different instruments) and, in order to suggest some authenticity, the story of sealed envelope and leaving of the same with PW 8 was sought to be inserted. Moreover, the plaintiffs never took steps

a to get the statement of the said Swamiji recorded, who was otherwise referred to by all the material witnesses as being the person before whom the document was allegedly opened. (Paras 22 and 24)

b Now, to the other point for determination. The submission of appellants that the High Court ought to have considered remanding the case by taking recourse to Order 41 Rule 23-A CPC is totally bereft of substance. Rule 23-A came to be inserted in Order 41 CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the appellate court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Insertion of Rule 23-A in Order 41 by the amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the appellate court shall have the power of remand, if a retrial is considered necessary. (Para 26.2)

c A conjoint reading of Order 41 Rules 23, 23-A and 24 CPC brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Order 41 Rule 24 CPC that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate court proceeds on a ground entirely different from that on which the trial court had proceeded. It is only in such cases d where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate e court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. (Paras 26.3 and 26.4)

Mohan Kumar v. State of M.P., (2017) 4 SCC 92 : (2017) 2 SCC (Civ) 368, *affirmed in law*

Mohan Kumar v. State of M.P., FA No. 3 of 1998, order dated 24-1-2005 (MP), *referred to*

f Where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill-up the lacuna in its case. In instant cases parties had adduced all their evidence. The High Court had meticulously examined the evidence and differed in its conclusion from the trial court which appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider g remanding the case to the trial court. (Paras 26.4.1 and 26.6)

Sharanabasappa v. Shivakumar, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160, *affirmed*

P-D/64180/SV

Advocates who appeared in this case :

h K. Radhakrishnan, Senior Advocate (M/s Lawyer S. Knit & Co., Advocate), for the Appellants;
Rajesh Mahale and Ms Anjana Chandrashekar, Advocates, for the Respondents.

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17. 1946 SCC OnLine PC 20 : (1945-46) 50 CWN 895, *Harmes v. Hinkson* 303f-g

The Judgment of the Court was delivered by

DINESH MAHESHWARI, J.—

Preliminary and brief outline

1. By way of this appeal, the appellant-plaintiffs have challenged the judgment and decree dated 26-10-2007 passed by the High Court of Karnataka at Bangalore in *Sharanabasappa v. Shivakumar*¹ whereby, the High Court reversed the judgment and decree dated 12-9-2001 passed by the Court of Civil Judge (Senior Division), Koppal in Original Civil Suit No. 56 of 1994.

1.1. The civil suit aforesaid was filed by the appellant-plaintiffs for declaration and injunction, essentially with the submissions that they had acquired ownership rights in the suit properties (described in Schedules A to D attached to the plaint) on the basis of a will dated 20-5-1991 executed by the owner of the said properties Sri Sangappa, son of Pampanna Shettar of Koppal; and that a trust created by the defendants on 28-5-1994, in the name

1 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160

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a “Shri Sangappa Pampanna Gadagshettar Trust, Koppal” in relation to the suit properties, was illegal, void and not binding on the plaintiffs. The contesting defendants i.e. Defendants 1 to 5 refuted the claim so made by the plaintiffs while questioning the genuineness of the alleged will dated 20-5-1991. Defendant 7, one of the erstwhile trustees of the said trust, however, admitted and endorsed the claim of the plaintiffs.

b 1.2. After framing necessary issues and after taking the oral and documentary evidence adduced by the parties, the trial court, in its judgment dated 12-9-2001, decided the principal issue relating to the said will dated 20-5-1991 in favour of the plaintiffs and, while also returning its findings on other necessary issues in favour of the plaintiffs, proceeded to decree the suit with declaration that the trust created by the defendants on 28-5-1994 was not binding on the plaintiffs, particularly in relation to the suit properties; and that the plaintiffs were owners of the suit properties as claimed. The trial court also c issued injunction against Defendants 1 to 5 that they shall not interfere with the plaintiffs’ peaceful possession and enjoyment of the suit properties.

d 1.3. The judgment and decree so passed by the trial court were questioned by the contesting defendants in the High Court by way of the said first appeal. The High Court, in its impugned judgment dated 26-10-2007¹ proceeded to allow the appeal while reversing the decision of the trial court on the principal issue relating to the genuineness of the will in question. The High Court found several unexplained suspicious circumstances as also discrepancies in the will in question and held that the alleged will dated 20-5-1991 was not a genuine document. Being aggrieved, the plaintiffs have preferred the instant appeal.

e *The lead persons, parties, witnesses and documents as also the properties involved*

2. It is but apparent that genuineness of the will dated 20-5-1991, said to have been executed by Sri Sangappa, son of Pampanna Shettar of Koppal, allegedly bequeathing the suit properties to the plaintiffs, is in question in this case.

f 3. For comprehension of the subject-matter and for effective determination of the questions raised in this appeal, we may take note of the principal persons involved in the matter with their respective roles as also the documents and the properties in question as infra:

g 3.1. *The testator of the will in question—late Sri Sangappa, son of Pampanna Shettar of Koppal:* He was a businessman and was also the Chairman of Sri Gavisiddeshwara V.V. Trust, Koppal (which is different than the trust questioned in the suit). Late Smt Mahantamma was his wife. Undisputedly, both the testator and his wife died in a car accident on 20-5-1994. The testator and his wife did not have any surviving children, as their children had died in infancy and they were issueless on the date of their death.

h

1 *Sharanabasappa v. Shivakumar*, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160

3.2. *The plaintiffs (Appellants 1 to 3 herein):* The plaintiffs S/Sri Shivakumar, Shashidhar and Karibasewaraj, all sons of Basetteppa, claim to be the legatees under the will in question. They are full-brothers and are grandnephews of the testator's wife. According to the plaintiffs, they were brought up by the testator and his wife and they were staying with the testator.

3.3. *The contesting defendants (Respondents 1 to 4 herein):* Defendant 1 Sri Sharanabasappa, son of Pampanna is the younger brother of the testator; Defendants 2 and 3 Smt Basavannemma and Smt Siddama are the sisters of the testator; Defendant 4 Sri Pampanna, son of Basappa and Defendant 5 Sri Siddanna, son of Fakirappa are the nephews of the testator.^{2, 3}

3.3.1. *Defendants 6 to 8:* Defendant 6 Sri Gurushantappa, Defendant 7 Sri Veerabasappa and Defendant 8 Dr N.S. Gaikwad were joined in the suit for being the members of the trust created by other defendants, which was questioned by the plaintiffs. Defendant 7 Sri Veerabasappa was said to be a close associate of the testator in running Gavisiddeshwar College of which, the testator was the Chairman of governing body. This defendant was not related to either of the parties; he, however, filed a separate written statement, admitting and endorsing the claim of the plaintiffs.⁴

3.4. *The trust in question—Sri Sangappa Pampanna Gadagshettar Trust:* The defendants created this Trust on 28-5-1994 (in the name of the testator) with inclusion of the properties in question, to pursue philanthropic and charitable purposes. The creation of this Trust was challenged in the suit.

3.5. *Special mention—Sri Gavisiddeshwara Swami, Koppal (Swamiji):* According to the plaintiffs, the testator was a philanthropic and a devotee of Sri Gavisiddeshwara Swami, Koppal (hereinafter also referred to as “Swamiji”); and the contested will was opened in the presence of Swamiji. However, Swamiji was not examined as a witness in this case.

3.6. The key witnesses:

3.6.1. *PW 1 Sri Basetteppa:* He is father of Plaintiffs 1 to 3. He allegedly used to assist the testator in his business.

3.6.2. *PW 3 Sri Radhakrishnarao and PW 4 Sri Ayyanagowda Hiregowdar:* They are claimed to be the attesting witnesses of the contested will.

3.6.3. *PW 8 Sri Bhusnoormath, Advocate:* He was a friend and advocate of the testator. Allegedly, the testator handed over the contested will to him in a sealed cover with the instructions that the same was to be opened after

² Defendant 2 Smt Basavannemma expired during the pendency of the suit and the fact was noted on the cause-title.

³ Defendant 4 Sri Pampanna (Respondent 3 herein) expired during the pendency of this appeal and his legal representatives were brought on record by the order dated 30-3-2015 [*Shivakumar v. Sharanabasappa*, 2015 SCC OnLine SC 1869].

⁴ Defendant 6 Gurushantappa expired on 13-10-2001. He was a trustee of the trust in question and no substitution was made in his place. The name of Defendant 7 Veerabasappa was deleted from the array of parties before the High Court on 24-7-2006. Defendant 8 has remained on record as Respondent 5 in this appeal.

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his death, only in the presence of Swamiji. The contested will was allegedly opened after the sudden demise of the testator and his wife in the presence of Swamiji on 29-5-1994.

3.7. Relevant exhibited documents:

3.7.1. Ext. P-2: Will cancellation deed 26-9-1990 whereby, the testator cancelled an earlier will executed by him in the year 1974.

3.7.2. Ext. P-3: Handwritten draft of the will said to have been prepared by the testator and kept in the sealed cover with the executed will.

3.7.3. Ext. P-4: The contested will dated 20-5-1991.

3.8. Suit properties:

3.8.1. Schedule A: Consisting of the parcels of land in Sy. No. 631 and Sy. No. 632. These were in the name of the testator's wife as per the relevant records.

3.8.2. Schedules B, C & D: Consisting of shops and houses; admittedly they belonged to the testator.⁵

Summary of the pleadings, issues and evidence

4. Having taken note of the persons and the properties involved in the matter, we may now summarise the pleadings of the parties, the issues framed by the trial court, and the evidence led by the parties for appreciating the respective findings of the trial court and the High Court.

The plaint

4.1. The appellant-plaintiffs filed the suit aforesaid seeking declaration and injunction with the averments, inter alia, that Schedule A to D properties were owned and possessed by the testator Sri Sangappa Shettar of Koppal; that Schedule A properties, being the parcels of land, were standing in the name of the testator's wife Mahantamma but were purchased by him. It was averred that on 20-5-1994, the testator Sangappa Shettar and his wife died in a car accident on the national highway between Hubli-Shiggoan. It was also averred that both of them died issueless as the children born to them had died in infancy. The plaintiffs further pointed out the relations of the parties with the testator and alleged that the testator was earlier joint with his family but, in or around the year 1964, a partition took place and thereafter, he remained separate until his demise. The plaintiffs asserted that their mother Mahadevamma was the sister of the wife of testator; that the testator Sri Sangappa, out of love and affection, brought up the plaintiffs by keeping them in his house; that the marriage of the plaintiffs' father (PW 1) was performed by the testator in the year 1972; and that the deceased testator also requested the father of the plaintiffs to assist him in the business. The plaintiffs further averred that the deceased testator executed a will in the year 1974 but, being disillusioned by the behaviour of legatees, he cancelled the same on 26-9-1990. The plaintiffs pointed out that the

⁵ The testator owned several other properties too that were not mentioned in the will, and hence, are not a part of the suit properties.

deceased testator was the Chairman of Sri Gavisiddeshwara V.V. Trust, Koppal and ardent devotee of Sri Gavisiddeshwara Swamiji of Koppal. The plaintiffs also averred that the deceased testator changed the name of the business from Gurukrupa Stores to Gurukrupa Traders.

4.1.1. The plaintiffs further averred that on 20-5-1991, the testator Sri Sangappa Shettar executed a will bequeathing Schedule A properties in favour of the plaintiffs jointly; Schedule B property in favour of Plaintiff 1; Schedule C property in favour of Plaintiff 2; and Schedule D property in favour of Plaintiff 3 whereas his remaining properties were directed to be kept intact and the plaintiffs were directed to apply those properties for charitable purposes. The plaintiffs asserted that the deed of the will in question was executed by the deceased voluntarily and in sound state of mind; and after due execution, he kept the will in a sealed cover and deposited the same with Sri Bhusanoormath, Advocate (PW 8) with directions to open the same after his death in the presence of Swamiji. According to the plaintiffs, after the death of the testator Sangappa, PW 8 Bhusanoormath, Advocate intimated about the will and the same was opened on 29-5-1994 in the presence of Swamiji.

4.1.2. The plaintiffs maintained that the relationship between the deceased testator and the defendants was not cordial until his death; however, the deceased bequeathed a house to Defendant 3 so that she may reside therein. The plaintiffs alleged that the defendants were well aware about the will executed by the testator and yet created the trust in question which was, in any case, not of any adverse effect on the rights of the plaintiffs who had become owners of the suit properties by virtue of the will executed by the testator. With these averments, the plaintiffs sought declaration against the trust so created by the defendants as also on their ownership rights over the properties in question and further for injunction against the defendants.

The written statement by Defendant 1 as adopted by Defendants 2 to 6 and 8

4.2. The contesting defendants refuted the plaint averments and contended, inter alia, that the suit was not maintainable under the provisions of Section 92 of the Code of Civil Procedure, 1908 ("CPC"); that the trust in question was not impleaded as party; and that the description of suit properties was not correct.

4.2.1. While stating that both Sri Sangappa and his wife died in the vehicular accident that took place at about 3.15 p.m. on 20-5-1994, these defendants stated that their dead bodies were identified after about 18 hours; and that Defendants 1 to 3 performed their last rites. The allegation regarding partition was denied.

4.2.2. The contesting defendants further denied the assertions that the plaintiffs were brought up by Sangappa and maintained that the plaintiffs were living with their father and mother in a rented house. The contesting defendants alleged that the relations between the deceased and the father of the plaintiffs were strained; and that father of the plaintiffs was, in fact, running the business in the name of Sri Karibasavashwar Trading Co. opposite to the place of business of the deceased Sangappa that was running in the name of Gurukrupa Traders.

4.2.3. While questioning the will propounded by the plaintiffs, the contesting defendants alleged that the plaintiffs are interested in the properties of the deceased and had forged the will with ulterior motives. These defendants denied that the deceased prepared the will and kept the same in the sealed cover and deposited it to the advocate with instruction to open the same in the presence of Swamiji. The contesting defendants recounted various suspicious circumstances concerning the will in question while alleging, inter alia, that the will did not bear the signature of deceased Sangappa; that there was a mismatch in Hindi calendar date with that of English calendar; that the past events were stated in the will in such a way that they would happen in future; that various blanks were left in the description of the properties and even otherwise, the description was incorrect; that the amount bequeathed to Rajeshwari and Siddabasemma was not shown; and that the description of the properties under the will was inconsistent, incorrect and incomplete.

4.2.4. The contesting defendants also alleged that after the death of Sangappa and his wife, they became Class II heirs of the deceased Sangappa according to the Hindu Succession Act and the trust was created for implementation of the noble thoughts of the deceased. The contesting defendants also alleged that the declaration of the trust on 28-5-1994 was prior to the creation of the deed of disputed will, which was allegedly opened on 29-5-1994. It was also alleged that Defendant 7 started acting against the interest of the trust and he was removed from the trust by way of a resolution.

The written statement by Defendant 7—supporting the plaintiffs

4.3. Defendant 7 filed a separate written statement, essentially admitting the claim of the plaintiffs. This defendant stated that he was a close associate of the deceased in running Gavisiddheshwar College; and that he was acquainted with the handwriting of the deceased. According to this defendant, after the demise of Sri Sangappa, the advocate met him and informed about the trust with religious and charitable objects to be formed out of the properties not bequeathed. Further, one day he stopped for paying respect to Swamiji near the house of Principal Mallikarjun Somalapur; and the advocate informed Swamiji about the will left by the deceased; and Swamiji instructed that the will be given effect to, which may give peace to the departed soul.

4.3.1. Defendant 7 further stated that the advocate handed him over a xerox copy of the will and he was convinced about its genuineness after examining the same and after enquiring from the attesting witnesses; and he also found that the draft was in the handwriting of the deceased. This defendant also referred to the proceedings of the meeting of the trust on 10-6-1994, where a suggestion was made that the legatees under the will should go and establish their claim in the court of law but he asserted that the will should be given effect to as, according to him, litigating against the plaintiffs was equivalent to asserting a false case that the deceased had not executed his will and therefore, he disassociated himself from the trust.

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Issues

4.4. On the pleadings of the parties, the trial court framed the following issues for determination of the questions involved in the matter:

“1. Whether the plaintiffs prove that the deceased Sangappa bequeathed the suit properties in their favour under the will deed dated 20-5-1991?

2. Whether Defendants 1 to 5 prove that the Commission Agency shop business was kept joint in the partition of 1954, held during the lifetime of father of deceased Sangappa?

3. Whether the suit is not maintainable for not impleading Sri Sangappa Pamapna Gadadshettar Trust, Koppal, as a party to the suit?

4. Whether the suit is not properly valued and court fee paid is not correct?

5. Whether the plaintiffs are entitled for the relief of declaration that the trust created under the name Sri Sangappa Pampanna Gandshettar Trust, Koppal, is illegal, void and not binding on them?

6. Whether Plaintiffs 1 to 3 are entitled for the relief of declaration that they are the joint owners of Suit A schedule properties?

7. Whether Plaintiff 1 is entitled for the relief of declaration that he is the owner of Suit B schedule properties?

8. Whether Plaintiff 2 is entitled for the relief of declaration that he is the owner of Suit C schedule properties?

9. Whether Plaintiff 3 is entitled for the relief of declaration that she is the owner of Suit D schedule properties?

10. Whether the plaintiffs are entitled for the consequential relief of perpetual injunction against the defendants?

11. Whether the defendants are entitled for exemplary costs of Rs 30,000?

12. What decree or order?”

Evidence

4.5. In order to prove their case, the plaintiffs examined as many as 8 witnesses, the material among them being their father Sri Basetteppa (PW 1); the two attesting witnesses of the will in question Sri Radhakrishnarao (PW 3) and Sri Ayyanagowda Hiregowdar (PW 4); and the advocate Sri Bhusnoormath (PW 8), to whom the will was allegedly handed over in a sealed cover and who opened the cover in the presence of Swamiji. The plaintiffs also produced 17 documents including Ext. P-2: the will cancellation deed 26-9-1990 whereby, the testator cancelled the earlier will executed by him in the year 1974; Ext. P-3: handwritten draft of the will said to have been prepared by the testator and kept in the sealed cover with the executed will; and Ext. P-4: the contested will dated 20-5-1991. The defendants examined 2 witnesses and produced 16 documents.

Findings of the trial court

5. It is but apparent that the pivotal question in this case had been as to whether the deceased Sangappa bequeathed the suit properties in favour of the plaintiffs under the will dated 20-5-1991?

6. The trial court took up Issues 1 and 6 to 10 together and found that the will in question was executed in accordance with Section 63 of the Succession Act, 1925 (hereinafter referred to as “the Succession Act”) and the same was proved as per the requirements of Section 68 of the Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”); and the plaintiffs got the rights as claimed thereunder. The relevant aspects of the findings of the trial court could be summarised as follows:

6.1. The trial court held that all the circumstances establishing that PW 8 was handed over the cover containing the will in question and its draft and of his opening the same before Swamiji on 29-5-1994 cannot be suspected as he had no personal gain from the plaintiffs and had no enmity with the defendants.

6.2. The trial court further held that PW 3 and PW 4 have given the details about the will but it was not necessary that they would meticulously know the contents of the will; that both have unanimously spoken about the deceased Sangappa having shown them the typed will, himself having read out the contents, and having signed before them. The trial court yet further observed that neither was the will drafted nor was it got typed in the presence of the attesting witnesses and everything was ready for execution and therefore, any more details regarding typing of will of the deceased were not expected. The trial court found that the will in question was duly identified by the said witnesses as Ext. P-4 and the signatures of Sangappa were also identified as Exts. P-4(a), (b) and (c); the signature of PW 3 was at Ext. P-4(d) and that of PW 4 at Ext. P-4(f). The signatures of other two witnesses were also identified as Ext. P-4(e) and Ext. P-4(g). Thus, according to the trial court, the mode of proof as provided under Section 68 of the Evidence Act stood duly complied with.

6.3. The trial court also noticed and recounted various features which, in its opinion, lend credence to the factum of existence of the will in question. The trial court observed, inter alia, that the draft of the will was prepared in the handwriting of the deceased as Ext. P-3; that PW 1 was a relative of the deceased who had been helping the deceased in business and was acquainted with the handwriting and signature of the deceased; and thus, the handwriting and signature were identified as per Section 47 of the Evidence Act. The trial court also observed that the draft was in the cover containing the executed will and there was no chance to open the sealed cover; and that even if the will did not contain all what was written in Ext. P-3, it was not a ground to raise any suspicion.

6.4. The trial court further observed that the fact that the deceased had taken help of PW 1, a distant relative, in presence of close relative like Defendant 1 and his sons, was sufficient to hold that there was no love lasting between the deceased and Defendant 1 and his sons. The trial court observed that

indisputably, the earlier will, executed in the year 1974, was cancelled in the year 1990 but therein too, Defendant 1 and his family had not been given anything; and the intention of the deceased was clear that he was not willing to give anything to Defendant 1 and his family. The trial court also referred to the fact that Defendants 2 and 3, the sisters of the deceased, did not come before the court to speak against the will in question.

6.5. As regards connectivity of the deceased with the plaintiffs, the trial court referred to the fact that in the admission forms of Plaintiff 1 pertaining to the years 1991-92 and 1993-94 for IUC classes in Gavisiddheshwar College, Koppal, the deceased had signed in place of the guardian; and as per the address given in those applications, he was staying in Warkar Galli c/o Sangappa Gadedshetter. Hence, the allegations of the defendants that the plaintiffs were staying separately were rejected. The trial court observed that even if father and mother of the plaintiffs were later on staying separately due to difference of opinion in women-fold, the fact remained that, prior to the year 1993, the plaintiffs and their parents were staying with the deceased as seen by the voter lists (Exts. P-12 to P-16) of Koppal Town pertaining to years 1975 to 1993.

6.6. As regards the state of mind of the deceased, the trial court observed that the deceased was in sound state of mind at the time of execution of will; and he died 3 years after making of will and, on the day of his demise, had gone to attend the marriage 100 km away, which showed that he was capable of managing himself. The trial court also observed that some of the discrepancies indicated by the defendants had essentially arisen because of self-scribing of the will and it cannot be said that the deceased was a feeble person.

Discrepancies/Suspicious answered by the trial court

6.7. The trial court also proceeded to deal with some of the discrepancies pointed out by the defendants in the will in question and answered the same as follows:

6.7.1. The trial court observed that the discrepancy in Hindi and English calendar dates, as found in Ext. P-3, cannot be made a ground to disbelieve the entire will, particularly when the date mentioned in the will i.e. 20-5-1991 was falling on Monday and the same had been the statements of PW 3 and PW 4. This discrepancy, according to the trial court was of no bearing on the substance of the matter.

6.7.2. The trial court further observed that absence of property numbers cannot be a ground to hold that the will was a forged one; and that the location of house property either in Warkar Galli or Katarki Road was inconsequential so far as giving effect to the will, as the deceased wanted to give the property with the boundaries mentioned therein. Similarly, the property shown as Item 2 in Schedule D was available with municipal number and was admittedly belonging to the deceased Sangappa. Therefore, according to the trial court, any discrepancy in particulars was of no bearing; and the blanks were also not casting any doubt or suspicion on the will in question. The trial court further observed that certain inconsistencies or certain improper directions may not be called as suspicious circumstances; and that though the description of property

in Para 5 of the will did not disclose the name of the legatee to whom it was bequeathed but, that too was not a circumstance to disbelieve the entire will.

a **6.7.3.** The trial court yet further observed that non-registration of will cannot raise the presumption of forgery and fabrication. The trial court also observed that the reason for keeping the will secret was that the legatees under the earlier will were not respecting the feelings of the deceased and hence, the deceased kept everybody guessing about the contents of his last will.

b **6.7.4.** As regards the suspicious circumstance asserted by the defendants that the deceased had not left anything for his wife in the will executed in the year 1991, the trial court observed that when, apart from the properties shown in the will, the deceased was leaving other properties too, definitely those properties would have gone to his wife and hence, not making the provision for wife in the will was not a ground that could be raised as suspicion. The trial court also observed that in Para 3 of the will, 4 acres of the land of Irkalgada was
c given to Gopur Basaveshwara Temple, which clearly showed that the deceased had given properties to charitable purposes also.

6.7.5. As regards entering of the names of the legatees in the will by the deceased by filing an application to municipality on 4-9-1993 during his lifetime, the trial court observed that such entries were of no legal effect and do not operate against the will in question.

d **6.7.6.** As regards the question raised by the defendants that even the past events were stated in the will as if to happen in future, the trial court observed that in Para 4 of the will, the deceased had stated that Sangappa Uttangi had promised to vacate the shop and godown in the year 1990 and though the wording should have been different when the will was written in the month of May 1991, but such a fact was irrelevant because Uttangi was a tenant and even
e if he had continued, that would not have affected the rights of legatees under the will.

6.8. In relation to the suspicious features pertaining to the documents in question i.e. the draft of the will, Ext. P-3 and the deed of the will, Ext. P-4, the trial court observed that only the strong suspicious circumstances were required
f to be explained by the propounder of the will; and proceeded to dismiss the suspicions suggested by the defendants, with the observations and findings, inter alia, as follows:

6.8.1. The trial court observed that the loose sheets were removed from the exercise notebook and used by the deceased to write the draft but, there was no evidence to show that the entire draft was made on one day; and the deceased
g might have written some pages on some day and some pages on some other day. After noticing that chronological numbers were not available on such loose sheets, the trial court observed that the draft could be used to read the intention and to interpret the will, Ext. P-4 but, it cannot be used to nullify the intention of the deceased. In this sequence, the trial court also observed that the persons challenging the will were not expected to get any property through succession
h because, in the event of the demise of Sangappa alone, the properties would have gone to his wife.

6.8.2. As regards non-examination of the typist, the trial court observed that it was not at all a suspicious circumstance because the will was a secret document and nobody, including the propounders, knew as to where the will was typed. a

6.8.3. Though the very opening recital in the will in question mentioned about the likelihood of an accident but in this regard, the trial court observed that none except the deceased himself could give explanation as to what was the intuition for him to write in the will about accident and death in the accident. b

6.8.4. As regards the document itself (Ext. P-4), the trial court noticed that pp. 1, 2 and 5 of the will were green coloured, whereas the colour of pp. 3 and 4 was not the same but observed that different coloured sheets might have been used by the typist. c

6.8.5. The trial court, of course, noted the features that the signature of the testator on p. 1 of the document in question (Ext. P-4) was made with an ink pen whereas ballpoint pen was used on the next page but, observed in this regard that one of the witnesses had spoken that the ink pen did not write properly so the ballpoint pen was used. The trial court further observed that so far putting the signatures before the witnesses was concerned, there was no doubt that Exts. P-4(a), (b) & (c) were the signatures of the deceased, as proved in the testimonies of the attesting witnesses. The trial court yet further observed that the will was kept by the deceased in sealed cover and this was a strong circumstance to show that the execution of will by the deceased cannot be suspected. d

6.9. In its conclusion, the trial court held that from every angle, the will in question was natural; and the plaintiffs had discharged their burden of proving the same and also dispelled the suspicious circumstances stated by the defendants. The trial court, accordingly, held that overall reading of the will indicated that the deceased had written the same with an intention of bequeathing the properties to the legatees. Issues 1 and 6 to 10 were, therefore, decided in favour of the plaintiffs. e

6.10. The trial court also returned the findings on other issues in favour of the plaintiffs and, accordingly, decreed the suit with declaration and injunction as noticed hereinbefore. f

Reversal by the High Court

7. In appeal by the contesting respondents against the judgment and decree so passed by the trial court, the High Court took note of the material on record as also the rival contentions and framed two points for determination as follows: g

“(i) Whether the plaintiffs proved that the deceased Sangappa bequeathed his properties in their favour under the will dated 20-5-1991?

(ii) Whether the trial court was justified in holding the will dated 20-5-1991 executed by Sangappa as genuine or not?” h

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- 7.1.** In relation to both the points aforesaid, which essentially revolved around the question of genuineness of the will in question, the High Court took note of the principles expounded by this Court in *Indu Bala Bose v. Manindra Chandra Bose*⁶ and *Jaswant Kaur v. Amrit Kaur*⁷ and thereafter, proceeded to examine the basic contentions of the defendants that by its very nature, the will appeared to be a fabricated document. After taking note of the discrepancies in the document itself and other unnatural circumstances as also after analysing the evidence of the star witnesses PW 4 and PW 8, the High Court found that the trial court had erred in deciding the relevant issue in favour of the plaintiffs and, while reversing the findings of the trial court, held that the contested will was not a genuine one. As the consequence, the judgment and decree passed by the trial court were set aside. Of course, as regards the question of possession, the High Court left it open for the contesting defendants to take recourse to appropriate remedies in accordance with law.
- 7.2.** As regards discrepancies in the document in question, about the difference of the colour of the three sheets used and in the alleged signatures of the testator, the High Court meticulously examined the document and recorded its observations and findings as follows: (*Sharanabasappa case*¹, SCC OnLine Kar para 24)
- “24. Keeping the observations of the Hon’ble Supreme Court in view, the will would have to be looked into since it has been strenuously contended by the learned Senior Counsel for the appellant that the very sight of the will would indicate that the same has been fabricated. The original of the will dated 20-5-1991 is marked as Ext. P-4 which is available in the records secured from the Court below. The same is typed in Kannada script on three sheets which are normally used for typing papers which are submitted to Court. The colour of the three sheets are not similar. *The first sheet is light green, the second sheet is very light in colour (almost white) and the third sheet is darker among the three. At the outset, it is clear that all the three sheets are not from the same stock and if the same was got typed from a typist in a normal course as claimed, the sheets could not have been different from one another.* The alleged signature of the testator is found at the bottom of each page on the facing side only. *Though there is typed matter on the reverse side at pp. 2 and 4 the same does not contain signatures. Even the signatures found on the facing sheet are not uniformly affixed.* On first page the signature is more than one inch below the last line of the typed matter and has the appearance of a prefixed signature. The second sheet (p. 3) contains signature near to the typed matter. The last sheet (p. 5) has the signature which is at a distance of about an inch below the last line of the typed matter. The name of the alleged testator typed below the signature has all indications of the same being typed below an existing signature. This is evident from the fact that the name would
- ⁶ (1982) 1 SCC 20
⁷ (1977) 1 SCC 369
¹ *Sharanabasappa v. Shivakumar*, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160

not have been typed so low from the typed matter, particularly when the place “Koppal” and date typed on the left side of the sheet is at a lesser distance from the typed matter and are not in alignment with each other. The space provided for signature of four witnesses seems very unnatural and even in that circumstance the name of the alleged testator would not have been typed so low if it was a natural typing on a blank sheet. *The first page and last page have been signed using fountain ink pen but the pen used is not similar to one another. The second sheet is signed by a ballpoint pen.* The pattern of signatures if compared with the earlier admitted will dated 29-6-1990 which was registered but later revoked, which is marked as Ext. P-1 would indicate uniform pattern immediately below the written matter without any gap and even a small correction has been attested, whereas in the propounded will, blanks have been left. *It does not require a detective like Sherlock Holmes to notice these discrepancies which are visible to naked eye and the very sight of the will does not inspire confidence that it could be genuine.”* (emphasis supplied)

7.3. The unusual feature of the use of different instruments while making three signatures on the same document came up for its fuller exposition when the High Court proceeded to examine the explanation sought to be furnished by PW 4. While rejecting the testimony of this witness PW 4, the High Court observed and found, inter alia, as under: (*Sharanabasappa case*¹, SCC OnLine Kar para 27)

“27. In this background, the discrepancies in the signatures and the different pens which were used also assumes importance. In this regard PW 4, Sri Ayyanagowda Hiregowdar who claims to be one of the attesting witness of the will in his cross examination admitted that Ext. P-4(a) is the signature with ink pen, except Ext. P-4(c) being the signature with ball pen and again signature Ext. P-4(b) is by ink pen and he has also stated that the signatures in Exts. P-4(a) and (b) have been made by the very same pen. He has further stated that both the pens were available with the testator. He has sought to explain the same by stating that while signing the third page the ink pen was not working, this explanation is palpably false and cannot be believed for the reason that the first page has been signed by fountain ink pen and the third page again has been signed by the fountain ink pen whereas the second page has been signed by a ballpoint pen. Hence this would not only indicate the incorrect statement but would certainly indicate the unnatural circumstances that a person would be so careless while signing a document in the nature of a will which is fully known to him that it is a document regarding which he would not be available to explain the situation. One other reason for which the said explanation cannot be believed is that *if the fountain ink pen used by the testator was really not working after affixing the signature on the first page, it cannot be understood as to how he could have signed the second sheet with the ballpoint pen and thereafter once again sign the third sheet with the*

¹ *Sharanabasappa v. Shivakumar*, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160

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a fountain ink pen more so, when the ink pen used in the first sheet and the third sheet are not similar to one another. That apart the signatures of the so called attesting witnesses to the will would indicate that the same have been made with fountain ink pen and the said ink of these signatures are much fresher than the signatures of the alleged testator.” (emphasis supplied)

b 7.4. The High Court also rejected the contentions of the plaintiffs that the alleged discrepancies could not take away the validity of the will as it was produced by PW 8 and the sealed envelope was opened in the presence of Swamiji. The High Court pointed out that the very assertion, about availability of the handwritten draft of the proposed will, Ext. P-3 in the sealed envelope along with the alleged executed will, Ext. P-4, was that of another unnatural feature because if the testator had himself completed and executed the will in the presence of witnesses, there was no reason to place the incomplete handwritten draft in the envelope. The High Court proceeded to observe that c such feature gave strong indication that the plaintiffs had been able to place their hands on an incomplete draft and have fabricated the will using blank sheets signed by the testator at different times; and only to make it appear authentic, the story of the envelope containing the draft was weaved. While rejecting the story about the availability of the sealed envelope with the advocate, PW 8 and its opening before Swamiji, the High Court also pointed out that the advocate d concerned, PW 8, was known to the testator as also to the father of the plaintiffs PW 1 inasmuch as he had indeed appeared in his professional capacity on behalf of PW 1. Moreover, and as noticed, in regard to the assertion of the plaintiffs and the witnesses that the cover containing the will was opened before Swamiji, the High Court observed that the said Swamiji was a very important and material witness in this case but the plaintiffs never took any steps to get his statement e recorded.

f 7.5. After taking note of the aforesaid inexplicable features, unnatural circumstances, unreliability of the witnesses of the plaintiffs and the fact that no steps were taken by the plaintiffs to get recorded the statements of a material witness, namely, the said Swamiji, the High Court also took note of the approach of the trial court and did not approve the same while observing, inter alia, as under: (*Sharanabasappa case*¹, SCC OnLine Kar para 28)

g “28. The said discrepancies though noticed have been sought to be explained by the learned Single Judge of the Court below in a manner as though to overcome the same wherein the learned Judge states that the difference in the colour of the papers cannot be suspected because it could have been used by the typist. The learned Single Judge further holds that it cannot be suspected since the said papers contain the signatures and the signatures have been identified by the witnesses. As noticed by us above, the very signatures itself are doubtful that it has been affixed after the matter was typed and the explanations given by the witnesses are even more doubtful and as such the learned Judge could not have lightly brushed aside h these aspects.”

1 *Sharanabasappa v. Shivakumar*, 2007 SCC OnLine Kar 509 : ILR 2007 Kar 5160

7.6. In view of the above, the High Court allowed the appeal and set aside the judgment and decree of the trial court. Hence, the unsuccessful plaintiffs have preferred this appeal.

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Rival contentions

8. Assailing the judgment of the High Court, the learned Senior Counsel for the appellant-plaintiffs has strenuously argued that the High Court has seriously erred in setting aside the findings of the trial court, which were based on due appreciation of the consistent evidence of the material witnesses. The learned counsel has contended that the facts are amply established on record that on 20-5-1991, the testator executed the will in question in accordance with the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act with his signatures and with attestation by more than two witnesses who had seen the testator signing the will. According to the learned counsel, the testator was in sound and disposing state of mind while voluntarily executing the will, as required by Section 59 of the Succession Act. PW 3 and PW 4 deposed before the trial court that the testator himself showed the typed will and put his signatures on the same; and the will was duly attested by PW 3 and PW 4. Hence, the requirements of Section 68 of the Evidence Act are fulfilled. The learned counsel has referred to the decision in *H. Venkatachala Iyengar v. B.N. Thimmajamma*⁸ and has contended that with all the legal requirements being fulfilled and there being no reason to ignore or disbelieve the will, the trial court had rightly decreed the suit and the High Court has not been justified in upsetting the considered decision of the trial court.

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8.1. The learned Senior Counsel has contended that the appellants have dispelled all suspicious circumstances qua the will in question; that as per Section 74 of the Succession Act, it is not necessary that technical words be used in the will; and what is necessary is only that the intention of the testator ought to be set out in the will. According to the learned counsel, Ext. P-3, the handwritten draft, makes the intention of the testator clear that he wanted to bequeath his properties to the appellants. Further, PW 5 and Defendant 7 have clearly identified the signature of the testator. The learned counsel would urge that with the intention of the testator having been amply established on record, some blanks in the will or some other minor inconsistencies cannot take away the substance thereof, particularly when the properties could be identified with the help of the boundaries. The learned counsel has referred to the decisions in *Indu Bala Bose v. Manindra Chandra Bose*⁶ and *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar*⁹. The learned counsel has further contended that exclusion of any legal heir from the will is not a suspicious circumstance and has referred to the decision in *Uma Devi Nambiar v. T.C. Sidhan*¹⁰.

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⁸ AIR 1959 SC 443

⁶ (1982) 1 SCC 20

⁹ 1995 Supp (2) SCC 664

¹⁰ (2004) 2 SCC 321

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a **8.2.** The learned Senior Counsel has further strenuously argued that it had not been the contention of the respondents that the document in question was drawn on blank signed papers and the observation of the High Court that the document in question was drawn on blank signed papers does not find support in the evidence and pleadings on record. In this regard, the learned counsel has relied upon the decision in *Mahesh Kumar v. Vinod Kumar*¹¹.

b **8.3.** In the last and in the alternative, the learned Senior Counsel has argued that if at all the High Court found the want of requisite evidence, the proper course was to exercise the power of remand under the provisions of Order 41 Rule 23-A CPC. The learned counsel has contended that the High Court being the first court of appeal, ought to have given the opportunity to the appellants to adduce proper additional evidence, considering the fact that the findings were being made on suspicious circumstances other than those raised by the defendants in their pleadings and evidence. The learned counsel has referred to and relied upon the decision in *Mohan Kumar v. State of M.P.*¹²

c **9.** Per contra, the learned counsel for the contesting respondents has duly supported the judgment of the High Court with reference to the reasonings and observations therein. The learned counsel has also argued that right from the beginning, it had been the case of the respondents that the propounded will was nothing but a fabricated document and it is incorrect to say that particular objection had not been taken by the respondents. The learned counsel has referred to the decision in *K. Laxmanan v. Thekkayil Padmini*¹³.

Points for determination

10. In view of the submissions made, the following points essentially arise for determination in this case:

e **10.1.** (1) As to whether the High Court was right in reversing the decision of the trial court and in holding that the contested will was not a genuine document?

10.2. (2) As to whether the High Court ought to have considered remanding the case to the trial court?

f ***Will — proof and satisfaction of the Court***

g **11.** As noticed, the basic point for determination in this case is as to whether the High Court was justified in taking a view contrary than that of the trial court and in holding that the will propounded by the plaintiffs is not the genuine will of the deceased Sangappa. Determination of this point, obviously, revolves around the legal principles applicable to the making of a testamentary document like will, its proof, and its acceptance by the Court.

11.1. The will being a rather solemn document that comes into operation after the death of the testator, special provisions are made in the statutes for making of a will and for its proof in a court of law. Section 59 of the Succession Act provides that every person of sound mind, not being a minor, may dispose

h ¹¹ (2012) 4 SCC 387 : (2012) 2 SCC (Civ) 526

¹² (2017) 4 SCC 92 : (2017) 2 SCC (Civ) 368

¹³ (2009) 1 SCC 354 : (2009) 1 SCC (Civ) 158

of his property by will. A will or any portion of a will, the making of which has been caused by fraud or coercion or by any such importunity that has taken away the free agency of the testator, is declared to be void under Section 61 of the Succession Act; and further, Section 62 of the Succession Act enables the maker of a will to make or alter the same at any time when he is competent to dispose of his property by will. Chapter III of Part IV of the Succession Act contains the provisions for execution of unprivileged wills (as distinguished from privileged wills provided for in Chapter IV).

11.2. Section 63 of the Succession Act, relevant for the present purpose, reads as under:

“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 of 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.”

11.3. Elaborate provisions have been made in Chapter VI of the Succession Act, in Sections 74 to 111, for construction of wills which, in their sum and substance, make the intention of legislature clear that any irrelevant misdescription or error is not to operate against the will; and approach has to be to give effect to a will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, when the will is surrounded by suspicious circumstances, the Court would expect that the legitimate suspicion should be removed before the document in question is accepted as the last will of the testator.

11.4. As noticed, as per Section 63 of the Succession Act, inter alia, requires that the will ought to be attested by two or more witnesses. Hence, any document propounded as a will cannot be used as evidence unless at least one attesting witness has been examined for the purpose of proving its execution, if such witness is available and is capable of giving evidence as per the requirements of Section 68 of the Evidence Act, that reads as under:

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence

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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:

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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.”

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11.5. The learned counsel for the appellant has referred to the decision in *H. Venkatachala Iyengar*⁸. It is noticed that in paras 18 to 22 of the said decision, this Court has synthesised and condensed almost the entire panorama relating with execution and proof of a will and the guiding principles for a court while examining the document which is propounded as a will. These passages in the said three-Judge Bench decision of this Court could be usefully reproduced as under: (AIR pp. 451-52, paras 18-22)

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“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 proved 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*

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⁸ *H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443

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*

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a 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 such legitimate doubts in the matter.

b 21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally 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. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasises that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

e 22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. *It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence.* It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson*¹⁴, 'where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth.' It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect." (emphasis supplied)

11.6. The learned counsel for the appellant has referred to paras 7 and 8 of the decision of this Court in *Indu Bala Bose*⁶ which may also be taken note of as under: (SCC pp. 22-23)

“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.¹⁵

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.”* (emphasis in original and supplied)

11.7. In *P.P.K. Gopalan Nambiar*⁹, the will in question was a registered one and the endorsement made by the Registrar showed that the testator was in a sound disposing state of mind and the will was executed out of the testator’s free will. It was also found that the testator died 8 years after registration of the will and though legatee propounded the will in his written statement, but no plea was taken by the opposite party to question the validity of the will. The will was duly proved with examination of the attesting witness. In the given circumstances,

⁶ *Indu Bala Bose v. Manindra Chandra Bose*, (1982) 1 SCC 20

¹⁵ See *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529; *H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426 : 1959 SCJ 507; *Purnima Debi v. Khagendra Narayan Deb*, AIR 1962 SC 567 : (1962) 3 SCR 195 : (1962) 1 SCJ 725

⁹ *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar*, 1995 Supp (2) SCC 664

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the fact that whole of the estate was given to one son under the will while depriving two daughters, was not considered to be a suspicious circumstance.

a On the requisite approach, this Court said as under: (SCC pp. 665-66, para 5)

b “5. Under these circumstances, the suspicion which excited the mind of the District Munsif is without any basis and he picked them from his hat without fact-foundation. The Subordinate Judge had rightly considered all the circumstances and upheld the will. The High Court, without examining the evidence, by merely extracting legal position set out by various decisions of this Court has upset the finding of the fact recorded by the Subordinate Judge in one sentence. It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. *But there must be real, germane and valid suspicious features and not fantasy of the doubting mind.*” (emphasis supplied)

c 11.8. In *Uma Devi Nambiar*¹⁰, this Court reviewed the case law dealing with the will to a large extent and, while referring to the Constitution Bench decision of this Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*¹⁶, observed that merely because the natural heirs have either been excluded or lesser share had been given to them, by itself, will not be considered to be a suspicious circumstance. This Court observed, inter alia, as under: (*Uma Devi*
d *Nambiar case*¹⁰, SCC pp. 332-34, paras 15-16)

e “15. Section 63 of the Act deals with execution of unprivileged wills. It lays down that 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. It further lays down that the will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator and each of the witnesses shall sign the will in the presence of the testator. Section 68 of the Indian Evidence Act, 1872 (in short “the Evidence Act”) mandates examination of one attesting witness in proof of a will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a
f case based upon a will has been examined in considerable detail in several decisions of this Court. ... A Constitution Bench of this Court in *Shashi Kumar Banerjee case*¹⁶ succinctly indicated the focal position in law as follows: (AIR p. 531, para 4)

g “4. ... The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian 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

h
10 *Uma Devi Nambiar v. T.C. Sidhan*, (2004) 2 SCC 321
16 AIR 1964 SC 529

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. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the 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 signature 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 suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes 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.'

16. A will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in earlier reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a will. It is true that a propounder of the will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar*⁹, it is the duty of the propounder of the will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstances, the court has to give effect to the will, even if the will might be unnatural in the sense that it has cut off wholly or in part near relations. ... In *Rabindra Nath Mukherjee v. Panchanan Banerjee*¹⁷, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

⁹ 1995 Supp (2) SCC 664

¹⁷ (1995) 4 SCC 459

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11.9. In *Mahesh Kumar*¹¹, this Court indicated the error of approach on the part of the High Court while appreciating evidence relating to the will in the following: (SCC pp. 405-406, paras 44-46)

a “44. The issue which remains to be examined is whether the High Court was justified in coming to the conclusion that the execution of the will dated 10-2-1992 was shrouded with suspicion and the appellant failed to dispel the suspicion? At the outset, we deem it necessary to observe that the learned Single Judge misread¹⁸ the statement of Sobhag Chand (DW 3) and recorded something which does not appear in his statement. While Sobhag Chand categorically stated that he had signed as the witness after Shri Harishankar had signed the will, the portion of his statement extracted in the impugned judgment gives an impression that the witnesses had signed even before the executant had signed the will.

b
c 45. Another patent error committed by the learned Single Judge is that he decided the issue relating to validity of the will by assuming that both the attesting witnesses were required to append their signatures simultaneously. Section 63(c) of the 1925 Act does not contain any such requirement and it is settled law that examination of one of the attesting witnesses is sufficient. Not only this, while recording an adverse finding on this issue, the learned Single Judge omitted to consider the categorical statements made by DW 3 and DW 4 that the testator had read out and signed the will in their presence and thereafter they had appended their signatures.

d
e 46. The other reasons enumerated by the learned Single Judge for holding that the execution of the will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and preparation of the draft by Shri S.K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If Respondent 1 wanted to show that the will was drafted by the advocate after Shri Harishankar and the attesting witnesses had signed blank papers, he could have examined or at least summoned Shri S.K. Agarwal, Advocate, who had represented him before the Board of Revenue.”

f
g **11.10.** In *K. Laxmanan*¹³, this Court, with reference to the settled principles including those in *Shashi Kumar Banerjee*¹⁶ re-emphasised on the requirement that the propounder has to prove the legality of execution of the will as also the genuineness thereof by proving the testamentary capacity of the testator as

11 *Mahesh Kumar v. Vinod Kumar*, (2012) 4 SCC 387 : (2012) 2 SCC (Civ) 526

h 18 *Vinod Kumar v. Mahesh Kumar*, FA No. 118 of 2003, order dated 22-7-2004 (MP)

13 *K. Laxmanan v. Thekkayil Padmini*, (2009) 1 SCC 354 : (2009) 1 SCC (Civ) 158

16 *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529

also his signatures and further by proving absence of suspicious circumstances. This Court, inter alia, said: (*K. Laxmanan case*¹³, SCC p. 361, paras 18-19)

“18. ... The propounder has to prove the legality of the execution and genuineness of the said will by proving absence of suspicious circumstances surrounding the said will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.” a

19. When there are suspicious circumstances regarding the execution of the will, the onus is also on the propounder to explain them to the satisfaction of the court and only when such responsibility is discharged, the court would accept the will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions 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 suspicion should be completely removed before the document is accepted as the last will of the testator.” b
c
d

11.10.1. In *K. Laxmanan*¹³, this Court also explained the principles governing the pleadings in such matters while observing, inter alia, as under: (SCC p. 363, para 28)

“28. It is however established in the present case that the issue of validity of the execution of both the deed of gift and deed of will was taken up by the respondent-plaintiff and specifically denied in the affidavits filed in respect of the injunction applications. *The parties have also gone to trial knowing fully well that execution of both these documents is under challenge. Parties knowing fully the aforesaid factual position led their evidence also to establish the legality and validity of both the documents. In that view of the matter, it cannot be said that the said document should be deemed to be admitted by the plaintiff as no replication was filed by the plaintiff.*” (emphasis supplied) e
f

11.11. We may also usefully refer to the principles enunciated in *Jaswant Kaur*⁷ for dealing with a will shrouded in suspicion, which were duly taken note of by the High Court in its impugned judgment¹⁹, as follows: (*Jaswant Kaur case*⁷, SCC p. 373, para 9) g

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple *lis* between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a

13 *K. Laxmanan v. Thekkayil Padmini*, (2009) 1 SCC 354 : (2009) 1 SCC (Civ) 158 h

7 *Jaswant Kaur v. Amrit Kaur*, (1977) 1 SCC 369

19 *Surjitinder Singh v. Jaswant Kaur*, 1975 SCC OnLine P&H 48 : AIR 1975 P&H 377

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a matter of the court's conscience and then *the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.*" (emphasis supplied)

b 12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

c 12.1. 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.

d 12.2. 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.

e 12.3. 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.

f 12.4. 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.

g 12.5. 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.

h 12.6. 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".

12.7. 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 abovenoted 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 circumstances 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.

12.8. 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?

12.9. 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.

Suspicious circumstances/features concerning the will in question

13. Having considered the present matter in its totality while keeping the principles aforesaid in view, we have not an iota of doubt that the High Court has examined the matter in its correct perspective and there had been substantial and material reasons for which, the decision of the trial court could not have been upheld; and the High Court has rightly reversed the same.

14. In summation of the lengthy discussion of the trial court, it could be noticed that some of the major factors which weighed with the trial court in rejecting the objections of the contesting defendants against the will in question had been:

14.1. That the testator Sangappa was not having warmth of relations with Defendant 1 and his family and was not willing to give anything to them.

14.2. That even in the earlier will of the year 1974, Sangappa had not bequeathed any property to the contesting defendants.

14.3. That the plaintiffs, the grandnephews of testator’s wife, were residing with the testator.

14.4. That the father of the plaintiffs was associated with the testator in his business and other dealings.

14.5. That the attesting witnesses were only the customers of the testator and were naturally chosen as independent persons to stand as witnesses to the will.

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14.6. That the will in question was in possession of PW 8 and was opened by him in the presence of Swamiji.

a **14.7.** That PW 8 had neither any animosity with the defendants nor was gaining anything from the will.

b **14.8.** As regards the discrepancies indicated by the defendants, the trial court took the view that mere misdescription of the property was of no effect, particularly when its identification was not in doubt; and for this very reason, the trial court found the blank spaces as regards the particulars of the property to be of no effect. As regards mentioning of a past event as something to happen in future, the trial court found that it had no adverse bearing on the validity of the will because existence of a tenant in the property was not going to affect the rights of the testator as also his legatees. As regards the statement in the will about likelihood of accident, the trial court observed that the reason for making such a recital was known to the testator alone. On the suspicious factors *c* concerning the document itself, the trial court observed that use of the sheets of paper of different colours could be attributed only to the typist who was not known to propounders. The trial court further found that the inconsistency regarding the dates from the Hindi calendar and English calendar were of no effect because the day of execution of the will was Monday, as stated by the witnesses. Further, the trial court found that the making of signatures by the *d* testator by different pens on different pages was duly explained by the witness PW 4.

e **15.** The High Court, on the other hand, felt dissatisfied with the document itself and found no explanation on record about numerous unnatural circumstances dilated upon and discussed by it in some of the passages extracted hereinbefore. Having examined the material placed on record, in our view, the observations and findings of the High Court remain unexceptionable.

f **16.** Taking up the document itself, it is not in dispute that the same is carrying 5 typed pages on 3 different sheets of papers, which are definitely not of the same colour. It had been noticed by the trial court as also by the High Court, and it remains indisputable, that the said papers are of different colours and have not been picked up from the same stack. Use of 3 different sheets of paper for typing a document of will running in 5 pages (with first and second paper being typed on both sides) is, in any case, not a normal action by a normal person in normal circumstances. True it is that this aspect could have been cleared only by the typist and the propounders are not expected to know the typist, particularly when they had not participated in execution and attestation of the document but, this circumstance is enough to indicate that the *g* matter calls for closer scrutiny with due regard to all the surrounding factors because, ordinarily, such document would be typed in one sitting and on the papers drawn from the same stack.

h **16.1.** Proceeding further, another feature surfaces, which was found by the High Court (though not discussed by the trial court). This feature is about the placement of the signatures of the testator on 3 pages, where it is apparent that on the first and the last page, the distance of signatures from the typewritten

contents is excessive than usual or natural. It is not in dispute that this feature also emanates from a bare look at the document in question.

16.2. The aforementioned two features, by themselves, may not be of material bearing but this much is clear that they stand at contradistinction to the ordinary course of dealings and give rise to legitimate suspicions about the genuineness of document. Now, the suspicion arising from the aforesaid two features is confounded by another factor that though the document carries 3 signatures of the testator, the same are not made from the same pen. It has been noticed, and again it remains indisputable, that while the signature of the testator at p. 1 are from an ink pen, that at p. 3 is from a ballpoint pen and then, again at p. 5, it is from an ink pen. The witness PW 4 has attempted to say that for the ink pen being not working properly, ballpoint pen was used. It sounds utterly unnatural and remains inexplicable that if the ink pen was not working and the second signature was made from a ballpoint pen, as to how and why the third signature, that is, the last one, was again made from another ink pen? It had not been the explanation of the attesting witnesses that after making the signature at p. 3, the ballpoint pen also stopped working and, therefore, another ink pen was used for making the third signature. We may observe that even when the possibility of the testator using different pens or instruments for his signatures on different pages of the same document is not ruled out altogether and even this fact, by itself, may not be decisive of the matter but, this much is certain that such happening cannot be categorised as normal or natural in the course of execution of a document of will.

16.3. Therefore, in the present case, three features of the document, Ext. P-4, carrying unusual characteristics of their own, manifest themselves on the face of the record and nothing but a bare look at the document is sufficient to notice them. The aforesaid three unnatural and unusual features of the document in question, where different sheets of paper have been used; where placement of the signatures of the testator at least at two places is beyond normal distance from the last typed matter; and where in making of three signatures, at least two different pens were used, make it clear that a deeper probe is called for to find as to whether this document could at all be accepted as the last will of the testator.

16.4. When the exploration is pushed slightly further, another major feature comes to the fore, which has been noticed by the High Court but which escaped the attention of the trial court altogether. The document in question is said to be a will running in 5 pages which is typed (in Kannada script) on 3 sheets of papers with the first and second sheets carrying the typewritten contents on both sides; p. 2 being typed on the backside of p. 1 and p. 4 being typed on the backside of p. 3. The significant feature is that p. 2 and p. 4 of this document, Ext. P-4 do not carry any signature at all!

16.4.1. It is apparent on the face of the record that even when the front facing pages i.e. pp. 1, 3 and 5 carry the signatures of the testator, the backside pages i.e. p. 2 and p. 4 are not signed at all and have gone unsigned. When this material aspect is added to the abovereferred three unusual features, the

a probative value of this document, Ext. P-4 is shaken to the core and it becomes a serious question as to whether this document could be considered to be a will that was got typed and signed by the testator in the presence of the alleged attesting witnesses.

b **16.4.2.** In relation to this aspect of want of signatures of the testator on p. 2 and p. 4, we may also observe that as per the requirement of clause (b) of Section 63 of the Succession Act, the signature or mark of the testator is to be so placed that it shall appear that by such signature or mark, the intention was to give effect to the writing as a will. Of course, when no specific form of making a will is provided, in a given case, depending on the relevant facts and circumstances, a document drawn on several sheets but carrying signature only at the end may also be accepted as a genuine will where the document was authenticated by only one signature. However, the scenario like the present one, where the executant had purportedly signed 3 out of 5 typewritten pages while c omitting to sign the other 2, definitely stands at contradistinction to the dealing of any normal person in normal way. When the signatures of the testator are indeed available on pp. 1, 3 and 5, it is difficult to find any plausible explanation for his omission to sign at p. 2 and p. 4 of the same document. The only explanation could be that the testator chose to sign the front face of each paper and did not consider it necessary to sign on the backside of the paper. However, d accepting such a frail explanation, and that too in the face of other unusual features (as noticed hereinbefore), would tantamount to thrusting the probative value into the document while ignoring everything that is incongruous to, and incompatible with, the normal course of happenings.

e **16.4.3.** The indisputable fact that p. 2 and p. 4 of the document in question (Ext. P-4) do not carry the signatures of the testator whereas other pages do carry his signatures, in our view, places the document in conflict with, or at least non-compliant with, the requirement of clause (b) of Section 63 of the Succession Act. The document in question could be rejected outright for this reason alone. However, having regard to the circumstances of the case, it would be appropriate to deal with other factual aspects concerning the document in question before reaching to the final conclusion.

f **16.5.** The discussion thus far makes it clear that at least four unusual features of the document in question are evident on the face of the record. To recapitulate, the disturbing unusual features of the document in question are that:

- g (i) it is typewritten on 3 different sheets of paper;
- (ii) the placement of signatures of the testator is not of uniformity and excessive space is seen between the typewritten contents and the signatures on p. 1 and p. 5;
- (iii) different pens have been used for signatures on different pages with ink pen having been used for first and third signatures (on p. 1 and p. 5) and ballpoint pen having been used for the second signature (on p. 3); and
- h (iv) all the typewritten pages do not carry the signatures of the testator, with there being no signature on p. 2 and p. 4.

It does not require any great deal of elaboration that in the ordinary, normal and usual course, such a typewritten document is expected to be on the sheets of paper drawn from the same stack; there would be reasonable uniformity in placement of the signatures running through the document and every signature would be placed alongside or at a reasonable distance from the contents; a single pen or instrument would be used for signing at all places; and, ordinarily, a maker of the will would not leave such ambiguity in expression of his intention as would arise by his signing 3 pages and not signing 2 other pages of the same document. In fact, in the normal and ordinary course of dealing, the maker of a will is least expected to leave any page of the document unsigned. Although existence of some such unusual features (as noticed above) cannot be ruled out during the course of typing and signing of the document but when all such unusual features combine together, the document becomes too vulnerable and cannot be readily accepted as a genuine document.

17. While proceeding further, we may usefully reiterate the principles relating to the examination of a document propounded as will that the document is not approached with doubts but is examined cautiously and with circumspection. From what has been noticed hereinabove, the document in question carries several such features of unusualness which travel into the realm of abnormalities. The matter does not rest with such abnormalities only. These abnormal features get confounded with other unusual features available in the contents of this document. Indisputably, several blank spaces are found in relation to the particulars of the properties and even some of the properties are not correctly described. Yet further, the dates mentioned in the document with reference to Hindi calendar and English calendar do not match. Yet another curious feature is the recital in the document of a past event (about vacating of the shop by the tenant in the year 1990) in the manner that such event shall happen in future. Therefore, the abnormalities relating to paper, pen and signature get magnified with blank spaces in the document as also with incorrect and inexplicable recitals.

18. The problems relating to the probative value of the document, Ext. P-4 do not end with the aforementioned abnormal features and curious factors. A close examination of this document takes us from abnormalities to mysteries too. In the opening passage of this document, the recital is to the effect that the testator was making the will because so many accidents do happen. The fact remains that the testator and his wife both died in the car accident on 20-5-1994 but, it would require travelling into an entirely mystical region to accept that while making the will on 20-5-1991, the testator had the premonition that he would perish in a vehicular accident.

19. As noticed, even when a fishing enquiry with digging of the faults and lacuna is not to be resorted to while examining a will but, and at the same time, the real and valid suspicions which arise because of anything standing beyond normal happening or conduct cannot be ignored either. Ignoring or brushing aside all the features noticed in relation to the document in question would require taking up an individual feature and ignoring it as being trivial or minor and then, proceeding with the belief that it had only been a matter

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a of chance that all the abnormalities somehow chose to conglomerate into this one document. Such an approach would, obviously, be detached from realities and cannot be adopted. It needs hardly any emphasis that examination of a document propounded as will has to be on the norms of reality as also normalcy; and the overall effect of all the features and circumstances is required to be examined.

b **20.** When all the aforesaid abnormal, curious and rather mysterious circumstances are put together, the inescapable conclusion is that the document in question cannot be accepted as the last will of the testator. The unexplained, unusual and abnormal features pertaining to the document only lead to the logical deduction that the document in question was prepared after the demise of the testator with use of blank signed papers that came in possession of the propounders and their associates. The High Court has stated such deduction after thorough examination of the material on record and, in our view, rightly so.

c It is noticed that all the features and factors indicated hereinabove are very much available on the face of the record. However, the trial court, even while dealing with several contentions in excessive details, either failed to notice some of the features indicated above or simply brushed aside the particular feature carrying abnormality with the observations to the effect that the propounders were not to be expected to remove the suspicions concerning the document when they had

d no role in its execution. The trial court having, obviously, misdirected itself on several of the key and pivotal factors, its decision could not have been approved.

e **20.1.** It is sought to be contended on behalf of the appellants that using of blank papers had not been the objection taken by the defendants. The contention remains bereft of substance for the simple reason that the defendants indeed asserted that the document in question was a fabricated one. The likelihood of it being drawn on the available blank papers with signatures of the testator is nothing but a deduction that logically comes out of the examination of the document in question.

f **21.** Much emphasis is laid on behalf of the appellants on the submissions that execution of the will in accordance with the requirements of Section 63 of the Succession Act and Section 68 of the Evidence Act has been duly established on record with the testimony of the attesting witnesses as also the witness with whom the will along with the handwritten draft of the will had been deposited by the testator. The submissions so made on behalf of the appellants cannot be accepted for the reason that mere proof of the document in accordance with the requirements of Section 68 of the Evidence Act is not

g final and conclusive for acceptance of a document as a will. When suspicious circumstances exist and the suspicions have not been removed, the document in question cannot be accepted as a will.

h **22.** Even the aspect suggested on behalf of the plaintiffs and their witnesses that the document in question (Ext. P-4) was drawn up as a will and was placed in a sealed cover with the handwritten draft (Ext. P-3) has its own shortcomings and the share of abnormalities. It remains indisputable that the said draft (Ext. P-3) had remained incomplete. It may be assumed that the same

was being drawn up by the testator in his own handwriting for finally making his last will after he had revoked the earlier will but, it had remained incomplete draft only. If the testator himself had got his will typed and then, took care to have it executed in the presence of 4 attesting witnesses; and if he intended such executed document to operate as his will; and also had the intention that his will be kept in a sealed cover to be opened before Swamiji, in the ordinary course of dealings, it was least expected of him to put the said incomplete draft also in the envelope because placing of such incomplete draft could have only created confusion in regard to the actual will, if there were any. Taking an overall view of the matter, the preponderance of probability is only to the effect that the entire story about execution of will by the deceased Sangappa has been cooked up with use of readily available signed papers (though of different sheets of paper and with signatures with different instruments) and, in order to suggest some authenticity, the story of sealed envelope and leaving of the same with PW 8 was sought to be inserted. This feature only operates against the plaintiffs where it carries another unexplained unusualness.

23. The trial court had largely been swayed by the fact that the deceased Sangappa was not inclined to give any property to Defendant 1 and his family as had been the case of the earlier will executed by him in the year 1974. Admittedly, the said will of the year 1974 was cancelled by Shri Sangappa on 26-9-1990. He perished in the vehicular accident on 20-5-1991. Whether he intended to bequeath any property to the defendants or not is hardly of any bearing in relation to the suspicious circumstances noticed above.

24. Having dilated on various major features which, individually and cumulatively, lead only to the conclusion that the document in question cannot be accepted to be the last will of late Shri Sangappa, it does not appear necessary to discuss several other shortcomings in the case of the plaintiffs, including various other factors like that the plaintiffs never took steps to get the statement of the said Swamiji recorded, who was otherwise referred to by all the material witnesses as being the person before whom the document was allegedly opened.

25. In our view, the document in question falls flat at the very first question indicated in *H. Venkatachala Iyengar*⁸, that is, as to whether the testator signed the will in question. The answer to this question is only in the negative. This is apart from the fact that the document in question, propounded as a will, is non-compliant with the requirements of clause (b) of Section 63 of the Succession Act.

25.1. In the ultimate analysis, we are satisfied that the High Court was right in reversing the decision of the trial court and in holding that the contested will was not a genuine document.

Whether remand was called for

26. Taking up the other point for determination, the submission of the learned counsel for the appellants that the High Court ought to have considered remanding the case by taking recourse to the provision contained

⁸ *H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443

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in Order 41 Rule 23-A CPC, in our view, remains totally bereft of substance; this submission has only been noted to be rejected.

- a **26.1.** The procedure relating to appeals from original decrees (usually referred to as “regular first appeal”) is provided in Order 41 of the Code of Civil Procedure, 1908 and therein, various provisions relating to hearing of an appeal, remand of case, remitting of issues for trial, production of additional evidence in appellate court, etc. are contained in Rules 16 to 29 under the sub-heading “Procedure on hearing”. For their relevance, we may take note of the provisions contained in Rules 23, 23-A, 24 and 25 of Order 41 CPC as follows:

- b **“23. Remand of case by appellate court.**—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

- c **23-A. Remand in other cases.**— Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

- d **24. Where evidence on record sufficient, appellate court may determine case finally.**—Where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the appellate court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate court proceeds.

- e **25. Where appellate court may frame issues and refer them for trial to Court whose decree appealed from.**—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate court essential to the right decision of the suit upon the merits, the appellate court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the appellate court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate court or extended by it from time to time.”

- f **26.2.** Rule 23-A came to be inserted in Order 41 CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the appellate court has the inherent power of remanding

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a a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23-A in Order 41 by the amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the appellate court shall have the power of remand, if a retrial is considered necessary.²⁰

b **26.3.** A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23-A of Order 41 is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate court proceeds on a ground entirely different from that on which the trial court had proceeded.

c **26.4.** A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. d An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of e a case.

f ²⁰ Such powers of remand, as provided in Rules 23 and 23-A of Order 41, are different than the power of the appellate court to remit an issue for findings under Rule 25. The power of remitting is ordinarily to be resorted to when the trial court has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case where the trial court, while disposing of the suit on merits, had failed to determine one or more of the material issues/questions, is to remit the issue/question(s) under Rule 25 and not to remand the whole case for retrial. Ordinarily, in the case of an order under Rule 25 of Order 41, the matter is retained on the file of the appellate court and only the issue/question(s) are remitted to the trial court for findings. On the other hand, when an order of remand is made under Rule 23 or Rule 23-A, the whole case goes back for decision to the trial court except on the point on which the appellate court has returned concluded finding, if any. While making a remand under Rule 23 or Rule 23-A, the judgment and decree of the trial court is required to be set aside but it is not necessary to set aside the impugned judgment and decree when taking recourse to Rule 25 of Order 41. g h

- 26.4.1.** The decision cited by the learned counsel for the appellants in *Mohan Kumar*¹² is an apt illustration as to when the appellate court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The trial court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the trial court was not challenged by the defendants but as against the part of the decision of the trial court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed²¹ the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the appellant-plaintiff had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed that when the High Court held that the appellant was not able to prove his title to the suit land due to nonexamination of his vendor, the proper course for the High Court was to remand the case to the trial court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for retrial was made out particularly when the trial court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case.

26.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of the trial court are reversed and a retrial is considered necessary by the appellate court.

- 26.6.** The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the appellant-plaintiffs that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As noticed, there had been several suspicious circumstances surrounding the will in question, some of which were noticed by the trial court but were brushed aside by it on untenable reasons. The High Court has meticulously examined

¹² *Mohan Kumar v. State of M.P.*, (2017) 4 SCC 92 : (2017) 2 SCC (Civ) 368

²¹ *Mohan Kumar v. State of M.P.*, FA No. 3 of 1998, order dated 24-1-2005 (MP)

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the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the trial court. The contention in this regard is required to be, and is, rejected.

Conclusion

27. From what has been discussed hereinabove, we are satisfied that the High Court has rightly interfered with the decision of the trial court and has rightly held that the document in question cannot be accepted as the genuine will of the deceased Sangappa; and there was no reason for the High Court to remand the case to the trial court.

28. Accordingly, and in view of the above, this appeal fails and is, therefore, dismissed while leaving the parties to bear their own costs throughout.

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THE SUPREME COURT CASES

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3-Judge
Bench

2020
Aug. 11

(BEFORE ARUN MISHRA, S. ABDUL NAZEER AND M.R. SHAH, JJ.)

VINEETA SHARMA

.. Appellant;

Versus

RAKESH SHARMA AND OTHERS

.. Respondents.

Civil Appeal No. ... Diary No. 32601 of 2018[†] with
SLPs (C) Nos. 35994 of 2015[‡], 684 of 2016^{††}, 38542 of
2016^{‡‡}, 6403 of 2019^{††}, 14353 of 2019^{‡‡}, 24901 of 2019^{†††}
and 1766-67 of 2020^{††‡}, decided on August 11, 2020

A. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Daughter's right in coparcenary property under substituted S. 6 of the HS Act, 1956 — Daughter born before date of enforcement of the 2005 Amendment Act — Held, has same rights as daughter born on or after the amendment — Non-requirement of coparcener father to be alive on date of coming into force of the said amendment, explained

— Held, if daughter is alive on date of enforcement of Amendment Act, 2005 i.e. 9-9-2005, she becomes a coparcener with effect from date of Amendment Act (i.e. 9-9-2005) irrespective of whether she was born before the said amendment — Provisions in substituted S. 6 of the HS Act confer status of coparcener on daughter born before or after the amendment in the same manner as son with same rights and liabilities — Rights under substituted S. 6 can be claimed by daughter born prior to the amendment, with effect from date of amendment (9-9-2005) with saving of past transactions as provided in proviso to S. 6(1) r/w S. 6(5) of the HS Act

[†] Arising from the Final Judgment and Order in *Vineeta Sharma v. Rakesh Sharma*, 2018 SCC OnLine Del 9092 (Delhi High Court, RFA No. 301 of 2017, dt. 15-5-2018)

[‡] Arising from the Final Judgment and Order in *Poonam v. Fulchand*, 2015 SCC OnLine Bom 8682 (Bombay High Court, Second Appeal No. 303 of 2014, dt. 1-4-2015)

^{††} Arising from the Judgment and Order in *Lokamani v. Mahadevamma*, 2015 SCC OnLine Kar 8642 : ILR 2015 Kar 5095 (Karnataka High Court, RFA No. 58 of 2014, dt. 7-9-2015)

^{‡‡} Arising from the Final Judgment and Order in *Sistla Sarada Devi v. Uppaluri Dasaradha Ramaiah* (Hyderabad High Court, Civil Revision Petition No. 5063 of 2010, dt. 13-4-2016)

^{†††} Arising from the Final Judgment and Order in *Kumar Hanmantagouda v. Channavva*, 2017 SCC OnLine Kar 6453 (Karnataka High Court, RFA No. 4182 of 2013, dt. 23-1-2017)

^{‡‡‡} Arising from the Final Judgment and Order in *V.L. Jayalakshmi v. V.L. Balakrishna*, 2018 SCC OnLine Kar 3863 (Karnataka High Court, Regular Second Appeal No. 646 of 2018, dt. 29-8-2018)

^{††††} Arising from the Final Judgment and Order in *Yadavrao Rodkuji Thakre v. Indubai*, 2019 SCC OnLine Bom 12675 (Bombay High Court, Second Appeal No. 623 of 2018, dt. 24-4-2019)

^{†††‡} Arising from the Final Judgment and Order in *B.K. Padmavathi v. B.K. Ganesh*, 2019 SCC OnLine Kar 3084 (Karnataka High Court, RFA No.1582 of 2010, dt. 10-10-2019)

— Further held, since right in coparcenary of daughter under the substituted S. 6 is by birth, it is not at all necessary that father of daughter should be living as on date of coming into force of the amendment — Daughter now being a coparcener with effect from date coming into force of the of amendment, can claim partition, which is a necessary concomitant of coparcenary — Existence of coparcenary on date of coming into force of the amendment is essential to enable the daughter of a coparcener to enjoy rights conferred on her — In case living coparcener dies after date of coming into force of the amendment, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted S. 6(3)

B. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Conferment of coparcenary rights on daughters by Amendment Act, 2005 — Relevant considerations while interpreting substituted provisions of S. 6(1) of the HS Act, 1956 — How property passes on death — Held, is not relevant — What is significant is how right of a coparcener is acquired under Mitakshara coparcenary — Further held, in construing provisions of substituted S. 6, full effect must be given to those provisions (Paras 74 and 137.4)

C. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Joint Hindu family governed by Mitakshara law — Status/Right conferred on daughters under substituted S. 6 vide the 2005 Amendment Act — Nature of — Acquisition of said status/right by daughters — Mode as to — Right conferred under substituted S. 6(1), held, is not by survivorship but by birth — Survivorship as a mode of succession of property of a Mitakshara coparcener has been abrogated with effect from 9-9-2005 by substituted S. 6(3)

— Now by legal fiction under amended provisions of S. 6 of the HS Act, daughters are treated as coparceners with effect from date of the 2005 Amendment Act i.e. 9-9-2005 — Said provisions make daughter by birth a coparcener in her own right and in the same manner as the son

— What is relevant in this regard is birth within degrees of coparcenary to which it extends — It cannot therefore be inferred that daughter is conferred with right only on death of a living coparcener — Claim based on birth is distinguishable from modes of succession — On basis of such view, contention raised that if father or any other coparcener died before the 2005 Amendment Act, the interest of father or other coparcener would have already merged in surviving coparcenary, and as such there was no coparcener alive from whom daughter would succeed, held, not tenable (Paras 60, 68, 69, 73 to 75 and 80)

D. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Daughter's right in coparcenary property under substituted S. 6 of the HS Act, 1956 — Whether available to adopted daughters — Use of the words "the daughter of a coparcener shall—by birth become a coparcener in her own right in the same manner as the son" in S. 6(1)(a) — Implications of

— Held, there is no dispute with the custom which was prevalent earlier that there could be the adoption of a male child and not that of females — There is no dispute with the proposition that a coparcenary right accrued to males under the then prevalent law by birth or adoption — In the same

manner, right is accrued by birth to the daughter under the provisions of the substituted S. 6 — The legislature in the substituted S. 6 used the term that a daughter becomes coparcener “by birth” — The claim based on birth is distinguishable and is different from modes of succession

— Furthermore, under the substituted S. 6, the right is given to daughters by birth i.e. unobstructed heritage (Paras 75, 48 and 49)

In various SLPs preferred before the Supreme Court, the question concerning the interpretation of Section 6 of the Hindu Succession Act, 1956 (for short “the HS Act, 1956”), as substituted by the Hindu Succession (Amendment) Act, 2005 (for short “the 2005 Amendment Act”), had been referred to a larger Bench in view of the conflicting verdicts rendered in the two Division Bench judgments of the Supreme Court in *Prakash*, (2016) 2 SCC 36 and *Danamma*, (2018) 3 SCC 343. Hence, the present reference.

In *Prakash case*, the Supreme Court held that the amended Section 6 was not retrospective in operation, and it would apply when both the coparcener and his daughter were alive on the date of commencement of the Amendment Act i.e. 9-9-2005. It was further opined that the provision contained in the Explanation to amended Section 6(5) providing for the requirement that partition for purposes of substituted Section 6 must be a registered one or by a decree of a court, would have no application to a statutory notional partition on the opening of succession as provided in the unamended Section 6. It was also opined that the notional statutory partition must be deemed to have taken place to ascertain the share of the deceased coparcener which was not covered either under the proviso to Section 6(1) or Section 6(5), including its Explanation. It was further observed that the registration requirement was inapplicable to partition of property by operation of law, which had to be given full effect. The provisions of Section 6 had been held to be prospective.

In *Danamma case*, the Supreme Court held that the amended provisions of Section 6 conferred full rights upon the daughter coparcener. The Court observed that any coparcener, including a daughter, could claim a partition in the coparcenary property. In that case, one *G* died in the year 2001, leaving behind two daughters, two sons and a widow. The coparcener’s father was not alive when the substituted provision of Section 6 came into force. The daughters, sons and the widow were given 1/5th share apiece.

Answering the reference in the terms below, the Supreme Court

Held :

Section 6 of the HS Act, 1956 deals with devolution of interest in coparcenary property of a joint Hindu family governed by the Mitakshara law. The originally enacted provision of Section 6 excluded the rule of succession concerning Mitakshara coparcenary property. It provided that the interest of a coparcener male Hindu who died after the commencement of the 1956 Act, shall be governed by survivorship upon the surviving members of the coparcenary. The exception was provided by the proviso to Section 6 that if the deceased had left 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 such coparcener shall devolve by testamentary or intestate succession, as the case may be, in order to ascertain the share of deceased coparcener, the partition has to be deemed before his death. Explanation II disentitled the separated person to make any claim in case of intestate succession. (Paras 53 and 58)

The substituted provisions of Section 6(1) of the HS Act, 1956 provide that on and from the commencement of the 2005 Amendment Act, the daughter is conferred the right of a coparcener. 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. (Para 60)

In this way, now by legal fiction, daughters are treated as coparceners. 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 (where right is created by birth) has been given a concrete shape under the provisions of Sections 6(1)(a) and 6(1)(b). Coparcener right is by birth. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive: what is relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. 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. Thus, as the daughter has not been conferred the rights of a coparcener by obstructed heritage (where right depends upon owner’s death), it is not at all necessary that the father of the daughter should be living as on the date of the amendment i.e. 9-9-2005. 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 coming into force of the Amendment Act, 2005. If a daughter is alive on the date of enforcement of the 2005 Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act i.e. 9-9-2005, irrespective of the date of birth earlier in point of time. However, daughter born before can claim these rights only with effect from the date of the amendment with saving of past transactions as provided in the proviso to Section 6(1) read with Section 6(5). (Paras 73, 68, 80, 69, 114, 76 and 77)

The decision in *Bireswar Mookerji*, 1892 SCC OnLine PC 3, was relied upon to contend that adoption is only of a male and not a female as a male becomes a coparcener by birth or adoption. There is no dispute with the custom, which was prevalent earlier that there could be the adoption of a male child and not that of females. There is no dispute with the proposition that a coparcenary right accrued to males under the prevalent law by birth or adoption. In the same manner, right is accrued by birth to the daughter under the provisions of Section 6. The legislature in Section 6 used the term that a daughter becomes coparcener by birth. The claim based on birth is distinguishable and is different from modes of succession. (Para 75)

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Bireswar Mookerji v. Ardha Chunder Roy Chowdhry, 1892 SCC OnLine PC 3 : (1891-92) 19 IA 101; *Amarendra Mansingh v. Sanatan Singh*, 1933 SCC OnLine PC 29 : (1932-33) 60 IA 242 : AIR 1933 PC 155, *held, partly statutorily superseded*

- a* Hence, the concept of “living coparcener”, as laid down in *Prakash*, (2016) 2 SCC 36, is overruled. The daughters should be living on 9-9-2005. In substituted Section 6, the expression “daughter of a living coparcener” has not been used. Right is given under Section 6(1)(a) to the daughter by birth. Declaration of right based on the past event was made on 9-9-2005 and as provided in Section 6(1)(b), daughters by their birth, have the same rights in the coparcenary, and they are
- b* subject to the same liabilities as provided in Section 6(1)(c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of Section 6(1) leave no room to entertain the proposition that coparcener should be living on 9-9-2005 through whom the daughter is claiming. (Para 80)

- c* The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. The coparcenary must exist on 9-9-2005 to enable the daughter of a coparcener to enjoy rights conferred on her. 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). (Para 69)

Resultantly, the reference is answered as under:

- d* (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 20-12-2004.

- e* (iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

- f* (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 1956 Act 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.

- g* (v) In view of the rigour of provisions of Explanation to Section 6(5) of the 1956 Act, 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 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
- h* outrightly. (Para 137)

This question, suits/appeals are pending before different High Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, it is directed that the pending matters be decided, as far as possible, within six months. (Para 138)

In view of the above, the views to the contrary expressed in *Prakash*, (2016) 2 SCC 36 and *Mangammal*, (2018) 15 SCC 662, are overruled. The opinion expressed in *Danamma*, (2018) 3 SCC 343, is partly overruled to the extent it is contrary to this decision. (Para 139)

Prakash v. Phulavati, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549; *Mangammal v. T.B. Raju*, (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300; *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385, partly overruled

Savita Samvedi v. Union of India, (1996) 2 SCC 380 : 1996 SCC (L&S) 521, referred to
Lokamani v. Mahadevamma, (2020) 9 SCC 91, reference answered

Lokamani v. Mahadevamma, 2015 SCC OnLine Kar 8642 : ILR 2015 Kar 5095; *Nagindas Bhugwandas v. Bachoo Hurkissondas*, 1915 SCC OnLine PC 53 : (1915-16) 43 IA 56 : AIR 1915 PC 41; *Nanak Chand v. Chander Kishore*, 1982 SCC OnLine Del 150 : AIR 1982 Del 520; *Garapati Narasimudu v. Pinnamaneni Basava Sankaram*, 1924 SCC OnLine Mad 252 : AIR 1925 Mad 249; *Haridas Narayandas Bhatia v. Devkuvarbai Bhratar Mulji*, 1926 SCC OnLine Bom 76 : AIR 1926 Bom 408; *Anthonyswamy v. M.R. Chinnaswamy Koundan*, (1969) 3 SCC 15; *Baijnath Prashad Singh v. Tej Bali Singh*, 1921 SCC OnLine PC 14 : (1920-21) 48 IA 195 : AIR 1921 PC 62; *Balusu Gurulingaswami v. Balusu Ramalakshamma*, 1899 SCC OnLine PC 5 : (1898-99) 26 IA 113; *Shashikalabai v. State of Maharashtra*, (1998) 5 SCC 332; *S. Sundaram Pillai v. V.R. Pattabiraman*, (1985) 1 SCC 591; *Kanai Lal Sur v. Paramnidhi Sadhukhan*, 1958 SCR 360 : AIR 1957 SC 907; *Prithi Pal Singh Bedi v. Union of India*, (1982) 3 SCC 140 : 1982 SCC (Cri) 642; *Sathyaprema Manjunatha Gowda v. CED*, (1997) 10 SCC 684; *Phulavati v. Prakash*, 2010 SCC OnLine Kar 5310 : (2011) 2 AIR Kant R 121; *Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24; *Shyama Devi v. Manju Shukla*, (1994) 6 SCC 342; *Vaishali Satish Ganorkar v. Satish Kesharao Ganorkar*, 2012 SCC OnLine Bom 116 : AIR 2012 Bom 101; *M. Prithviraj v. Leelamma N.*, 2007 SCC OnLine Kar 553; *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*, 2014 SCC OnLine Bom 908 : AIR 2014 Bom 151; *Danamma v. Amar*, 2012 SCC OnLine Kar 9178, cited

E. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Mitakshara Law — Hindu coparcenary and joint Hindu family — Distinction — Creation of coparcenary/coparcener — Various modes — Test to determine a coparcener

— Held, a Hindu coparcenary is a much narrower body than a joint Hindu family — A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters — Such family is one in worship and holds joint assets — After separation of assets, family ceases to be joint — Mere severance in food and worship is not treated as a separation — On the other hand, coparcenary is creation of law — Coparcener heirs get right by birth — Another method to be a coparcener is by way of adoption — It is by virtue of birth or by way of adoption (within permissible degrees), a person is to be treated as coparcener and not otherwise — Coparcenary consists of propositus and three lineal descendants — Though earlier a woman could not be a coparcener, but she could still be a joint family member — Now by amendment of S. 6 of the HS Act, 1956 w.e.f. 9-9-2005, daughters are recognised as coparceners in their rights, by birth in the family like a son — Since only a coparcener has a right to demand partition, if a person can demand a partition of the coparcenary, he is a coparcener,

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otherwise not — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Words and Phrases — “Coparcenary”, “coparcener”, “joint Hindu family”, “Hindu joint family” (Paras 22, 23, 25 and 73)

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; *SBI v. Ghamandi Ram*, (1969) 2 SCC 33; *CED v. Alladi Kuppaswamy*, (1977) 3 SCC 385 : 1977 SCC (Tax) 480; *Satrughan Isser v. Sabujpari*, AIR 1967 SC 272; *Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287; *Kalyanji Vithaldas v. CIT*, 1936 SCC OnLine PC 68 : (1936-37) 64 IA 28 : AIR 1937 PC 36; *Gowli Buddanna v. CIT*, AIR 1966 SC 1523; *Surjit Lal Chhabda v. CIT*, (1976) 3 SCC 142 : 1976 SCC (Tax) 252; *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh*, (1985) 2 SCC 321, *relied on*

Sunil Kumar v. Ram Parkash, (1988) 2 SCC 77, *affirmed*
Sudarsanam Maistri v. Narasimhulu Maistri, 1901 SCC OnLine Mad 91 : ILR (1902) 25 Mad 149; *Gansavant Balsavant v. Narayan Dhond Savant*, 1883 SCC OnLine Bom 1 : ILR (1883) 7 Bom 467; *Lakshmi Perumallu v. Krishnavenamma*, AIR 1965 SC 825; *Karsondas Dharamsey v. Gangabai*, 1908 SCC OnLine Bom 67 : ILR (1908) 32 Bom 479; *N.V. Narendranath v. CWT*, (1969) 1 SCC 748, *cited*

S.V. Gupte: Hindu Law in British India, 2nd Edn., p. 59; N.R. Raghavachariar: *Hindu Law*, 8th Edn., *cited*

F. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Coparcenary property under Mitakshara Law — Meaning and traits of — Nature of interest of a coparcener in that property and his right to definite share therein

— Held, coparcenary consists of propositus and three lineal descendants i.e. coparcenary property is one which is inherited by a Hindu (w.e.f. 9-9-2005 by male or female Hindu) from his/her father, grandfather or great-grandfather — Property inherited from others is held in his rights and cannot be treated as forming part of coparcenary — In case coparcenary property comes to hands of a single person temporarily, it would be treated as his property, but once a son is born, coparcenary would revive in terms of Mitakshara Law — Property in coparcenary is held as joint owners — Basic concept of coparcenary is based upon common ownership by coparceners — When property remains undivided, share of coparcener is not certain — Coparcener cannot claim any precise share as interest in coparcenary keeps on fluctuating — It increases and diminishes by death and birth in family — Interest of a coparcener is called undivided coparcenary interest — It is only on actual partition a coparcener becomes entitled to a definite share — Words and Phrases — “Coparcenary”, “coparcener”

Sitabai v. Ramchandra, (1969) 2 SCC 544; *CIT v. Raja of Bhore*, (1967) 65 ITR 634 (SC); *Katama Natchier v. Rajah of Shivagunga*, 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543; *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe*, (1986) 1 SCC 366; *Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer*, AIR 1952 SC 72, *relied on*

Sheela Devi v. Lal Chand, (2006) 8 SCC 581; *M. Yogendra v. Leelamma N.*, (2009) 15 SCC 184 : (2009) 5 SCC (Civ) 602; *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe*, (1988) 2 SCC 126; *Vellikannu v. R. Singaperumal*, (2005) 6 SCC 622; *Rohit Chauhan v. Surinder Singh*, (2013) 9 SCC 419 : (2013) 4 SCC (Civ) 377; *Thamma Venkata Subbamma v. Thamma Rattamma*, (1987) 3 SCC 294; *Shankara Coop. Housing Society Ltd. v. M. Prabhakar*, (2011) 5 SCC 607 : (2011) 3 SCC (Civ) 56, *affirmed*

C. Krishna Prasad v. CIT, (1975) 1 SCC 160 : 1975 SCC (Tax) 16; *Approvier v. Rama Subba Aiyar*, (1866-67) 11 Moo IA 75; *A. Viswanatha Pillai v. LAO*, (1991) 4 SCC 17; *Kanta*

Goel v. B.P. Pathak, (1977) 2 SCC 814; *Sri Ram Pasricha v. Jagannath*, (1976) 4 SCC 184; *Pal Singh v. Sunder Singh*, (1989) 1 SCC 444, *cited*

N.R. Raghavachariar: *Hindu Law—Principles and Precedents*, 8th Edn. (1987), *cited*

G. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Daughters by birth becoming coparceners with effect from date of Amendment Act, 2005 i.e. 9-9-2005 — Entitlement of daughters to claim partition of coparcenary with effect from date of amendment i.e. 9-9-2005 — Deemed/Fictional partition under unamended S. 6, or, pendency of final decree proceedings in partition suit or of an appeal arising from that suit — Effect and consequences thereof

— Held, once constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition — Shares will therefore have to be determined in changed scenario — Severance of status cannot come in the way to give effect to statutory provision such as substituted S. 6 and changes by subsequent events

— Statutory fiction of partition (under unamended S. 6) was far short of actual partition — It was meant for a specific purpose — It did not bring about actual partition or disruption of coparcenary — Also, mere severance of status by way of filing a suit does not bring about partition — Till the date of final decree, change in law, and changes due to subsequent events can be taken into consideration

— Thus, notwithstanding that a preliminary partition decree has been passed, daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal — Civil Procedure Code, 1908, S. 54 and Or. 20 R. 18

H. Property Law — Partition — Severance of status by filing of partition suit — Preliminary decree — Effect of — Held, up until pendency of final decree proceedings in partition suit or of an appeal arising from that suit, there is no actual partition and thus, in pending proceedings for final decree or in an appeal, change in law (for e.g. as brought about to S. 6 HSA in 2005), and changes due to subsequent events can be taken into consideration

I. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Partition/Family Arrangement/Settlement — Notional/Deemed partition under S. 6 HSA (prior to its substitution in 2005) — Statutory fiction of partition (under unamended S. 6), held, was far short of actual partition — It was meant for a specific purpose — It did not bring about actual partition or disruption of coparcenary — Also, mere severance of status by way of filing a suit does not bring about partition — Till the date of final decree, change in law, and changes due to subsequent events can be taken into consideration

J. Property Law — Partition — Fictional/Deemed partition under an Act — Meaning, effect and consequences — S. 6 Expln. I of HSA, 1956 as it stood before its substitution in 2005 — Contrast with substituted S. 6(3) w.e.f. 9-9-2005 — Words in said S. 6 Expln. I being “if a partition had taken place” whereas in substituted S. 6(3) being “shall be deemed to have been divided as if a partition had taken place” — Substituted S. 6(3) Expln. being identical with original S. 6 Expln. I — Implications of

K. Statute Law — Deeming Provision/Legal Fiction — Legal fiction — Applicability — Held, cannot be extended beyond the purpose for which it is created

a

Held :

The right to claim partition is a significant basic feature of the coparcenary, and a coparcener is one who can claim partition of the coparcenary. 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 Sections 6(1) and 6(2) of the HS Act (as substituted in 2005), the rights of a daughter are *pari passu* with a son. (Para 85)

b

Shares of coparceners can undergo a change in coparcenary by birth and death unless and until the final division is made. The body of coparcenary is increased by the operation of law as daughters have been declared as a coparcener, full effect is required to be given to the same. What has been recognised as partition by the legislation under amended Section 6 of the HS Act, 1956, accordingly, rights are to be worked out. The provisions of the substituted Section 6 are required to be given full effect. (Paras 87, 114 and 137.4)

c

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 scenario. The severance of status cannot come in the way to give effect to statutory provision and change by subsequent event. (Paras 107 and 103)

d

When the proviso to unamended Section 6 of the HS Act, 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 the Explanation I to Section 6 of the HS Act, 1956 (as it stood prior to amendment in 2005). The fiction of notional partition was meant for a specific purpose. 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 1956 Act or male relative of such female. It was not to bring about the real partition. It was far short of actual partition. Neither did it affect the severance of interest nor demarcated the interest of surviving coparceners or of the other family members, if any, entitled to a share in the event of partition but could not have claimed it. The entire partition of the coparcenary is not provided by deemed fiction; otherwise, coparcenary could not have continued which is by birth, and the death of one coparcener would have brought an end to it. Legal fiction is only for a purpose it serves, and it cannot be extended beyond the purpose for which it has been created. Thus, the statutory fiction of partition created by proviso and Explanation 1 to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The effect of statutory fiction of the proviso and Explanation 1 to Section 6 as discussed in *Prakash*, (2016) 2 SCC 36 and *Danamma*, (2018) 3 SCC 343, is rejected. (Paras 109, 107, 137.4, 78, 71 and 114)

e

f

g

State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, 1954 SCR 53 : AIR 1953 SC 333; *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661; *Man Singh v. Ram Kala*, (2010) 14 SCC 350 : (2012) 1 SCC (Civ) 475, *relied on*

Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver, (1996) 6 SCC 185, *affirmed* *CED v. S. Harish Chandra*, 1986 SCC OnLine All 805 : (1987) 167 ITR 230, *approved*

h

Gyarsi Bai v. Dhansukh Lal, AIR 1965 SC 1055; *CIT v. S. Teja Singh*, AIR 1959 SC 352, *explained*

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SUPREME COURT CASES

(2020) 9 SCC

Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum, (1978) 3 SCC 383; *Anar Devi v. Parmeshwari Devi*, (2006) 8 SCC 656, *explained and distinguished*

Prakash v. Phulavati, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549; *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385, *overruled on this point*

Also, the severance of status may take place from the date of filing of a suit; however, a decree is necessary for working out the results of the same, and there may be a change of rights during the pendency of the suit for allotting definite shares till final decree is passed. There are cases in which partition can be reopened on the ground of fraud or mistake, etc. or on certain other permissible grounds. In appropriate cases, it can be reopened at the instance of minor also. Thus, 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 events can be taken into consideration. The Supreme Court has consistently held in various decisions that when the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law has to be conferred. Thus, 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. (Paras 133, 107, 114 and 137.4)

Kedar Nath v. Ratan Singh, 1910 SCC OnLine PC 17 : (1909-10) 37 IA 161; *Palani Ammal v. Muthuvenkatachala Moniagar*, 1924 SCC OnLine PC 61 : (1924-25) 52 IA 83 : AIR 1925 PC 49; *Mukund Dharman Bhoir v. Balkrishna Padmanji*, 1927 SCC OnLine PC 68 : (1926-27) 54 IA 413 : AIR 1927 PC 224; *Purnananthachi v. T.S. Gopalaswami Odayar*, 1936 SCC OnLine PC 48 : (1935-36) 63 IA 436 : AIR 1936 PC 281; *CIT v. N.K. Sarada Thampatty*, 1991 Supp (2) SCC 737, *relied on*

S. Sai Reddy v. S. Narayana Reddy, (1991) 3 SCC 647; *Prema v. Nanje Gowda*, (2011) 6 SCC 462 : (2011) 3 SCC (Civ) 379; *Ganduri Koteshwaramma v. Chakiri Yanadi*, (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880; *Shub Karan Bubna v. Sita Saran Bubna*, (2009) 9 SCC 689 : (2009) 3 SCC (Civ) 820; *Lakshmi Narayan Guin v. Niranjana Modak*, (1985) 1 SCC 270; *United Bank of India v. Abhijit Tea Co. (P) Ltd.*, (2000) 7 SCC 357, *affirmed*

A.N. Chockalingam Chettiar v. V.T. Sp. Muthukaruppan Chettiar, 1938 SCC OnLine Mad 119 : AIR 1938 Mad 849; *T.S. Ramabadra Odayar v. T.S. Gopalaswami Odayar*, 1930 SCC OnLine Mad 82 : AIR 1931 Mad 404; *Gangabai v. Punau Rajwa Teli*, 1955 SCC OnLine MP 39 : AIR 1956 Nag 261, *approved*

Hari Chand Roach v. Hem Chand, (2010) 14 SCC 294 : (2012) 1 SCC (Civ) 430, *distinguished*
Girja Bai v. Sadashiv Dhundiraj, 1916 SCC OnLine PC 31 : (1915-16) 43 IA 151 : AIR 1916 PC 104 : ILR (1916) 43 Cal 1031; *Kawal Nain v. Budh Singh*, 1917 SCC OnLine PC 25 : (1916-17) 44 IA 159 : AIR 1917 PC 39; *K. Ramalinga Annavi v. Narayana Annavi*, 1922 SCC OnLine PC 13 : (1921-22) 49 IA 168 : AIR 1922 PC 201; *Joala Prasad Singh v. Chandarjot Kuer*, 1938 SCC OnLine Pat 37 : AIR 1938 Pat 278, *limited*

Puttrangamma v. M.S. Ranganna, AIR 1968 SC 1018, *referred to*

S. Narayana Reddy v. S. Sai Reddy, 1990 SCC OnLine AP 12 : (1990) 1 AP LJ 252; *R. Gurubasaviah v. Rumale Karibasappa*, 1954 SCC OnLine Kar 5 : AIR 1955 Mys 6; *Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari*, 1956 SCC OnLine Bom 103 : AIR 1957 Bom 59; *Jadu Nath Ray v. Parameswar Mallik*, 1939 SCC OnLine PC 52 : (1939-40) 67 IA 11 : AIR 1940 PC 11; *Prema v. Nanje Gowda*, 2002 SCC OnLine Kar 428 : AIR 2003 Kar 104; *Phoolchand v. Gopal Lal*, AIR 1967 SC 1470; *Ram Sarup v. Munshi*, AIR 1963 SC 553; *Mula v. Godhu*, (1969) 2 SCC 653; *Dayawati v. Inderjit*, AIR 1966 SC 1423; *Amarjit Kaur v. Pritam Singh*, (1974) 2 SCC 363; *Kristnama Chariar v. Mangammal*, 1902 SCC OnLine Mad 30 : ILR (1903) 26 Mad 91; *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*, 1940 SCC OnLine FC 10 : AIR 1941 FC 5; *Suraj Narain v. Iqbal Narain*, 1912 SCC OnLine PC 50 : ILR (1913) 35 All 80; *Syed Kasam v. Jorawar Singh*, 1922 SCC OnLine PC 21 : (1921-22) 49 IA 358 : ILR (1922) 50 Cal 84, *cited*

L. Family and Personal Laws — Hindu Law — Inference of partition — Requisite proof

- a* — Reiterated, cesser of commonality is not conclusive proof of partition — Merely by reason that members are separated in food and residence for convenience, and separate residence at different places due to service or otherwise, does not show separation — Several acts, though not conclusive proof of partition, may lead to that conclusion in conjunction with various other facts, such as separate occupation of portions, division of income of joint property, definement of shares in joint property in revenue or land registration records, mutual transactions — Evidence Act, 1872, Ss. 101 to 103 (Para 130)
- b* *Bhagwani Kunwar v. Mohan Singh*, 1925 SCC OnLine PC 27 : AIR 1925 PC 132, *relied on* *Digambar Adhar Patil v. Devram Girdhar Patil*, 1995 Supp (2) SCC 428, *affirmed*

- M. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6(5) r/w Explan. thereto [as substituted by the Hindu Succession (Amendment) Act, 2005] — Provision under, exempting those partitions which were effected before 20-12-2004 by a decree of a court or a deed duly registered in terms of Registration Act, 1908 — Intendment of S. 6(5) Explan. and its importance, explained and emphasised**
- c*

- Recognition as to other modes of partition — Power of court — Oral partition — Defence based upon plea as to — Exceptional cases in which may be accepted, carved out — Extreme caution required on the part of court in these exceptional cases in light of intendment of S. 6(5) Explan.**
- d*

- Held, the intendment of the substituted S. 6(5) r/w Explan. thereto is only to accept the genuine partitions that might have taken place under the prevailing law and prevent the setting up of false or frivolous defence based upon plea of oral partition or unregistered memorandum of partition which deprives the daughter of her right as a coparcener under the substituted provisions of S. 6 of the HS Act — This object has to be given full effect to protect the coparcenary rights of daughter**
- e*

- However, having regard to fact that earlier execution of a registered document for partition was not always necessary, and court was rarely approached for sake of family prestige, exception carved out to amended S. 6(5) Explan. by holding that though in view of rigour of provisions of Explan. to S. 6(5), oral partition cannot be accepted as statutorily recognised mode of partition under S. 6(5) Explan. but, 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 been effected by a decree of a court, it may be accepted — Plea of oral partition is thus not to be readily accepted — 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 is available, such a plea may be entertained, but not otherwise — Finding must not be based on preponderance of probabilities in view of provisions of gender justice and rigour of very heavy burden of proof which meet intendment of Explan. to S. 6(5)**
- f*
- g*

- Registration Act, 1908 — S. 17 — Interpretation of Statutes — Particular Statutes or Provisions — Beneficent/beneficial legislation — Object of — Must not be defeated**
- h*

N. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Partition/Family Arrangement/Settlement — Oral partition — When may be accepted for purposes of S. 6(5) Expln. of the HSA Act, as substituted in 2005 — Extreme caution required on the part of court

O. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6(5) r/w Expln. thereto [as substituted by the Hindu Succession (Amendment) Act, 2005] — Partition effected by a decree of a court or a deed duly registered in terms of Registration Act, 1908, as saved under S. 6(5) r/w Expln. thereto of HS Act, 1956 — Meaning, scope and proof as to

— Held, partition effected by a decree of a court would mean giving of final effect to actual partition by passing a final decree — Partition made by execution of deed duly registered under Registration Act, 1908, also refers to completed event of partition, not merely intendment to separate — Court to find out whether partition is actually carried out as per intendment of substituted provisions of S. 6 of the HSA, 1956

— Even if partition is supported by a registered document, it is necessary to prove that it had been given effect to and acted upon and is not otherwise sham or invalid — In case partition had been worked out finally in toto as if it would have been carried out in the same manner as if effected by a decree of a court, it can be recognised, but not otherwise — Words and Phrases — “Partition”, “partition effected by a decree of a court” (Para 136)

Held :

The protection of rights of daughters as coparcener is envisaged in the substituted Section 6 of the HS Act, 1956 recognising the partition brought about by a decree of a court or effected by a registered instrument. The partition so effected before 20-12-2004 is saved. (Para 134)

A special definition of partition has been carved out in the Explanation to Section 6(5) of the HS Act, 1956. 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 requirement of substituted Section 6(5) is stricter to rule out unjust deprivation to the daughter of the coparcener's right. (Paras 135 and 128)

Thus, 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 the 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

- a 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. It is reiterated 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. It is said so for exceptionally good cases where partition
- b is proved conclusively and the courts are cautioned that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigour of very heavy burden of proof which meets the intentment 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. However, an exception is carved out by the Supreme Court herein as earlier execution of a registered document for partition was not necessary, and the court was rarely
- c 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. Even before 1956, partition in other modes than envisaged under Section 6(5) had taken place. There being a clear legislative departure with respect to proof of partition which prevailed earlier, the court may recognise the other mode of partition in exceptional cases based upon continuous evidence for a long time in the shape of public document
- d not mere stray entries then only it would not be in consonance with the spirit of the provisions of Section 6(5) and its Explanation. (Paras 135, 124 and 136)

- e Resultantly, although in view of the rigour of provisions of the Explanation to Section 6(5) of the HS Act, 1956, a plea of oral partition cannot be accepted as the statutorily 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, 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 been effected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and has to be rejected outrightly. (Para 137.5)

- f *Kale v. Director of Consolidation*, (1976) 3 SCC 119; *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar*, (1974) 2 SCC 156; *Chinthamani Ammal v. Nandagopal Gounder*, (2007) 4 SCC 163; *Rukhmabai v. Laxminarayan*, AIR 1960 SC 335; *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh*, (1969) 1 SCC 386; *Kalwa Devadattam v. Union of India*, AIR 1964 SC 880, *considered*
Tek Bahadur Bhujil v. Debi Singh Bhujil, AIR 1966 SC 292, *cited*

- g **P. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Substituted S. 6 only enlarges the rights of daughters — Rights of other relatives remain unaffected as prevailed in proviso to S. 6 as it stood before amendment**

Held :

- h Under the proviso to Section 6 before the amendment made in the year 2005 in case a coparcener died leaving behind female relative of Class I heir or a male descendant claiming through such Class I female heir, the daughter was one of them. Section 6, as substituted, presupposes the existence of coparcenary. It is only the case of the enlargement of the rights of the daughters. The rights of other

relatives remain unaffected as prevailed in the proviso to Section 6 as it stood before amendment. (Para 70)

Q. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Conferment of coparcenary rights on daughter thereunder — Unamended S. 6 proviso, explained and held, has no effect thereon

— Submission based on unamended S. 6 proviso that if the father or any other coparcener died before the Amendment Act, 2005 leaving behind a Class I female heir, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and thus, there would be no coparcener alive from whom the daughter would succeed, rejected — This is because it is not by the death of the father or other coparcener that rights accrue to the daughters under the substituted S. 6 — Rather, it is by the factum of birth — Proviso to S. 6 as originally stood, contained an exception to the survivorship right — Right conferred under substituted S. 6(1) is not by survivorship but by birth — Thus held, even if the father had died before the coming into effect of the substituted S. 6, the proviso to the unamended S. 6 does not come in the way of formation of a coparcenary and becoming of a coparcener by daughters w.e.f. 9-9-2005 (Para 74)

R. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6(3) [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Survivorship as a mode of succession of property of a Mitakshara coparcener, held, has been abrogated with effect from 9-9-2005 by the substituted S. 6(3) (Para 74)

S. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Coparcenary property — Right to alienate/sell without partition or consent of other coparceners — Scope of — Transfer of Property Act, 1882, Ss. 44, 7 and 54

Held :

It is settled proposition of law that without partition, only undivided share can be sold but not specific property, nor joint possession can be disrupted by such alienation. Whether the consent of other coparcener is required for sale or not, depends upon by which School of Mitakshara law, parties are governed, to say, in Benares School, there is a prohibition on the sale of property without the consent of other coparceners. (Para 87)

Hardeo Rai v. Sakuntala Devi, (2008) 7 SCC 46, *distinguished*

SBI v. Ghamandi Ram, (1969) 2 SCC 33, *cited*

T. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Mitakshara coparcenary — Unobstructed and obstructed heritage — Meaning and concept of, explained

— When right is created by birth, it is called unobstructed heritage — In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue, it is called obstructed heritage — It is so called because in this case accrual of right is obstructed by owner's existence and it takes place only on his death — Under S. 6 of the Hindu Succession Act, 1956 (as substituted in 2005), right is given by birth i.e. unobstructed heritage — It is not obstructed heritage depending upon owner's

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death — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005] — Words and Phrases — “Obstructed heritage”, “unobstructed heritage” (Paras 48 and 49)

Mohd. Husain Khan v. Babu Kishva Nandan Sahai, 1937 SCC OnLine PC 48 : (1936-37) 64 IA 250 : ILR 1937 All 655 : 169 IC 1 : AIR 1937 PC 233; *Om Parkash v. Sarvjit Singh*, 1993 SCC OnLine HP 36 : AIR 1995 HP 92; *Sirtaji v. Algu Upadhyay*, 1936 SCC OnLine Oudh CC 112 : ILR (1937) 12 Luck 237 : 163 IC 935 : AIR 1936 Oudh 331, *cited*

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U. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Partition/Family Arrangement/Settlement — Presumption of jointness in a Hindu family — Separation of one coparcener — Effect of, on status of non-separating members

— Held, generally every Hindu family is presumed to be joint unless contrary is proved — If one coparcener has separated, it is open to non-separating members to remain joint and to enjoy as members of a joint family — No express agreement is required to remain joint — It may be inferred from how their family business was carried on after one coparcener was separated from them — Whether there was a separation of one coparcener from all other members of a joint family by a decree of partition, the decree alone should be looked at to determine the question (Para 131)

Palani Ammal v. Muthuvenkatachala Moniagar, 1924 SCC OnLine PC 61 : (1924-25) 52 IA 83 : AIR 1925 PC 49; *Girijanandini Devi v. Bijendra Narain Choudhary*, AIR 1967 SC 1124; *Hari Bakhsh v. Babu Lal*, 1923 SCC OnLine PC 1 : (1923-24) 51 IA 163 : AIR 1924 PC 126, *relied on*

V. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Hindu Women, Property Rights of — Coparcenary property governed by Mitakshara law — Right of wife of a coparcener to claim her share in eventuality of partition — Effect on, if any, of amendment made in S. 6 of the Hindu Succession Act, 1956 vide Amendment Act, 2005 — Hindu Succession Act, 1956, S. 6 (as amended in 2005)

Held :

In the eventuality of a partition, apart from sons 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 by the amended provisions of Section 6 of the Hindu Succession Act, 1956. (Para 85)

W. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005] — Coparcenary rights conferred on daughters w.e.f. 9-9-2005 — Plea that such conferment causes uncertainty — Rejected — Held, law of Mitakshara coparcenary makes the share of surviving coparceners uncertain till actual partition takes place — Uncertainty in the right of share in a Mitakshara coparcenary is thus inhered in its underlying principles — There is no question of upturning it when daughter is treated like a son and is given the right by birth, to be exercised from a particular date i.e. 9-9-2005

— It does not resurrect the past but recognises an antecedent event for conferral of rights prospectively — Hence, contention that if daughter is given right to be a coparcener by birth and deemed to become a coparcener at any

point in the past, in normal working of law uncertainty would be caused, held, not tenable (Para 78)

X. Family and Personal Laws — Hindu Law — Family Property, Succession and Inheritance — Adoption and Coparcenary/Joint Family Property/Parents' Property — Adoption by widow of deceased coparcener — Relates back to date of her husband's death, subject to saving the alienations made in intermittent period (Para 72)

Y. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Provisions under — Nature and applicability — Held, are of retroactive application i.e. they confer benefits based on the antecedent event i.e. rights given by birth, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener — They are not retrospective i.e. do not affect or reopen concluded transactions and neither take away nor impair vested rights acquired under existing laws

Z. Statute Law — Retrospective/Retroactive operation/Retrospectivity — Prospective, retrospective and retroactive statutes — Operation of — Determination as to — Retroactive operation distinguished from retrospective operation — General Clauses Act, 1897 — S. 6 — Words and Phrases — "Retroactive" distinguished from "retrospective"

Held :

Though the rights conferred on the daughter under the amended Section 6 of the HS Act, 1956 can be claimed, w.e.f. 9-9-2005, the provisions are of retroactive application: they confer benefits based on the antecedent event i.e. rights given by birth, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. The provisions contained in Section 6(4) also make it clear that provisions of Section 6 are not retrospective as the rights and liabilities thereunder are both from the commencement of the Amendment (Paras 60, 61 and 66)

G. Sekar v. Geetha, (2009) 6 SCC 99 : (2009) 2 SCC (Civ) 747; *Sheela Devi v. Lal Chand*, (2006) 8 SCC 581, *considered and partly affirmed*

G. Sekar v. Geetha, 2007 SCC OnLine Mad 98 : (2007) 2 CTC 17, *cited*

The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier i.e. characteristics or events which happened in the past or requisites which had been drawn from antecedent events. (Para 61)

Darshan Singh v. Ram Pal Singh, 1992 Supp (1) SCC 191, *relied on*

Gokal Chand v. Parvin Kumari, AIR 1952 SC 231; *Garikapati Veeraya v. N. Subbiah Choudhry*, AIR 1957 SC 540; *Jose Da Costa v. Bascora Sadasiva Sinai Narcornim*, (1976) 2 SCC 917; *Govind Das v. CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133; *Henshall v. Porter*, (1923) 2 KB 193; *United Provinces v. Atiqa Begum*, 1940 SCC OnLine FC 11 : AIR 1941 FC 16, *cited*

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ZA. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005] — Discrimination against daughters under unamended provision — Held, has

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been done away with vide Amendment Act, 2005 by providing the daughters equal treatment in matter of inheritance with Mitakshara coparcenary

a — Constitution of India — Art. 14 — Particular statutes and rules — Hindu Succession Act, 1956, S. 6 (as it stood prior to its amendment in 2005) (Paras 54, 57 and 71)

b ZB. Family and Personal Laws — Hindu Succession Act, 1956 — S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005 w.e.f. 9-9-2005] — Sea-change brought by Amendment Act, 2005 — Reiterated (Paras 53, 58, 60, 66, 65, 56 and 67)

c ZC. Family and Personal Laws — Hindu Law — Generally — Origin and Sources/Hindu Law Texts/Custom/Schools of Hindu Law — Development of Hindu Law — Law emanating from Vedas and past shrutis/smritis — Region-wise application of four schools of Mitakshara — Traced — Role played by custom, equity, justice and conscience and judicial decisions in development of customary Hindu law — Codification of Hindu law, particularly to protect rights of women — Subsequent amendments in codified law to bring about equality of status — Indicated — Hindu Succession Act, 1956, S. 6 [as substituted by the Hindu Succession (Amendment) Act, 2005] (Paras 18 to 21)

Diwan Singh Harnam Singh v. Bhaiya Lal, 1997 SCC OnLine MP 96 : (1997) 2 MP LJ 202, referred to

d W-D/65772/CV

Advocates who appeared in this case :

R. Venkataramani, V.V.S. Rao, Senior Advocates (Amici Curiae) (Sridhar Potaraju, Amit Pai, Sameer Shrivastava and Anagha S. Desai, Advocates), for the appearing parties.

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122.	1901 SCC OnLine Mad 91 : ILR (1902) 25 Mad 149, <i>Sudarsanam Maistri v. Narasimhulu Maistri</i>	36e-f
123.	1899 SCC OnLine PC 5 : (1898-99) 26 IA 113, <i>Balusu Gurulingaswami v. Balusu Ramalakshamma</i>	25d-e
124.	1892 SCC OnLine PC 3 : (1891-92) 19 IA 101, <i>Bireswar Mookerji v. Ardha Chunder Roy Chowdhry (held partly statutorily superseded)</i>	25e, 58c-d g
125.	1883 SCC OnLine Bom 1 : ILR (1883) 7 Bom 467, <i>Gansavant Balsavant v. Narayan Dhond Savant</i>	36f-g
126.	1876 SCC OnLine PC 6 : (1875-76) 3 IA 154 : ILR (1876-82) 1 Mad 69, <i>Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo</i>	24f-g, 34a 43a, 66b-c
127.	(1866-67) 11 Moo IA 75, <i>Approvier v. Rama Subba Aiyan</i>	
128.	1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543, <i>Katama Natchier v. Rajah of Shivagunga</i>	43g-h, 45e-f h

The Judgment of the Court was delivered by

- ARUN MISHRA, J.**— The question concerning the interpretation of
- a Section 6 of the Hindu Succession Act, 1956 (in short “the 1956 Act”) as amended by the Hindu Succession (Amendment) Act, 2005 (in short “the 2005 Act”) has been referred¹ to a larger Bench in view of the conflicting verdicts rendered in the two Division Bench judgments of this Court in *Prakash v. Phulavati*² and *Danamma v. Amar*³. In other connected matters, the question involved is similar; as such, they have also been referred for hearing along.
- b **2.** In *Lokamani v. Mahadevamma*¹, [SLP (C) No. 684 of 2016] the High Court held⁴ that Section 6, as amended by the 2005 Act, is deemed to be there since 17-6-1956 when the 1956 Act came into force, the amended provisions are given retrospective effect, when the daughters were denied right in the coparcenary property, pending proceedings are to be decided in the light of
- c the amended provisions. Inequality has been removed. The High Court held that the oral partition and unregistered partition deeds are excluded from the definition of “partition” used in the Explanation to amended Section 6(5).
- d **3.** In *Balchandra v. Poonam* [SLP (C) No. 35994 of 2015], the question raised is about the retrospectivity of Section 6 as substituted by the 2005 Amendment Act and in case the father who was a coparcener in the joint Hindu family, was not alive when the 2005 Act came into force, whether daughter would become a coparcener of joint Hindu family property.
- e **4.** In *Sistla Sarada Devi v. Uppaluri Hari Narayana* [SLP (C) No. 38542 of 2016], the question raised is where the final decree has not been passed in a suit for partition, whether the redistribution of shares can be claimed by the daughters by amended Section 6, as substituted.
- 5.** In *Girijavva v. Kumar Hanmantagouda* [SLP (C) No. 6403 of 2019], the question raised is whether Section 6, as substituted, is prospective as the father died in the year 1994 and, thus, no benefit could be drawn by the daughters.
- f **6.** In *V.L. Jayalakshmi v. V.L. Balakrishna* [SLP (C) No. 14353 of 2019], the petitioner sought partition of his father’s ancestral properties, and the suit was filed in 2001. The trial court granted 1/7th share to all the parties. The same was modified. It was held that the petitioner and daughters were entitled to only 1/35th share in the light of the decision of this Court in *Prakash v. Phulavati*².
- g **7.** In *Indubai v. Yadavrao Rodkuji Thakre* [SLP (C) No. 24901 of 2019], a similar question has been raised. In *B.K. Venkatesh v. B.K. Padmavathi* [SLPs (C) Nos. 1766-67 of 2020], the daughters have been accorded equal shares in Item 1 of Schedule A property, that has been questioned.

h 1 *Lokamani v. Mahadevamma*, (2020) 9 SCC 91

2 (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

3 (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

4 *Lokamani v. Mahadevamma*, 2015 SCC OnLine Kar 8642 : ILR 2015 Kar 5095

8. A Division Bench of this Court in *Prakash v. Phulavati*² held that Section 6 is not retrospective in operation, and it applies when both coparceners and his daughter were alive on the date of commencement of the Amendment Act, 9-9-2005. This Court further opined that the provision contained in the Explanation to Section 6(5) provides for the requirement of partition for substituted Section 6 is to be a registered one or by a decree of a court, can have no application to a statutory notional partition on the opening of succession as provided in the unamended Section 6. The notional statutory partition is deemed to have taken place to ascertain the share of the deceased coparcener which is not covered either under the proviso to Section 6(1) or Section 6(5), including its Explanation. The registration requirement is inapplicable to partition of property by operation of law, which has to be given full effect. The provisions of Section 6 have been held to be prospective.

9. In *Danamma*³, this Court held that the amended provisions of Section 6 confer full rights upon the daughter coparcener. Any coparcener, including a daughter, can claim a partition in the coparcenary property. Gurunalingappa died in the year 2001, leaving behind two daughters, two sons and a widow. The coparcener's father was not alive when the substituted provision of Section 6 came into force. The daughters, sons and the widow were given 1/5th share apiece.

Arguments

10. Shri Tushar Mehta, learned Solicitor General of India, appearing on behalf of the Union of India, raised the following arguments:

10.1. The daughters have been given the right of a coparcener, to bring equality with sons, and the exclusion of daughter from coparcenary was discriminatory and led to oppression and negation of fundamental rights. The 2005 Amendment Act, is not retrospective but retroactive in operation since it enables the daughters to exercise their coparcenary rights on the commencement of the Amendment Act. Even though the right of a coparcener accrued to the daughter by birth, coparcenary is a birthright.

10.2. The conferment of coparcenary status on daughters would not affect any partition that may have occurred before 20-12-2004 when the Bill was tabled before Rajya Sabha as contained in the proviso to Section 6(1). Hence, the conferment of right on the daughter did not disturb the rights which got crystallised by partition before 20-12-2004.

10.3. Unamended Section 6 provided that if a male coparcener had left behind on death a female relative specified in Class I of the Schedule or male relative claiming through such female relative, the daughter was entitled to limited share in the coparcenary interest of her father and not share as a coparcener in her rights. They were unable to inherit the ancestral property like sons/male counterparts. The Mitakshara coparcenary law not only contributed

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

³ *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

to discrimination on the ground of gender but was oppressive and negated the fundamental right of equality guaranteed by the Constitution of India.

a **10.4.** With effect from 9-9-2005, the date of enforcement of the Amendment Act, the daughters became coparceners by birth, in their own right with the same liability in the coparcenary property as if she had been a son.

10.5. The Explanation contained under Section 6(1) concerning conferral of rights as coparcener, daughter as coparcener, shall not affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before 20-12-2004.

b **10.6.** After substitution of the provisions of Section 6, the devolution of coparcenary by survivorship has been abrogated. Now in case of death of coparcener, male/female, the coparcenary interest would not devolve by survivorship but by intestate succession under the provisions of the Hindu Succession Act or based on testamentary succession.

c **10.7.** The decision in *Prakash v. Phulavati*² to the effect that there should be a living daughter of a living coparcener on the date of commencement of the 2005 Act fails to appreciate that coparcenary rights are by birth. The death of a Hindu coparcener father or any other coparcener is only relevant for the succession of his coparcenary interest under Section 6(3) of the 2005 Act. The death of any coparcener does not bring to an end any coparcenary. An increase or decrease in the coparcenary interest independently held by each coparcener may occur by birth or death. On the coparcener's death, the notional partition is drawn only to determine his coparcenary's interest. It does not disturb the other incidents of the coparcenary, it can continue without disruption with other coparceners, and even new coparceners can be added on account of birth till the time an actual partition takes place. Coparcenary interest becomes definite only when a partition is effected.

d **10.8.** The daughter of a coparcener in Section 6 does not imply the daughter of a living coparcener or father, as the death of the coparcener/father does not automatically lead to the end of coparcenary, which may continue with other coparceners alive. Thus, the coparcener, from whom the daughter is inheriting by her being coparcener, needs not to be alive as on the commencement of the Amendment Act of 2005.

e **10.9.** The Explanation to Section 6(5) was not provided in the original amendment Bill moved before the Rajya Sabha on 20-12-2004, which came to be added later.

f **10.10.** Often, coparceners enter into a family arrangement or oral partition, and it may not be necessary to register such a partition. Explanation to Section 6(5) of the Amendment Act requires the partition to be registered, was inserted to avoid any bogus or sham transactions. Considering the entire scheme of the Amendment Act, the requirement of registered partition deed is directory and not mandatory. Any coparcener relying upon any family arrangement or oral partition must prove the same by leading proper documentary evidence.

h

11. Shri R. Venkataramani, learned Senior Counsel/Amicus Curiae, argued as under:

11.1. There is no conflict between the decisions in *Prakash v. Phulavati*² and *Danamma v. Amar*³. In both the decisions, the provisions of Section 6 have been held to be of prospective application. The amendment is a prospective one. The declaration by the law that the daughter of a coparcener has certain entitlements and be subject to certain liabilities is prospective. The daughter is treated as a coparcener under the Amendment Act and not because of the daughter's birth prior to the amendment.

11.2. Unlike the joint tenancy principle in English law, a joint Hindu family stands on a different footing. Every son by birth became a coparcener, and because of birth, the son became entitled to be a coparcener in the joint Hindu family property entitled to claim partition with or without reference to the death of the karta of a joint Hindu family. Like a son born into the family, an adopted son is also entitled to succeed to the joint family property. He becomes a coparcener with adoptive father, but his relationship with the natural family is severed, including his status as a coparcener in the family of birth as laid down in *Nagindas Bhugwandas v. Bachoo Hurkissondas*⁵ and *Nanak Chand v. Chander Kishore*⁶.

11.3. A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows, and unmarried daughters bound together by the fundamental principle of a sapindaship of family relationship is the essence and distinguishing feature of the institution of the coparcenary. A joint family may consist of a single male member and widows of deceased male members. This body is purely a creature of law and cannot be created by an act of parties, as observed in *Garapati Narasimudu v. Pinnamaneni Basava Sankaram*⁷; and *SBI v. Ghamandi Ram*⁸. An undivided family which is the normal condition of Hindu society is ordinarily joint not only in the estate but in food and worship, and, therefore, not only the concerns of the joint family but whatever relates to their commensality and their religious duties are regulated by the member or by the manager to whom they have expressly or by implication delegated the task of regulation as held in *Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo*⁹. The coparcener status being the result of birth; possession of the joint property is only an adjunct of the joint family and is not necessary for its constitution, as discussed in *Haridas Narayandas Bhatia v. Devkuvarbai Bhratar Mulji*¹⁰.

2 (2016) 2 SCC 36 ; (2016) 1 SCC (Civ) 549

3 (2018) 3 SCC 343 ; (2018) 2 SCC (Civ) 385

5 1915 SCC OnLine PC 53 ; (1915-16) 43 IA 56 : AIR 1915 PC 41

6 1982 SCC OnLine Del 150 : AIR 1982 Del 520

7 1924 SCC OnLine Mad 252 : AIR 1925 Mad 249

8 (1969) 2 SCC 33

9 1876 SCC OnLine PC 6 ; (1875-76) 3 IA 154 : ILR (1876-82) 1 Mad 69

10 1926 SCC OnLine Bom 76 : AIR 1926 Bom 408

- 11.4.** A Hindu coparcenary is said to have seven essential characteristics, which include that the interest of a deceased member survives on his death and merges in the coparcenary property as observed in *CED v. Alladi Kuppuswamy*¹¹. As a result, if father or any other coparcener has died before the 2005 Amendment Act, the interest of father or another coparcener would have already merged in the surviving coparcenary. Consequently, there will be no coparcener alive, from whom the daughter will succeed. Thus, the daughter can succeed only in the interest of living coparcener as on the date of enforcement of the Amendment Act.
- 11.5.** In *Anthony Swamy v. M.R. Chinnaswamy Koundan*¹², it was observed that as a logical corollary and counter-balance to the principle before the amendment, that the son from the moment of his birth, acquires an interest in the coparcener, a pious obligation is imposed on him to pay his father's debts incurred for the purpose which is not illegal or immoral.
- 11.6.** In *Baijnath Prashad Singh v. Tej Bali Singh*¹³, it was observed that there is a difference between coparcenary in Hindu law, which is not identical with coparcenary as understood under the English law. In the case of death of a member of a coparcenary under the Mitakshara law, his right accretes to other members by survivorship while under the English law if one of the co-heirs jointly inheriting property dies, his or her right goes to his or her relations without accreting to surviving coparceners.
- 11.7.** By birth and adoption, a male becomes a coparcener. The custom of adoption is of ancient origin, as observed in *Amarendra Mansingh v. Sanatan Singh*¹⁴, and *Balusu Gurulingaswami v. Balusu Ramalakshamma*¹⁵. The adoption at the relevant time was only of male and not of a female as the custom related to succession to the property, as discussed in *Bireswar Mookerji v. Ardha Chunder Roy Chowdhry*¹⁶.
- 11.8.** By the expression used in the amended Section 6, the daughter becomes coparcener by birth. The retrospective effect is not intended to be given to the provisions of Section 6. Though equality has been brought in, w.e.f. 2005, the incidence of birth of a daughter before 2005 is of no consequence and not to reopen the past transactions.
- 11.9.** The oral partition and family settlement are not intended to be reopened by Sections 6(1) and 6(5).
- 11.10.** If the daughter is treated as coparcener at any point of time in the past before the amendment, the same will bring in enormous uncertainty in the working of the law. It can be stated that Parliament has not intended to scramble the unscrambled egg or to resurrect the past.
- 11.11.** Challenges to partition had always come when any member of a coparcenary, including an adopted son, stood deprived of the entitlement to succeed to the joint family property.

11 (1977) 3 SCC 385 : 1977 SCC (Tax) 480

12 (1969) 3 SCC 15

13 1921 SCC OnLine PC 14 : (1920-21) 48 IA 195 : AIR 1921 PC 62

14 1933 SCC OnLine PC 29 : (1932-33) 60 IA 242 : AIR 1933 PC 155

15 1899 SCC OnLine PC 5 : (1898-99) 26 IA 113

16 1892 SCC OnLine PC 3 : (1891-92) 19 IA 101

11.12. The scheme of Section 6 is future and forward-looking, and it has to be interpreted in such a manner that its relevance is not diluted. Now the rights of a coparcener have been enlarged, and the provision has disabled it from defeating the right of a daughter from being treated equally.

11.13. In the light of the decision in *Shashikalabai v. State of Maharashtra*¹⁷, the past transactions cannot be reopened. Thus, the daughter, whose coparcener father, was alive on the date of incorporation of provisions of Section 6, will be treated as a coparcener. Any other interpretation would cause unjust consequences.

12. Shri V.V.S. Rao, learned Amicus Curiae/Senior Counsel, argued that:

12.1. The logic of *Prakash v. Phulavati*² has been upheld in *Mangammal v. T.B. Raju*¹⁸. It was held that there should be a living daughter of a living coparcener to inherit the property on the date of enforcement of the amended provisions of the 2005 Act.

12.2. Section 6(1)(a) declares a daughter to be a coparcener by birth. By the declaration, a daughter stands included in coparcenary. As the declaration is to the effect that the daughter is to become coparcener by birth, the question of prospectivity or retrospectivity will not arise—daughter, whether born before 2005 or after that, is considered a coparcener.

12.3. Sections 6(1)(b) and (c) deal with the effects of inclusion of daughter as a coparcener. Having regard to the plain language and future perfect tense “shall have the same rights”, the only conclusion is that the daughters who are included in the coparcenary will have the same rights after coming into force of the Amendment Act. The future perfect tense indicates that an action will have been completed (finished or perfected) at some point in the future. This tense is formed with “will” plus “have” plus the past participle of the verb. If Parliament had intended to mean as conferring the same rights in the coparcenary, anterior to the amendment, the language would have been different. The future perfect tense indicates that action will have to be completed at some point in time in the future. The tense is formed with “will” plus “have” plus the past participle of the verb. If Parliament intended to mean conferring the same rights in the coparcenary, anterior to the amendment, the language would have been different. If the daughter is now made a coparcener, she would now have the same rights as she is a son.

12.4. The legislative history of Section 6 throws light in understanding the provision before the 1956 Act was enacted. Women were not having any interest in the coparcenary properties, and on the demise of a coparcener, the share of the deceased coparcener devolved on the surviving coparceners. The Hindu Succession Act made inroads into the system. It provided that on the demise of a coparcener, his interest in the coparcenary properties would not devolve on other coparceners by survivorship, and the share of the deceased coparcener was to be ascertained by way of notional partition as on the date

¹⁷ (1998) 5 SCC 332

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

¹⁸ (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300

of death. To that limited extent, the women did not become a coparcener, but they could inherit the property.

a **12.5.** The 174th Report of the Law Commission of India recommended the adoption of the Kerala Model, and the amendments were effected in Kerala, Andhra Pradesh, Karnataka, and in several States, giving coparcenary rights to the daughters.

b **12.6.** Parliament Standing Committee Report indicates that the Ministry proposed giving the benefit of the provision of this Bill to married daughters after the commencement of the proposed amending legislation.

12.7. It was proposed in the report that nothing in the amended Section 6 shall apply to a partition that has been effected before the commencement of the Amendment Act.

c **12.8.** Deliberations by the Committee also indicate that concerning the partition effected through oral means, it was opined that it would depend upon the facts of a particular case. As per the prevailing law, it was not necessary that a partition should be registered. There can be an oral partition also, as the law does not prohibit it. At the same time, the Committee observed that the term “partition” should be defined appropriately, and for all practical purposes, should be registered or should have been effected by a decree of the court.
d In case where oral partition is recognised, it should be backed by proper evidentiary support.

12.9. Parliament intended to confer the status of a coparcener from the birth of a daughter. However, it was never intended to confer her the rights in the coparcenary property retrospectively, for the following reasons:

e **12.9.1.** Section 6(1)(a) deals with the inclusion of a daughter in the coparcenary “on and from the commencement of the Amendment Act, 2005”, w.e.f. 9-9-2005.

12.9.2. The operating part of Section 6(1) controls not only clause (a) but also clauses (b) and (c).

12.9.3. Hence, the daughter who is declared as coparcener from 9-9-2005 would have the right in a coparcenary property only from 9-9-2005.

f **12.9.4.** Equally, a daughter who is now coparcener will be subject to the same liabilities in respect of property only from 9-9-2005.

g **12.10.** Conferment of coparcenary status shall take effect on and from the commencement “of the Amendment Act”. The use of the words “on and from” in Section 6(1) indicates that the daughter becomes coparcener from the commencement of the Act. The daughter of a coparcener shall by birth become a coparcener, have the same rights and be subject to the same liabilities. The word “shall” indicates the due status of the daughter as coparcener is created only for the future and would not affect the existing rights of a male coparcener. The use of the words “become”, “have” and “be” are all present tenses, and they reiterate to support the above-suggested interpretation.

h **12.11.** In the Bill recommended by the Law Commission and the Bill introduced, the Explanation to Section 6(5) was not mentioned. It was

introduced only on the recommendations of the Parliamentary Committee. Thus, the concept of partition by registered deed and decree of the court were introduced. It follows that on a daughter becoming coparcener from a particular date, she cannot prospectively affect the share of a coparcener, which was already fixed as held in *Prakash v. Phulavati*².

12.12. The essential condition for conferring the status of coparcener on the daughter is that there should be a coparcenary on the date of coming into force of the Act in 2005. If the coparcenary was disrupted by the act of the parties or by the death of parties, in partition or sale, the daughter could not get the status of a coparcener in coparcenary. The status conferred cannot affect the past transactions of alienation, disposition, partition—oral or written.

12.13. Partition could be in the form of a memorandum of partition, or it could also be made orally. In most of the families, there used to be an oral partition. Once parties settle their rights, the partition effected orally cannot be ignored to give shares to the daughters. Such legal transactions cannot be unsettled; the Explanation safeguards all genuine transactions of the past, including oral partition effected by the parties. The Explanation should not be understood as invalidating all other documents recording partition or oral partition in respect of coparcenary property before 20-12-2004.

12.14. Daughters conferred with the status of coparcener under the Amendment Act cannot challenge past transactions that took place before 20-12-2004, and the daughter should be alive as on the date of amendment. There should be “living coparcener” to whom the daughter can inherit to become a coparcener.

13. Shri Sridhar Potaraju, learned counsel, vociferously argued that:

13.1. The decision in *Prakash v. Phulavati*² adopted the correct interpretation of the provision. Married daughters are not considered as part of the father’s joint family. They were recognised as Class I heirs that, by itself, did not make them part of their father’s joint Hindu family. He has relied upon *Surjit Lal Chhabda v. CIT*¹⁹. A married daughter ceases to be a member of the father’s family and becomes a member of her husband’s family.

13.2. As considered by P. Ramanatha Aiyar in *Major Law Lexicon*, the land is held in coparcenary when there is the unity of title, possession and interest. A Hindu coparcenary is a narrower body than the joint family. A coparcener shares (equally) with others in inheritance in the estate of a common ancestor. Otherwise called parceners are such as have an equal portion in the inheritance of an ancestor. The share of a coparcener is undefined and keeps fluctuating with the birth and death of a coparcener. When a male is born, he becomes a coparcener, thereby decreasing the share of other coparceners. In the event of the death of a coparcener, the rule of survivorship comes into play, and the estate devolves on the surviving coparceners to the exclusion of heirs of the deceased coparcener. Status of a coparcener is a creation of law commencing with birth

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

¹⁹ (1976) 3 SCC 142 : 1976 SCC (Tax) 252

and ending with death or by severance of such status by way of partition or statutory fiction. The status of coparcenary ceases on death.

- a **13.3.** “Daughter of a coparcener” means the daughter of an alive person and has the status of a coparcener on the date of commencement of the Amendment Act. In case a statutory partition has taken place, the same is required to be recognised. It would bring severance of jointness of status and settle the share.

- b **13.4.** If a preliminary decree of partition has been passed and has attained finality, it must be given effect. The mere filing of a suit for partition is sufficient to effect a partition. On separation of status, the decree is passed by a court as held in *Puttrangamma v. M.S. Ranganna*²⁰.

13.5. What rights have been conferred by way of survivorship are not intended to be taken away except as provided by the amended proviso in Section 6(3) of the Amendment Act.

- c **13.6.** A legal fiction created in law cannot be stretched beyond the purpose for which the fiction has been created, as held in *Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver*²¹.

- d **13.7.** Statutory partition leads to disruption. A statutory partition, as provided in Section 6(3), is to be given full effect. The same leads to severance of status of jointness of the deceased coparcener and his legal heirs, which shall include the right of maintenance from the joint family of the widow of the deceased coparcener and such other rights. Such partition brings an end to the joint family. In the case of death of the father of the petitioner in 1963, notional partition would occur and the consequences laid down in *Anar Devi v. Parmeshwari Devi*²² would follow.

- e **13.8.** The married daughters on the death of father in 1963 were not entitled to a share in the coparcenary property. Only sons were entitled to equal shares, and sons obtained the property by way of survivorship. The statutory partition under unamended Section 6 was considered in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*²³. Statutory partition has been in existence in Section 6 since 1956 and is continued by the 2005 Amendment.

- f **13.9.** Section 6, as amended, is not applicable in the case of a daughter whose father is not alive at the time of the introduction of provisions of Section 6. Every member of a joint Hindu family is not entitled to be a coparcener either under the traditional Hindu law or under the Hindu Succession Act, 1956 or the 2005 Amendment Act. Under Section 29-A introduced in the State of Andhra Pradesh, unmarried daughters were given the rights of a coparcener while excluding married daughters. The Central Amendment has not made a distinction based on the daughter’s marital status expressly but has made it evident by the use of the expression “joint Hindu family” and “daughter of a coparcener”. The provisions should be read to

20 AIR 1968 SC 1018

21 (1996) 6 SCC 185

22 (2006) 8 SCC 656

23 (1978) 3 SCC 383

exclude married daughters. The provisions of Section 6, as amended, are prospective. It was not intended to unsettle the settled affairs.

13.10. The Explanation to Section 6(5) cannot be interpreted to take away the rights crystallised upon the surviving coparceners of the joint family under the statutory partition. The purpose of the Explanation was considered in *S. Sundaram Pillai v. V.R. Pattabiraman*²⁴ thus: (SCC p. 613, para 53)

“53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same to make it consistent with the dominant object it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

13.11. A preliminary decree determines the shares. Section 2(2) of the Code of Civil Procedure defines “decree” to mean the formal expression, which clarifies that a decree is preliminary when further proceedings have to be taken before the suit can be decided entirely. Insofar as the determination of individual shares to be allotted to parties to the suit is concerned, the preliminary decree is final. After the dismissal of Special Leave Petition (C) No. 38542 of 2016 in *Sistla Sarada Devi v. Uppaluri Hari Narayana*, the only step required to be taken is to apportion the shares by metes and bounds in terms of the preliminary decree which was passed. The daughters born after the commencement of the Amendment Act become coparceners, and daughters born before the commencement of the Amendment Act have been covered under Section 6(1)(b) and granted the same rights in coparcenary as given to a son. The daughters born before and after the amendment covered under Section 6 are given the status of a coparcener. The status of a coparcener to daughters cannot be given from the date of birth, and they cannot be made liable for all the liabilities of coparcenary property. The benefit cannot be conferred from the date of birth as it would relate in several cases to date of birth even in the year 1925. All liabilities are to be borne only from the amendment; as such, the provisions are not retrospective.

²⁴ (1985) 1 SCC 591

13.12. Even alternatively, if the status of coparcenary on the daughter is to be conferred retrospectively, the limitations governing such legal fiction will have to take into consideration the implications of: (i) statutory partition; (ii) court's decree; and (iii) legitimate alienation of the property by karta/coparceners, prior to commencement of the Amendment Act. All other dispositions or alienations, including any partition or testamentary disposition of property made before 20-12-2004, are required to be saved as earlier the daughters were not coparceners. On a statutory partition, the property becomes the self-acquired property and is no more a coparcenary property.

13.13. Even in a case of adoption, the past transactions are saved while applying the theory of relation back as laid down in *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar*²⁵.

13.14. Thus, the provisions of Section 6 are to be construed prospectively.

14. Shri Amit Pai, learned counsel, strenuously urged that:

14.1. The golden rule of interpretation is required to be adopted as laid down in *Kanai Lal Sur v. Paramnidhi Sadhukhan*²⁶. The rule of literal construction is relied upon, as observed in *Prithi Pal Singh Bedi v. Union of India*²⁷.

14.2. The substitution of the provision of Section 6 dates back to the commencement of the principal 1956 Act. A notional partition on the death of a coparcener to ascertain his share is not an actual partition. The same is not saved by the proviso contained in Section 6. A daughter cannot be deprived of the right to equality as per the Statement of Objects and Reasons. The provision of Section 6 is required to be given full effect.

14.3. The decision in *Prakash v. Phulavati*² cannot be said to be laying down the law correctly. The concept of living daughter of a living coparcener is adding to the text of provisions of Section 6, whereas no word can be added or read into a statute by the court. It can only repair errors or supply omissions. It is for the legislature to provide such a concept of a daughter of a living coparcener. Thus, it was argued that Section 6 includes all living daughters of coparceners, irrespective of whether such coparceners are deceased or alive at the commencement of the 2005 Amendment.

15. Shri Sameer Shrivastava, learned counsel, urged that:

15.1. The term "coparcener" is not defined in the Succession Act. This Court considered it in *Sathyaprema Manjunatha Gowda v. CED*²⁸. It is a narrower body than a joint family and consists of only those persons who have taken by birth, an interest in the property, and can enforce a partition, whenever they like. The daughter is entitled to share in the property subject to the restrictions provided under sub-section (1) and sub-section (5) of amended Section 6.

²⁵ (1974) 2 SCC 156

²⁶ 1958 SCR 360 : AIR 1957 SC 907

²⁷ (1982) 3 SCC 140 : 1982 SCC (Cri) 642

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

²⁸ (1997) 10 SCC 684

15.2. Section 6(3) provides a consequence of the death of a coparcener, devolution on the death of a coparcener after the commencement of the Amendment Act. The concept of survivorship has been done away with. Testamentary or intestate succession has been provided where a Hindu dies before the commencement of the Amendment Act. The relevant provisions are Sections 6(1) and (2), where male Hindus are given the right by birth to become a coparcener, and they have the right to take a partition with coparcenary property.

15.3. The decision in *Prakash v. Phulavati*², laying down that Section 6 as amended applies in case of living daughters of a living coparcener, is arbitrary and non est in the eye of the law. Both sons and daughters of coparceners are conferred the right of becoming coparcener by birth. Birth in coparcenary creates interest. The only other exception is by way of adoption. Coparcenary incident is the right to the severance of the status of partition.

16. Ms Anagha S. Desai, learned counsel, strenuously urged that Section 6 provides parity of rights in coparcenary property among male and female members of a joint Hindu family on and from 9-9-2005. The declaration in Section 6 that the daughter of a coparcener shall have the same rights and liabilities as she would have been a son is unambiguous and unequivocal. The daughter is entitled to a share in the ancestral property. She has relied upon *Ganduri Koteshwaramma v. Chakiri Yanadi*²⁹.

17. When a daughter, who is claiming and demanding a share in the coparcenary, is alive, there is no difficulty of interpretation, irrespective of the fact whether a coparcener has died before the commencement of the Amendment Act. The coparcener and the daughter do not need to be alive as on the date of the amendment. If it is to be interpreted that coparcener and daughter both should be alive, it will defeat the very purpose and objective of the amended provisions. Earlier, the provisions of Hindu law treated a son as a coparcener by birth; now, daughters are given the same rights since birth. In case partition has been effected by metes and bounds and is adequately proved, then the daughter of coparcenary cannot seek partition of already divided property.

In re: Historical background

18. The Hindu branch of dharma is influenced by the theological tenets of the Vedic Aryans. What is not modified or abrogated by the legislation or constitutional provisions still prevails, the basic Hindu law emanates from Vedas and past shrutis/smritis. Various dharma shastras regard custom as the basis of Hindu law as administered from time to time. Law has advanced and made progress as per the requirements of the society and the prevailing ethos. The justice used to be administered by the emperors resolving the conflicts. The building of law has taken place over time. There are two main schools of Hindu law i.e. Mitakshara and Dayabhaga. Mitakshara has further been sub-

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

²⁹ (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880

divided into four schools i.e. Benares, Mithila*, Maharashtra or Bombay, and Dravida or Madras school. Benares, Mithila, Dravida, and Maharashtra denote old names of the territories.

19. The application of schools of Mitakshara is region-wise. There has been reorganisation of States in 1956, and after that, some confusion has arisen concerning the administration of Bombay school and Benares school. Benares school practically governs the whole of Northern India. The Bombay school covers Western India and various other territories. Certain States were reorganised by the States Reorganisation Act, 1956. In some regions of reorganised States, given the common name, different schools apply. Take, for example, Madhya Pradesh. It consists of territories to which both Bombay and Benares schools are applicable. However, various authors of Hindu law have failed to note the fact in which parts of the State of M.P. after reorganisation which school is applicable. A reference is found to tenets of Bombay school of Hindu law in the entire State of M.P., whereas Benares school is applicable in various parts of Madhya Pradesh. It was clarified by a Full Bench of Madhya Pradesh High Court in *Diwan Singh Harnam Singh v. Bhaiya Lal*³⁰, and a Division Bench decision was relied on in FA No. 31 of 1968 decided on 14-12-1976. In integrating the State of Madhya Bharat and some other parts of Madhya Pradesh, Benares school is applicable, not Bombay.

20. Mitakshara law applies to most parts of India except Bengal. Maharashtra school (*quaere* Benares and Mithila schools) prevailed in North India; Bombay school, in Western India. However, certain areas in Southern India are governed by Marumakkatayam, Aliyasantana and Nambudiri systems of law.

21. Besides the various sources, custom, equity, justice and conscience have also played a pivotal role in the development of Hindu law, which prevailed. When the law was silent on certain aspects, judicial decisions also acted as a source of law. Hindu law was not static but always progressive. Slowly necessity was felt for the codification of Hindu law. In particular, women's rights were taken care of, and attempts were made to remove the anomalies and unscrupulous practices. Necessity was also felt after the Independence, given the constitutional imperatives to bring about equality of status, the codified law has been amended from time to time. The latest attempt has been made by way of amending the Hindu Succession Act concerning rights of daughter to be a coparcener in Mitakshara coparcenary and has been given the rights equal to that of a son.

In re: Coparcenary and joint Hindu family

22. A joint Hindu family is a larger body than a Hindu coparcenary. A joint Hindu family consists of all persons lineally descended from a common ancestor and include their wives and unmarried daughters. A joint Hindu family is one in worship and holds joint assets. After separation of assets, the family

* **Ed.:** Geographically corresponding to parts of modern day Bihar and Jharkhand States.
30 1997 SCC OnLine MP 96 : (1997) 2 MP LJ 202

ceases to be joint. Mere severance in food and worship is not treated as a separation, as observed in *Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo*⁹.

23. Hindu coparcenary is a much narrower body. It consists of propositus and three lineal descendants. Before 2005, it included only those persons like sons, grandsons and great-grandsons who are the holders of joint property. For example, in case *A* is holding the property, *B* is his son, *C* is his grandson, *D* is great-grandson, and *E* is a great-great-grandson. The coparcenary will be formed up to *D* i.e. great-grandsons, and only on the death of *A*, holder of the property, the right of *E* would ripen in coparcenary as coparcenary is confined to three lineal descendants. Since grandsons and great-grandsons become coparceners by birth, they acquired an interest in the property.

24. Coparcenary property is the one which is inherited by a Hindu from his father, grandfather, or great-grandfather. Property inherited from others is held in his rights and cannot be treated as forming part of the coparcenary. The property in coparcenary is held as joint owners.

25. Coparcener heirs get right 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. By substituted Section 6 with effect from 9-9-2005 daughters are recognised as coparceners in their rights, by birth in the family like a son. 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.

In re: Formation of coparcenary

26. For interpreting the provision of Section 6, it is necessary to ponder how coparcenary is formed. The basic concept of coparcenary is based upon common ownership by coparceners. 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 coparcenary is fluctuating. It increases and diminishes by death and birth in the family.

27. In *Sunil Kumar v. Ram Parkash*³¹, the Court discussed essential features of coparcenary of birth and sapindaship thus: (SCC p. 85, paras 17-18)

“17. Those who are of individualistic attitude and separate ownership may find it hard to understand the significance of a Hindu joint family and joint property. But it is there from the ancient time perhaps, as a social necessity. A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. *They are bound together by the*

⁹ 1876 SCC OnLine PC 6 : (1875-76) 3 IA 154 : ILR (1876-82) 1 Mad 69

³¹ (1988) 2 SCC 77

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fundamental principle of sapindaship or family relationship, which is the essential feature of the institution. The cord that knits the members of the family is not property but the relationship of one another.

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18. *The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like. It is a narrower body than a joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenarship is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degrees can offer spiritual ministrations to an ancestor. Only males can be coparceners. [See: *Hindu Law* by N.R. Raghavachariar, 8th Edn., p. 202]”* (emphasis supplied)

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28. In case coparcenary property comes to the hands of a “single person” temporarily, it would be treated as his property, but once a son is born, coparcenary would revive in terms of the Mitakshara law. In *Sheela Devi v. Lal Chand*³², it was observed: (SCC pp. 585-86, para 12)

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“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 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*³³). But once a son is born, it becomes a coparcenary property, and he would acquire an interest therein.”

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29. In *M. Yogendra v. Leelamma N.*³⁴, similar opinion was expressed thus: (SCC p. 192, para 29)

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“29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid.”

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30. In *Sitabai v. Ramchandra*³⁵, it was held: (SCC p. 546, para 3)

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“3. ... under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and that the property of a joint family did not cease to belong to a joint family merely

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³² (2006) 8 SCC 581

³³ (1975) 1 SCC 160 : 1975 SCC (Tax) 16

³⁴ (2009) 15 SCC 184 : (2009) 5 SCC (Civ) 602

³⁵ (1969) 2 SCC 544 : AIR 1970 SC 343

because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess.”

31. In *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe*³⁶, it was held that joint family property retains its character even after its passing on to the hands of a sole surviving coparcener. If a son is subsequently born or adopted, the coparcenary will survive, subject to saving the alienations made in the interregnum.

32. In *Ghamandi Ram*⁸, the formation, concept and incidents of the coparcenary were discussed thus: (SCC pp. 36-37, paras 5-6)

“5. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (*see* Mitakshara, Chapter I, 1-27). The incidents of coparcenary under the Mitakshara law are: first, the lineal male *descendants* of a person up to the third generation, *acquire on birth ownership in the ancestral properties* of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. *A coparcenary under the Mitakshara School is a creature of law and cannot arise by Act of parties except insofar that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter.* In *Sudarsanam Maistri v. Narasimhulu Maistri*³⁷, ILR at p. 154.

Mr Justice Bhashyam Ayyangar stated the legal position thus:

‘The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body (*Gansavant Balsavant v. Narayan Dhond Savant*³⁸) and Mayne’s *Hindu Law and Usage*, (6th Edn., para 270) and the possession of property by such corporate body. The first requisite therefore is the family unit; and the possession by it of property is the second requisite. For the present purpose, female members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition viz. the undivided state — it forms a corporate

³⁶ (1988) 2 SCC 126

⁸ *SBI v. Ghamandi Ram*, (1969) 2 SCC 33

³⁷ 1901 SCC OnLine Mad 91 : ILR (1902) 25 Mad 149

³⁸ 1883 SCC OnLine Bom 1 : ILR (1883) 7 Bom 467

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a body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by act of parties, save insofar that, by adoption, a stranger may be affiliated as a member of that corporate family.’

6. Adverting to the nature of the property owned by such a family the learned Judge proceeded to state:

b ‘As regards the property of such family, the “*unobstructed heritage*” devolving on such family, with its accretions, is owned by the family, as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate “unobstructed heritage” which, with its accretions, may be exclusively owned by such branch as a corporate body.’ ” (emphasis supplied)

c 33. Essential characteristics of coparcenary, as discussed in the abovementioned decision in *Ghamandi Ram*⁸, were analysed in *CED v. Alladi Kuppuswamy*¹¹, thus: (SCC pp. 393-94, para 8)

“8. * * *

d ‘Thus analysing the ratio of the aforesaid case regarding the incidents of a Hindu coparcenary it would appear that a Hindu coparcenary has six essential characteristics, namely, (1) that the lineal male descendants up to the third generation acquire an independent right of ownership by birth and not as representing their ancestors; (2) that the members of the coparcenary have the right to work out their rights by demanding partition; (3) that until partition, each member has got ownership extending over the entire property conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive; (4) that as a result of such co-ownership the possession and enjoyment of the property is common; (5) that there can be no alienation of the property without the concurrence of the other coparceners unless it be for legal necessity; and (6) that the interest of a deceased member lapses on his death and merges in the coparcenary property. Applying these tests to the interest of a Hindu widow who has been introduced into a coparcenary by virtue of the 1937 Act, we find that, excepting Condition (1), all other conditions are fully satisfied in case of a Hindu widow succeeding to the interest of her husband in a Hindu coparcenary. In other words, after her husband’s death the Hindu widow under the 1937 Act has got the right to demand partition, she cannot predicate the exact share which she might receive until partition is made, her dominion extends to the entire property conjointly with the other members of the coparcenary, her possession and enjoyment is common, the property cannot be alienated without concurrence of all the members of the family, except for legal necessity, and like other

h ⁸ *SBI v. Ghamandi Ram*, (1969) 2 SCC 33

¹¹ (1977) 3 SCC 385 : 1977 SCC (Tax) 480

coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family. It is manifest that she cannot fulfil the first condition, because she enters the coparcenary long after she is born and after she is married to her husband and acquires his interest on his death. Thus, short of the first condition, she possesses all the necessary indicia of a coparcenary interest. The fact that before the 1956 Act, she had the characteristic of a widow-estate in her interest in the property does not detract any the less from this position. It must follow as a logical corollary that though a Hindu widow cannot be a coparcener, she has coparcenary interest and she is also a member of the coparcenary by virtue of the rights conferred on her under the 1937 Act.”

34. In *CED*¹¹, it has also been laid down that if a widow does not exercise her right of partition, there is no severance of the Hindu coparcenary and on her death, the interest of the widow merges in the coparcenary property or lapses to the other coparceners. It was observed that the male issue of coparcener acquires an interest in the coparcenary by birth, not as representing his father.

35. This Court in *CED*¹¹, placed reliance on *Satrughan Isser v. Sabujpari*³⁹. In case the right to partition by a widow has not been exercised, there is no severance of Hindu coparcenary, and on death of coparcener, there is no dissolution of coparcenary. In *Satrughan*³⁹, it was held: (AIR pp. 274-75, para 7)

“7. By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener: though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property: *Lakshmi Perumallu v. Krishnavenamma*⁴⁰. The interest acquired by her under Section 3(2) is subject to the restrictions on alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her

¹¹ *CED v. Alladi Kuppuswamy*, (1977) 3 SCC 385 : 1977 SCC (Tax) 480

³⁹ AIR 1967 SC 272

⁴⁰ AIR 1965 SC 825

a husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property. But if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by Section 3(2) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve upon her husband's heirs. To assume as has been done in some decided cases that the right of the coparceners to take her interest on determination of the widow's interest survives even after the interest has become definite, because of a claim for partition, is to denude the right to claim partition of all realty.” (emphasis supplied)

36. In *Bhagwan Dayal v. Reoti Devi*⁴¹, it was held that coparcenary is a creature of law and branch of the family was a subordinate corporate body and discussed the proposition thus: (AIR p. 304, para 47)

d “47. ... *Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognises a branch of the family as a subordinate corporate body.* The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identity of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognise some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired.

g The concept of joint tenancy known to English law with the right of

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41 AIR 1962 SC 287

survivorship is unknown to Hindu law except in regard to cases specially recognised by it. In the present case, the uncle and the two nephews did not belong to the same branch. The acquisitions made by them jointly could not be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties passed by inheritance and not by survivorship.” (emphasis supplied)

37. In *Kalyanji Vithaldas v. CIT*⁴², the concept of Hindu Undivided Family was considered thus: (SCC OnLine PC)

“... The phrase “Hindu Undivided Family” is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words “Hindu coparcenary”—all the more that it is not possible to say on the face of the Act that no female can be a member.” (emphasis supplied)

38. In *Gowli Buddanna v. CIT*⁴³, it was held that coparcenary is narrower body than joint family thus: (AIR p. 1525, para 6)

“6. ... A Hindu joint family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons, and great-grandsons of the holder of the joint property for the time being. Therefore there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners.” (emphasis supplied)

39. The difference between joint Hindu family and coparcenary was considered in *Surjit Lal Chhabda v. CIT*¹⁹ thus: (SCC p. 149, para 13)

“13. Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father’s family and becomes a member of her husband’s family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption:

‘The fundamental principle of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation,

42 1936 SCC OnLine PC 68 : (1936-37) 64 IA 28 : AIR 1937 PC 36

43 AIR 1966 SC 1523

19 (1976) 3 SCC 142 : 1976 SCC (Tax) 252

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the sapinda relation, which distinguishes the joint family, and is of its very essence⁴⁴.’ ” (emphasis supplied)

a **40.** In *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh*⁴⁵, characteristics of joint family and coparcenary were culled out. It was also held that interest of a female member of a joint Hindu family gets fixed, on her inheriting interest of a deceased male member of the family. She would not cease to be a member of family unless she chooses to become separate by partition, thus: (SCC pp. 328 & 330-31, paras 8 & 10)

b “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*⁴³ and *Sitabai v. Ramchandra*³⁵.) 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*⁴⁶.) 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.

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g **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*

44 Per Beaman, J. in *Karsondas Dharamsey v. Gangabai*, 1908 SCC OnLine Bom 67 : ILR (1908) 32 Bom 479 at p. 493. See also *Hindu Law in British India* by S.V. Gupte, 2nd Edn., p. 59

45 (1985) 2 SCC 321

h 43 AIR 1966 SC 1523

35 (1969) 2 SCC 544 : AIR 1970 SC 343

46 (1969) 1 SCC 748

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.” (emphasis supplied)

41. The essential feature is aggregate ownership i.e. “samudavika swatwa” in coparcenary and the share keeps on fluctuating, was observed in *CIT v. Raja of Bhor*⁴⁷ thus: (ITR p. 637)

“... no individual member of a Hindu coparcenary, while it remains undivided, can predicate of the joint and undivided property, that he, or any particular member, has a definite share, one-third or one-fourth —

⁴⁷ (1967) 65 ITR 634 (SC)

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a (Lord Westbury in *Approvier v. Rama Subba Aiyar*⁴⁸). His interest in the coparcenary property is a fluctuating interest which is capable of being enlarged by death in the family. It is only on partition that the coparcener is entitled to a definite share. But the important thing to notice is that the theory of ownership being acquired by birth has given rise to the doctrine of *samudavika swatwa* or aggregate ownership in the Mitakshara school. Till partition therefore all the coparceners have got rights extending over the entirety of the coparcenary property.” (emphasis supplied)

b 42. In *Vellikannu v. R. Singaperumal*⁴⁹, this Court restated that the share of a member of a coparcenary fluctuates from time to time is a settled proposition of law. It was held: (SCC pp. 627-28, paras 11 & 13)

c “11. So far as the property in question is concerned, there is a finding of the courts below that the property is a coparcenary property and if that being so, if Defendant 1 had not murdered his father then perhaps things would have taken a different shape. But what is the effect on the succession of the property of the deceased father when the son has murdered him? If he had not murdered his father he would have along with his wife succeeded in the matter. So far as the rights of coparceners in the Mitakshara law are concerned, the son acquires by birth or adoption a vested interest in all d coparcenary property whether ancestral or not and whether acquired before or after his birth or adoption, as the case may be, as a member of a joint family. This is the view which has been accepted by all the authors of the Hindu law. In the famous principles of *Mulla*, 15th Edn. (1982) at pp. 284 and 285, the learned author has stated thus:

e ‘The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth. His interest is a fluctuating interest, f capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is “undivided coparcenary interest”. The nature and extent of that interest is defined in Section 235. The rights of each coparcener until g a partition takes place consist in a common possession and common enjoyment of the coparcenary property. As observed by the Privy Council in *Katama Natchier v. Rajah of Shivagunga*⁵⁰: (SCC OnLine PC)

h 48 (1866-67) 11 Moo IA 75

49 (2005) 6 SCC 622

50 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543

“there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased’s lifetime a common interest and a common possession”.’

* * *

13. In *N.R. Raghavachariar’s Hindu Law — Principles and Precedents*, 8th Edn. (1987) at p. 230 under the heading “Rights of Coparceners” it is said thus:

‘The following are the rights of a coparcener.—(1) Right by birth, (2) Right of survivorship, (3) Right to partition, (4) Right to joint possession and enjoyment, (5) Right to restrain unauthorised acts, (6) Right of alienation, (7) Right to accounts, and (8) Right to make self-acquisition.’

While dealing with “Right by Birth” the learned author says thus:

‘Every coparcener gets an interest by birth in the coparcenary property. This right by birth relates back to the date of conception. This, however, must not be held to negative the position that coparcenary property may itself come into existence after the birth of the coparcener concerned.’

While dealing with right of survivorship, it is said thus:

‘The system of a joint family with its incident of succession by survivorship is a peculiarity of the Hindu law. In such a family no member has any definite share and his death or somehow ceasing to be a member of the family causes no change in the joint status of the family. Where a coparcener dies without male issue his interest in the joint family property passes to the other coparceners by survivorship and not by succession to his own heir. Even where a coparcener becomes afflicted with lunacy subsequent to his birth, he does not lose his status as a coparcener which he has acquired by his birth, and although his lunacy may under the Hindu law disqualify him from demanding a share in a partition in his family, yet where all the other coparceners die and he becomes the sole surviving member of the coparcenary, he takes the whole joint family property by survivorship, and becomes a fresh stock of descent to the exclusion of the daughter of the last predeceased coparcener, a case of leprosy of the last surviving coparcener. The beneficial interest of each coparcener is liable to fluctuation, increasing by the death of another coparcener and decreasing by the birth of a new coparcener.’

Therefore, it is now settled that a member of a coparcenary acquires a right in the property by birth. His share may fluctuate from time to time but his right by way of survivorship in coparcenary property in Mitakshara law is a settled proposition.” (emphasis supplied)

43. In *Rohit Chauhan v. Surinder Singh*⁵¹, the concept of coparcenary of sharing equally with others and no definite share, was discussed thus: (SCC pp. 423-24, para 11)

a “11. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr Rao. In our opinion coparcenary property means the property which consists of ancestral property and a *coparcener* would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A *coparcener* has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.” (emphasis supplied)

44. A similar view was taken in *Thamma Venkata Subbamma v. Thamma Rattamma*⁵² that the share is not defined in coparcenary. It keeps on fluctuating on death and birth in the family.

45. It is only on actual partition a coparcener becomes entitled to a definite share. The interest of a coparcener is called “undivided coparcenary interest”, which remains undivided as held by the Privy Council in *Katama Natchier v. Rajah of Shivagunga*⁵⁰. In *Shankara Coop. Housing Society Ltd. v. M. Prabhakar*⁵³, it was observed that coparcenary be collective ownership. If a suit for recovery of property is filed, it is for the benefit of all co-owners. The position of ownership of co-ownership property indicates a change when actual division takes place, and co-owner’s share becomes identifiable. In *Shankara Coop.*⁵³, it was observed: (SCC pp. 640-41, para 85)

g “85. Shri Ranjit Kumar, learned Senior Counsel, contends that the writ petition was filed by one of the co-owners of late Mandal Buchaiah and judgment and order passed would not bind the other parties. We cannot agree. It is a settled law that no co-owner has a definite right, title and interest in any particular item or portion thereof. On the other hand, he has right, title and interest in every part and parcel of the joint property or coparcenary under Hindu law by all the coparceners. Our conclusion

51 (2013) 9 SCC 419 : (2013) 4 SCC (Civ) 377

52 (1987) 3 SCC 294

50 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543

53 (2011) 5 SCC 607 : (2011) 3 SCC (Civ) 56

is fortified by the view expressed by this Court in *A. Viswanatha Pillai v. LAO*⁵⁴ in which this Court observed: (SCC p. 21, para 2)

‘2. ... It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners. It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenary under Hindu law by all the coparceners. In *Kanta Goel v. B.P. Pathak*⁵⁵, this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable. The same view was reiterated in *Sri Ram Pasricha v. Jagannath*⁵⁶ and *Pal Singh v. Sunder Singh*⁵⁷. A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner’s property was not its own. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds. Therefore, a co-owner of the property is an owner of the property acquired but entitled to receive compensation pro rata.’ ” (emphasis supplied)

46. In *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe*⁵⁸, a 3-Judge Bench of this Court held that character of a joint family property does not change with the severance in the status of the joint family before an actual partition takes place. It was observed thus: (SCC p. 385, para 14)

“14. ... The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property.”

47. In *Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer*⁵⁹, it was held that once a coparcener separates himself from other members of the joint family, there is no presumption that rest of the coparceners continued to be joint, it would be a question of fact in each case. The following discussion was made: (AIR p. 74, para 7)

“7. ... The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but ... where it is admitted that one of the coparceners did separate himself from the other

⁵⁴ (1991) 4 SCC 17

⁵⁵ (1977) 2 SCC 814

⁵⁶ (1976) 4 SCC 184

⁵⁷ (1989) 1 SCC 444

⁵⁸ (1986) 1 SCC 366

⁵⁹ AIR 1952 SC 72

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a members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the plaintiff's side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

In re: Unobstructed and obstructed heritage

c 48. In Mitakshara coparcenary, there is unobstructed heritage i.e. apratibandha daya and obstructed heritage i.e. sapratibandha daya. When right is created by birth, it is called unobstructed heritage. At the same time, the birthright is acquired in the property of the father, grandfather, or great-grandfather. In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue, it is called obstructed heritage. It is obstructed because the accrual of right to it is obstructed by the owner's existence. It is only on his death that obstructed heritage takes place. *Mulla on Hindu Law* has discussed the concept thus:

d "216. *Obstructed and unobstructed heritage.*—*Mitakshara* divides property into two classes, namely, *apratibandha daya* or unobstructed heritage, and *sapratibandha daya* or obstructed heritage.

e (1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner.

f Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather,⁶⁰ is unobstructed heritage as regards his own male issue i.e. his son, grandson, and great-grandson.⁶¹ His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.

g Property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue, is called obstructed heritage. It is called obstructed, because the accrual of right to it is obstructed by the existence of the owner.

h ⁶⁰ *Mohd. Husain Khan v. Babu Kishya Nandan Sahai*, 1937 SCC OnLine PC 48 : (1936-37) 64 IA 250 : ILR 1937 All 655 : 169 IC 1 : AIR 1937 PC 233; *Om Parkash v. Sarvjit Singh*, 1993 SCC OnLine HP 36 : AIR 1995 HP 92 (property inherited from person other than father, father's father, or father's father's father is obstructed heritage).

⁶¹ *Sirtaji v. Algu Upadhyay*, 1936 SCC OnLine Oudh CC 112 : ILR (1937) 12 Luck 237 : 163 IC 935 : AIR 1936 Oudh 331

Thus, property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere spes successionis, or a bare chance of succession to the property, contingent upon their surviving the owner.⁶²

(2) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, some cases in which obstructed heritage is also passed by survivorship.”

49. It is apparent that unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner. It is significant to note that under Section 6 by birth, right is given that is called unobstructed heritage. It is not the obstructed heritage depending upon the owner’s death. Thus, coparcener father need not be alive on 9-9-2005, date of substitution of provisions of Section 6.

In re: Section 6 of the 1956 Act

50. Section 6 of the 1956 Act before the substitution by the 2005 Amendment Act is reproduced hereunder:

“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 I.—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.”

51. The substituted provision of Section 6 by the 2005 Amendment Act is extracted hereunder:

“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;

⁶² Mitakshara, Ch. I, S-1, v-3.

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(b) have the same rights in the coparcenary property as she would have had if she had been a son;

a (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:

b 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 20th day of December, 2004.

c (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

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

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

e (b) the share of the predeceased son or a predeceased 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 predeceased daughter; and

(c) the share of the predeceased child of a predeceased son or of a predeceased 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 predeceased child of the predeceased son or a predeceased daughter, as the case may be.

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

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

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

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

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

(5) Nothing contained in this section shall apply to a partition, which has been effected before 20th day of December, 2004.

Explanation.—For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.”

52. The Statement of Objects and Reasons behind the introduction of the Bill is reproduced as under:

“**Statement of Objects and Reasons.**—The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession among Hindus. The Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women’s property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools and also to those governed previously by the Murumakkattayam, Aliyasantana and Nambudri laws. The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Pararthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

2. Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to

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daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

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

b 4. The above proposals are based on the recommendations of the Law Commission of India as contained in its 174th Report on “Property Rights of Women: Proposed Reform under the Hindu Law”.

5. The Bill seeks to achieve the above objects.

NEW DELHI

16-12-2004.”

c 53. Section 6 deals with devolution of interest in coparcenary property of a joint Hindu family governed by the Mitakshara law. The originally enacted provision of Section 6 excluded the rule of succession concerning Mitakshara coparcenary property. It provided that the interest of a coparcener male Hindu who died after the commencement of the 1956 Act shall be governed by survivorship upon the surviving members of the coparcenary. The exception was provided that if the deceased had left 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 such coparcener shall devolve by testamentary or intestate succession, as the case may be, in order to ascertain the share of deceased coparcener, the partition has to be deemed before his death. Explanation 2 disentitled the separated person to make any claim in case of intestate succession.

d 54. Though the widow or daughter could claim a share, being a Class I heir in the property left by the deceased coparcener, and a widow was entitled, having a right to claim a share in the event of partition daughter was not treated as a coparcener. The goal of gender justice as constitutionally envisaged is achieved though belatedly, and the discrimination made is taken care of by substituting the provisions of Section 6 by the 2005 Amendment Act.

e 55. Concerning gender discrimination to a daughter who always remains a loving daughter, we quote *Savita Samvedi v. Union of India*⁶³, thus: (SCC p. 382, paras 6-7)

g “6. A common saying is worth pressing into service....

‘A son is a son until he gets a wife. A daughter is a daughter throughout her life.’

h 7. ... The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state), ...

63 (1996) 2 SCC 380 : 1996 SCC (L&S) 521

to claim the benefit.... [Otherwise, it would be] unfair, gender-biased and unreasonable, liable to be struck down under Article 14 of the Constitution. ... It suffered from the twin vices of gender discrimination inter se among women on account of marriage.”

56. The daughter is treated as a coparcener in the same manner as a son by birth with the same rights in coparcenary property and liabilities. However, the proviso of sub-section (1) contains a non obstante clause providing that nothing contained in the sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before 20-12-2004.

57. It is apparent from the provisions of Section 6 that the discrimination with the daughter has been done away with, and they have been provided equal treatment in the matter of inheritance with Mitakshara coparcenary. In several States viz. Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra, the State Amendments in the 1956 Act were made to extend equal rights to daughters in Hindu Mitakshara coparcenary property. An amendment was made on 30-7-1994 by the insertion of Section 6-A by Karnataka Act 23 of 1994 in the 1956 Act. In the State of Andhra Pradesh, the amendment was made w.e.f. 5-9-1985, Tamil Nadu w.e.f. 25-3-1989 and Maharashtra w.e.f. 26-9-1994 by the addition of Section 29-A in the 1956 Act. In Kerala, the Act was enacted in 1975.

58. Before the amendment, Section 6 provided that on the death of a male Hindu, a coparcener's interest in Mitakshara coparcenary shall devolve by survivorship upon the surviving members of the coparcenary under the uncodified Hindu law and not in accordance with the mode of succession provided under the 1956 Act. It was provided by the proviso to Section 6, in case a male Hindu of Mitakshara coparcenary has left surviving a female relative of Class I heir or a male relative who claims through such female relative of Class I. The Schedule containing categories of Class I heirs is extracted hereunder:

“THE SCHEDULE

(See Section 8)

HEIRS IN CLASS I AND CLASS II

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.”

59. In view of the provisions contained in Section 6 when a coparcener is survived by a female heir of Class I or male relative of such female, it was necessary to ascertain the share of the deceased, as such, a legal fiction

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a was created. Explanation I provided legal fiction of partition as if it had taken place immediately before his death, notwithstanding whether he had the right to claim it or not. However, a separated Hindu could not claim an interest in the coparcenary based on intestacy in the interest left by the deceased.

b **60.** The amended provisions of Section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener “in her own right” and “in the same manner as the son”. Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. 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 c be claimed, w.e.f. 9-9-2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20-12-2004, the date on which the d Bill was presented in the Rajya Sabha, shall not be invalidated.

e **61.** The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act.

f **62.** The concept of retrospective and retroactive statute was stated by this Court in *Darshan Singh v. Ram Pal Singh*⁶⁴, thus: (SCC pp. 211-13, paras 35-37)

g “35. Mr Sachar relies on *Gokal Chand v. Parvin Kumari*⁶⁵, *Garikapati Veeraya v. N. Subbiah Choudhry*⁶⁶, *Jose Da Costa v. Bascora Sadasiva Sinai Narcornim*⁶⁷, *Govind Das v. CIT*⁶⁸, *Henshall v. Porter*⁶⁹, *United Provinces v. Atiqa Begum*⁷⁰, in support of his submission that the Amendment Act was not made retrospective by the legislature either

64 1992 Supp (1) SCC 191

65 AIR 1952 SC 231

66 AIR 1957 SC 540

67 (1976) 2 SCC 917

h 68 (1976) 1 SCC 906 : 1976 SCC (Tax) 133

69 (1923) 2 KB 193

70 1940 SCC OnLine FC 11 : AIR 1941 FC 16

expressly or by necessary implication as the Act itself expressly provided that it shall be deemed to have come into force on 23-1-1973; and therefore there would be no justification to giving it retrospective operation. The vested right to contest which was created on the alienation having taken place and which had been litigated in the court, argues Mr Sachar, could not be taken away. In other words, the vested right to contest in appeal was not affected by the Amendment Act. However, to appreciate this argument we have to analyse and distinguish between the two rights involved, namely, the right to contest and the right to appeal against the lower court's decision. Of these two rights, while the right to contest is a customary right, the right to appeal is always a creature of statute. The change of the forum for appeal by enactment may not affect the right of appeal itself. In the instant case we are concerned with the right to contest and not with the right to appeal as such. There is also no dispute as to the propositions of law regarding vested rights being not taken away by an enactment which is *ex facie* or by implication not retrospective. But merely because an Act envisages a past act or event in the sweep of its operation, it may not necessarily be said to be retrospective. Retrospective, according to *Black's Law Dictionary*, means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law, according to the same dictionary, means a law which looks backwards or contemplates the past; one which is made to affect acts or facts occurring, or rights occurring, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Retroactive statute means a statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights.

36. In *Halsbury's Laws of England* (4th Edn., Vol. 44, at para 921) we find:

'921. *Meaning of "retrospective".*—It has been said that "retrospective" is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights; or is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing.'

37. We are inclined to take the view that in the instant case the legislature looked back to 23-1-1973 and not beyond to put an end to the custom and merely because on that cut-off date some contests were brought to abrupt end would not make the Amendment Act retrospective. In other

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a words, it would not be retrospective merely because a part of the requisites for its action was drawn from a time antecedent to the Amendment Act coming into force. We are also of the view that while providing that
b “no person shall contest any alienation of immovable property whether ancestral or non-ancestral or any appointment of an heir to such property”, without preserving any right to contest such alienations or appointments as were made after the coming into force of the Principal Act and before the coming into force of the Amendment Act, the intention of the legislature was to cut off even the vested right; and that it was so by implication as well. There is no dispute as to the proposition that retrospective effect is not to be given to an Act unless, the legislature made it so by express words or necessary implication. But in the instant case it appears that this was the intention of the legislature. Similarly courts will construe a provision as conferring power to act retroactively when clear words are used. We
c find both the intention and language of the Amendment Act clear in these respects.”

63. In *G. Sekar v. Geetha*⁷¹ with respect to the operation of the 2005 Amendment Act, it was observed that the same is prospective in nature and not retrospective thus: (SCC p. 110, para 30)

d “30. Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court⁷² might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it
e is not retrospective in nature, its application is prospective.”

64. The decision in *G. Sekar*⁷¹ concerned with the provisions of Section 23 of the Hindu Succession Act prior to its deletion w.e.f. 9-9-2005. The question involved therein was the effect of the deletion by the Amendment Act of 2005. The suit for partition of the residential dwelling house was not maintainable under Section 23. In that context, the observations were made by this Court.
f In *Sheela Devi*³², the question was whether Section 8 of the 1956 Act would apply or the law applicable prior to the 1956 Act.

65. Section 6(2) provides that when the female Hindu shall hold the property to which she becomes entitled under Section 6(1), she will be bound to follow the rigours of coparcenary ownership, and can dispose of the property by testamentary mode.
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66. With respect to a Hindu who dies after the commencement of the 2005 Amendment Act, 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

h ⁷¹ (2009) 6 SCC 99 : (2009) 2 SCC (Civ) 747

⁷² *G. Sekar v. Geetha*, 2007 SCC OnLine Mad 98 : (2007) 2 CTC 17

³² *Sheela Devi v. Lal Chand*, (2006) 8 SCC 581

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 the child has also died then the 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 sea-change 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). The Explanation to Section 6(3) is the same as Explanation I to Section 6 as originally enacted. 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 the 2005 Amendment Act. 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.

67. 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.

68. Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. The expression used in Section 6 is that she becomes coparcener in the same manner as a son. By adoption also, the status of coparcener can be conferred. The concept of uncodified Hindu law of unobstructed heritage has been given a concrete shape under the provisions of Sections 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).

69. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 9-9-2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant

a 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).

In re: Effect of enlargement of daughter's rights

b 70. Under the proviso to Section 6 before the amendment made in the year 2005 in case a coparcener died leaving behind female relative of Class I heir or a male descendant claiming through such Class I female heir, the daughter was one of them. Section 6, as substituted, presupposes the existence of coparcenary. It is only the case of the enlargement of the rights of the daughters. The rights of other relatives remain unaffected as prevailed in the proviso to Section 6 as it stood before amendment.

c 71. 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. d 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.

e 72. There can be a sole surviving coparcener in a given case the property held by him is treated individual property till a son is born. In case there is a widow or daughter also, it would be treated as joint family property. If the son is adopted, he will become a coparcener. An adoption by a widow of a deceased coparcener related to the date of her husband's death, subject to saving the alienations made in the intermittent period.

In re: Acquisition of rights in coparcenary property

f 73. It is by birth that interest in the property is acquired. Devolution on the death of a coparcener before 1956 used to be only by survivorship. After 1956, women could also inherit in exigencies, mentioned in the proviso to unamended Section 6. Now by legal fiction, daughters are treated as coparceners. No one is made a coparcener by devolution of interest. It is by virtue of birth or by way of adoption obviously within the permissible degrees; a person is to be treated as coparcener and not otherwise.

g 74. The argument raised that if the father or any other coparcener died before the 2005 Amendment Act, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and there was no coparcener alive from whom the daughter would succeed. We are unable to accept the submission because it is not by the death of the father or other coparcener that rights accrue. It is by the factum of birth. It is only when a female of Class I heir is left, or in case of her death, male relative is left, h

the share of the deceased coparcener is fixed to be distributed by a deemed partition, in the event of an actual partition, as and when it takes place as per the proviso to unamended Section 6. The share of the surviving coparcener may undergo change till the actual partition is made. The proviso to Section 6 does not come in the way of formation of a coparcenary, and who can be a coparcener. The proviso to Section 6 as originally stood, contained an exception to the survivorship right. The right conferred under substituted Section 6(1) is not by survivorship but by birth. The death of every coparcener is inevitable. How the property passes on death is not relevant for interpreting the provisions of Section 6(1). Significant is how right of a coparcener is acquired under Mitakshara coparcenary. It cannot be inferred that the daughter is conferred with the right only on the death of a living coparcener, by declaration contained in Section 6, she has been made a coparcener. The precise declaration made in Section 6(1) has to be taken to its logical end; otherwise, it would amount to a denial of the very right to a daughter expressly conferred by the legislature. Survivorship as a mode of succession of property of a Mitakshara coparcener, has been abrogated with effect from 9-9-2005 by Section 6(3).

75. The decision in *Bireswar Mookerji v. Ardha Chunder Roy Chowdhry*¹⁶, was relied upon to contend that adoption is only of a male and not a female as held in *Amarendra Mansingh v. Sanatan Singh*¹⁴, a male becomes a coparcener by birth or adoption. There is no dispute with the custom, which was prevalent earlier that there could be the adoption of a male child and not that of females. There is no dispute with the proposition that a coparcenary right accrued to males under the prevalent law by birth or adoption. In the same manner, right is accrued by birth to the daughter under the provisions of Section 6. The legislature in Section 6 used the term that a daughter becomes coparcener by birth. The claim based on birth is distinguishable and is different from modes of succession.

76. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to Section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20-12-2004. A daughter can assert the right on and from 9-9-2005, and the proviso saves from invalidation the above transactions.

77. It was argued that in the eventuality of the death of a father or other coparcener, the parties would have not only partitioned their assets but also acted in pursuance of such partition. However, partitions have been taken care of by the proviso to Sections 6(1) and 6(5). Parliament has not intended to upset all such transactions as specified in the proviso to Section 6(1).

78. It was vehemently argued that if the daughter is given the right to be a coparcener by birth and deemed to become a coparcener at any point in

¹⁶ 1892 SCC OnLine PC 3 : (1891-92) 19 IA 101

¹⁴ 1933 SCC OnLine PC 29 : (1932-33) 60 IA 242 : AIR 1933 PC 155

- a the past, in the normal working of the law, uncertainty would be caused. In our opinion, no uncertainty is brought about by the provisions of Section 6 as the law of Mitakshara coparcenary makes the share of surviving coparceners uncertain till actual partition takes place. Uncertainty in the right of share in a Mitakshara coparcenary is inhered in its underlying principles, and there is no question of upturning it when the daughter is treated like a son and is given the right by birth; to be exercised from a particular date i.e. 9-9-2005. It is not to resurrect the past but recognising an antecedent event for conferral of rights,
- b prospectively. There is no doubt about it that advancement brings about the enlargement of the size of the coparcenary and disabling it from treating the daughter unequally. Even otherwise, its size could be enlarged by the birth of a son also. By applying Section 8, the joint possession was not repudiated by the fact that a female, whether a wife or daughter, inherited the share of coparcener under the proviso to original Section 6. She was an equal member of the joint
- c Hindu family and deemed statutory partition did not bring disruption of the coparcenary.

79. In *Prakash v. Phulavati*², father died in the year 1988, daughters filed a suit for partition in 1992, same was dismissed in 2007, entitlement was given to the daughters to a share on a notional partition under the proviso to Section 6 in the share of the coparcener father. However, the High Court⁷³
- d applied the amended provisions of Section 6 to the pending proceedings and treated daughters equally with sons. As such, the matter travelled to this Court. It was held that the proviso is not retrospective. The requirement of partition being registered can have no application to statutory notional partition, on the opening of succession as per the unamended proviso to Section 6, having regard to the nature of such partition, which is by operation of law. It was opined:
- e (SCC pp. 48-49 & 52, paras 17-18, 23, 27.2 & 27.3)

- f “17. The text of the amendment itself clearly provides that the right conferred on a “daughter of a coparcener” is “on and from the commencement of the Hindu Succession (Amendment) Act, 2005”. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective⁷⁴. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect.
- g Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view⁷³ of the High Court cannot be sustained.

h ² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

⁷³ *Phulavati v. Prakash*, 2010 SCC OnLine Kar 5310 : (2011) 2 AIR Kant R 121

⁷⁴ *Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24, paras 22 to 27

18. The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

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23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.

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27.2. In *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*²³, *Shyama Devi v. Manju Shukla*⁷⁵ and *Anar Devi v. Parmeshwari Devi*²² cases this Court interpreted Explanation I (p. 60, para 50) to Section 6 (prior to the 2005 Amendment) of the Hindu Succession Act. It was held that the deeming provision referring to partition of the property immediately before the death of the coparcener was to be given due and full effect in view of settled principle of interpretation of a provision incorporating a deeming fiction. In *Shyama Devi*⁷⁵ and *Anar Devi*²² cases, same view was followed.

27.3. In *Vaishali Satish Ganorkar v. Satish Kesharao Ganorkar*⁷⁶, the Bombay High Court held that the amendment will not apply unless the daughter is born after the 2005 Amendment, but on this aspect a different view has been taken in the later larger Bench judgment in *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*⁷⁷. We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that

23 (1978) 3 SCC 383

75 (1994) 6 SCC 342

22 (2006) 8 SCC 656

76 2012 SCC OnLine Bom 116 : AIR 2012 Bom 101

77 2014 SCC OnLine Bom 908 : AIR 2014 Bom 151

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daughter should be alive and her father should also be alive on the date of the amendment.”

- a* **80.** A finding has been recorded in *Prakash v. Phulavati*² that the rights under the substituted Section 6 accrue to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. Hence, we respectfully find ourselves unable to agree with the concept of “living coparcener”, as laid down in *Prakash v. Phulavati*². In our opinion, the daughters should be living on 9-9-2005. In substituted Section 6, the expression “daughter of a living coparcener” has not been used. Right is given under Section 6(1)(a) to the daughter by birth.
- c* Declaration of right based on the past event was made on 9-9-2005 and as provided in Section 6(1)(b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in Section 6(1)(c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of Section 6(1) leave no room to entertain the proposition that coparcener should be living on 9-9-2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part.
- d*

- 81.** In *Mangammal v. T.B. Raju*¹⁸, the Court considered the provisions made in the State of Tamil Nadu, the State Government enacted the Hindu Succession (Tamil Nadu Amendment) Act, 1989, made effective from 25-3-1989, adding Section 29-A in the Hindu Succession Act, 1956. Section 29-A was held to be valid regarding succession by survivorship. Section 29-A provided equal rights to daughters in coparcenary property. The provisions were more or less similar, except Section 29-A(iv) treated a married daughter differently. The provisions were not applicable to the daughters married before the date of commencement of the Amendment Act, 1989. Thus, married daughters were not entitled to equal rights. That too, has been taken care of in Section 6, as substituted by the 2005 Act, and no discrimination is made against married daughters. In the said case, Mangammal got married in 1981, and Indira got married in or about 1984 i.e. before the 1989 Amendment. Therefore, it was held that because of Section 29-A(iv) of the Amendment Act, the appellant could not institute a suit for partition and separate possession as they were not coparceners. The decisions in *Prakash v. Phulavati*² and *Danamma*³ were referred, and it was opined that *Prakash v. Phulavati*² would still hold the value of precedent for right of a daughter in ancestral property and only “living daughters of living coparceners” as on 9-9-2005 would be entitled to claim a share in the coparcenary property.
- e*
- f*
- g*

h ² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549
¹⁸ (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300
³ *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

82. In *Mangammal*¹⁸, the Court opined thus: (SCC pp. 667-68, paras 15-17)

“15. Moreover, under Section 29-A of the Act, the legislature has used the words “the daughter of a coparcener”. Here, the implication of such wordings mean both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the amendment of 1989. The similar issue came up for consideration before this Court in *Prakash v. Phulavati*², wherein this Court while dealing with the identical matter held at para 23 as under: (SCC p. 49)

‘23. Accordingly, we hold that the rights under the amendment are applicable to *living daughters of living coparceners* as on 9-9-2005 irrespective of when such daughters are born.’

16. It is pertinent to note here that recently, this Court in *Danamma v. Amar*³, dealt, inter alia, with the dispute of daughter’s right in the ancestral property. In the above case, father of the daughter died in 2001, yet the court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of *Danamma*³, it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law *whether daughter who was born prior to the 2005 Amendment would be entitled to claim a share in ancestral property or not?* In such circumstances, in our view, *Prakash*², would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

17. Hence, without touching any other aspect in the present case, we are of the view that the appellants were not the coparceners in the Hindu joint family property in view of the 1989 Amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted.” (emphasis in original)

It is apparent that the question of living daughter of a living coparcener was not involved in the matter, once this Court held that the married daughters were not entitled to claim partition and separate possession as marriage had taken place prior to the enforcement of the 1989 Amendment, as observed in para 17 quoted above. However, this Court opined that the decision in *Prakash v. Phulavati*², laying down that only living daughters of living coparceners would be entitled to claim a share in the ancestral property under Section 6 of the 1956 Act. The opinion expressed cannot be accepted for the reasons mentioned above. Moreover, it was not necessary to go into the aforesaid question.

18 *Mangammal v. T.B. Raju*, (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300

2 (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

3 (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

a **83.** In *Danamma*³, a Division Bench of this Court dealt with the interpretation of amended provisions of Section 6. The decision in *Anar Devi v. Parmeshwari Devi*²² was relied upon. It was observed that the controversy concerning the interpretation of Section 6 now stands settled with authoritative pronouncement in *Prakash v. Phulavati*² which affirmed the view^{77a} taken by the High Court as well as a Full Bench in *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*⁷⁷. In *Danamma*³, the Court further opined: (SCC pp. 356-57, paras 23 & 25-27)

b “23. Section 6, as amended, stipulates that *on and from* the commencement of the Amendment Act, 2005, the daughter of a coparcener shall *by birth* become a coparcener in her own right in *the same manner as the son*. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners *since birth*.
c The amended provision now statutorily recognises the rights of coparceners of daughters as well *since birth*. The section uses the words *in the same manner as the son*. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners *by birth*. It is the very *factum of birth* in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners *by virtue of birth*. Devolution of coparcenary property
d is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and is well recognised. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-sections (1)(a) and (b).
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* * *

25. Hence, it is clear that the right to partition has not been abrogated. *The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.*

f 26. In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court⁷⁸. This Court in *Ganduri Koteswaramma v. Chakiri Yanadi*²⁹, held that the rights of daughters in coparcenary property as per
g the amended Section 6 are not lost merely because a preliminary decree has

³ *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

²² (2006) 8 SCC 656

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

^{77a} *M. Prithviraj v. Leelamma N.*, 2007 SCC OnLine Kar 553

h ⁷⁷ 2014 SCC OnLine Bom 908 : AIR 2014 Bom 151

⁷⁸ *Danamma v. Amar*, 2012 SCC OnLine Kar 9178

²⁹ (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880

been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

27. On facts, there is no dispute that the property which was the subject-matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5th share each in the said property. The plaintiff (Respondent 1) is son of Arun Kumar (Defendant 1). Since, Arun Kumar will have 1/5th share, it would be divided into five shares on partition i.e. between Defendant 1 Arun Kumar, his wife Defendant 2, his two daughters Defendants 3 and 4 and son/plaintiff (Respondent 1). In this manner, Respondent 1-plaintiff would be entitled to 1/25th share in the property.” (emphasis in original)

84. In *Danamma*³, it is pertinent to mention that Gurulingappa, propositus of a Hindu joint family and the father of living daughter coparcener died in 2001, before the 2005 Amendment Act came into force, leaving behind two daughters, son and a widow. Daughters were given equal rights by this Court. We agree with certain observations made in paras 23 and 25 to 27 (supra) but find ourselves unable to agree with the earlier part approving the decision in *Prakash v. Phulavati*² and the discussion with respect to the effect of the statutory partition. As a matter of fact, in substance, there is a divergence of opinion in *Prakash v. Phulavati*² and *Danamma*³ with respect to the aspect of living daughter of a living coparcener. In the latter case, the proposition of the living daughter of a living coparcener was not dealt with specifically. However, the effect of reasons given in para 23 had been carried out to logical end by giving an equal share to the daughter.

In re: Partition and effect of statutory fiction

85. 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 Sections 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 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.

³ *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

² (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

86. We deem it appropriate to refer to the decision in *Hardeo Rai v. Sakuntala Devi*⁷⁹ laying down that when an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. After taking a definite share in the property, a coparcener becomes the owner of that share, and, as such, he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property. It was observed: (SCC p. 51, paras 22-23)

b “22. For the purpose of assigning one’s interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as “joint tenants” but as “tenants-in-common”. The decision of this Court in *SBI*⁸, therefore, is not applicable to the present case.

23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.”

d **87.** It is settled proposition of law that without partition, only undivided share can be sold but not specific property, nor joint possession can be disrupted by such alienation. Whether the consent of other coparcener is required for sale or not, depends upon by which School of Mitakshara law, parties are governed, to say, in Benares School, there is a prohibition on the sale of property without the consent of other coparceners. The Court in the abovesaid decision *e* made general observation but was not concerned with the aspect when the partition was completed, the effect of intervening events and effect of statutory provisions as to partition, as such, it cannot be said to be an authority as to provisions of Section 6 as substituted and as to enlargement of the right by operation of law achieved thereunder. Shares of coparceners can undergo a change in coparcenary by birth and death unless and until the final division *f* is made. The body of coparcenary is increased by the operation of law as daughters have been declared as a coparcener, full effect is required to be given to the same. The above decision cannot be said to be an authority for the question involved in the present matters.

g **88.** In *Man Singh v. Ram Kala*⁸⁰, the question of devolution of interest in coparcenary property arose on the death of male Hindu leaving behind wife, son and three daughters, and determination of their shares. It was observed that until the disruption of joint family status occurs, the definite share cannot be claimed with certainty, and share cannot be predicated in joint and undivided property. The question of disruption of joint family status by a definite and unequivocal declaration of intention to separate himself from the family was

h ⁷⁹ (2008) 7 SCC 46

⁸ *SBI v. Ghamandi Ram*, (1969) 2 SCC 33

⁸⁰ (2010) 14 SCC 350 : (2012) 1 SCC (Civ) 475 : AIR 2011 SC 1542

also considered. The question in the present case is when the partition has not taken place whether the statutory fiction contained in the proviso to Section 6 with respect to the determination of shares of a deceased coparcener and its devolution thereunder would disrupt coparcenary. The answer is in the negative. In *Man Singh*⁸⁰, it was observed that the wife has a right to claim an equal share in the husband's property as that of a son, and she can enjoy the share separately even from her husband thus: (SCC pp. 355-56, paras 14 & 17)

“14. ... Till disruption of joint family status takes place, neither coparcener nor the other heirs entitled to share in the joint family property can claim with certainty the exact share in that property. In *Approvier v. Rama Subba Aiyan*⁴⁸, Lord Westbury speaking for the Judicial Committee (Privy Council) observed:

‘According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.’

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17. In *Principles of Hindu Law* by Mulla, Vol. I (17th Edn.) as regards the right of wife, it is stated that:

‘315. *Wife*.—(1) A wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband.’

(Article 315 at p. 506.)”

89. In *Girja Bai v. Sadashiv Dhundiraj*⁸¹, *Kawal Nain v. Budh Singh*⁸² and *K. Ramalinga Annavi v. Narayana Annavi*⁸³, it was laid that the institution of a suit for partition by a member of a joint family is a clear intimation of his intention to separate and the decisions indicate that there was consequential severance of joint status from the date when the suit was filed though there was an assertion of his right to separate by filing of the suit whether the consequential judgment is passed or not. However, we add a rider that if subsequently, the law confers a right, or such other event takes place, its effect has to be worked out even after passing of the preliminary decree.

90. In *Kedar Nath v. Ratan Singh*⁸⁴ and *Palani Ammal v. Muthuvenkatachala Moniagar*⁸⁵, it was observed that if the suit is withdrawn before trial and passing of the decree, the plaintiff ultimately has not chosen

80 *Man Singh v. Ram Kala*, (2010) 14 SCC 350 : (2012) 1 SCC (Civ) 475 : AIR 2011 SC 1542

48 (1866-67) 11 Moo IA 75

81 1916 SCC OnLine PC 31 : (1915-16) 43 IA 151 : AIR 1916 PC 104 : ILR (1916) 43 Cal 1031

82 1917 SCC OnLine PC 25 : (1916-17) 44 IA 159 : AIR 1917 PC 39

83 1922 SCC OnLine PC 13 : (1921-22) 49 IA 168 : AIR 1922 PC 201

84 1910 SCC OnLine PC 17 : (1909-10) 37 IA 161

85 1924 SCC OnLine PC 61 : (1924-25) 52 IA 83 : AIR 1925 PC 49

to go for separation. It was laid down that there was no severance of the joint status of the family by filing of the suit.

a **91.** In *Joala Prasad Singh v. Chanderjot Kuer*⁸⁶, it was held that the filing of a suit is a shred of strong evidence, but not conclusive evidence of an intention to separate. However, in our opinion, the intention to separate need not be confused with the change of rights during the pendency of the suit, which has to be given full effect, to do complete justice.

b **92.** In *A.N. Chockalingam Chettiar v. V.T. Sp. Muthukaruppan Chettiar*⁸⁷, it was laid down that even a decree passed by consent does not affect a severance; it had no validity if its terms were not executed and the members continue to live together having abandoned their decision to separate.

c **93.** In *Mukund Dharman Bhoir v. Balkrishna Padmanji*⁸⁸, a distinction was made between severance of the joint status, which is a matter of individual decision and the division of the property where the allotment of shares may be effected by private arrangements, by arbitrators or as a last resort, by the Court. It was observed: (SCC OnLine PC)

d “In the first place, there is separation, which means the severance of the status of jointness. That is matter of individual volition; and it must be shown that an intention to become divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct.

Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods.”

e **94.** In *Palani Ammal*⁸⁵, *T.S. Ramabadra Odayar v. T.S. Gopalaswami Odayar*⁸⁹ and *Gangabai v. Punau Rajwa Teli*⁹⁰, it was laid down that joint family does not get disrupted merely by ascertainment of the shares of the coparcener. In order to constitute a partition, the shares should be defined with the intention of an immediate separation.

f **95.** In *Purnananthachi v. T.S. Gopalaswami Odayar*⁹¹, only one of the members was given the share by way of instrument of partition. It was also provided that the rest of the property was to remain joint. It was held that there was no partition between the other members. In *CIT v. N.K. Sarada Thampatty*⁹², it was held that if a preliminary decree for partition is passed, it will not amount to a partition unless an actual physical partition is carried out pursuant to a final decree.

g ⁸⁶ 1938 SCC OnLine Pat 37 : AIR 1938 Pat 278

⁸⁷ 1938 SCC OnLine Mad 119 : AIR 1938 Mad 849

⁸⁸ 1927 SCC OnLine PC 68 : (1926-27) 54 IA 413 : AIR 1927 PC 224

⁸⁵ *Palani Ammal v. Muthuvenkatachala Moniagar*, 1924 SCC OnLine PC 61 : (1924-25) 52 IA 83 : AIR 1925 PC 49

⁸⁹ 1930 SCC OnLine Mad 82 : AIR 1931 Mad 404

h ⁹⁰ 1955 SCC OnLine MP 39 : AIR 1956 Nag 261

⁹¹ 1936 SCC OnLine PC 48 : (1935-36) 63 IA 436 : AIR 1936 PC 281

⁹² 1991 Supp (2) SCC 737 : AIR 1991 SC 2035

96. In *S. Sai Reddy v. S. Narayana Reddy*⁹³, a suit for partition, was filed. A preliminary decree determining the shares was passed. The final decree was yet to be passed. It was observed that unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. A preliminary decree does not bring about the final partition. For, pending the final decree, the shares themselves are liable to be varied on account of the intervening events, and the preliminary decree does not bring about any irreversible situation. The concept of partition that the legislature had in mind could not be equated with a mere severance of the status of the joint family, which could be effected by an expression of a mere desire by a family member to do so. The benefit of the provision of Section 29-A could not have been denied to women whose daughters were entitled to seek shares equally with sons in the family. In *S. Sai Reddy*⁹³, it was held: (SCC pp. 650-51, paras 7-8)

“7. The question that falls for our consideration is whether the preliminary decree has the effect of depriving Respondents 2 to 5 of the benefits of the amendment. The learned counsel placed reliance on clause (iv) of Section 29-A to support his contention that it does. Clause (ii) of the section provides that a daughter shall be allotted share like a son in the same manner treating her to be a son at the partition of the joint family property. However, the legislature was conscious that prior to the enforcement of the amending Act, partitions will already have taken place in some families and arrangements with regard to the disposition of the properties would have been made and marriage expenses would have been incurred, etc. The legislature, therefore, did not want to unsettle the settled positions. Hence, it enacted clause (iv) providing that clause (ii) would not apply to a daughter married prior to the partition or to a partition which had already been effected before the commencement of the amending Act. Thus if prior to the partition of family property a daughter had been married, she was disentitled to any share in the property. Similarly, if the partition had been effected before 5-9-1985 the date on which the amending Act came into force, the daughter even though unmarried was not given a share in the family property. The crucial question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes viz. by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. *The preliminary decree which determines shares does not bring about the final*

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a partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. This intervening event which gave shares to Respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its strata, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.

e 8. Hence, in our opinion, the High Court has rightly held⁹⁴ that since the final decree had not been passed and the property had not been divided by metes and bounds, clause (iv) to Section 29-A was not attracted in the present case and the respondent daughters were entitled to their share in the family property.” (emphasis supplied)

f 97. In *Prema v. Nanje Gowda*⁹⁵, insertion of Section 6-A by the amendment made by the State of Karnataka in the Hindu Succession Act, 1956, was considered. Equal rights were given to the daughter in coparcenary property in a suit for partition. A preliminary decree was passed. Amendment in the Act was made during the final decree proceedings. It was held that the discrimination practised against the unmarried daughter was removed. Unmarried daughters had equal rights in the coparcenary property. The amendment’s effect was that the unmarried daughter could claim an equal share in the property in terms of Section 6-A inserted in Karnataka. In *Prema*⁹⁵, the Court opined: (SCC pp. 469 & 471-72, paras 12 & 16)

g “12. ... in *R. Gurubasaviah v. Rumale Karibasappa*⁹⁶, *Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari*⁹⁷ and *Jadu Nath Ray v.*

94 *S. Narayana Reddy v. S. Sai Reddy*, 1990 SCC OnLine AP 12 : (1990) 1 AP LJ 252

h 95 (2011) 6 SCC 462 : (2011) 3 SCC (Civ) 379 : AIR 2011 SC 2077

96 1954 SCC OnLine Kar 5 : AIR 1955 Mys 6

97 1956 SCC OnLine Bom 103 : AIR 1957 Bom 59

*Parameswar Mallik*⁹⁸, and held that if after passing of preliminary decree in a partition suit but before passing of final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment, the Court is duty-bound to decide the matter and pass final decree keeping in view of the changed scenario.

* * *

16. We may add that by virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the High Court⁹⁹, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before the conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the court seized with the final decree proceedings is not only entitled but is duty-bound to take notice of such change and pass appropriate order.” (emphasis supplied)

98. It was held that if after passing of a preliminary decree in a partition suit but before passing of the final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment; the court is duty-bound to decide the matter and pass final decree keeping in view the changed scenario. In *Prema*⁹⁵, the Court further opined: (SCC p. 478, para 29)

“29. In our view, neither of the aforesaid three judgments can be read as laying down a proposition of law that in a partition suit, preliminary decree cannot be varied in the final decree proceedings despite amendment of the law governing the parties by which the discrimination practiced against unmarried daughter was removed and the statute was brought in conformity with Articles 14 and 15 of the Constitution. We are further of the view that the ratio of *Phoolchand v. Gopal Lal*¹⁰⁰ and *S. Sai Reddy v. S. Narayana Reddy*⁹³ has direct bearing on this case and the trial court and the High Court committed⁹⁹ serious error by dismissing the application filed by the appellant for grant of equal share in the suit property in terms of Section 6-A of Karnataka Act 23 of 1994.”

98 1939 SCC OnLine PC 52 : (1939-40) 67 IA 11 : AIR 1940 PC 11

99 *Prema v. Nanje Gowda*, 2002 SCC OnLine Kar 428 : AIR 2003 Kar 104

95 *Prema v. Nanje Gowda*, (2011) 6 SCC 462 : (2011) 3 SCC (Civ) 379 : AIR 2011 SC 2077

100 AIR 1967 SC 1470

93 (1991) 3 SCC 647

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It was laid down that by the change of law, the share of daughter can be enlarged even after passing a preliminary decree, the effect can be given to in final decree proceedings.

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99. In *Ganduri Koteshwaramma v. Chakiri Yanadi*²⁹, this Court considered the amendment made in Section 6 of the Hindu Succession Act in 2005 and held that the right of a daughter in coparcenary property is not lost by passing of a preliminary decree for partition before the stipulated date i.e. 20-12-2004. A partition suit does not stand disposed of by passing of a preliminary decree.

b

Relying inter alia, on *S. Sai Reddy*⁹³, it was held that the preliminary decree can be amended in order to fully recognise the rights of a daughter: (SCC pp. 794-97, paras 13-15 & 18-21)

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“13. The legal position is settled that partition of a joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before 20-12-2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by Respondent 1 is the determination of shares vide preliminary decree dated 19-3-1999, which came to be amended on 27-9-2003 and the receipt of the report of the Commissioner.

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14. *A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation.*

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15. We are fortified in our view by a three-Judge Bench decision of this Court in *Phoolchand v. Gopal Lal*¹⁰⁰, wherein this Court stated as follows: (AIR p. 1473, para 7)

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‘7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. ... So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates

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²⁹ (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880

⁹³ *S. Sai Reddy v. S. Narayana Reddy*, (1991) 3 SCC 647

¹⁰⁰ AIR 1967 SC 1470

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a change in shares, the court can and should do so; ... There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. ... for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. ... a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree.'

* * *

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18. The above legal position is wholly and squarely applicable to the present case. It surprises us that the High Court was not apprised of the decisions of this Court in *Phoolchand*¹⁰⁰ and *S. Sai Reddy*⁹³. The High Court considered the matter as follows:

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19. The High Court was clearly in error in not properly appreciating the scope of Order 20 Rule 18 CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In *Phoolchand*¹⁰⁰, this Court has stated the legal position that CPC creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. *The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demands. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification.* It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

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20. Section 97 CPC that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the court to

100 *Phoolchand v. Gopal Lal*, AIR 1967 SC 1470

93 *S. Sai Reddy v. S. Narayana Reddy*, (1991) 3 SCC 647

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modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.

a 21. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree.” (emphasis supplied)

b The effect of the legislative provision concerning partition was considered, and it was held that a preliminary decree merely declares the shares and on which law confers equal rights upon the daughter that is required to be recognised.

c 100. The concept of partition and its effect was considered by this Court in *Shub Karan Bubna v. Sita Saran Bubna*¹⁰¹ thus: (SCC pp. 693 & 696-98, paras 5-6, 18 & 20)

“*The issue*

d 5. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

e 6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “*Separation of share*” is a species of “*partition*”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

f 18. The following principles emerge from the above discussion regarding partition suits:

g 18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition*, that is, division by metes and bounds takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the

h 101 (2009) 9 SCC 689 : (2009) 3 SCC (Civ) 820

* Ed.: The word “partition” has been emphasised in original as well.

Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

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20. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree.” (emphasis supplied)

b

101. In *Lakshmi Narayan Guin v. Niranjan Modak*¹⁰², it was laid down that change in law during the pendency of the appeal has to be taken into consideration thus: (SCC pp. 274-75, para 9)

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“9. That a change in the law during the pendency of an appeal has to be taken into account and will govern the rights of the parties was laid down by this Court in *Ram Sarup v. Munshi*¹⁰³ which was followed by this Court in *Mula v. Godhu*¹⁰⁴. We may point out that in *Dayawati v. Inderjit*¹⁰⁵ this Court observed: (AIR p. 1426, para 10)

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‘10. ... If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance.’

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Reference may also be made to the decision of this Court in *Amarjit Kaur v. Pritam Singh*¹⁰⁶ where effect was given to a change in the law during the pendency of an appeal, relying on the proposition formulated as long ago as *Kristnama Chariar v. Mangammal*¹⁰⁷ by Bhashyam Ayyangar, J., that the hearing of an appeal was, under the processual law of this country, in the nature of a re-hearing of the suit. In *Amarjit Kaur*¹⁰⁶ this Court referred also to *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*¹⁰⁸ in which the Federal Court had laid down that once a decree passed by a court had been appealed against, the matter became sub judice again and thereafter the appellate court acquired seisin of the whole case, except that for certain

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102 (1985) 1 SCC 270

103 AIR 1963 SC 553

104 (1969) 2 SCC 653

105 AIR 1966 SC 1423

106 (1974) 2 SCC 363

107 1902 SCC OnLine Mad 30 : ILR (1903) 26 Mad 91

108 1940 SCC OnLine FC 10 : AIR 1941 FC 5

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purposes, for example, execution, the decree was regarded as final and the court below retained jurisdiction.”

a **102.** In *United Bank of India v. Abhijit Tea Co. (P) Ltd.*¹⁰⁹, with respect to change in law during the pendency of proceedings, it was observed: (SCC p. 365, para 20)

b “20. Now, it is well settled that it is the duty of a court, whether it is trying original proceedings or hearing an appeal, to take notice of the change in law affecting pending actions and to give effect to the same. (See G.P. Singh: *Interpretation of Statutes*, 7th Edn., p. 406.) If, while a suit is pending, a law like the 1993 Act that the civil court shall not decide the suit, is passed, the civil court is bound to take judicial notice of the statute and hold that the suit—even after its remand—cannot be disposed of by it.”

c **103.** In *Gurupad Khandappa Magdum*²³, the question of Explanation I to Section 6 of the Hindu Succession Act, 1956 came up for consideration with respect to the determination of widow’s interest in the coparcenary property. The Court held that a widow’s share in the coparcenary property must be ascertained by adding the share to which she is entitled at a notional partition during her husband’s lifetime and the share she would have obtained in her husband’s interest upon his death. The first step is to ascertain the share of
d the deceased in the coparcenary property that would be worked out ultimately, and that shall be deemed to be the share in the property that should have been allotted to the deceased. 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. The assumption must permeate the entire process of ascertainment of the ultimate share of the heirs. All the consequences must
e be taken to a logical end. It was opined: (SCC pp. 389-90, para 13)

f “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 I to Section 6 resorts to the simple expedient, undoubtedly
g 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
h 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

¹⁰⁹ (2000) 7 SCC 357 : AIR 2000 SC 2957

²³ *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*, (1978) 3 SCC 383

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)

The only question involved in the aforesaid matter was with respect to the Explanation of Section 6 and the determination of the widow's share. In that case, the question was not of fluctuation in the coparcenary body by a legal provision or otherwise. Everything remained static. No doubt about it, the share of the deceased has to be worked out as per the statutory fiction of partition created. However, in case of change of body of the coparceners by a legal provision or otherwise, unless and until the actual partition is finally worked out, rights have to be recognised as they exist at the time of the final decree. It is only the share of the deceased coparcener, and his heirs are ascertained under the Explanation to Section 6 and not that of other coparceners, which keep on changing with birth and death.

104. In *Anar Devi v. Parmeshwari Devi*²², the decision in *Gurupad*²³ was considered, and it was held that when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative claiming through such female relative, his undivided interest is not devolved by survivorship but upon his heir by intestate succession thus: (*Anar Devi case*²², SCC pp. 559 & 660-61, paras 8 & 11)

“8. According to the learned author, at pp. 253-54, the undivided interest

‘of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time

²² (2006) 8 SCC 656

²³ *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*, (1978) 3 SCC 383

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of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition’.

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11. Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation I to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e. 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, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition.”

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105. In *Anar Devi*²², the question of enlargement of right by a legal provision or otherwise change in the coparcener’s share was not involved. The decision cannot help the cause set up of partition created by statutory fiction. Statutory fiction is with respect to the extent of the share of deceased coparcener in exigency provided in the proviso to Section 6. Coparcenary or HUF, as the case may be, does not come to an end by statutory fiction. Disruption of coparcenary by statutory fiction takes place, is not the proposition laid down in the aforesaid decision.

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106. In *Puttrangamma v. M.S. Ranganna*²⁰, this Court considered the doctrine of Hindu law, separation in status by a definite, unequivocal and unilateral declaration thus: (AIR pp. 1020-22, para 4)

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“4. It is now a settled doctrine of Hindu Law that 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. There does not need to be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been

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²² *Anar Devi v. Parmeshwari Devi*, (2006) 8 SCC 656

²⁰ AIR 1968 SC 1018

expounded by the early writers of Hindu Law. The relevant portion of the commentary of Vijnaneswara states as follows:

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[And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place]

Saraswathi Vilasa, placitum 28 states:

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—सकुनवयअनेन ज्ञायते परिभावां विना संकल्पमात्रेणापि विभाग सिद्धिः ।

यथा पुत्रिकाकरणमपठय परिभा—वपतवयां विना संकल्पमात्रात्सिध्यति इति ।।

‘[From this it is known that without any speech (or Explanation) even by means of a determination (or resolution) only, partition is effected, just an appointed daughter is constituted by mere intention without speech.]’

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Viramitrodaya of Mitra Misra (Ch. 11. pl. 23) is to the following effect:

—सकुनवयअत्रचपुत्रेच्छया यो जीवद्विभागः । एकेच्छयापि

भवत्यवि—यदेयो—वपतवयात्—पठय ।—तकुनवय

‘[Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener)].’

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Vyavahara Mayukha of Nilakantabhatta also states:

—सकुनवयद्रव्यसामान्याध्यादेवि त्व—वृत्तअवयवोहं विभक्त इति व्यवस्थामात्रेणापि भवत्येव विभागः ।
बुद्धिवि—यदेयो—वपतवयामात्रमेव हि विभागः ।। तस्यैवामिव्यजिकेयं व्यवस्था ।।—तकुनवय

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‘[Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration “I am separate from thee” because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition).]’ (Ch. IV, S. III-I).

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Emphasis is laid on the “budhivishesha” (particular state or condition of the mind) as the decisive factor in producing a severance in status and the declaration is stated to be merely “abhivyanjika” or manifestation which might vary according to circumstances. In *Suraj Narain v. Iqbal Narain*¹¹⁰ the Judicial Committee made the following categorical statement of the legal position: (SCC OnLine PC)

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‘A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed ... Suraj Narain alleged that he separated a few months later; there is, however, no writing in support

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a of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family.'

b In a later case—*Girja Bai v. Sadashiv Dhundiraj*⁸¹, the Judicial Committee examined the relevant texts of Hindu Law and referred to the well-marked distinction that exists in Hindu law between a severance in status so far as the separating member is concerned and a de facto division into specific shares of the property held until then jointly, and laid down the law as follows: (SCC OnLine PC)

c 'One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that, by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.'

e In *Syed Kasam v. Jorawar Singh*¹¹¹, Viscount Cave, in delivering the judgment of the Judicial Committee, observed: (SCC OnLine PC)

f 'It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, *even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree.*' " (emphasis supplied)

g **107.** 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 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.

h ⁸¹ 1916 SCC OnLine PC 31 : (1915-16) 43 IA 151 : AIR 1916 PC 104 : ILR (1916) 43 Cal 1031
¹¹¹ 1922 SCC OnLine PC 21 : (1921-22) 49 IA 358 : ILR (1922) 50 Cal 84

108. As to the effect of legal fiction, reliance was placed on *CIT v. S. Teja Singh*¹¹², in which it was laid down that in construing the scope of legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. There is no dispute with the aforesaid proposition, but the purpose of fiction is limited so as to work out the extent of the share of the deceased at the time of his death, and not to affect the actual partition in case it has not been done by metes and bounds.

109. When the proviso to unamended Section 6 of the 1956 Act 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. Neither did it affect the severance of interest nor demarcated the interest of surviving coparceners or of the other family members, if any, entitled to a share in the event of partition but could not have claimed it. The entire partition of the coparcenary is not provided by deemed fiction; otherwise, coparcenary could not have continued which is by birth, and the death of one coparcener would have brought an end to it. Legal fiction is only for a purpose it serves, and it cannot be extended beyond was held in *State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory*¹¹³; *Bengal Immunity Co. Ltd. v. State of Bihar*¹¹⁴; and *CED v. S. Harish Chandra*¹¹⁵. A legal fiction created in law cannot be stretched beyond the purpose for which it has been created, was held in *Mancheri Puthusseri Ahmed*²¹ thus: (SCC p. 195, para 8)

“8. ... In the first place the section creates a legal fiction. Therefore, the express words of the section have to be given their full meaning and play in order to find out whether the legal fiction contemplated by this express provision of the statute has arisen or not in the facts of the case. Rule of construction of provisions creating legal fictions is well settled. In interpreting a provision creating a legal fiction the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction.”

110. It is apparent that the right of a widow to obtain an equal share in the event of partition with the son was not deprived under old Section 6. Unamended Section 6 provided that the interest of a coparcener could be disposed of by testamentary or intestate succession on happening of exigency

112 AIR 1959 SC 352

113 1954 SCR 53 : AIR 1953 SC 333

114 AIR 1955 SC 661

115 1986 SCC OnLine All 805 : (1987) 167 ITR 230

21 *Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver*, (1996) 6 SCC 185

a under the proviso. Under the old law before 1956, a devise by a coparcener of Hindu Mitakshara family property was wholly invalid. Section 30 of the 1956 Act provided competence for a male Hindu in Mitakshara coparcenary to dispose of his interest in the coparcenary property by a testament.

b 111. In *Gyarsi Bai v. Dhansukh Lal*¹¹⁶, it was held that the shares of all coparceners should be ascertained in order to work out the share of the deceased coparcener, partition to be assumed and given effect to when the question of allotment comes, but this Court did not lay down in the said decision that the deeming fiction and notional partition brought an end to the joint family or coparcenary.

c 112. In case coparcenary is continued, and later on between the surviving coparceners partition takes place, it would be necessary to find out the extent of the share of the deceased coparcener. That has to be worked out with reference to the property which was available at the time of death of deceased coparcener whose share devolved as per the proviso and Explanation I to Section 6 as in case of intestate succession.

d 113. In *Hari Chand Roach v. Hem Chand*¹¹⁷, a widow inherited the estate of her husband and had an undivided interest in the property. The subsequent family arrangement was entered into whereby she exchanged her share for another property. This Court held that though her share was definite, the interest continued undivided, and there was a further family arrangement that will have the effect of giving her disposition over the property in question, which was given to her in the subsequent family arrangement. It is apparent that under an undivided interest, as provided under Section 6, the shares are definite, but the interest in the property can continue undivided.

e 114. In the instant case, the question is different. What has been recognised as partition by the legislation under Section 6, accordingly, rights are to be worked out. This Court consistently held in various decisions mentioned above that when the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law has to be conferred. Hence, we have no hesitation to reject the effect of statutory fiction of the proviso to Section 6 as discussed in *Prakash v. Phulavati*² and *Danamma*³. If a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act, irrespective of the date of birth earlier in point of time.

In re: Section 6(5)

g 115. The Explanation to Section 6(5) provides that for the purposes of Section 6, “partition” means effected by any registered partition deed or effected by a decree of a court. It is pertinent to mention that the Explanation did not find place in the original Amendment Bill moved before the Rajya

116 AIR 1965 SC 1055

h 117 (2010) 14 SCC 294 : (2012) 1 SCC (Civ) 430

2 (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

3 *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

Sabha on 20-12-2004. The same was added subsequently. In the initial Note, it was mentioned that partition should be properly defined, leaving any arbitrary interpretation, and for all practical purposes, the partition should be evinced by a registered public document or have been affected by a decree of a court. In a case partition is oral, it should be supported by documentary evidence. Initially, it was proposed to recognise the oral partition also, in case the same is supported by contemporaneous documentary evidence. The intention was to avoid any sham or bogus transactions in order to defeat the rights of coparcener conferred upon daughters by the 2005 Amendment Act. In this regard, Note for Cabinet issued by the Legislative Department, Ministry of Law & Justice, Government of India, suggested as under:

“As regards sub-section (5) of the proposed new Section 6, the committee vide paragraph has recommended that the term “partition” should be properly defined, leaving any arbitrary interpretation. Partition for all practical purposes should be registered have been effected by a decree of the court. In case where oral partition is recognised, be backed by proper documentary evidence. It is proposed to accept this recommendation and make suitable changes in the Bill.”

116. The learned Solicitor General argued that the requirement of a registered partition deed may be interpreted as only directory and not mandatory in nature considering its purposes. However, any coparcener relying upon any such family arrangements or oral partition so arrived must prove the same by leading proper documentary evidence.

117. The Cabinet Note made on 29-7-2005 with respect to “partition” is quoted hereunder:

“5.2. In this connection, it may be noted that the amendments made in the Hindu Succession Act, 1956 by the States of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu and the Kerala Joint Hindu Family System (Abolition) Act, 1975 will be superseded by any subsequent Central enactment containing provisions to the contrary as the Central legislation will prevail over the State enactments by virtue of operation of doctrine of repugnancy enunciated in Article 254 of the Constitution. Innumerable settled transactions and partitions which have taken place hitherto will also become disturbed by the proposed course of action. Further, there could be heartburning from the majority of the Hindu population. In the circumstances, it is proposed that we may remove the distinction between married and unmarried daughters and at the same time clearly lay down that alienation or disposition of property made at any time before the 20th day of December, 2004, that is, the date on which the Hindu Succession (Amendment) Bill, 2004 was introduced in the Rajya Sabha will not be affected or invalidated. Consequential changes are also suggested in sub-section (5) of proposed Section 6.”

118. Section 6(5) as proposed in the original Bill of 2004 read thus:

a “6. (5) Nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Hindu Succession (Amendment) Act, 2004.”

b **119.** Shri R. Venkataramani, Amicus Curiae, argued that the proviso to Section 6 is plain and clear. All dispositions, alienations, testamentary depositions, including partition effected prior to 20-12-2004, shall not be reopened. There may be a partition of coparcenary property, and they would have also acted in pursuance of such partition. There could be any number of instances where parties would have entered into family settlements or division of properties on the basis of respective shares or entitlement to succeed on a partition. In many of those cases, a simple mutation in revenue entries would have been considered as sufficient for severance of status. Parliament did not intend to upset all such cases, complete transactions, and open them for a new order of succession. The partition effected merely to avoid any obligation under any law, for example, the law relating to taxation or land ceiling legislation, are not examples relevant for understanding the objects and scheme of Section 6. Therefore, the proviso to sub-section (1) of Section 6 and sub-section (5) of Section 6 is required to be given such meaning and extent to not dilute the relevance in the forward and future-looking scheme of Section 6. The past cases shall not be reopened for this purpose. He has relied upon *Shashikalabai*¹⁷.

c **120.** Shri V.V.S. Rao, learned Senior Counsel appearing as Amicus Curiae, pointed out that under Section 6(5), as proposed in the Bill mentioned that nothing contained in the amended Section 6 should apply to a partition, which has been effected before the commencement of the Amendment Act. The following deliberation was made by the Committee:

“*Deliberation by the Committee*

d **35.** During its deliberation on the Bill, the Committee pondered on the concept of “partition” as referred to in the aforesaid sub-section. When the Secretary (Legislative Department) was asked as to the validity of partition effected through oral means, he replied that it depends upon the facts of the particular case. The Secretary stated as below:

e “Sub-clause (5) (of the Bill) says that nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Act. So, people may not have a chance of effecting registered partition or going to the court and getting it registered.”

f **36.** Further, the Legal Secretary stated as below:

g “... under the present legal position, it is not necessary that a partition should be registered. There is no legal requirement. There can be oral partition also.”

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¹⁷ *Shashikalabai v. State of Maharashtra*, (1998) 5 SCC 332

General observation by the Committee

37. The Committee recommends that the term “partition” should be properly defined leaving no scope for any arbitrary interpretation. Partition, for all practical purposes should be registered or should have been effected by a decree of the court. In cases, where oral partition is recognised, it should be backed by proper evidentiary support.

Subject to above, Clause 2 of the Bill is adopted.”

121. Shri V.V.S. Rao argued that the status of coparcener conferred on daughters cannot affect the partition made orally, and the Explanation at the end of Section 6 was added after receiving report of the Parliamentary Committee. The partition may be effected orally and later on memorandum can be created for memory purposes. Such a document containing memorandum of partition is not required to be registered. The parties may settle their rights and enter into subsequent transactions based upon such a partition. It is not to unsettle the completed property transactions that had already taken place. The Explanation should not be understood as invalidating all the documents or oral partition in respect of the coparcenary property. In case genuineness of such document is questioned, it has to be proved to the satisfaction of the court. The saving of transactions would safeguard the genuine past transaction and prevent unrest in the family system. Similar proposal was made by the Law Commission of India.

122. The learned counsel, Shri Sridhar Potaraju, argued that ignoring statutory fiction of partition under the proviso to Section 6, which provision had been incorporated in 1956 and continued till 2005, is not warranted.

123. Ms Anagha S. Desai, learned counsel, argued that in the absence of partition deed also, partition could be effected by metes and bounds, and if it is proved properly, the daughters will not open these concluded transactions of coparcenary property.

124. 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 recognised under Section 6(5).

125. How family settlement is effected was considered in *Kale v. Director of Consolidation*¹¹⁸, thus: (SCC pp. 126-28, paras 10 & 15)

“10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

“(1) *The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;*

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(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

a (3) *The family arrangement may be even oral in which case no registration is necessary;*

b (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made ***under the document*** and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

c (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

d (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

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f 15. In *Tek Bahadur Bhujil v. Debi Singh Bhujil*¹¹⁹, AIR SC at p. 295 it was pointed out by this Court that a family arrangement could be arrived at even orally and registration would be required only if it was reduced into writing. It was also held that a document which was no more than a memorandum of what had been agreed to did not require registration. This Court had observed thus: (AIR p. 295, para 12)

g ‘12. Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that

h ** Ed.: The matter between two double asterisks has been emphasised in original.
119 AIR 1966 SC 292

the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.’ ” (emphasis supplied)

It is settled law that family arrangements can be entered into to keep harmony in the family.

126. Reliance has been placed on *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar*²⁵, in which effect of adoption by a widow and its effect on partition and other alienation made before adoption was considered; the following observations were made: (SCC pp. 162 & 167-68, paras 11 & 18)

“11. Two crucial questions then arise. One-third share out of what? Should the gift by Mahadev of what was under the then circumstances his exclusive property be ignored in working out the one-third share? *Two principles compete in this jurisdiction and Judges have struck a fair balance between the two, animated by a sense of realism, impelled by desire to do equity and to avoid unsettling vested rights and concluded transactions, lest a legal fiction should by invading actual facts of life become an instrumentality of instability.* Law and order are jurisprudential twins and this perspective has inarticulately informed judicial pronouncements in this branch of Hindu law. ...

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18. We reach the end of the journey of precedents, ignoring as inessential other citations. The balance sheet is clear. *The propositions that emerge are that: (i) A widow’s adoption cannot be stultified by an anterior partition of the joint family and the adopted son can claim a share as if he were begotten and alive when the adoptive father breathed his last; (ii) Nevertheless, the factum of partition is not wiped out by the later adoption; (iii) Any disposition testamentary or inter vivos lawfully made antecedent to the adoption is immune to challenge by the adopted son; (iv) Lawful alienation in this context means not necessarily for a family necessity but alienation made competently in accordance with law; (v) A widow’s power of alienation is limited and if—and only if—the conditions set by the Hindu Law are fulfilled will the alienation bind a subsequently adopted son. So also alienation by the Karta of an undivided Hindu family or transfer by a coparcener governed by the Benares school; (vi) Once partitioned validly, the share of a member of a Mitakshara Hindu family in which his own issue have no right by birth can be transferred by him at his will and such transfers, be they by will, gift or sale, bind the adopted son who comes later on the scene. Of course, the position of a void or voidable transfer by such a sharer may stand on a separate footing but we need not investigate it here.”* (emphasis supplied)

127. In *Chinthamani Ammal v. Nandagopal Gounder*¹²⁰, it was observed that a plea of partition was required to be substantiated as under law, there is a presumption as to jointness. Even separate possession by co-sharers may not, by itself, lead to a presumption of partition.

²⁵ (1974) 2 SCC 156

¹²⁰ (2007) 4 SCC 163

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128. In *Rukhmabai v. Laxminarayan*¹²¹ and *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh*¹²², it was observed that prima facie a document expressing the intention to divide brings about a division in status, however, it is open to prove that the document was a sham or a nominal one and was not intended to be acted upon and executed for some ulterior purpose. The relations with the estate is the determining factor in the statement made in the document. The statutory requirement of substituted Section 6(5) is stricter to rule out unjust deprivation to the daughter of the coparcener's right.

129. In *Kalwa Devadattam v. Union of India*¹²³, it was laid down that when a purported petition is proved to be a sham, the effect would be that the family is considered joint.

130. Earlier, an oral partition was permissible, and at the same time, the burden of proof remained on the person who asserted that there was a partition. It is also settled law that cesser of commonality is not conclusive proof of partition, merely by the reason that the members are separated in food and residence for the convenience, and separate residence at different places due to service or otherwise does not show separation. Several acts, though not conclusive proof of partition, may lead to that conclusion in conjunction with various other facts. Such as separate occupation of portions, division of the income of the joint property, definement of shares in the joint property in the revenue or land registration records, mutual transactions, as observed in *Bhagwani Kunwar v. Mohan Singh*¹²⁴ and *Digambar Adhar Patil v. Devram Girdhar Patil*¹²⁵.

131. There is a general presumption that every Hindu family is presumed to be joint unless the contrary is proved. It is open even if one coparcener has separated, to the non-separating members to remain joint and to enjoy as members of a joint family. No express agreement is required to remain joint. It may be inferred from how their family business was carried on after one coparcener was separated from them. Whether there was a separation of one coparcener from all other members of a joint family by a decree of partition, the decree alone should be looked at to determine the question was laid down in *Palani Ammal*⁸⁵ and *Girijanandini Devi v. Bijendra Narain Choudhary*¹²⁶. In *Palani Ammal*⁸⁵, it was held: (SCC OnLine PC)

“... It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners,

¹²¹ AIR 1960 SC 335

¹²² (1969) 1 SCC 386 : AIR 1969 SC 1076

¹²³ AIR 1964 SC 880

¹²⁴ 1925 SCC OnLine PC 27 : AIR 1925 PC 132

¹²⁵ 1995 Supp (2) SCC 428 : AIR 1995 SC 1728

⁸⁵ *Palani Ammal v. Muthuvenkatachala Moniagar*, 1924 SCC OnLine PC 61 : (1924-25) 52 IA 83 : AIR 1925 PC 49

¹²⁶ AIR 1967 SC 1124

without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved.”

132. In *Hari Bakhsh v. Babu Lal*¹²⁷, it was laid down that in case there are two coparcener brothers, it is not necessary that there would be a separation inter se family of the two brothers. The family of both the brothers may continue to be joint.

133. The severance of status may take place from the date of filing of a suit; however, a decree is necessary for working out the results of the same, and there may be a change of rights during the pendency of the suit for allotting definite shares till final decree is passed. There are cases in which partition can be reopened on the ground of fraud or mistake, etc. or on certain other permissible grounds. In appropriate cases, it can be reopened at the instance of minor also.

134. The protection of rights of daughters as coparcener is envisaged in the substituted Section 6 of the 1956 Act recognises the partition brought about by a decree of a court or effected by a registered instrument. The partition so effected before 20-12-2004 is saved.

135. 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 the 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 rigour of very heavy burden of proof which meets the intendment of Explanation to Section 6(5). It has to be remembered that the 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.
- 136.** The expression used in the Explanation to Section 6(5) “partition effected by a decree of a court” would mean giving of final effect to actual partition by passing the final decree, only then it can be said that a decree of a court effects partition. A preliminary decree declares share but does not effect the actual partition, that is effected by passing of a final decree; thus, statutory provisions are to be given full effect, whether partition is actually carried out as per the intendment of the Act is to be found out by the court. Even if partition is supported by a registered document it is necessary to prove that it had been given effect to and acted upon and is not otherwise sham or invalid or carried out by a final decree of a court. In case partition, in fact, had been worked out finally in toto as if it would have been carried out in the same manner as if affected (*sic* effected) by a decree of a court, it can be recognised, not otherwise.
- A partition made by execution of deed duly registered under the Registration Act, 1908, also refers to completed event of partition not merely intendment to separate, is to be borne in mind while dealing with the special provisions of Section 6(5) conferring rights on a daughter. There is a clear legislative departure with respect to proof of partition which prevailed earlier; thus, the court may recognise the other mode of partition in exceptional cases based upon continuous evidence for a long time in the shape of public document not mere stray entries then only it would not be in consonance with the spirit of the provisions of Section 6(5) and its Explanation.

137. Resultantly, we answer the reference as under:

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

137.2. 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 the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the 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 1956 Act 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.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, 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 been affected (*sic* effected) 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.

138. We understand that on this question, suits/appeals are pending before different High Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, we request that the pending matters be decided, as far as possible, within six months.

139. In view of the aforesaid discussion and answer, we overrule the views to the contrary expressed in *Prakash v. Phulavati*² and *Mangammal v. T.B. Raju*¹⁸. The opinion expressed in *Danamma v. Amar*³ is partly overruled to the extent it is contrary to this decision. Let the matters be placed before appropriate Bench for decision on merits.

2 (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549

18 (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300

3 (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385

2024 SCC OnLine SC 5591

In the Supreme Court of India
(BEFORE B.V. NAGARATHNA AND PANKAJ MITHAL, JJ.)

Kamal Anant Khopkar ... Petitioner(s);

Versus

Union of India and Another ... Respondent(s).

Writ Petition (Civil) No. 1517/2018

Decided on November 6, 2024

Advocates who appeared in this case:

Ms. Meenakshi Arora, Sr. Adv. (A.C.), Item 11 Ms. Mrunal D. Buva, Adv., Mr. Dhairyashil D. Salunkhe, Adv., Ms. Manju Jetley, AOR, Item 11.1 Mr. DN Goburdhun, Sr. Adv., Mr. Aakarsh Kamra, AOR, Mr. Hemant Raj Phalpher, Adv., Ms. Gouri Goburdhun, Adv., Mr. Rohan Kochhar, Adv., Item 11.2 Mr. Sameer Shrivastava, AOR, Ms. Palak Mathur, Adv., Item 11.3 Mr. Sumeer Sodhi, AOR, Mr. Chaitanya Sharma, Adv., Item 11.4 Ms. Anusha Nagarajan, Adv., Ms. Aakanksha Bhola, Adv., Mrs. Pragya Baghel, AOR, Item 11.5 Ms. Sanjana Saddy, Adv., Mr. Sanyat Lodha, AOR, Item 11.6 Mr. Praveen Suri, Adv., Mr. Neeraj Kumar Gupta, AOR, Mr. Akshaya Agarwal, Adv., Mr. Shivang Srivastava, Adv., Mr. Deval N Modi, Adv., For Petitioner(s)

R-1 (Item 11) Mr. Tushar Mehta, Solicitor General (NP), Mr. Kanu Agarwal, Adv.(NP), Mr. Rajat Nair, Adv., Ms. Vanshaja Shukla, Adv., Mr. Mohd Akhil, Adv., Ms. Indira Bhakar, Adv., Mr. Pranay Ranjan, Adv., Mr. Mayank Pandey, Adv., Mr. Arvind Kumar Sharma, AOR, R-2 (Item 11) Mr. Gurmeet Singh Makker, AOR, IMPL(Item 11) Mr. Rahul Jain, AOR, INT (Item 11) Mr. Pranaya Kumar Mohapatra, AOR, IMPL(Item 11) Mr. Aditya Wadhwa, Adv., Mr. Debopriyo Moulik, Adv., Mr. Vipul Kumar, Adv., Mr. Shivendra Singh, AOR, Ms. Prakriti Rastogi, Adv., R-2 (Item 11.3) Mr. Abhishek Kumar Gola, Adv., Mr. Ramneek Singh, Adv., Ms. Savita, Adv., Mr. Roop Chaudhary, Adv., Mr. Piyush Aggarwal, Adv., Mr. Sudhir Naagar, AOR, R-2 (Item 11.4) Mr. Yash S. Vijay, AOR, For Respondent(s)

ORDER

1. Ms. Mrunal D. Buva, learned counsel appearing for the petitioner submitted that the petitioner herein, who has filed this writ petition, had also filed Special Leave Petition (Civil) No. 5967 of 2019 and the said Special Leave Petition was disposed of *vide* order dated 18.02.2019 by way of a settlement arrived at between the parties.

2. In such circumstances, we do not think that the very same petitioner can be permitted to continue this writ petition as a public

interest litigation or as a petition under Article 32 of the Constitution of India in private interest.

3. Recording the above, we dispose of this writ petition. Pending application(s), if any, shall stand disposed of.

4. By order dated 18.02.2019, Ms. Meenakshi Arora, learned Senior counsel was appointed as an *Amicus Curiae* to assist this Court. Since the writ petition has been disposed of, we place on record our sincere appreciation for the assistance rendered by Ms. Meenakshi Arora, learned Senior counsel to this Court. She further submits that since in other cases, learned counsel are representing the respective parties, she may be discharged from the batch of cases. We accede to her request by once again placing on record our appreciation for her services. We discharge the *Amicus Curiae*, Ms. Meenakshi Arora, learned Senior counsel from this case.

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Writ Petition (Civil) No. 1517/2018

Kamal Anant Khopkar ... Petitioner(s);

Versus

Union of India and Another. ... Respondent(s).

([Ms. Meenakshi Arora, Learned Senior Counsel (A.C.)

For Final Disposal]

IA No. 243551/2023 - Appropriate Orders/Directions

IA No. 243740/2023 - Intervention Application

IA No. 18073/2022 - Intervention/Impleadment

IA No. 155516/2021 - Intervention/Impleadment

IA No. 13542/2022 - Permission to File Additional Documents/Facts/Annexures

IA No. 14918/2020 - Permission to File Additional Documents/Facts/Annexures

IA No. 186057/2018 - Permission to File Lengthy List of Dates)

With

W.P.(C) No. 732/2020 (PIL-W)

(IA No. 111528/2020 - Appropriate Orders/Directions IA No.

67124/2020 - Appropriate Orders/Directions

IA No. 2087/2021 - Clarification/Direction

IA No. 67125/2020 - Exemption From Filing Affidavit)

SLP(C) No. 10602/2022 (IV-C)

(IA No. 84801/2022-Exemption from Filing C/C of the Impugned Judgment and IA No. 84800/2022-Exemption From Filing O.T. and IA No. 84802/2022-Exemption from Filing Affidavit)

T.P.(C) No. 457/2022 (IV-B)
(IA No. 29470/2022-Exemption from Filing O.T.)

W.P.(C) No. 27/2023 (X)
(IA No. 199162/2022-Condonation of Delay in Refiling/Curing the
Defects)

W.P.(C) No. 1261/2023 (X)
W.P.(C) No. 550/2024 (X)

ORDER

WRIT PETITION (CIVIL) NO. 1517 OF 2018

The writ petition is disposed of in terms of the signed order.

Pending application(s), if any, shall stand disposed of.

SPECIAL LEAVE PETITION (CIVIL) NO. 10602 OF 2022

1. We have heard learned counsel for the petitioner.
2. We do not find any merit in the matter.
3. Hence the Special Leave Petition is dismissed. Pending application (s), if any, shall stand disposed of.

TRANSFER PETITION (CIVIL) NO. 457 OF 2022

As there is no representation on behalf of the 2nd respondent, the matter is hence adjourned to 15.01.2025.

WRIT PETITION (CIVIL) NOS. 732 OF 2020, 27 OF 2023, 1261 OF 2023 AND 550 OF 2024

1. We have heard learned Senior counsel and learned counsel appearing for the writ petitioners and learned counsel for the respondent-Union of India as well as Ms. Meenakshi Arora, learned Senior counsel who was appointed by this Court as an Amicus Curiae to assist this Court in a connected writ petition which has been disposed of today.

2. Having heard learned counsel at length, we find that the focus of attention in these writ petitions must be only with regard to the *vires* of Section 15(1)(b) of the Hindu Succession Act, 1956 (for short 'the Act'), as the thrust of the arguments is that when the deceased daughter has died interstate without leaving behind any son/daughter or husband, the heirs of the husband cannot have a preferential right as compared to the parents of the deceased daughter, having regard to the order of succession mentioned in Section 16 of the Act.

3. Learned counsel for the petitioners also drew our attention to Section 15(2)(b) of the Act inasmuch as the property inherited by a female Hindu from her husband or from her father-in-law, devolving in the absence of any children of the deceased woman or her husband, being inherited by the family of the husband.

4. Learned counsel for the respondent-Union of India sought time to file counter affidavit to the writ petitions.

5. Hence the matters are adjourned to 15.01.2025.

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SUPREME COURT CASES

(2023) 3 SCC

(2023) 3 Supreme Court Cases 528

2J

(BEFORE M.R. SHAH AND KRISHNA MURARI, JJ.)

KAMLA NETI (DEAD) THROUGH LEGAL REPRESENTATIVES . . . Appellant; a
Versus

SPECIAL LAND ACQUISITION
OFFICER AND OTHERS . . . Respondents.

Civil Appeal No. 6901 of 2022[†], decided on December 9, 2022

**Family and Personal Laws — Hindu Succession Act, 1956 — S. 2(2) —
Female member of Scheduled Tribe (ST) not entitled to share by survivorship
in compensation awarded for acquisition of ancestral land in view of
non-applicability of the HSA, 1956 to STs** b

— Her claim of equal share with male coparceners in joint family property
may be supportable in equity but cannot be sustained under S. 2(2) of the HSA,
1956 as it stands — Central Government, therefore, directed to consider if it
would be just and necessary to withdraw exclusion of STs from application of
provisions of the Act by amending S. 2(2) of the HSA, 1956, having regard to
rights guaranteed under Arts. 14 and 21 of the Constitution c

— Constitution of India — Arts. 14 and 21 — Land Acquisition Act, 1894
— Ss. 30 and 9 — Apportionment of compensation — Persons entitled to d

Held :

The appellant belongs to tribal community and is a member of the Scheduled
Tribe. As per Section 2(2) of the Hindu Succession Act, the Act will not
be applicable to the members of the Scheduled Tribe. Therefore in view of
Section 2(2) and the appellant being the member of the Scheduled Tribe and as the
female member of the Scheduled Tribe is specifically excluded, the appellant is not
entitled to any right of survivorship under the provisions of the Hindu Succession
Act, though in equity the Court may be with the appellant. So long as Section 2(2)
stands and there is no amendment, the parties shall be governed by the provisions
of Section 2(2) of the Hindu Succession Act. (Paras 10 and 16) e

B. Premanand v. Mohan Koikal, (2011) 4 SCC 266 : (2011) 1 SCC (L&S) 676, *followed*

Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125, *clarified and followed* f

Kamala Neti v. LAO, 2016 SCC OnLine Ori 730, *affirmed*

Labishwar Manjhi v. Pran Manjhi, (2000) 8 SCC 587; *J.P. Bansal v. State of Rajasthan*, (2003)
5 SCC 134 : 2003 SCC (L&S) 605; *State of Jharkhand v. Govind Singh*, (2005) 10 SCC
437 : 2005 SCC (Cri) 1570, *cited*

There may not be any justification to deny the right of survivorship so far
as the female member of the tribal community is concerned. When the daughter
belonging to the non-tribal community is entitled to the equal share in the
property of the father, there is no reason to deny such right to the daughter of the
Tribal community. Female tribal is entitled to parity with male tribal in intestate
succession. To deny the equal right to the daughter belonging to the tribal even
after a period of 70 years of the Constitution of India under which right to equality
is guaranteed, it is high time for the Central Government to look into the matter g

[†] Arising from the Judgment and Order in *Kamala Neti v. LAO*, 2016 SCC OnLine Ori 730 (Orissa
High Court, Cuttack Bench, LAA No. 79 of 2015, dt. 7-10-2016) [**Affirmed**] h

KAMLA NETI v. LAO (*M.R. Shah, J.*)

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and if required, to amend the provisions of the Hindu Succession Act by which the Act is not made applicable to the members of the Scheduled Tribe. (Para 17)

a Therefore, while dismissing the appeal, the Central Government is directed to examine the question and consider it just and necessary to withdraw the exemptions provided under the Hindu Succession Act insofar as the applicability of the provisions of the Act to the Scheduled Tribes is concerned and whether to bring a suitable amendment or not, taking into consideration the right to equality guaranteed under Articles 14 and 21 of the Constitution. (Para 18)

b R-D/69590/CV

Advocates who appeared in this case :

Dr Jarnejaya Roy, Aneesh Mittal (Advocate-on-Record), SR Sunderam and Digant Kallol Deo, Advocates, for the Appellant;

Dr Kedar Nath Tripathy and Ramendra Mohan Patnaik (Advocate-on-Record), Advocates, for the Respondents.

<i>c</i>	Chronological list of cases cited	on page(s)
	1. 2016 SCC OnLine Ori 730, <i>Kamala Neti v. LAO</i>	529e, 530b
	2. (2011) 4 SCC 266 : (2011) 1 SCC (L&S) 676, <i>B. Premanand v. Mohan Koikal</i>	531f-g, 532d-e
	3. (2005) 10 SCC 437 : 2005 SCC (Cri) 1570, <i>State of Jharkhand v. Govind Singh</i>	531f-g
	4. (2003) 5 SCC 134 : 2003 SCC (L&S) 605, <i>J.P. Bansal v. State of Rajasthan</i>	531f-g
<i>d</i>	5. (2000) 8 SCC 587, <i>Labishwar Manjhi v. Pran Manjhi</i>	531e
	6. (1996) 5 SCC 125, <i>Madhu Kishwar v. State of Bihar</i>	530b-c, 530d-e, 531g-h, 532e-f, 533a, 533a-b

The Judgment of the Court was delivered by

e **M.R. SHAH, J.**— Feeling aggrieved and dissatisfied with the impugned judgment and order¹ passed by the High Court of Orissa at Cuttack in Land Acquisition Appeal No. 79 of 2015 by which the High Court has dismissed the said appeal preferred by the appellant herein and has confirmed the order passed by the learned Reference Court, the original applicant has preferred the present appeal.

f 2. The dispute is with respect to the apportionment of the amount of compensation with respect to the land acquired. The land originally stood recorded in the name of late Satyananda Negi, a common ancestor of the appellant and the other coparceners. The said Satyananada died leaving behind his two sons, namely, Chakradhar and Gajadhar. Chakradhar died leaving behind his four sons, namely, Chintamani, Parakhita, Basudev and Kulamani and one daughter Kamla (the appellant herein). Similarly, Gajadhar died leaving behind his two daughters, namely, Kumari and Kumudini. With respect to the land acquired, Khasra No. 81, Mouza Kopsingha which originally stood recorded in the name of late Satyananda Negi, the amount of compensation was settled at Rs 5,97,35,754 in favour of Respondents 2 to 5 herein i.e. Kadamba Negi, Janhabi Negi, Basudev Negi, Lalita Negi and daughters of Gajadhar i.e. Kumari Dhrua and Kumudini Majhi.

h

¹ *Kamala Neti v. LAO*, 2016 SCC OnLine Ori 730

3. At the instance of the appellant claiming to be the daughter of Chakradhar and claiming 1/5th share in the amount of compensation a reference was made to the Reference Court under Section 30 of the Land Acquisition Act. The Reference Court — the learned Senior Civil Judge, Sundargarh rejected the claim of the appellant/share of the appellant in the compensation, mainly on the ground that as the parties belong to Scheduled Tribe Community, the provisions of the Hindu Succession Act shall not be applicable and therefore the appellant being a daughter shall not be entitled to the share in the amount of compensation. The order passed by the learned Reference Court denying the share in the amount of compensation has been confirmed by the High Court by the impugned judgment and order¹. Hence, the present appeal against the impugned judgment and order passed by the High Court.

4. The learned counsel appearing on behalf of the appellant has heavily relied upon the decision of this Court in *Madhu Kishwar v. State of Bihar*² in support of his submission that the appellant being a daughter shall be entitled to the share in the amount of compensation even applying the provisions of the Hindu Succession Act.

4.1. It is vehemently submitted that as observed and held by this Court denial of right to succession to Scheduled Tribe women would amount to deprivation of the right to livelihood under Article 21 of the Constitution of India. It is submitted that as observed and held by this Court exclusive succession in the male line of heirs must remain in suspended animation till the immediate female relatives of the last male tenant continue to depend for their livelihood on the land.

4.2. It is submitted that as observed and held by this Court in the aforesaid decision², to deny the equal right to the women/daughter belonging to Scheduled Tribe would be gender-based discrimination and the daughter cannot be denied the right in the joint family property in which all coparceners have the equal share.

5. Making the above submissions and relying upon the above decision, it is prayed to allow the present appeal and to hold that the appellant being daughter of one of the coparceners shall be entitled to 1/5th share in the amount of compensation.

6. The present appeal is vehemently opposed by Dr Kedarnath Tripathy, learned counsel appearing on behalf of the contesting respondents.

6.1. It is submitted that in the present case the parties are members of the Scheduled Tribe. The suit land belongs to one Satyananda Negi and after his death, the said land devolved upon his two sons Chakradhar and Gajadhar with the right of survivorship being available. The said Chakradhar passed away in the year 1948 before the commencement of the Constitution of India and the Hindu Succession Act, 1954. That after the death of Chakradhar and his wife, his share in the property stood devolved upon his four sons who held 1/4th share each by way of succession. After more than 60 years of such succession by the four sons holding 1/4th shares each, their properties were acquired by the Government for establishment of Ultra Mega Power Project at

¹ *Kamala Neti v. LAO*, 2016 SCC OnLine Ori 730

² (1996) 5 SCC 125

Bhedabahal, District Sundargarh. The compensation for the acquisition of land was determined and the same was duly paid to the four sons — respondents herein being the owners of the property.

- a **6.2.** It is submitted that thereafter the appellant herein filed an application before the LAO, Sundargarh claiming their 1/5th share in the compensation being one of the descendants of Satyananda Negi. That the matter was referred to the Court of Senior Civil Judge, Sundargarh in a matter of reference under Section 30 of the Land Acquisition Act made by the Special Land Acquisition Officer. The learned Reference Court dismissed the application by holding that she is not entitled to claim any amount in the amount of compensation as being member of the Scheduled Tribe, the provisions of the Hindu Succession Act shall not be applicable and therefore, she would not have any right of survivorship in the joint family property. It is submitted that considering the provisions of the Hindu Succession Act more particularly Section 2(2), the High Court has not committed any error.
- b
- c **6.3.** It is submitted that the appellant is not entitled to receive any share in the suit property by virtue of Section 8 of the Hindu Succession Act. It is submitted that her father Chakradhar passed away way back in the year 1948 before the enactment of the Hindu Succession Act, 1954 and even before the Constitution of India. It is submitted that apart from the fact that in view of Section 2(2) of the Hindu Succession Act, 1954, the Hindu Succession Act will not be applicable to the members of the Scheduled Tribe; without any explicit clause in the Hindu Succession Act, the Hindu Succession Act cannot be given a retrospective operation to provide compensation to the appellant.
- d
- e **6.4.** It is further submitted that as per Section 2(2) of the Hindu Succession Act, the Act shall not be applicable to the members of the Scheduled Tribe. It is submitted that in *Labishwar Manjhi v. Pran Manjhi*³, it is clearly held that if the members of the Scheduled Tribe follow customary and practices of Hinduism, then and then only the Hindu Succession Act would be applicable. It is submitted that in the present case there is no evidence on record to prove that the parties have Hinduised. It is submitted therefore Hindu Succession Act shall not be applicable to the parties herein.
- f **6.5.** It is further submitted that as held by this Court in a catena of decisions whenever there is a conflict between the law and equity, the law would prevail. Reliance is placed on the decision of this Court in *B. Premanand v. Mohan Koikal*⁴. It is submitted that as observed and held by this Court in *J.P. Bansal v. State of Rajasthan*⁵ and *State of Jharkhand v. Govind Singh*⁶, it is for the legislature to amend the law and not the Court.
- g **6.6.** It is submitted that this Hon'ble Court on many occasions denied extending the benefits of the Hindu Succession Act to the tribal communities unless the same has been notified by the Central Government. Reliance is placed on the observations made by this Court in *Madhu Kishwar*².

3 (2000) 8 SCC 587

4 (2011) 4 SCC 266 : (2011) 1 SCC (L&S) 676

5 (2003) 5 SCC 134 : 2003 SCC (L&S) 605

6 (2005) 10 SCC 437 : 2005 SCC (Cri) 1570

2 *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125

7. Making above submissions, it is prayed to dismiss the present appeal.

8. Heard the learned counsel for the respective parties at length.

9. A short question which is posed for consideration of this Court is whether the appellant-petitioner being the daughter is entitled to the share in the compensation with respect to the land acquired, on survivorship basis under the provisions of the Hindu Succession Act?

10. At the outset, it is required to be noted that the appellant belongs to tribal community and is a member of the Scheduled Tribe. As per Section 2(2) of the Hindu Succession Act, the Hindu Succession Act will not be applicable to the members of the Scheduled Tribe. Therefore, as such, as rightly observed by the High Court, the appellant cannot claim any right of survival (*sic* survivorship) under the provisions of the Hindu Succession Act. Therefore, so long as Section 2(2) of the Hindu Succession Act stands and there is no amendment, the parties shall be governed by the provisions of Section 2(2) of the Hindu Succession Act.

11. Therefore, though on equity we may be with the appellant being daughter and more than approximately 70 years have passed after the enactment of the Hindu Succession Act and much water has flown thereafter and though we are prima facie of the opinion that not to grant the benefit of survivorship to the daughter in the property of the father can be said to be bad in law and cannot be justified in the present scenario, unless Section 2(2) of the Hindu Succession Act is amended, the parties being member of the Scheduled Tribe are governed by Section 2(2) of the Hindu Succession Act. It is observed and held by this Court in *Mohan Koikal*⁴ that when there is a conflict between the law and equity, the law would prevail. Equity can only supplement the law. There is a gap in it but it cannot supplant the law.

12. If the claim of the appellant on the basis of the survivorship under the Hindu Succession Act is accepted in that case it would tantamount to amend the law. It is for the legislature to amend the law and not the Court.

13. Now so far as the reliance placed upon the decision of this Court in *Madhu Kishwar*² by the learned counsel for the appellant is concerned, at the outset it is required to be noted that by the majority decision, this Court refused to strike down the provisions of Chota Nagpur Tenancy Act, 1908 which provided the succession to property in the male line of heirs and denying the right to succession to the daughter, on the touchstone of Article 14. However, this Court read into the said provisions and observed and held that the intervening right of female dependants/descendants under Sections 7 and 8 of the Act shall be carved out, by suspending the exclusive right of the male succession till the female dependant/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose. This Court by observing so disposed of the writ petition. However, by disposing of the writ petition this Court issued direction to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law.

⁴ *B. Premanand v. Mohan Koikal*, (2011) 4 SCC 266 : (2011) 1 SCC (L&S) 676

² *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125

a 14. This Court in *Madhu Kishwar*² also directed to examine the question of recommending to the Central Government whether the Central Government considers it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act insofar as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned.

b 15. However, K. Ramaswamy, J. in his concurrent judgment in *Madhu Kishwar*² has further observed and held that the provisions of the Hindu Succession Act and the Indian Succession Act would apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Thereafter it is held that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by this Court. However, it is required to be noted that the same is minority view.

c 16. Under the circumstances in view of Section 2(2) of the Hindu Succession Act and the appellant being the member of the Scheduled Tribe and as the female member of the Scheduled Tribe is specifically excluded, the appellant is not entitled to any right of survivorship under the provisions of the Hindu Succession Act. No error has been committed by the High Court. The appeal therefore deserves to be dismissed and is accordingly dismissed.

d 17. Before parting, we may observe that there may not be any justification to deny the right of survivorship so far as the female member of the tribal community is concerned. When the daughter belonging to the non-tribal community is entitled to the equal share in the property of the father, there is no reason to deny such right to the daughter of the Tribal community. Female tribal is entitled to parity with male tribal in intestate succession. To deny the equal right to the daughter belonging to the tribal even after a period of 70 years of the Constitution of India under which right to equality is guaranteed, it is high time for the Central Government to look into the matter and if required, to amend the provisions of the Hindu Succession Act by which the Hindu Succession Act is not made applicable to the members of the Scheduled Tribe.

e 18. Therefore, though we dismiss the present appeal, it is directed to examine the question by the Central Government to consider it just and necessary to withdraw the exemptions provided under the Hindu Succession Act insofar as the applicability of the provisions of the Hindu Succession Act to the Scheduled Tribes is concerned and whether to bring a suitable amendment or not. We hope and trust that the Central Government will look into the matter and take an appropriate decision taking into consideration the right to equality guaranteed under Articles 14 and 21 of the Constitution of India.

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2 *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125

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2J

(BEFORE S. ABDUL NAZEER AND KRISHNA MURARI, JJ.)

ARUNACHALA GOUNDER

(DEAD) BY LEGAL REPRESENTATIVES

.. Appellants;

Versus

PONNUSAMY AND OTHERS

.. Respondents.

Civil Appeal No. 6659 of 2011[†], decided on January 20, 2022

A. Family and Personal Laws — Hindu Law — Succession and Inheritance — Hindu Women, Rights of — Right of widow and daughter to inherit self-acquired property, or, share obtained in partition of coparcenary/family property of husband/father, prior to commencement of the Hindu Succession Act, 1956 — Law extensively surveyed and clarified

— Right of widow or daughter to inherit the self-acquired property, or, share received in partition of coparcenary/family property of Hindu male dying intestate, held, is well recognised not only under the old customary Hindu Law but also by various judicial pronouncements — Therefore, if property of male Hindu dying intestate is self-acquired property, or, obtained in partition of coparcenary/family property, held, the same would devolve by inheritance and not by survivorship, and daughter of such male Hindu would be entitled to inherit such property in preference to other collaterals

— Thus held, *K* the daughter of *M* being his sole surviving heir, inherited the self-acquired property of *M*, when *M* died before the commencement of the 1956 Act — The said property, held, did not devolve upon *M*'s brother's son by survivorship

— Alienation/Disposition by will/Devolution of self-acquired property

B. Family and Personal Laws — Hindu Succession Act, 1956 — S. 15(2) — Basic aim of legislature in enacting S. 15(2), held, is to ensure that inherited property of a female Hindu dying issueless and intestate, goes back to the source

C. Family and Personal Laws — Hindu Succession Act, 1956 — Ss. 15, 8, Class I and Class II Entries IV (1) & (3) — Female Hindu dying intestate and issueless after commencement of the 1956 Act — Persons entitled to succeed to property of such female Hindu, where such property is inherited from her father — As per scheme of S. 15(2)(a) if a female Hindu dies intestate without leaving any issue, then property inherited by her from her father or mother would go to heirs of her father

[†] Arising from the Judgment and Order in *Thangammal v. Ponnusamy*, 2009 SCC OnLine Mad 215 (Madras High Court, AS No. 351 of 1994, dt. 21-1-2009) [Reversed]

— After death of *M*, his property was inherited by his sole heir, his daughter *K* (see Shortnote A) — Upon death of *K* in 1967, held, as per S. 15(2)(a) of the 1956 Act, the property of *K* inherited from her father *M* would devolve upon the heirs of *M*

— In the present case, only heirs of *M* alive at that time of *K*'s death were the five children of *R* the brother of *M* (as the said children were Class II heirs of *M*) — *T*, the plaintiff herein being one of the said five children of *R*, thus held, was entitled to inherit a proportionate share in the property inherited by *K* from her father *M* — Thus, held, trial court should have decreed partition suit of *T*

D. Civil Procedure Code, 1908 — Or. 14 and Rr. 1(5) & (6) — Framing of issues — When required — Admission by a party — Defendant made admission in his written statement that suit property was exclusively purchased by *M* — Held, there was no need to frame issue whether suit properties are absolute properties of *M* — Evidence Act, 1872, S. 58

Suit for partition was filed by *T*, daughter of *R*, claiming 1/5th share in the suit property on the allegations that the plaintiff is one of 5 children including Defendants 5 and 6, of *R*. The said *R* had an elder brother by the name of *M*. It was alleged by the appellant-plaintiff that *R*, predeceased his brother *M*; and that *M* died on 14-4-1957 leaving behind the sole daughter *K* who also died issueless in 1967. Further case set up by the appellant-plaintiff was that after the death of *M*, his property was inherited by *K* and upon her death in 1967, all the five children of *R*, including *T* the plaintiff, are heirs in equal of *K* and entitled to 1/5th share each.

Defence set up by the respondent-defendants was that *M* died on 11-5-1949 and not on 14-4-1957 as alleged by the appellant-plaintiff and as per the provisions of the Hindu Law prevailing prior to 1956, *G* (son of *T*) was the sole heir of *M* and accordingly, he inherited the suit properties and was in possession and enjoyment of these properties and after his death the respondents in present appeal, were continuing as lawful owners.

It was an undisputed fact between the parties that the property in question i.e. the suit property was independently purchased by *M* in the year 1938 through the process of a court-auction and thus, it was his independent property. However, there was an issue between the parties in respect of the date of death of *M*. The appellant-plaintiff asserted the date of death as 14-4-1957, whereas the respondent-defendant pleaded the date of death as 15-4-1949.

The trial court after considering the evidence brought on record of the case by the parties concluded that *M* died on 15-4-1949 and thus, the suit property would devolve upon the sole son of deceased *R*, the deceased brother of *M* by survivorship and the appellant-plaintiff had no right to file the suit for partition and, accordingly, dismissed the suit.

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Findings recorded by the trial court particularly in respect of the date of death of *M* in 1949 was confirmed by the High Court in the first appeal and the decree dismissing the suit for partition was affirmed holding that the property would devolve upon the defendant by way of survivorship.

The issues for determination before the Supreme Court were:

(i) Whether daughters of Hindu male dying intestate, would be entitled to inherit self-acquired and other properties obtained in partition by father and get preference over other collateral members of family or not?

(ii) Whether when succession of suit properties opened in 1967 upon death of sole daughter, the 1956 Act will be applicable and thereby father's brother's daughters being Class I heirs of their father, would be entitled to share in suit properties?

Allowing the appeal, the Supreme Court

Held :

Insofar as, the date of death of *M* being 15-4-1949, it is a finding of fact affirmed by the two fact-finding courts based on appreciation of material evidence existing on the record of the case and is not liable to be interfered with and the Supreme Court proceeded to decide the issue between the parties taking the date of death of *M* as 15-4-1949. (Para 15)

Other aspect of the matter is whether the suit property was exclusively purchased by *M* in the court-auction and was his separate property or it was purchased out of the joint family fund making it a joint family property. It is correct that neither was any issue framed by the trial court in this regard nor was any evidence led by the parties nor any finding has been returned. However, in view of the admission made by the defendant in the written statement that suit properties are absolute properties of *M*, he having purchased the same in a court-auction sale on 19-9-1938, there was hardly any necessity to frame any issue in this regard, once the fact was admitted in written statement. (Para 16)

In ancient texts daughter was in fact capable of inheriting the father's separate estate. (Paras 23 to 51)

Pranjivandas Tulsidas v. Devkuvarbai, (1859) 1 Bom HC 130; *Tuljaram Morarji v. Mathuradas*, 1881 SCC OnLine Bom 52 : ILR (1881) 5 Bom 662; *Chotay Lall v. Chunnoolal*, 1874 SCC OnLine Cal 10; *Bhaskar Trimbak Acharya v. Mahadev Ramji*, (1869) 6 Bom HC Rep (OC) 1, *held, approved*

Katama Natchier v. Rajah of Shivagunga, 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543, *cited*

A *Treatise on the Hindoo Law of Inheritance* by Standish Grove Grady published in 1868 by Gantz Brother Mount Road, Madras; *Vyavastha-Chandrika: A Digest of Hindu Law* by Shyama Charan Sarkar, Vidya Bhushan printed in 1878 by I.C. Bose & Co., Stanhope Press 249, Bow-Bazar, Calcutta; *Hindu Law and Judicature from the Dharma-Sastra of Yajnavalkya* published in 1859; *A Digest of Hindu Law As administered in the Courts of The Madras Presidency*, published in 1877 by Higginbotham & Co., Madras; *Hindu Law* by Mulla (22nd Edn.), *referred to*

a Ancient texts as also the Smritis, the commentaries written by various renowned persons, and even judicial pronouncements have recognised the rights of several female heirs, the wives and the daughters being the foremost of them. (Paras 52 to 66)

The law laid down in *Katama Natchier*, 1863 SCC OnLine PC 11, that succession in the case of Hindu male dying intestate is to be governed by inheritance rather than survivorship, is reaffirmed. In the absence of male member, the property devolves upon widow and thereafter to daughter. (Para 57)

b *Katama Natchier v. Rajah of Shivagunga*, 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543; *Sivagnanan Tevar v. Pariasami*, 1878 SCC OnLine PC 6 : ILR (1878) 1 Mad 312; *Gopal Singh v. Ujagar Singh*, AIR 1954 SC 579, *followed*

Ghurpatari v. Sampati, 1975 SCC OnLine All 367 : AIR 1976 All 195; *Lal Singh v. Roor Singh*, 1952 SCC OnLine Punj 139 : PLR (1953) 55 P&H 168; *Devidas v. Vithabai*, 2008 SCC OnLine Bom 397 : (2008) 5 Mah LJ 296, *approved*

Mulla's Principles of Hindu Law (14th Edn.), *referred to*

c Rights of women in the family to maintenance were very substantial rights and on the whole, it would seem that some of the commentators erred in drawing adverse inferences from the vague references to women's succession in the earlier Smritis. The views of the Mitakshara on the matter are unmistakable. Vijneshwara also nowhere endorses the view that women are incompetent to inherit. (Para 67)

d Right of a widow or daughter to inherit the self-acquired property or share received in partition of a coparcenary property of a Hindu male dying intestate is well recognised not only under the old customary Hindu Law but also by various judicial pronouncements. Therefore, if a property of a male Hindu dying intestate is a self-acquired property or obtained in partition of a coparcenary or a family property, the same would devolve by inheritance and not by survivorship, and a daughter of such a male Hindu would be entitled to inherit such property in preference to other collaterals. (Para 68)

e In the present case since the property in question was admittedly the self-acquired property of *M*, despite the family being in state of jointness upon his death intestate, his sole surviving daughter *K*, will inherit the same by inheritance and the property shall not devolve by survivorship. (Para 69)

f Section 14(1) of the 1956 Act converted all limited estates owned by women into absolute estates and the succession of these properties in the absence of a will or testament would take place in consonance with Section 15 of the 1956 Act. (Para 74)

g The scheme of sub-section (1) of Section 15 of the 1956 Act goes to show that property of Hindu females dying intestate is to devolve on her own heirs, the list whereof is enumerated in clauses (a) to (e) of Section 15(1) of the 1956 Act. Sub-section (2) of Section 15 of the 1956 Act carves out exceptions only with regard to property acquired through inheritance and further, the exception is confined to the property inherited by a Hindu female either from her father or mother, or from her husband, or from her father-in-law. The exceptions carved out by sub-section (2) shall operate only in the event of the Hindu female dies without leaving any direct heirs i.e. her son or daughter or children of the pre-deceased son or daughter. (Para 75)

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Thus, if a female Hindu dies intestate without leaving any issue, then the property inherited by her from her father or mother would go to the heirs of her father whereas the property inherited from her husband or father-in-law would go to the heirs of the husband. (Para 76)

Basic aim of the legislature in enacting Section 15(2) of the 1956 Act is to ensure that inherited property of a female Hindu dying issueless and intestate, goes back to the source. (Para 77)

Section 15(1)(d) read with Section 15(2)(a) of the 1956 Act provides that failing all heirs of the female specified in Sections 15(1)(a) to (c), but not until then, all her property howsoever acquired will devolve upon the heirs of the father. The devolution upon the heirs of the father shall be in the same order and according to the same rules as would have applied if the property had belonged to the father and he had died intestate in respect thereof immediately after her death. In the present case since the succession of the suit properties opened in 1967 upon death of *K*, the 1956 Act shall apply and thereby *R*'s daughters being Class I heirs of their father too shall be heirs and entitled to 1/5th share each in the suit properties. (Para 78)

In the present case, since the succession of the suit properties opened in 1967 upon death of *K*, the 1956 Act shall apply and thereby *R*'s daughters being Class I heirs of their father too shall also be heirs and entitled to 1/5th share in each of the suit properties. (Paras 79 to 81)

State of Punjab v. Balwant Singh, 1992 Supp (3) SCC 108; *Bajaya v. Gopikabai*, (1978) 2 SCC 542; *Bhagat Ram v. Teja Singh*, (2002) 1 SCC 210, followed

Thangammal v. Ponnusamy, 2009 SCC OnLine Mad 215, reversed

[Ed.: Brother's children of a male Hindu are given as Class II heirs under Entries IV (1) and (3):

"IV. (1) Brother's son... (3) brother's daughter..."]

RM-D/68465/SV

Advocates who appeared in this case :

P.V. Yogeswaran (Advocate-on-Record), Ashish Kr. Upadhyay, Jaiyesh Bakhshi, Y. Lokesh, V. Sibi Kargil, Ms V. Keerthana and Anubhav Chaturvedi, Advocates, for the Appellants;

K.K. Mani (Advocate-on-Record) and Ms T. Archana, Advocates, for the Respondents.

Chronological list of cases cited

	<i>on page(s)</i>	
1. 2009 SCC OnLine Mad 215, <i>Thangammal v. Ponnusamy</i> (reversed)	525b-c, 548e	
2. 2008 SCC OnLine Bom 397 : (2008) 5 Mah LJ 296, <i>Devidas v. Vithabai</i>	542f-g	
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4. 1992 Supp (3) SCC 108, <i>State of Punjab v. Balwant Singh</i>	547c-d, 548b	
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6. 1975 SCC OnLine All 367 : AIR 1976 All 195, <i>Ghurpatari v. Sampati</i>	541d	<i>g</i>
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10. 1878 SCC OnLine PC 6 : ILR (1878) 1 Mad 312, <i>Sivagnanan Tevar v. Pariasami</i>	541a	<i>h</i>
11. 1874 SCC OnLine Cal 10, <i>Chotay Lall v. Chunnool Lall</i>	530e-f	

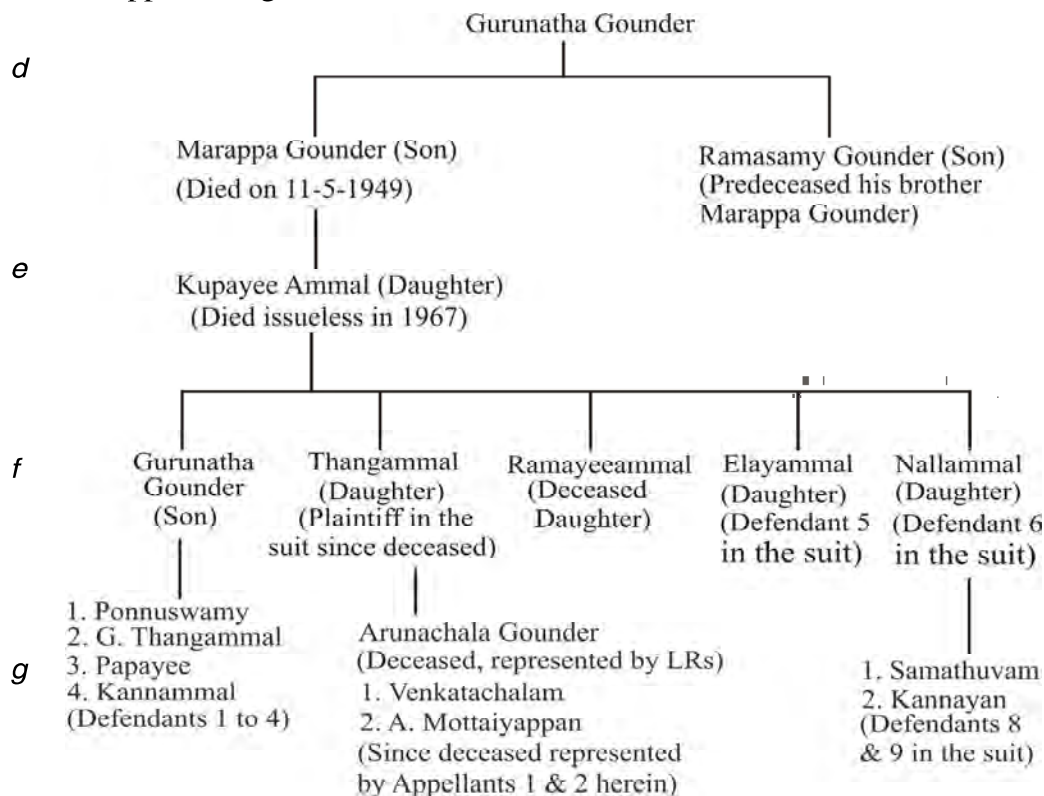
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12. (1869) 6 Bom HC Rep (OC) 1, *Bhaskar Trimbak Acharya v. Mahadev Ramji* 530f
13. 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543, *Katama Natchier v. Rajah of Shivagunga* 533e, 537a, 537d, 537g-h, 540d, 541a, 541b-c, 541c-d
14. (1859) 1 Bom HC 130, *Pranjivandas Tulsidas v. Devkuvarbai* 530b-c, 530d-e, 530e-f, 530f-g, 531a

b The Judgment of the Court was delivered by

KRISHNA MURARI, J.— Challenge has been laid in this civil appeal to the judgment and order dated 21-1-2009¹ passed by the High Court of Judicature at Madras (hereinafter referred to as “the High Court”) dismissing a regular first appeal being AS No. 351 of 1994 filed under Section 96 of the Civil Procedure Code, 1908, challenging the judgment and decree dated 1-3-1994 rendered by the trial court dismissing Original Suit No. 295 of 1991 for partition filed by the appellant herein, claiming 1/5th share in the suit properties.

2. The following genealogy of the parties is necessary to be taken note of for appreciating their claims and contentions:



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1 *Thangammal v. Ponnusamy*, 2009 SCC OnLine Mad 215

3. Suit for partition was filed by Thangammal, daughter of Ramasamy Gounder, claiming 1/5th share in the suit property on the allegations that the plaintiff and Defendants 5 and 6, namely, Elayammal and Nallammal and one Ramayeeammal are sisters of Gurunatha Gounder, all the five of them being the children of Ramasamy Gounder. The said Ramasamy Gounder had an elder brother by the name of Marappa Gounder. Ramasamy Gounder, predeceased his brother Marappa Gounder who died on 14-4-1957 leaving behind the sole daughter by the name of Kuppayee Ammal who also died issueless in 1967. Further case set up by the appellant-plaintiff was that after the death of Marappa Gounder, his property was inherited by Kuppayee Ammal and upon her death in 1967, all the five children of Ramasamy Gounder, namely, Gurunatha Gounder, Thangammal (original the plaintiff now represented by legal heir), Ramayeeammal, Elayammal and Nallammal are heirs in equal of Kuppayee and entitled to 1/5th share each.

4. Gurunatha Gounder, died leaving behind Defendants 1 to 4 (respondents herein) as heirs and legal representatives. Ramayeeammal died leaving behind Defendants 7 to 9. The appellant-plaintiff, Thangammal, died leaving behind, Appellants 1, 3 and 4 herein and Appellant 1, Arunachala Gounder, since having died is represented by her legal representatives Appellant 1, Venkatachalam and Appellant 2, A. Mottaiyappan.

5. The defence set up by the respondent-defendants was that Marappa Gounder died on 11-5-1949 and not on 14-4-1957 as alleged by the appellant-plaintiff and as per the provisions of the Hindu Law prevailing prior to 1956, Gurunatha Gounder was the sole heir of Marappa Gounder and accordingly, he inherited the suit properties and was in possession and enjoyment of these properties and after his death the respondents herein, were continuing as lawful owners.

6. It is an undisputed fact between the parties that the property in question i.e. the suit property, was independently purchased by Marappa Gounder in the year 1938 through the process of a court-auction and thus, it was his independent property. However, there was an issue between the parties in respect of the date of death of Marappa Gounder. The appellant-plaintiff asserted the date of death as 14-4-1957, whereas the respondent-defendant pleaded the date of death as 15-4-1949.

7. The trial court after considering the evidence brought on record of the case by the parties concluded that Marappa Gounder died on 15-4-1949 and thus, the suit property would devolve upon the sole son of deceased Ramasamy Gounder, the deceased brother of Marappa Gounder by survivorship and the appellant-plaintiff had no right to file the suit for partition and, accordingly, dismissed the suit.

8. The findings recorded by the trial court particularly in respect of the date of death of Marappa Gounder in 1949 was confirmed by the High Court in the first appeal and the decree dismissing the suit for partition was affirmed holding that the property would devolve upon the defendant by way of survivorship.

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9. We have heard Shri P.V. Yogeswaran, learned counsel for the appellant and Shri K.K. Mani, learned counsel for the respondents.

a Arguments on behalf of appellants

10. Shri P.V. Yogeswaran, learned counsel for the appellant submits that since the property was purchased through court auction-sale by Marappa Gounder on 15-12-1938, hence, it is his independent property and it was never considered as a joint family property, as such on death of Marappa Gounder, this property would devolve by succession upon his daughter, Kupayee Ammal, who died in the year 1967. He further submitted that under the law of Mitakshara, the right to inheritance depends upon propinquity i.e. proximity of relationship. Since, the daughter has closer proximity of relationship, she would inherit the property from the father instead of the father's brother's son and daughter.

11. He further points out that there are three classes of heirs recognised by Mitakshara, namely, (a) Gotrajasapindas, (b) Samanodakas and (c) Bandhus. The first class succeeds before the second and the second succeeds before the third. To support the contentions, he made a reference to *Mulla-Hindu Law* 23rd Edn. He also submitted that under the Hindu Law, a daughter is not disqualified to inherit in separate property of her father and when a male Hindu dies without a son leaving only daughter, his separate property would devolve upon the daughter through succession and the property will not devolve upon brother's son through survivorship and the courts below have wrongly applied the principles of Hindu Law and dismissed the suit. In support of his contention, he cited references from various commentaries which we shall deal with at appropriate place.

e Arguments on behalf of respondents

12. Shri K.K. Mani, learned counsel representing the respondents submitted that the property in question was purchased by Marappa Gounder in court auction-sale out of the family funds and thus, it was a joint property, and on his death, since he had no male heir, the defendant as a coparcener succeeded to the estate. He further submitted that the trial court after scrutinising the evidence brought on record by the parties came to the conclusion that the paternal uncle of the plaintiff, Marappa Gounder, died prior to the enforcement of the Hindu Succession Act, 1956 and, therefore, the plaintiff and other sisters of the plaintiff were not the heirs as on the date of death of Marappa Gounder in the year 1949 and thus, the plaintiff was not entitled to the partition of 1/5th share in the suit properties, and thus, the suit was rightly dismissed.

13. Shri K.K. Mani, learned counsel further submits that when the date of death of Marappa Gounder, was confirmed to be in the year 1949, the succession to his properties would open in the year 1949 when Kupayee Ammal, the daughter of Marappa Gounder, was not having any right to inherit the property left by her deceased father. The only heir available at the time of death of Marappa Gounder was Guranatha Gounder, the son of Ramasamy Gounder, who was none other than the father of Defendants 1 to 4. Once the

properties of Marappa Gounder devolved upon Guranatha Gounder, it became his property and, therefore, it could not be made the subject-matter of the partition after the promulgation of the Hindu Succession Act, 1956. He also submitted that neither any issue was framed nor any evidence was led by the appellant-plaintiff throughout the entire proceedings to establish that property purchased in the court-auction in the year 1938 was a self-acquired property of Marappa Gounder and thus, it would be presumed that it was a joint family property leaving no rights in his daughter to inherit the same.

14. We have considered the arguments advanced by the learned counsel for the parties and with their assistance perused the record of the case and the various texts and commentaries pertaining to Hindu Law.

15. Insofar as, the date of death of Marappa Gounder being 15-4-1949, it is a finding of fact affirmed by the two fact-finding courts based on appreciation of material evidence existing on the record of the case and is not liable to be interfered with and we proceed to decide the issue between the parties taking the date of death of Marappa Gounder as 15-4-1949.

16. The other aspect of the matter is whether the suit property was exclusively purchased by Marappa Gounder in the court-auction and was his separate property or it was purchased out of the joint family fund making it a joint family property. It is correct that neither any issue was framed by the trial court in this regard nor any evidence was led by the parties nor any finding has been returned. However, in view of the admission made by the defendant in Para 3 of the written statement that suit properties are absolute properties of Marappa Gounder, he having purchased the same in a court auction-sale on 19-9-1938, there was hardly any necessity to frame any issue in this regard, once the fact was admitted in written statement.

17. It may be relevant to extract the relevant part of Para 3 of the written statement which reads as under:

“3. It is true that the suit properties are the absolute properties of the Marappa Gounder, he having purchased the suit properties in the court auction-sale on 19-9-1938.”

Furthermore, the defendants themselves have nowhere pleaded that purchase of suit property was made by Marappa Gounder out of the joint family funds. There is a clear admission in the written statement that property in question was the absolute property of Marappa Gounder, he having purchased the same in the court auction-sale.

18. In view of above facts, the arguments advanced by the learned counsel for the respondent, in this regard, has no force and not liable to be accepted.

19. In the backdrop of the above facts, the primary issue which arises for our consideration is with respect to the right of the sole daughter to inherit the self-acquired property of her father, in the absence of any other legal heir having inheritable rights before the commencement of the Hindu Succession Act, 1956 or in other words, whether such suit property will devolve on to the

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daughter upon the death of her father intestate by inheritance or shall devolve on to father's brother's son by survivorship.

a **20.** The determination and adjudication of the issue depends upon the answers to the following questions:

20.1. (1) What is the nature of the property and what would be the course of succession if it is a separate property as opposed to undivided property?

b **20.2.** (2) Whether a sole daughter could inherit her father's separate property dying intestate? And if so

20.3. (3) What would be the order of succession after the death of such daughter?

21. To answer these questions, we are required to delve into the concepts of old Hindu Law and its application. It is also imperative to look into its origin and sources.

c **Sources of Hindu Law**

d **22.** The exact origin of Hindu Law is shrouded in antiquity, however, the Hindus believe their laws to exist in the revelations preserved in "Vedas", Shrutis (that which are heard and revealed) and Smritis in contradiction to Shrutis (that which is remembered). The Smritis comprise forensic law or the Dharma Shashtra and are believed to be recorded in the very words of Lord Brahma. The Dharma Shashtra or forensic law is to be found primarily in the institutes or collections known as "Sanhitas", Smritis or in other words, the textbooks attributed to the learned scholarly sages, such as, Manu, Yajnavalchya, Vishnu, Parasara and Gautama, etc. Their writings are considered by the Hindus as authentic works. On these commentaries, digests and annotations have been written. These ancient sources have thus, charted the development of Hindu Law. These sources constantly evolved over the years, embracing the whole system of law, and are regarded as conclusive authorities. Besides these sources customs, equity, justice, good conscience and judicial decisions have also supplemented the development of Hindu Law.

f **23.** The commentaries by various learned scholars have given rise to different schools of Hindu Law, like Dayabhaga in Bengal, Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India. The Mitakshara school of law is one of the most important schools of law having a very wide jurisdiction. It applies to majority of India with slight variations with the fundamental principles being the same. These slight variations formed various sub-schools, namely, g Banaras School, Mithila School, Maharashtra/Bombay School, Dravida/Madras School.

24. The Mitakshara is supposed to be the leading authority in the school of Benaras. Mr Colebrooke, a famous Sanskrit scholar of Bengal, writes "the range of its authority and influence is far more extensive than that of Jinota h Vahanas Treatise for it is received in all other schools of Hindu Law, from Benaras to the southern extremity of the Peninsula of India, as the chief

groundwork of the doctrines which they follow, and as an authority from which they rarely dissent”². The Mitakshara has always been considered as the main authority for all the schools of law, with the sole exception of that of Bengal, which is mostly covered by another school known as Dayabhaga.

25. Reference may also be made to another observation at p. 165, where it is stated as under:

“Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on failure of male issue and a widow, the daughter would take.”

26. The commentary also refers to a case of *Pranjivandas Tulsidas v. Devkuvarbai*³, wherein a Hindu owning separate property died without a male issue, leaving behind — a widow, four daughters and a brother and male issues of other deceased brothers. The Court observed that the widow was entitled to a life estate in the property and subject to her interest the property would devolve to the daughters absolutely in preference to the brother and the issue of the deceased brothers.

27. References to this case have also been made in numerous reported as well as unreported cases; as in *Tuljaram Morarji v. Mathuradas*⁴, it was observed that: (SCC OnLine Bom)

“... The decision in that case and that in *Pranjivandas Tulsidas v. Devkuvarbai*³ have been steadily followed by the High Court in numerous unreported cases, and by the legal profession.... Any departure now from those decisions would cause much confusion and injustice throughout this Presidency, and no advantage that we can perceive. We, therefore, must abide by the principles which they clearly indicate.”

28. In *Chotay Lall v. Chunnoo Lall*⁵ the Court noted:

“The following are the direct authorities on the point. Sir M. Sausse in 1859, in *Pranjivandas Tulsidas v. Devkuvarbai*³, held that a daughter takes absolutely when inheriting from her father. In *Bhaskar Trimbak Acharya v. Mahadev Ramji*⁶, decided in January 1869 by Sir Joseph Arnould, the headnote states that all property acquired by a married woman by inheritance (except from her husband) classes as *stridhan*, and descends accordingly. But this case is founded exclusively on the case of *Pranjivandas Tulsidas v. Devkuvarbai*³.”

² *A Treatise on the Hindoo Law of Inheritance* by Standish Grove Grady published in 1868 by Gantz Brother Mount Road, Madras.

³ (1859) 1 Bom HC 130

⁴ 1881 SCC OnLine Bom 52 : ILR (1881) 5 Bom 662

⁵ 1874 SCC OnLine Cal 10

⁶ (1869) 6 Bom HC Rep (OC) 1

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29. However, despite our best efforts we could not get a copy of the judgment in *Pranjivandas*³, therefore, we are relying upon the aforesaid observations made in the said case by the Bombay High Court as mentioned in the commentary by Standish Grove Grady and the abovementioned cases.

30. One of the sub-schools of Mitakshara—the Madras school of law tends to cover most of the southern part of India. It exercises its authority under Mitakshara law school. The Mitakshara school derives majorly from the running commentaries of Smritis written by “Yajnavalkya”. Other important sources governing the Mitakshara school are “Vyavastha Chandrika” and most importantly Smriti Chandrika.

31. The digest of “Yajnavalkya” states that “*What has been self-acquired by any one, as an increment, without diminishing the paternal estate, likewise a gift from a friend or a marriage gift, does not belong to the co-heirs.*”

32. It may also be relevant to refer to commentaries and annotations from *The Principles and Elements of Hindu Law* in the form of a digest by Shyama Charan Sarkar Vidya Bhushan, known as “Vyavastha Chandrika”⁷, a digest of Hindu Law. Section II of the said digest deals with Daughters’ Right of Succession.

33. In Clause 118 of Section II of the commentary, it is stated as under:

“In default of the widow, the daughters inherit the estate of the man who died separated (from his coparceners) and not re-united (with them).”

34. It also quotes “Vishnu” and “Vrihaspati” as under:

Vishnu: The wealth of a man who leaves no male issue goes to his wife; on failure of her, to his daughter.

Vrihaspati: The wife is pronounced successor to the wealth of her husband; in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then, should any other person take her father’s wealth?

(b) *Any other person*—These terms exclude the son and widow, (who are preferable heirs), and include the father and the rest. — Smriti Chandrika, Chapter XI, Section (ii), Clauses 5 and 6.”

“The meaning is how could the father and the rest take the property of a son-less man, while the daughter is alive.”

35. It also quotes “Manu” as under:

Manu: The son of a man is even as himself, and the daughter is equal to the son. How then can any other inherit his property, notwithstanding the survival of her, who is, as it were, himself.”

³ *Pranjivandas Tulsidas v. Devkuvarbai*, (1859) 1 Bom HC 130

⁷ *Vyavastha-Chandrika, A Digest of Hindu Law* by Shyama Charan Sarkar, Vidya Bhushan printed in 1878 by I.C. Bose & Co., Stanhope Press 249, Bow-Bazar, Calcutta.

36. Clause 120 of the “Vyavastha Chandrika” reads as under:

“120. A daughter being entitled to inherit the divided property of her father, it has been, by parity of reasoning, determined that, she is entitled to inherit also such property as was separately acquired or held by him, or was vested in him.”

37. The purport of the text of “Vrihaspati” is that the brother or the father and like would not take the property of a man who died without leaving a male, when the daughter is alive. By springing from the same limbs of the father, a daughter has been treated in Smriti Chandrika as equal to a son.

38. “Narada” aware of the equitableness of the proposition that it is the daughter who should succeed on the failure of the son and the widow, says, “on failure of male issue, the daughter inherits, for she is equally a cause of perpetuating the race”.

39. Standish Grove Grady in his book *Treatise on Hindoo Law of Inheritance* published in 1868, in Chapter IX — “Inheritance of Succession” while discussing the line of descent, has observed as under:

“*Line of Descent*—It will be seen in the course of this chapter that the Hindoo Law of inheritance comprehends the deceased’s family and his near relations, viz, his issue, male and female; his widow, who takes immediately in default of sons—a term which includes grandsons and great-grandsons. On exhaustion of this line of descent, the succession ascends to his parents, brothers, nephews, and grand nephews, this line continuing upwards to the grandfather and great-grandfather, the grandmother and great grandmother, the latter being given precedence by those who have preferred the mother to the father. The succession then runs downwards to their respective issue, including daughter’s sons, but not daughters, the whole being preferred to the half blood; then follow the more remote kindred which we shall presently enumerate.

In proportion as the claimant becomes remote, the particulars vary with different schools and authors presently pointed out.

In default of natural kind, the series of heirs in all the classes, except that of Brahmins, closes with the preceptor of the deceased, his pupil, his priest, hired to perform sacrifices, or his fellow-student, each in his order and failing all these, the lawful heirs of the Kshtrya, Vashya and Soodra, who are learned and virtuous Brahmins, resident in the same town or village with the deceased.

If an estate should vest by succession in a Brahmin—as he, being such, cannot perform obsequies for one of an inferior caste — the duty may be discharged by substitution of a qualified person, equal in class with the deceased. In all cases where the heir is under disabilities, he must take the same course, paying the person employed for his services. The king too where he takes by escheat, must cause obsequies to be performed for the deceased.

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The Hindoos give the agnate succession the preference, the succession of females being deemed exceptions.

- a Females cannot on account of their sex perform obsequies. They do not, therefore, confer any benefit and are generally disqualified from inheriting. *From this rule, there are only four exceptions for special reasons, viz, the widow, the daughter, the mother and the grandmother. According to the Benaras and Mithila Schools, the females abovementioned inherit only when the family is divided. In an undivided family, females are not admitted as heirs. There are two modes of devolution of property:*
- b

- (i) From a sole separate owner.
(ii) From a female.

- c Property of a united owner cannot be considered as devolving upon the rest, they being joint proprietors by birth. In the second class, the property will, in part, be affected by the rights of collateral sharers.

But even in undivided families, a widow takes the self-acquired property of her husband.

In the case of self-acquired property in the same Chapter, Grady states:

- d “It may safely be stated as a true proposition that property, which is not ancestral, is self-acquired, in whatever way the property may have been obtained, whether by gift or purchase or labour, mental or physical, or otherwise.

- e Referring to judgment of *Katama Natchier v. Rajah of Shivagunga*⁸ [which we shall deliberate in the later part of the judgment], he observes when a Zamindari was escheated on the death of the last zamindar, the government granted it a new to a distant relation of his. This was treated as self-acquired property. That case has decided that all self-acquired property devolves in the same way as the family property of a divided member. Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on the failure of male issue and a widow, the daughter would take”. (emphasis supplied)
- f

40. In the commentary titled as “Hindu Law and Judicature” — from the Dharma-sastra of Yajnavalkya⁹ by renowned authors Edward Roer, PhD, MD and W.A. Montriou, in Clause 135, it is stated as under:

- g “135. If a man depart this life without male issue; (i) his wife, (ii) his daughter, (iii) his parents, (iv) his brothers, (v) the sons of his brothers, (vi) others of the same gotra, (vii) kindred more remote, (viii) a pupil, (ix) a fellow-student — these succeed to the inheritance, each class upon failure of the one preceding. This rule applies to all the caste.”

- h

⁸ 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543

⁹ *Hindu Law and Judicature from the Dharma-Sastra of Yajnavalkya* published in 1859.

41. In another digest “*Hindu Law As Administered in the Courts of Madras Presidency*¹⁰”, arranged and annotated by H.S. Cunningham, the then Advocate General of Madras, it is stated in Clause 203 of Chapter VI, dealing with inheritance by daughters as under: a

“203. In default of sons, grandsons, great-grandsons, and widows, the daughter succeeds to a life estate in her father’s property.”

42. Clause 206 of the said commentary provides that “a married daughter and daughters who are widows succeed irrespectively of the fact of their being barren or having no male issue” and similarly, Clause 207 reads as under: b

“207. Daughters of each class hold their estate jointly; the share of any daughter dying vests in the surviving daughter or daughters of the same class, and descends to the daughters of the next class only when all the daughters of the prior class are exhausted. In each class, a daughter who has not been endowed on marriage, succeeds in preference to the daughter who has been endowed.” c

43. Clause 209 in the said commentary reads as under:

“209. The daughter succeeds on the death of her father’s widow, notwithstanding that such widow be not her mother.” d

44. “Mulla” in his book *Hindu Law* (22nd Edn.), while discussing the law prior to the Hindu Succession Act, 1956 says that there are two systems of inheritance amongst the Hindus in India, namely, Mitakshara system and Dayabhaga system. The Dayabhaga system prevails in Bengal, while the Mitakshara system is applicable to other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under the Dayabhaga School, there is no such definite guiding principle under the Mitakshara School. Sometimes consanguinity, and at the other times, religious efficacy has been regarded as the guiding principle. According to “Mulla”, Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rules of survivorship apply to joint family property, and the rules of succession apply to property held in absolute severalty by the last owner. e

45. It may also be relevant to refer to Section 34 regarding devolution of property according to Mitakshara Law¹¹. In determining the mode in which the property of a Hindu male, governed by Mitakshara Law, devolves on his death, the following propositions are to be noted: f

45.1. Where the deceased was, at the time of the death, a member of joint and undivided family, technically called coparcenary, his undivided interest in the coparcenary property devolves on his coparceners by survivorship. g

¹⁰ *A Digest of Hindu Law as administered in the Courts of The Madras Presidency*, published in 1877 by Higginbotham & Co., Madras. h

¹¹ *Hindu Law* by Mulla (22nd Edn.).

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a (i) Even if the deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by succession according to the order given in Section 43, and not to his coparceners.

(ii) If the deceased was at the time of his death, the sole surviving member of a coparcenary property, the whole of his property, including the coparcenary property, will pass to his heirs by succession according to the order given in Section 43.

b (iii) If the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by succession according to the order given in Section 43.

45.2. If the deceased was reunited at the time of his death, his property will pass to his heirs by succession according to the Rule laid down in Section 60.

c **46.** According to “Mulla” under the Mitakshara Law, the right to inherit arises from propinquity i.e. proximity of relationship. Mitakshara divided blood relations into three classes, namely—

(a) Gotra-sapindas i.e. sapindas belonging to the same gotra or family as the deceased from 1st-7th degree;

d (b) Samanodaka i.e. persons belonging to the same gotra or family as the deceased from 8th-14th degree; and

(c) Bhinna gotra sapindas i.e. Sapindas belonging to a different gotra or family from the deceased.

e **47.** “Gotra-sapindas” and “samanodaka” are persons connected to the deceased by an unbroken line of male descendants i.e. all agnates; and bhinna-gotra sapindas are persons connected to the deceased through a female i.e. cognates such as a sister’s son. “Bhinna-gotra sapindas” are also known as “Bandhus” in Mitakshara. These classifications while now archaic and delineated as Class I, Class II, Class III and Class IV heirs under the Hindu Succession Act, 1956, are of importance with respect to the property in question considering its succession opened before the commencement of the Hindu Succession Act, 1956.

f **48.** The gotra-sapindas of a person, according to Mitakshara are:

(i) His six male descendants in the male line; i.e. his son, son’s son’s son, etc.

g (ii) His six male ascendants in the male line, the wives of the first three of them, and probably also of the next three; i.e. his father, father’s father, father’s father’s father, etc, being F1 to F6 in the table and their wives, that is M1 to M6, being the mother, father’s mother, father’s father’s mother, etc.

h (iii) The six male descendants in the collateral male line of each of his male ascendants; i.e. to X6 in the line of F1, being his brother, brother’s son, brother’s son’s son, etc. to X6 in the line of F2, being his paternal uncle, paternal uncle’s son, etc; to X6 in the line of F3, being his paternal

granduncle, paternal granduncle's son, etc.; to X6 in the line of F4; to X6 in the line of F5, and to X6 in the line of F6.

(ii) His six male ascendants in the male line, the wives of the first three of them, and probably also of the next three; i.e. his father, father's father, father's father's father, etc, being F1 to F6 in the table and their wives, that is M1 to M6, being the mother, father's mother, father's father's mother, etc.

(iii) The six male descendants in the collateral male line of each of his male ascendants; i.e. to X6 in the line of F1, being his brother, brother's son, brother's son's son, etc; to X6 in the line of F2, being his paternal uncle, paternal uncle's son, etc; to X6 in the line of F3, being his paternal granduncle, paternal granduncle's son, etc.; to X6 in the line of F4; to X6 in the line of F5', and to X6 in the line of F6.

(iv) His wife, daughter, and daughter's son.

49. The Sapinda relationship extends to seven degrees reckoned from and inclusive of the deceased and six degrees, if you exclude the deceased. The wife becomes a sapinda of the husband on marriage. The daughter's son is not a gotraja sapinda, he is a bandhu because he is related to the deceased through a female. However, for the purpose of succession, he is ranked with gotraja sapindas.

50. The Hindu Law of Inheritance (Amendment) Act, 1929 was the earliest statutory legislation which brought the Hindu females into the scheme of inheritance. The 1929 Act introduced certain female statutory heirs which were already recognised by the Madras School i.e. the son's daughter, daughter's daughter, sister and sister's son in the order so specified, without making any modifications in the fundamental concepts underlying the textual Hindu Law relating to inheritance; only difference being that while before the Act, they succeeded as bandhus, under the Act, they inherited as "gotra sapindas".

51. The Mitakshara law also recognises inheritance by succession but only to the property separately owned by an individual, male or female. Females are included as heirs to this kind of property by Mitakshara law. Before the Hindu Law of Inheritance (Amendment) Act, 1929, the Bengal, Benares and Mithila sub-schools of Mitakshara recognised only five female relations as being entitled to inherit, namely — widow, daughter, mother, paternal grandmother and paternal great-grandmother. The Madras sub-school recognised the heritable capacity of a larger number of females heirs that is of the son's daughter, daughter's daughter and the sister, as heirs who are expressly named as heirs in Hindu Law of Inheritance (Amendment) Act, 1929. The son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. The Bombay school which is most liberal to women, recognised a number of other female heirs, including a half-sister, father's sister and women married into the family such as step-mother, son's widow, brother's widow and also many other females classified as bandhus. From the above discussions, it is abundantly clear that a daughter was in fact capable of inheriting the father's separate estate.

Judicial precedents

- 52.** Privy Council has delivered some notable judgments on the issue arising for adjudication in the case at hands. Reference may be made to the case of *Katama Natchier v. Rajah of Shivagunga*⁸. The dispute in the appeal before the Privy Council was in respect of the Right of Inheritance of Shivagunga Zamindary, situate in the District Maduua, Presidency of Madras. The Privy Council after noticing the facts of the long litigation and the three suits filed between the parties, which were dismissed by the Provincial Court and the appeal was filed in each of the three suits which were heard together and disposed of by the decree of the Sudder Court. The Privy Council noted the following arguments advanced before it, by Anga Moottoo Natchiar, as under: (SCC OnLine PC)

- “She submitted as in issue of fact that the Zamindary had been acquired by the sole exertions and merits of her husband; and as an issue of law that what is acquired by a man, without employment of his patrimony, shall not be inherited by her brothers and co-heirs, but if he dies without male issue, shall descend to his widows, his daughters, and the parents, before going to his brothers or remoter collaterals.”

- 53.** After analysing the factual aspects in details, the Privy Council posed three questions as under: (*Rajah of Shivagunga case*⁸, SCC OnLine PC)

- “The substantial contest between the appellant and the respondent is, as it was between Anga Moottoo Natchiar and the respondent’s predecessors, whether the Zamindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:

First. Were Gowery Vallabha Taver and his brother, Oya Taver, undivided in estate, or had a partition taken place between them?

Second. If they were undivided, was the Zamindary the self-acquired and separate property or Gowery Vallabha Taver? And if so—

Third. What is the course of succession according to the Hindoo Law of the South of India of such an acquisition, where the family is in other respects an undivided family?

- 54.** Insofar as, the first question is concerned, the Privy Council did not disturb the findings in the decree of 1847 that Gowery Vallabha Taver and his brother, after the acquisition by the former of the zamindary, lived very much as if they were separate. The second question was answered in affirmative. With respect to the third question, the Privy Council observed as under: (*Rajah of Shivagunga case*⁸, SCC OnLine PC)

- “The third question is one of nicety and of some difficulty. The conclusion which the courts in India have arrived at upon it, is founded

upon the opinion of the Pundits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to be found in the *Mitakshara*, and in Chapter II, Section 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The *Mitakshara* purports to be a commentary upon the earlier institutes of Yajnyawalkya; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the *Mitakshara* refers to various authorities which are apparently in conflict with the doctrines of Yajnyawalkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion 'that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue.' This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according

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a to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of join property, is apparent from a passage in *W.H. Macnaghten's "Hindu Law,"* title "*Partition*," Vol. I, p. 53, where it is said as follows:

c 'According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.'

d Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the coparceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindoo law, there need not be unity of heirship.

g But to look more closely into the Hindoo law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from *Macnaghten's "Hindu Law,"* that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

h

Again, there are two principles on which the rule of succession according to the Hindoo law appears to depend : the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange's "Hindu Law", p. 135). But some ancient authorities also invoke the other principle. ...

Again, the theory which would restrict the preference of the coparceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that coparceners should take separate property by descent, when they take no interest in it upon partition. We may further observe, that the view which we have thus indicated of the Hindoo law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience."

55. On a complete reading of the judgment⁸ of Privy Council in extenso, the following legal principles are culled out:

55.1. That the general course of descends of separate property according to the Hindu Law is not disputed — it is admitted that according to that law such property (separate property) descends to widow in default of male issue.

55.2. It is upon the respondent therefore to make out that the property herein in question which was separately acquired does not descend according to the general course of Law.

55.3. According to the more correct opinion where there is undivided residue, it is not subject to ordinary rules of partition of joint property, in other words if it a general partition any part of the property was left joint the widow of the deceased brother will not participate notwithstanding with separation but such undivided residue will go exclusively to the brother.

55.4. The law of succession follows the nature of property and of the interest in it.

55.5. The law of partition shows that as to the separately acquired property of one member of a united family, the other members of the family have neither community of interest nor unity of possession.

55.6. The foundation therefore of a right to take such property by survivorship fails and there are no grounds for postponing the widow's right to any superior right of the coparceners in the undivided property.

55.7. The Hindu Law is not only consistent with this principle but is also most consistent with convenience.

⁸ *Katama Natchier v. Rajah of Shivagunga*, 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543

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56. Another case of the Privy Council is *Sivagnanan Tevar v. Pariasami*¹². The aforesaid case, before the Privy Council was in continuity and of the consequence of the previous case *Katama Natchier*⁸ but of a different branch of the family. In the said case, it was observed as under: (*Pariasami case*¹², SCC OnLine PC)

“Their Lordships then have come to the conclusion that, as between the descendants of Muttu Vaduga and Dhorai Pandian, the palayapat was the separate property of the latter; that on the death of Dhorai Pandian, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding the undivided *status* of the family; and that therefore, the case was one to which the rule of succession affirmed in *Shivagunga case*⁸ applies.” (emphasis in original)

57. The principles of law which can be deduced from reading of the aforesaid judgment can be summarised as under:

57.1. The law laid down in *Katama Natchier v. Rajah of Shivagunga*⁸, that succession in the case of Hindu male dying intestate is to be governed by inheritance rather than survivorship, is reaffirmed.

57.2. In the absence of male member, the property devolves upon widow and thereafter to daughter.

58. A Full Bench of the Allahabad High Court, in *Ghurpatari v. Sampati*¹³, while considering the question whether a custom under which daughters are excluded from inheriting the property of their father can by implication exclude the daughters’ issues both males and females, also from such inheritance, made the following observations in respect of Right of Inheritance of a widow or a daughter of a male Hindu dying intestate: (SCC OnLine All para 17)

“17. The rules relating to inheritance by widow and daughter were enunciated in the ancient past by various sages and were ultimately elaborated by Vijnyaneshwara in Mitakshara. We may quote from Colebrooke’s translation.

Katyayan said ‘let the widow succeed to her husband’s wealth, provided she be chaste; and in default of her let the daughter inherit if married’. Brihaspati stated, ‘the wife is pronounced successor to the wealth of her husband; and in her default the daughter; as a son so does the daughter of a man proceed from his several limbs, how then shall any other person take the father’s wealth’? Vishnu laid down, ‘if a man leaves neither son, nor son’s son, nor wife, nor female issue, the daughter’s son shall take his wealth, for in regard to the obsequies of ancestors, daughter’s son is considered as son’s son.’ Manu likewise declared that ‘by a male child, who were daughter whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grand sire of son’s son, let that son give the funeral oblation and possess the

¹² 1878 SCC OnLine PC 6 : ILR (1878) 1 Mad 312

⁸ *Katama Natchier v. Rajah of Shivagunga*, 1863 SCC OnLine PC 11 : (1861-64) 9 Moo IA 543

¹³ 1975 SCC OnLine All 367 : AIR 1976 All 195

inheritance.’ The right of daughter and daughter’s son to succeed to the property was thus well recognised in the Mitakshara Law. The daughter ranks fifth in the order of succession and the daughter’s son ranked sixth.” a

59. Thereafter, the Court proceeded to consider the question of custom prevalent in a particular sect and whether they will have the sources of law with which we are not concerned in the case at hands.

60. The Hindu Law of Inheritance (Amendment) Act 2 of 1929 (hereinafter called as “the 1929 Act”), for the first time entitled the daughter’s daughter, subject to a special family or local custom, to succeed to the property of a male Hindu governed by Mitakshara Law. Daughter’s daughter then ranked 13th-B in the order of succession. The order of succession to the estate of a Hindu dying intestate and governed by Mitakshara Law are set out in Para 43 of Mulla’s Principles of Hindu Law¹⁴ as under: b

“43. The Sapindas succeeded in the following order: c

1-4. A son, grandson (son’s son) and great-grandson (son’s son’s son) and (after 14-4-1937) widow, predeceased son’s widow, and predeceased son’s son’s widow.

5. Daughter

6. Daughter’s son

13. Father’s father d

13.A Son’s daughters

13.B Daughter’s daughter”

61. In *Lal Singh v. Roor Singh*¹⁵, it was held that daughters and daughters’ son have a preferential claim to the non-ancestral property as against the collaterals. e

62. In *Gopal Singh v. Ujagar Singh*¹⁶, it was observed by this Court that the daughter succeeds to the self-acquired property of her father in preference to collaterals. This Court proceeded to rely upon the following observation in *Rattigan’s Digest to Customary Law*: (AIR p. 580, para 8)

“8. ... ‘In regard to the acquired property of her father, the daughter is preferred to the collaterals.’ ” f

63. Reference may also be made to the decision of the Bombay High Court in *Devidas v. Vithabai*¹⁷. In the said case, one Arjuna died in 1936, when succession opened and while determining the shares during partition daughter of one pre-deceased sons of Arjuna, namely, Vithabai was held entitled for a share. The name of Vithabai was removed from revenue record. She filed a suit for declaration claiming 1/3rd share with other reliefs. The trial court dismissed the suit. The first appellate court held that the plaintiff, Vithabai, being daughter g

14 *Mulla’s Principles of Hindu Law* (14th Edn.).

15 1952 SCC OnLine Punj 139 : PLR (1953) 55 P&H 168 at p. 172

16 AIR 1954 SC 579

17 2008 SCC OnLine Bom 397 : (2008) 5 Mah LJ 296

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of Zolu was a Class I heir and thus, was entitled to 1/3rd share and accordingly, reversed the decree. The matter was carried in second appeal.

a **64.** The High Court while reversing the decree of lower appellate court and confirming that of the trial court observed as under: (SCC OnLine All para 12)

b “12. Zolu, when died in 1935 was joint with his father and brothers. Therefore, his share in the coparcenary would devolve by survivorship and not by succession. Zolu did not hold any separate property admittedly and therefore, there was no question of property passing over by succession. The following illustration to Section 24 in *Mulla’s Hindu Law*, 19th Edn. shall be enough to unfortunately negative the claim of the plaintiff. The case is squarely covered by this illustration.

c (1) A and B two Hindu brothers, governed by the Mitakshara School of Hindu Law, are members of a joint and undivided family. A dies leaving his brother B and a daughter. A’s share in the joint family property will pass to his brother, the surviving coparcener, and not to his daughter. However, if A and B were separate, A’s property would on his death pass to his daughter as his heir.

d The plaintiff due to the above proposition of law was not entitled to succeed to the estate of her father. The persons on whom the share of Zolu devolved were his brothers and father by survivorship. The share could not devolve on the daughter by succession since the plaintiff herself pleads that the property was joint and there was no partition. It was, therefore, not a separate estate of Zolu so that rule of succession could be applied. The property therefore passed over by survivorship in favour of brothers and father who were coparceners.”

e **65.** The 174th Law Commission in its report on “Property Rights of Women” while proposing reforms under the Hindu Law has observed as under:

f “1.3.3. The Mitakshara law also recognises inheritance by succession but only to the property separately owned by an individual, male or female. Females are included as heirs to this kind of property by Mitakshara law. Before the Hindu Law of Inheritance (Amendment) Act, 1929, the Bengal, Benares and Mithila sub-schools of Mitakshara recognised only five female relations as being entitled to inherit, namely— widow, daughter, mother, paternal grandmother, and paternal great-grand mother.

g 1. The Madras sub-school recognised the heritable capacity of a larger number of females heirs that is of the son’s daughter, daughter’s daughter and the sister, as heirs were expressly named as heirs in Hindu Law of Inheritance (Amendment) Act, 1929.

h 2. The son’s daughter and the daughter’s daughter ranked as bandhus in Bombay and Madras. The Bombay School which is most liberal to women, recognised a number of other female heirs, including a half sister, father’s sister and women married into the family such as

stepmother, son's widow, brother's widow and also many other females classified as bandhus."

66. From the above discussions, it is clear that ancient texts as also the Smritis, the commentaries written by various renowned learned persons and even judicial pronouncements have recognised the rights of several female heirs, the wives and the daughters being the foremost of them.

67. The rights of women in the family to maintenance were in every case very substantial rights and on whole, it would seem that some of the commentators erred in drawing adverse inferences from the vague references to women's succession in the earlier Smritis. The views of the Mitakshara on the matter are unmistakable. Vijneshwara also nowhere endorses the view that women are incompetent to inherit.

Our analysis

68. Right of a widow or daughter to inherit the self-acquired property or share received in partition of a coparcenary property of a Hindu male dying intestate is well recognised not only under the old customary Hindu Law but also by various judicial pronouncements and thus, our answer to the Questions 1 and 2 are as under:

"If a property of a male Hindu dying intestate is a self-acquired property or obtained in partition of a coparcenary or a family property, the same would devolve by inheritance and not by survivorship, and a daughter of such a male Hindu would be entitled to inherit such property in preference to other collaterals."

69. In the case at hands, since the property in question was admittedly the self-acquired property of Marappa Gounder despite the family being in state of jointness upon his death intestate, his sole surviving daughter Kupayee Ammal, will inherit the same by inheritance and the property shall not devolve by survivorship.

70. Insofar as, Question 3 is concerned under the old customary Hindu Law, there are contradictory opinions in respect of the order of succession to be followed after the death of such a daughter inheriting the property from his father. One school is of the view that such a daughter inherits a limited estate like a widow, and after her death would revert back to the heirs of the deceased male who would be entitled to inherit by survivorship. While other school of thought holds the opposite view. This conflict of opinion may not be relevant in the present case inasmuch as since Kupayee Ammal, daughter of Marappa Gounder, after inheriting the suit property upon the death of Marappa Gounder, died after enforcement of the Hindu Succession Act, 1956 (hereinafter referred to as "the 1956 Act"), which has amended and codified the Hindu Law relating to intestate succession among Hindus. The main scheme of this Act is to establish complete equality between male and female with regard to property rights and the rights of the female were declared absolute, completely abolishing all notions of a limited estate.

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a 71. The 1956 Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. The 1956 Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga Schools and also to those governed previously by the Murumakkattayam, Aliyasantana and Nambudri laws. The 1956 Act applies to every person, who is a Hindu by religion in any of its forms including a Virashaiva, a Lingayat or a follower of the Brahmo Prarthana or Arya Samaj and even to any person who is Buddhist, Jain or Sikh by religion excepting one who is Muslim, Christian, Parsi or Jew or Sikh by religion.

b 72. Section 14 of the 1956 Act declares property of a female Hindu to be her absolute property, which reads as under:

c **"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.

d *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.

e (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."

73. The legislative intent of enacting Section 14(1) of the Act was to remedy the limitation of a Hindu woman who could not claim absolute interest in the properties inherited by her but only had a life interest in the estate so inherited.

f 74. Section 14(1) converted all limited estates owned by women into absolute estates and the succession of these properties in the absence of a will or testament would take place in consonance with Section 15 of the Hindu Succession Act, 1956, which reads as follows:

g **"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—

- h
- (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;
 - (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 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 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) to 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."

75. The scheme of sub-section (1) of Section 15 goes to show that property of Hindu females dying intestate is to devolve on her own heirs, the list whereof is enumerated in clauses (a) to (e) of Section 15(1). Sub-section (2) of Section 15 carves out exceptions only with regard to property acquired through inheritance and further, the exception is confined to the property inherited by a Hindu female either from her father or mother, or from her husband, or from her father-in-law. The exceptions carved out by sub-section (2) shall operate only in the event of the Hindu female dies without leaving any direct heirs i.e. her son or daughter or children of the pre-deceased son or daughter.

76. Thus, if a female Hindu dies intestate without leaving any issue, then the property inherited by her from her father or mother would go to the heirs of her father whereas the property inherited from her husband or father-in-law would go to the heirs of the husband. In case, a female Hindu dies leaving behind her husband or any issue, then Section 15(1)(a) comes into operation and the properties left behind including the properties which she inherited from

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her parents would devolve simultaneously upon her husband and her issues as provided in Section 15(1)(a) of the Act.

a 77. The basic aim of the legislature in enacting Section 15(2) is to ensure that inherited property of a female Hindu dying issueless and intestate, goes back to the source.

b 78. Section 15(1)(d) provides that failing all heirs of the female specified in Entries (a)-(c), but not until then, all her property howsoever acquired will devolve upon the heirs of the father. The devolution upon the heirs of the father shall be in the same order and according to the same rules as would have applied if the property had belonged to the father and he had died intestate in respect thereof immediately after her death. In the present case since the succession of the suit properties opened in 1967 upon death of Kupayee Ammal, the 1956 Act shall apply and thereby Ramasamy Gounder's daughters being Class I heirs of their father too shall be heirs and entitled to 1/5th share each in the suit properties.

c 79. This Court while analysing the provisions of Sections 15 and 16 of the Act in *State of Punjab v. Balwant Singh*¹⁸, has held as under: (SCC p. 112, paras 7-8)

d “7. Sub-section (1) of *Section 15* groups the heirs of a female intestate into five categories and they are specified under clauses (a) to (e). As per Section 16 Rule 1 those in one clause shall be preferred to those in the succeeding clauses and those included in the same clause shall take simultaneously. Sub-section (2) of *Section 15* begins with a non obstante clause providing that the order of succession is not that prescribed under sub-section (1) of *Section 15*. It carves out two exceptions to the general order of succession provided under sub-section (1). The first exception relates to the property inherited by a female Hindu from her father or mother. That property shall devolve, in the absence of any son or daughter of the deceased (including the children of the 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. The second exception is in relation to the property inherited by a female Hindu from her husband or from her father-in-law. That property shall devolve, in the absence of any son or daughter of the deceased (including the children of the pre-deceased son or daughter) not upon the other heirs referred to under sub-section (1) in the order specified thereunder but upon the heirs of the husband.

g 8. The process of identifying the heirs of the intestate under sub-section (2) of *Section 15* has been explained in *Bajaya v. Gopikabai*¹⁹. There this Court observed that the rule under which the property of the intestate would devolve is regulated by Rule 3 of *Section 16* of the Act. Rule 3 of *Section 16* provides that

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¹⁸ 1992 Supp (3) SCC 108
¹⁹ (1978) 2 SCC 542

‘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.’ ”

80. Again in *Bhagat Ram v. Teja Singh*²⁰, a two-Judge Bench of this Court analysing the provisions of Sections 14, 15 and 16 of the Act reiterating the view taken in the *State of Punjab v. Balwant Singh*¹⁸, observed as under: (*Bhagat Ram case*²⁰, SCC p. 215, para 13)

“13. The source from which she inherits the property is always important and that would govern the situation. Otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property. That would defeat the intent and purpose of sub-section (2) of Section 15, which gives a special pattern of succession.”

81. Applying the above settled legal proposition to the facts of the case at hands, since the succession of the suit properties opened in 1967 upon death of Kupayee Ammal, the 1956 Act shall apply and thereby Ramasamy Gounder’s daughter’s being Class I heirs of their father too shall also be heirs and entitled to 1/5th share in each of the suit properties.

82. Unfortunately, neither the trial court nor the High Court adverted itself to the settled legal propositions which are squarely applicable in the facts and circumstances of the case. Thus, the impugned judgment and decree dated 1-3-1994 passed by the trial court and confirmed by the High Court vide judgment and order dated 21-1-2009¹ are not liable to be sustained and are hereby set aside.

83. The appeal, accordingly, stands allowed and the suit stands decreed.

84. Let a preliminary decree be drawn accordingly. It shall be open to the parties to invoke the jurisdiction of appropriate court for preparation of final decree in accordance with law.

85. However, in the facts and circumstances of the case, we do not make any order as to costs.

²⁰ (2002) 1 SCC 210

¹⁸ 1992 Supp (3) SCC 108

¹ *Thangammal v. Ponnusamy*, 2009 SCC OnLine Mad 215

2025 SCC OnLine Mad 9290 : (2025) 6 Mad LJ 110

In the High Court of Madras
(BEFORE N. ANAND VENKATESH, J.)

Rhutikumari ... Applicant;

Versus

Zanmai Labs Pvt. Ltd., rep. by its Managing Director
Mr. Nischal Shetty and Others ... Respondents.

Original Application No. 194 of 2025

Decided on October 25, 2025, [Reserved on : 17.10.2025]

Advocates who appeared in this case:

For Applicant : Mr. D. Ravichander

For R 1 : Mr. Satish Parasaran, SC for Mr. Vishnu Mohan

For R 2 to R 5 : Mr. Adithya Reddy

Original Application under Section 9(1)(ii)(a), (d) and (e) of the Arbitration and Conciliation Act, 1996 praying to grant an order of injunction restraining the respondents herein, their men, agents, assignees or any other persons claiming through them from interfering with the account/portfolio holding of the applicant to the tune of 3,532.30 XRP coins bearing Client I.D. No. 1709079 in the WazirX Platform either by redistribution or apportionment or reallocation.

The Order of the Court was delivered by

N. ANAND VENKATESH, J.:— This application has been filed under Section 9 of the Arbitration and Conciliation Act (for short, the Act) for an order of injunction restraining the respondents from interfering with the account/portfolio holding of the applicant to the tune of 3,532.30 XRP coins bearing Client I.D. No. 1709079 in the WazirX platform either by redistribution or apportionment or reallocation.

2. Heard both.

3. The case of the applicant is as follows:

(i) The first respondent is incorporated under the Indian Companies Act, 2013 and respondents 2 to 5 are the directors of the first respondent company. The first respondent company is engaged in the business of running crypto currency exchange platform under the name and style of WazirX. The applicant made an investment to the tune of Rs. 1,98,516/- in the exchange platform of the first respondent during January 2024. A portfolio account was allotted to the applicant by giving a specific identification number and it was registered with both the e-mail address as well as the mobile contact number of the applicant.

- (ii) By investing the said amount, the applicant purchased 3,532.30 XRP Coins, which were retained in the custody of the first respondent company. The Indian currency that was invested by the applicant after conversion into XRP Coins has been stored in the wallet maintained by the first respondent company.
- (iii) The first respondent company holds the XRP coins in its capacity as the custodian and in trust on behalf of the applicant. The value of the XRP coins belonging to the applicant will keep varying depending upon the market fluctuation. The value of the XRP coins is identified/based on US Dollars (USD), which, in turn, is based on the conversion rate of USD to Indian rupees. On 20.2.2025, the value of each XRP coin was USD 2.77. As on 17.1.2025, the XRP coins held by the applicant were carrying the value of Rs. 9,55,148.20 Ps.
- (iv) In the meantime on 18.7.2024, the first respondent made an official announcement in its website that one of its cold wallets had been subjected to cyber attack, that on account of the same, there has been loss of Ethereum and Ethereum based tokens (ETH) - ERC 20 coins stored in the concerned crypto wallet and that therefore, the first respondent company suffered a loss to the tune of USD 230 Million. Following the said announcement, the first respondent company immediately froze the crypto account/portfolio of the applicant as on 18.7.2024 and thereby prevented the applicant from having access or to trade with her XRP coins or liquidate the same.
- (v) The parties are governed under a WazirX user agreement dated 01.8.2023 and it contained a dispute resolution mechanism by referring the dispute for arbitration under the Arbitration Rules of Singapore International Arbitration Centre (SIAC) with the seat of arbitration at Singapore.
- (vi) It is under these circumstances, the above application came to be filed before this Court seeking for an order of injunction.

4. The first respondent filed a counter affidavit wherein they took the following stand:

- (i) WazirX platform was founded in the year 2018 and it was a leading crypto currency exchange in India with over 60 million registered users, out of whom, 4.3 Million users have crypto currency balances in their accounts maintained with the platform. The first respondent company is a wholly owned subsidiary of M/s. Zettai Pte. Ltd. (for brevity, the Zettai), a company incorporated under the laws of Singapore. The Zettai was formerly known as M/s. Zannmai Pte Ltd. The platform facilitated peer to peer (P2P) trade of crypto currency between the users. The platform holds the crypto currency in an escrow between the two counter parties

until the payment in fiat currency funds between the buyer and the seller is completed. Such supported crypto currency is released as soon as the payment is confirmed.

- (ii) The platform does not take custody or facilitate transfer of the fiat currency fund and the transfer of the fiat currency funds is solely between the users without any responsibility or liability of the platform. Hence, the platform does not hold the virtual digital assets of its users in its capacity as a custodian or trustee. The users of the platform can withdraw the crypto currency tokens, which are also termed as virtual digital assets either by transferring the crypto currency tokens to any crypto currency wallet of the user's choice held outside the platform or by liquidating/selling the crypto currency assets on the platform for Indian rupees and thereafter withdrawing back the proceeds to their respective registered bank accounts.
- (iii) The WazirX platform was owned and operated by the Zettai and its affiliates until November 2019. Later, a group of entities known as Binance entered into negotiations with the founders of the platform - the first respondent for its acquisition. On 21.11.2019, Binance announced its acquisition of the platform. Thereafter, the first respondent and Binance entered into a licence and distribution agreement. Under this agreement, the first respondent must act as a non exclusive and limited distributor of the platform within the territory of India for a compensation in the nature of licence fee as determined under the provisions of the agreement.
- (iv) The first respondent was appointed as a non exclusive distributor of the platform for services in relation to trading between Indian rupees and crypto currencies. From November 2019, Binance operated the crypto currency related services on the platform and licensed the platform to the first respondent for the sole purpose of distribution of the services for trading between Indian rupees and crypto currencies, in India.
- (v) Every user of the platform is given an Indian rupee wallet and a crypto currency wallet. Binance operates the crypto currency wallet. The first respondent operates the Indian rupee wallet, which is facilitated through third party bank accounts situated in India.
- (vi) In or around August 2022, Binance started to distance itself from the platform, which resulted in a dispute related to the ownership of the platform. On 26.1.2023, Binance terminated the wallet and the related technology support to the platform. In or around February 2023, Binance publicly announced its decision to cease providing services in relation to the platform. This has

resulted in a dispute between the original owner - Zettai and Binance, which is a subject matter of an ongoing confidential formal dispute resolution process. Since Binance withdrew its support infrastructure for the virtual digital assets, to ensure continuity of the platform and to safeguard the interests of the platform users, the Zettai stepped into the shoes of Binance and held custody of the crypto currency assets associated with the platform.

- (vii) In these circumstances, on 31.1.2023, the Zettai entered into a licence agreement with another entity namely M/s. Answer Eleven Pte. Ltd. (hereinafter called as Liminal Infrastructure). Pursuant to this agreement, Liminal Infrastructure undertook to provide a digital asset wallet management services required to operate the crypto currency. The crypto currency tokens, which were lying in the Binance wallets, were transferred to the wallets of Liminal Infrastructure.
- (viii) During July 2024, the platform fell victim of a vicious cyber attack and the hackers siphoned off a huge sum of around USD 234 Million worth of crypto currency assets amounting to approximately 45% of the platform assets held in the wallets maintained at Liminal Infrastructure to certain unknown wallets. The first respondent along with the Zettai were also victims of the said cyber attack. Immediately after the cyber attack, the platform promptly informed the stakeholders about the cyber attack through social media, blogs, etc., and provided day-to-day developments. They also approached the law enforcement authorities both in Singapore and in India and the authorities in India are investigating into the complaint filed by the first respondent. Steps were also taken to trace and tag the stolen token assets.
- (ix) The Zettai also reached out over 500 crypto currency exchanges to block the identified wallet addresses, to which, some of the stolen token assets have been transferred. The platform ceased processing of users' withdrawal requests to prevent further losses and to ensure safety of wallets. The platform also ceased to process trades. The platform migrated all the remaining assets from Liminal Infrastructure to alternative wallets for enhanced security of the remaining virtual digital assets. The platform also initiated restructuring proceedings in Singapore under the relevant enactment. The investigation is also started in this regard.
- (x) Since the cyber attack took place, there are insufficient crypto currency tokens attributable to the platform's user liabilities to satisfy unsecured crypto currency claims of its users. Hence, the

Zettai devised a solution for the benefit of platform's users through a scheme of arrangement under the Singapore Companies Act, which would provide a mechanism for a fair and orderly manner of distribution pursuant to the scheme under the supervision of the Singapore Courts. During the pendency of restructuring proceedings, information was provided in the blogposts of the Zettai for disseminating to the users and conducted virtual polls and surveys in the platform and otherwise for assessing the user sentiment pertaining to the moratorium sought in the restructuring proceedings. Almost, 95% of the survey responded favouring moratorium.

(xi) At the time when the counter affidavit was filed, the proceedings were pending before the Singapore High Court. In the meantime, in the interest of all the depositors, their accounts were frozen to prevent any further trading or liquidating the crypto currency assets. During the pendency of the proceedings, the Singapore High Court, by order dated 13.10.2025, rendered a finalized scheme of arrangement, which was approved by the Singapore High Court under the Singapore Companies Act so as to bind the Zettai Group and the scheme of creditors.

(xii) The respondents have taken a stand that the applicant would be paid as per the scheme of arrangement on pro-rata basis. It involved a three step process. As a first step, the Zettai must transfer its role in the WazirX platform operations to the first respondent. In the second step, the Zettai must transfer the crypto currency from their wallet to the wallet of the first respondent and provide the first respondent with a list of creditors and the amounts to be credited to each WazirX account. As a third step, the first respondent opens a platform for withdrawal with updated WazirX accounts and it provides for three options. The first option is for a direct crypto withdrawal on chain. The second option is to crypto conversion. The third option is crypto to Indian rupees conversion. Once this option is chosen, the Indian rupees would be sent to the bank account fund. This scheme of arrangement is going to be held for all those, who invested money, including the applicant. Ultimately, they sought for dismissal of this application.

5. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record.

6. The learned Senior Counsel appearing on behalf of the first respondent raised a preliminary objection on the ground that the agreement between the parties contemplated that the seat of arbitration should be at Singapore, that the Arbitrator would be appointed as per the Rules of the SIAC as the digital wallets are held

outside India by a foreign entity and that therefore, the above application filed under Section 9 of the Act is not maintainable before this Court.

7. In reply to the above submissions, the learned counsel for the applicant contended that a part of the cause of action has arisen within the jurisdiction of this Court in the present case since the applicant had transferred her Indian national currency from the account held at Kotak Mahindra Bank, George Town, Chennai and that the applicant was also using the WazirX platform through her mobile phone, which was operated within the jurisdiction of this Court.

8. To support his submission, the learned counsel appearing for the applicant relied upon the judgment of the Hon'ble Apex Court in *PASL Wind Solutions (P) Ltd. v. GE Power Conversion India (P) Ltd.* [(2021) 7 SCC 1 : (2021) 3 SCC (Civ) 702] wherein the relevant portions read thus:

"37. This being the case, it is a little difficult to accede to any argument that would breach the wall between Parts I and II. Mr Himani's argument that the proviso to Section 2(2) of the Arbitration Act is a bridge which connects the two parts must, thus, be rejected. As a matter of fact, Section 2(2) specifically states that Part I applies only where the place of arbitration is in India. It is settled law that a proviso cannot travel beyond the main enacting provision — see Union of India v. Dileep Kumar Singh [Union of India v. Dileep Kumar Singh, (2015) 4 SCC 421 : (2015) 2 SCC (L&S) 1] (at para 20), DMRC v. Tarun Pal Singh [DMRC v. Tarun Pal Singh, (2018) 14 SCC 161 : (2018) 4 SCC (Civ) 488] (at para 21), Kandla Export Corpn. v. OCI Corpn. [Kandla Export Corpn. v. OCI Corpn. (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664] (at para 13), and Mavilayi Service Coop. Bank Ltd. v. CIT [Mavilayi Service Coop. Bank Ltd. v. CIT, (2021) 7 SCC 90 : (2021) 431 ITR 1] (at para 44).

38. As a matter of fact, the reason for the insertion of the proviso to Section 2(2) by the Arbitration and Conciliation (Amendment) Act, 2015 was because the judgment in Bhatia International v. Bulk Trading S.A. [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] ["Bhatia"] had muddled the waters by holding that Section 9 would apply to arbitrations which take place outside India without any express provision to that effect. The judgment in Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] has been expressly overruled by a five-Judge Bench in BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810 : (2013) 180 Comp Cas 311]. Pursuant thereto, a proviso has now been inserted to Section 2(2) which only makes it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim

orders are required qua such assets, including preservation thereof, the courts in India may pass such orders. It is important to note that the expression "international commercial arbitration" is specifically spoken of in the context of a place of arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act. The context of this expression is, therefore, different from the context of the definition of "international commercial arbitration" contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies "unless the context otherwise requires". The four sub-clauses contained in Section 2(1)(f) would make it clear that the definition of the expression "international commercial arbitration" contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, inter alia, be a person who is a national of or habitually resident in any country other than India. On the other hand, when "international commercial arbitration" is spoken of in the context of taking place outside India, it is place-centric as is provided by Section 44 of the Arbitration Act. This expression, therefore, only means that it is an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an "international" commercial arbitration."

9. In the said judgment, the Hon'ble Apex Court dealt with the Proviso that was inserted to Section 2(2) of the Act and held that at least, one of the parties to the arbitration agreement is a resident in India, that the assets of one of the parties are situated in India, that interim orders are required qua such assets, including preservation thereof and that the Courts in India can pass orders under Section 9 of the Act.

10. In the case in hand, the WazirX platform was used by the applicant. It was operated through her mobile phone from her ordinary place of residence and she has been prevented from either trading or liquidating her crypto currency holdings through WazirX platform. To that extent, prima facie, it must be held that the asset namely the crypto currency was held by her in India by means of WazirX platform and that the applicant has been prevented from using the platform since it has been frozen. Therefore, in the light of the said judgment of the Hon'ble Apex Court, the above application filed under Section 9 of the Act is maintainable before this Court.

11. The next issue to be considered is as to whether the applicant must be construed as an investor or a proprietor of her holdings i.e. 3,532.20 XRP coins and consequently as to whether the proceedings before the Singapore High Court, which resulted in the approval of the

modified scheme of arrangement on 13.10.2025, will bind the applicant.

12. The article “*10 Things Judges Should Know About Cryptocurrency*,” written by *Lee Reiners* at *Duke Law School*, explains as to how crypto currency has transformed modern finance and as to why Judges must understand it as cases increasingly involve digital assets. It begins with the origins of money, showing that currencies emerged not merely to simplify barter, but as a medium of trust and credit. Governments historically gave value to currency by accepting it for taxes. Crypto currency, on the other hand, removes the State's involvement and replaces trust in people or institutions with trust in technology.

13. Bitcoin, the first and most popular crypto currency, represented the breakthrough idea of creating a digital asset verified collectively through blockchain technology rather than any central authority. Blockchain acts as a shared digital ledger that ensures every transaction is transparent and immutable, meaning thereby that it cannot be changed once recorded. This technological design allows value to be transferred without relying on banks or governments. Yet, Bitcoin's decentralised and semi-anonymous nature has also made it popular among criminals, enabling drug marketplaces such as Silk Road and recent ransomware attacks like the 2021 Colonial Pipeline incident. Criminals exploit the fact that identities on the blockchain are pseudonymous, though law enforcement has improved its ability to trace transactions using advanced data analytics.

14. The article notes that US law lacks a single unified framework for crypto currency regulation. Different agencies treat it differently — the Treasury's FinCEN views crypto as money and applies anti-money-laundering rules; the Commodity Futures Trading Commission treats Bitcoin and Ether as commodities; the Securities and Exchange Commission regards many tokens as securities depending on whether they meet the “Howey test” for investment contracts; and the Internal Revenue Service classifies crypto currency as property for tax purposes. This fragmented approach confuses both regulators and market participants, leading to overlapping oversight and uncertainty.

15. In 2022, President Biden signed an executive order calling for a coordinated national strategy titled “*Ensuring Responsible Development of Digital Assets*.” It directed multiple agencies to balance innovation with safeguards for consumers, financial stability, and national security. Despite this, efforts to legislate clear frameworks have faced resistance from the growing political influence of the crypto industry in the United States. Lawmakers such as Senators Gillibrand and Lummis have proposed bipartisan bills to clarify jurisdiction over crypto markets, but these are yet to pass into law.

16. Crypto currency increasingly appears in courtrooms in various forms — from financial crimes and money laundering to divorce disputes where spouses hide assets in digital wallets. Courts have also handled regulatory questions, such as whether certain tokens qualify as commodities or securities. In one notable case, the *Commodity Futures Trading Commission v. My Big Coin Pay, Inc.*, [334 F. Supp. 3d 492 (D. Mass. 2018)], the Federal Court held that crypto currencies can be classified as commodities under the Commodity Exchange Act, thereby bringing them within the agency's jurisdiction.

17. Around the world, countries have taken divergent paths. El Salvador adopted Bitcoin as legal tender, allowing citizens to use it alongside the US dollar for everyday transactions, though widespread use remains limited. Conversely, China completely banned crypto currency trading, citing risks like financial crime and speculation and introduced its own central bank digital currency, the digital yuan. These opposing examples show how national priorities shape crypto regulation : for some, it represents innovation and inclusion; for others, it is a danger to financial sovereignty.

18. Finally, Reiners highlights that crypto currency has grown far beyond Bitcoin. The 19,000 existing crypto currencies are worth nearly \$2 trillion in total market capitalization. Innovations like stablecoins, which maintain fixed value by linking to assets such as the US dollar, and decentralised finance platforms (DeFi), which offer banking services without intermediaries, are reshaping global finance. Non-fungible tokens (NFTs) have created unique digital ownership over art, music and even property titles, with billions traded annually. The author concludes that crypto currency is no longer a passing phenomenon. Its challenges — from regulation and enforcement to privacy and policy — will persist and Judges, like all decision-makers, must understand its workings to interpret the law effectively in this evolving domain.

19. If one is to now examine as to how courts across the world are treating crypto currencies, we note as under:—

- (1) United Kingdom: In the United Kingdom, the case of *AA v. Persons Unknown*, [2019 EWHC 3556] became a turning point, where the Court held that Bitcoin could be considered a form of property, capable of ownership and transfer.
- (2) Singapore: This reasoning was followed in Singapore in cases dealing with NFTs and stablecoins, such as *Janesh v. Unknown Person*, [2022 SGHC 264] and *ByBit Fintech Ltd. v. Ho Kai Xin*, [2023 SGHC 199]. These rulings confirmed that digital tokens can be defined, identified, transferred and stored like any other form of property.

(3) USA: Meanwhile, US courts have focused on whether these tokens can be classified as securities. In *Securities and Exchange Commission (SEC) v. Ripple Labs Inc.*, [682 F. Supp. 3d 308 (S.D.N.Y. 2023)] and *SEC v. Terraform Labs Pte. Ltd.*, [2023 WL 8944860 (S.D.N.Y. Dec. 28, 2023)] Judges examined whether crypto tokens sold to investors met the criteria of the Howey Test—a legal tool used to decide if something is an “investment contract.” Ripple's case set an important precedent, ruling that XRP tokens sold in public markets were not securities, though institutional sales were. Terraform's case raised similar questions, but also drew attention to fraudulent misrepresentation in the crypto market. These cases underline a global challenge : applying traditional financial laws to a new, decentralised world.

(4) New Zealand : There is a different approach. This is detailed further below.

20. At its heart, it remains to be seen as to what really crypto currency is. The Supreme Court says, in *Internet and Mobile Association of India v. Reserve Bank of India*, [(2020) 2 SCR 297], any attempt to define what a virtual currency is, it appears, should follow the Vedic analysis of negation namely “*neti, neti*”. Avadhuta Gita of Dattatreya says, ‘by such sentences as ‘that thou are’, our own self or that which is untrue and composed of the 5 elements, is affirmed, but the sruti says ‘not this not that’.” The concept of Neti Neti is an expression of something inexpressible, but it seeks to capture the essence of that, to which, no other definition applies. This conundrum will squarely apply to crypto currencies and hence this flashback into its genesis, so that its DNA is sequenced.

21. The term “currency” is a misnomer, since a currency is an official index of value. Everyone, who holds a 100 rupee note, knows exactly what it is worth. However, the value of a crypto currency is nothing more than what a willing buyer and willing seller would attribute as value for it.

22. Crypto currencies are streams of 1s and 0s residing in a blockchain managed by the issuer of the crypto currency. A unit of crypto currency - a single bitcoin or dogecoin or ethereum coin - is not created based on any central banker's study of fiscal data, but is based on data mining and solving of problems, which add to the blockchain. Therefore, the bitcoin itself resides in the place where the blockchain is located.

23. These crypto currencies are called as digital assets. It is important to note here that neither is crypto currency a currency *stricto sensu*, nor can we jump to the conclusion that a digital asset, is an asset *stricto sensu*.

24. Digital “assets” are stored and recorded on the blockchain ledger

where they were issued. Every blockchain ledger has entries with respect to the ownership of the digital assets held in that blockchain. Each ledger entry has a public and private key associated with it, which is not like a computer-generated email address and password.

25. There are digital wallets that help store a person's keys securely, so that only that person can access his or her digital assets. Digital wallets are convenient places to view one's assets and ledger positions.

26. The digital asset is stored on the blockchain ledger and the keys that give one access to it are stored in a wallet.

27. One can try to draw an analogy to dematerialized shares. The depository holds the shares in the dematerialized form in its digital ledger and the shareholder has only a depository participant ID, with which, he or she exercises his/her beneficial interest. However, the important distinction here is that the shares are real. They represent equitable interests in a real corporation, carrying on real business. A holder of a dematerialized share can, theoretically, prove in liquidation, and get an actual return for his or her money.

28. No such thing exists in the case of crypto currency.

29. The difficulty arises in attempting to pigeonhole completely new concepts into existing frameworks, which may or may not be adequate to absorb these new concepts.

30. Stablecoins—currencies linked to real-world assets like the US dollar—have also drawn attention. The SEC's notice to Paxos in 2023, arguing that its Binance USD (BUSD) was an unregistered security, reflected growing confusion about whether these tokens are closer to currency or investment. Markets, users and regulators all await clearer global definitions.

31. Cases like *Mt. Gox Co. Ltd. in Japan*, *FTX Trading Limited in the United States* and *Gatecoin Limited in Hong Kong* illustrate what happens when governance fails in centralized crypto exchanges. Mt. Gox's collapse in 2014 led Japan to introduce a self-regulatory model under the Japan Virtual and Crypto Assets Exchange Association, which has been widely praised for balancing innovation with protection. The FTX scandal, where founder Sam Bankman-Fried was found guilty of massive investor fraud, highlighted the disastrous consequences of poor corporate governance. Investors lost billions as funds were moved between companies without transparency. Gatecoin's liquidation further showed that the wording of exchange terms can decide whether investor funds are treated as trust property or company assets during insolvency.

32. Together, these cases send a clear message : existing corporate governance and prudential standards can and should apply to Web3 service providers. Exchange operators must separate client assets from

company funds, conduct independent audits and follow anti-money laundering and Know Your Customer (KYC) rules with the same rigor as banks.

33. Ultimately, Courts have become the central stage where the future of digital value is debated. Through each ruling, they are shaping a clearer picture of rights, responsibilities, and trust in the age of decentralization. India, by learning from these experiences, has the opportunity to design a regulatory regime that encourages innovation while protecting consumers and maintaining financial stability.

34. In the decision in *Internet and Mobile Association of India*, the Hon'ble Supreme Court dealt with the question as to whether the Reserve Bank of India (RBI) had the legal power to restrict banking services for those involved in virtual currency transactions. The dispute arose when the RBI issued a circular in April 2018 directing all regulated entities not to deal with or provide services to businesses and individuals trading in virtual currencies such as crypto currencies. This order effectively cut off crypto exchanges and traders from regular banking channels, making their operations nearly impossible.

35. The Internet and Mobile Association of India, representing crypto exchanges and digital entrepreneurs, challenged this directive before the Hon'ble Supreme Court. The RBI defended its circular by stating that it was acting within its powers under Section 35A of the Banking Regulation Act, 1949, the relevant provisions of the RBI Act, 1934 and the Payment and Settlement Systems Act, 2007 and that these laws empower the RBI to issue directions in the interests of public good, monetary stability and the banking system. The Hon'ble Apex Court observed that the RBI's responsibility is to safeguard not only the banking system, but also the faith of the general public in that system and that therefore, it has the authority to act preventively when it perceives risk, even if the activity in question—like trading in virtual currencies—is not outright illegal under the Indian law.

36. On behalf of the Internet and Mobile Association of India, it was argued that the RBI had acted excessively and unreasonably. They claimed that the RBI failed to differentiate between various types of virtual currencies and ignored the steps taken by crypto businesses to meet compliance standards such as KYC and Anti-Money Laundering (AML) norms. They also contended that other regulators like the Security Exchange Board of India (SEBI), the Enforcement Directorate (ED) and the Central Board of Direct Taxes (CBDT) had chosen to monitor rather than restrict such activities and the RBI should have adopted a similar, balanced approach. But, the Hon'ble Apex Court held that different agencies have separate roles—while the SEBI deals with securities and the ED steps in when actual money laundering occurs, the RBI's mandate is to protect monetary and banking stability. Hence,

its preventive action could not be questioned on the ground that other authorities had opted for a softer approach.

37. The Court further noted that what may be referred to as a “light-touch” approach in other countries cannot dictate the legality of the RBI’s decisions, because a comparative law is useful only to understand principles and it should not measure the validity of decisions under Indian statutes. The Judges acknowledged that the global understanding of virtual currencies is still evolving and that even the Government of India had not yet finalized its stance on whether to allow or ban them completely. The Court also observed that the RBI had not banned virtual currencies as such; it had only prohibited banks from facilitating their trade, which is an important distinction showing that the circular was a preventive rather than punitive measure.

38. A significant issue raised was whether the circular violated the Fundamental Right under Article 19(1)(g) of The Constitution of India, which guarantees freedom to trade and business. The Court agreed that restrictions under this Article must pass the test of reasonableness. It was found that since there was no conclusive evidence of harm caused by crypto trading to the banking system and that because the Government itself had not declared virtual currencies illegal, the RBI’s absolute disconnection of banking services was disproportionate. As a result, the Court allowed the petition and set aside the circular.

39. In its reasoning, the Hon’ble Supreme Court made two important clarifications. Firstly, the Reserve Bank of India is not an ordinary statutory authority—it performs sovereign and regulatory functions that maintain the country’s monetary stability. Secondly, while it has the power to act against risks to the financial system, its actions must still be proportionate to the threats identified. Thus, although the RBI’s authority to regulate was upheld, the exercise of that authority in this instance was found to exceed what was necessary.

40. In summary, the Hon’ble Supreme Court recognized the RBI’s power to make decisions concerning virtual currencies, but struck down its 2018 ban on banking support to crypto businesses for being disproportionate. This judgment became a landmark in balancing regulatory caution with the constitutional freedom to trade, paving the way for more nuanced policymaking in India’s evolving crypto landscape.

41. One good judgment on the point is that of the New Zealand High Court in *Ruscoe v. Cryptopia Ltd. (in Liquidation)* [2020 NZHC 728] wherein the New Zealand High Court held that crypto currencies, as digital assets, are a form of property that are capable of being held on trust.

42. Cryptopia was a crypto currency exchange that enabled account holders to trade crypto currencies. There were block chain ledgers,

databases and digital wallets to enable its customers to know what their holdings were. The customers' digital wallets were protected by encryption with Cryptopia exclusively holding the private keys to the digital wallets. Cryptopia was victim of a massive hack in 2019 and all the digital assets were stolen.

43. Massive claims were filed against Cryptopia. Cryptopia's shareholders filed for winding up of Cryptopia. The liquidators applied to the Court for guidance on two questions relating to the categorization and distribution of assets in the liquidation:

- Is crypto currency a "property" for the purposes of Section 2 of the New Zealand's Companies Act, 1993, capable of forming the subject matter of a trust?
- Was the crypto currency in fact held on trust by Cryptopia for the account holders?

The findings of the Court were as under:—

"They are a type of intangible property as a result of the combination of three interdependent features.

- (1) They obtain their definition as a result of the public key recording the unit of currency.*
- (2) The control and stability necessary to ownership and for creating a market in the coins are provided by the other two features - the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin."*

Therefore, the Court held that although it is only a series of 1s and 0s, it is more than mere information. It is a type of property and it is capable of being held on trust.

44. In India, the word "*property*" is not defined excepting in laws with specific contexts. One very good expression of this word is to be found in a case, which dealt with Article 19(1)(f), now repealed.

45. In the decision of the Hon'ble Apex Court in *Ahmed G.H. Ariff v. CWT*, [(1969) 2 SCC 471 : (1970) 76 ITR 471], it was held as follows:

—

"8. Now "property" is a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can clearly hold or enjoy. The meaning of the word "property" has come up for examination before this Court in a number of cases. Reference may be made to one of them in which the question arose whether Mahantship or Shebaitship which combines elements of office and property would fall within the ambit of the word "property" as used in Article 19(1)(f) of the Constitution. It was observed in the Commr., Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri.

Shirur Mutt [(1954) 1 SCC 412 : 1954 SCR 1005, 1019] that there was no reason why that word should not be given a liberal and wide connotation and should not be extended to those well-recognised types of interests which had the insignia or characteristic of proprietary right. Although Mahantship was not heritable like the ordinary property, it was still held that the Mahant was entitled to claim protection of Article 19(1)(f) of the Constitution. It is stated in the Halsbury's Laws of England, Vol. 32, 3rd Edn., page 534 that an annuity (which is a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land) can be an item of property separate and distinct from the beneficial interests therein and from the funds and other property producing it. It is property capable of passing on a death and can be separately valued for the purpose of estate duty."

46. Then, came a judgment which interpreted the word "property" in the next avatar of Article 19(1)(f), which is Article 300A. In the decision of the Hon'ble Apex Court in *Jilubhai Nanbhai Khachar v. State of Gujarat*, [1995 Supp (1) SCC 596], it has been held thus:

42. Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. In Ramanatha Aiyar's The Law Lexicon, Reprint Edn., 1987, at p. 1031, it is stated that the property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. The term property has a most extensive signification, and, according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. In Dwarkadas Shrinivas case [1950 SCC 833 : (1951) 21 COMP CAS 33 : 1950 SCR 869 : AIR 1951 SC 41] this Court gave extended meaning to the word property. Mines, minerals and

quarries are property attracting Article 300-A.

47. Judging from the above two decisions, there can be no doubt that “*crypto currency*” is a property. It is not a tangible property nor is it a currency. However, it is a property, which is capable of being enjoyed and possessed (in a beneficial form). It is capable of being held in trust.

48. In Indian law regime, the crypto currency is treated as a virtual digital asset and it is not treated as a speculative transaction. This is in view of the fact that the investment made by the user is converted into crypto currency, which is capable of being stored, traded and sold. Crypto currency is termed as a virtual digital asset and is governed under Section 2(47A) of the Income Tax Act, 1961.

49. The stand taken by the first respondent is that the foreign entity (Binance/Zettai) maintained the wallet infrastructure and crypto operation, that the first respondent had no control over those wallets, which were under the control of the foreign entity and that the first respondent's role was limited to facilitating the Indian rupees denominated transaction in a non P2P trading.

50. Thus, it was contended on the side of the first respondent that where a user purchased crypto currency using Indian rupees, the fiat leg is processed through Indian banking channels managed by the first respondent. But, the crypto leg remained in the foreign entity's custody, that the first respondent never held or controlled the crypto asset, that if the asset has to be preserved, such orders can be passed only against the foreign entity and that it will be ineffectual and unenforceable against the first respondent.

51. The relationship between the applicant and the first respondent is governed by the user agreement. The applicant availed crypto currency through the non P2P method. The applicant transferred her fiat currency from Kotak Mahindra Bank to the platform and the same is converted into crypto currency. This is covered under Clause 6 of the user agreement falling within the scope and domain of the first respondent.

52. For proper appreciation, Clause 6 of the user agreement is extracted as hereunder:

“SERVICES OFFERED AND OPERATED BY ZANMAI

Only the following Services are offered and operated by Zanmai.

Zanmai enables Users to trade with each other in trading pairs involving Indian Rupees (INR) on the one hand, and Supported Crypto currency on the other hand e.g. INR-BTC, INRETH. Such enabling of trades is on a non-P2P basis only (as P2P transactions are offered and operated by Binance (as described under Clause 5.4 above). Terms applicable to Indian Resident Users

In non-P2P transactions. Users resident in India (as defined under the Foreign Exchange Management Act, 1999) add to their INR balance by depositing Indian Rupees from their registered bank account/payment instrument to Zانmai's or its partners' bank account using regulated banking and payment channels and can redeem their INR balance to their bank accounts/payment instrument by placing a withdrawal request to Zانmai, upon which request, Zانmai will transfer the INR balance amount to the Users' registered bank account/payment instrument, using regulated banking and payment channels, subject to Know Your Customer and other safeguards carried out in Zانmai's sole discretion and subject to withdrawal limits published on the website/mobile application from time to time. In this model, Zانmai merely acts as a duly appointed agent of the User, to whom the payment is due, and does not operate a payment system. You hereby duly appoint Zانmai as your agent for this purpose.

Terms applicable to Non-Indian Resident Users

In all circumstances, Users not resident in India (as defined under the Foreign Exchange Management Act, 1999) shall not use Zانmai's Services to trade between Indian Rupee (INR) and Supported Crypto currencies."

53. To operate a crypto currency within India, the concerned service provider has to be registered as a reporting entity with the Financial Intelligence Unit.

54. In the present case, it is the first respondent, which got registered as a reporting entity and is, therefore, authorized to handle crypto currency in India. Neither the Zettai nor Binance is registered as a reporting entity in India and hence, they are not authorized to handle crypto currency within India or operate the platform.

55. What were held by the applicant as crypto currencies were 3532.30 XRP coins. What were subjected to cyber attack on 18.7.2024 in the WazirX platform were ERC 20 coins, which are completely different crypto currencies not held by the applicant.

56. One moot question that will arise for consideration is as to whether the ERC 20 coins, which were the subject matter of cyber attack and which were held in a separate wallet resulting in a loss to the first respondent company, can be adjusted against a completely different crypto currency held by the applicant namely XRP coins in a different wallet.

57. The Bombay High Court had an occasion to deal with a similar plea wherein the claimant therein was holding crypto currency and the platform was frozen. He approached the Arbitral Tribunal for interim protection and it was granted and confirmed by the Bombay High Court in a petition filed by the first respondent company under Section 37 of

the Act. The prima facie findings rendered by the learned Single Judge of the Bombay High Court assume a lot of significance.

58. The findings of the learned Single Judge of the Bombay High Court in *Zanmai Labs Private Limited v. Bitcipher Labs LLP* [reported in Commercial Arbitration Petition (L) No. 11646 of 2025 dated 07.10.2025] are extracted as hereunder:

“30. Likewise, the facet of “socialisation” of losses needs to be dealt with. The term is nothing but a proposal to spread the losses arising out of the cyber-attack across multiple users of the platform - somewhat like a group insurance of a self-help group. The basis of such a proposition is not any term in the contractual framework between the parties. The basis is a scheme of arrangement proposed by Zettai in Singapore. Had the contract had such a framework at least in concept, it would have posed a basis to give the proposition strong credence. How such scheme propounded by Zettai in Singapore would bind Zanmai and its clients in India (parties to whom Zanmai held itself out as WazirX at least with effect from July 2022) is not at all borne out from the material on record.

31. The Learned Arbitral Tribunal has noted that Zanmai does not have an absolute liability but has a liability attributable to a reasonable duty of care. However, that does not mean the Learned Arbitral Tribunal has to necessarily hold that users and brokers registered on the WazirX Platform would be bound by a socialisation proposal initiated by a party outside the contractual framework among them, to impact the contractual relationship between the parties. The very role of Zettai and the scope of its entry, which is based on the dissociation of Binance, is shrouded in mystery. A careful examination of the record would indicate that what the “acquisition” by Binance in 2019 was and what the terms of disengagement were in 2022 is unclear. In fact, Mr. Nischal Shetty, in his affidavit in the Singapore Court when propounding the scheme of arrangement that forms basis of the “socialisation” theory has firmly stated that he would not disclose the nature of the disputes with Binance for reasons of “confidentiality”. This presents a high degree of ambiguity at a foundational level, and the Learned Arbitral Tribunal cannot be faulted for perceiving vulnerability for Bitcipher and Nextgendev.

32. Having examined the fact that the virtual digital asset, subjected to the cyber-attack was ERC-20, the Learned Arbitral Tribunal has in fact, despite this observation about the scheme of arrangement and the “socialisation” has allowed a 45% haircut to the exposure of the Bitcipher and Nextgendev to the extent of 45% of their exposure to ERC-20. In other words, equitable considerations have weighed with the Learned Arbitral tribunal indicating that those

assets which were not subjected to the cyber-attack could not be subjected to a haircut and indeed, since ERC-20 was compromised and stolen to the extent of ~USD 235 million, a pro rata haircut was accepted by the Learned Arbitral Tribunal in the value of exposure to ERC-20.

33. Towards this end, taking the total value of the assets held by the Bitcipher and Nextgendev on the WazirX Platform, a 45% haircut has been applied to the percentage component of ERC-20 held in such portfolio of asset. The Learned Arbitral Tribunal has modified and moulded the relief to reduce the scope of the security to be provided by Zanmai to Bitcipher and Nextgendev.

34. Prima facie, what is apparent is that the WazirX Platform is a platform offered by Zanmai and its parent Zettai (holding 100% and also represented by the same Mr. Nishchal Shetty in proceedings in both jurisdictions) and was providing services to users in India. Those users who are brokers executed the Broker Agreement such as the one executed by Bitcipher. The Broker Agreement entails brokers such as Bitcipher providing access to the WazirX Platform to enable their clients to trade in a number of digital assets, which would be in the nature of a permitted listing. Therefore, while there were indeed two denominations for assets that could be transacted, one being the Indian Rupee stream and the other being the virtual digital asset stream, the cyber-attack led to theft of one of the many tokens traded. The services that were meant to be provided in connection with the management of crypto asset was indeed indicated as Binance but what precisely was a nature of Binance's role in the WazirX Platform whether it was truly an owner or a brand associate is unclear. It is Zanmai's expectation that the Singapore Court would allow Zettai a haircut to be effected to those affected by the cyber-attack after Zettai took over services under Clause 5 of the User Agreement from Binance, can be translated into implications for Indian users on the WazirX Platform. Thereby, Zanmai was hopeful of placing restrictions across all assets held by all users on the WazirX Platform in India. The Learned Arbitral Tribunal finding this untenable and yet adjusting for 45% of the assets held in the form ERC-20 by the users, cannot be regarded as a perverse interlocutory prima facie finding. Indeed, the view that Bitcipher must be secured for its claim to its own assets, which were only stored on the WazirX Platform cannot be regarded as perverse or patently illegal, warranting any interference under Section 37 of the Act.

35. The virtual digital asset, held electronically are meant to be held in trust with a fiduciary duty owed to the owners of such assets. The owners of such assets indeed agreed that a cyber-attack in a security breach would constitute a force majeure situation. Equally,

to assuage them, in the Broker Agreement Zanmai has explicitly agreed that notwithstanding a cyber-attack being a force majeure event, WazirX Platform would take its best efforts uninterrupted performance of the Broker Agreement, and that too by treating WazirX as synonymous with Zanmai.

36. Whether a force majeure clause would affect the performance of services (leading to a hold) or whether it could even erode the very assets legitimately held by the users and not just access to further services is a matter for adjudication. If an asset is stored digitally on the WazirX Platform, the provision of services could perhaps be suspended namely, permission to trade or the ability to transact could be stalled owing to the force majeure event. But whether it can be held that the very asset would stand eroded due to a security lapse or security breach and such erosion can be validly spread across all users of the platform is a matter that would need to be adjudicated in terms of the User Agreement and the Bipartite Agreement. Pending such adjudication, the vulnerable party whose assets stand frozen is indeed entitled to protection. The Learned Arbitral Tribunal's view that the counterparties such as Bitciphir and Nextgendev are vulnerable to losing their entire value is not at all an unfair or an improper finding. In this light, the protective measure adopted by the Learned Arbitral Tribunal, for the reasons set out above, cannot be faulted.

37. To use those assets not belonging to Zanmai, and that too by Zettai, and to utilize them for covering losses attributable to other users is not something even on the face of it lends itself to a reasonable acceptance. In fact, the Learned Arbitral Tribunal has adjusted for such component of virtual digital assets which were subjected to the cyberattack and indeed provided an interim haircut on the value of such asset. Therefore, the approach of the Learned Arbitral Tribunal cannot be found at fault with, on this count as well.

38. Indeed, the broker agreement makes no distinction between WazirX Platform and Zanmai, and the finding in this regard cannot be held to be arbitrary or unfair. The Learned Arbitral Tribunal has even taken care to hold that no absolute liability can be fastened on Zanmai and the Learned Arbitral Tribunal has only taken a measure that in its best judgment is intended to be protective and preservative of the subject matter of the arbitration agreement.

39. Apart from the aforesaid analysis, there is one another facet that is raised before me, in upholding the impugned order. If assets are held in the custody of a person under an agreement, it is for the person in whose custody those assets are, held to be accountable for the custody of those assets. It would not be open for that person to state that the assets were handed over by him to yet another person

without the consent of the person whose assets were handed over to him in custody. It is another matter if the person in whose custody the assets were meant to be held, faced an overwhelming and supervening force majeure event such as a cyber-attack and that facet would be dealt with by interpretation of the contract governing the party.

40. However, to state that the assets were entirely handed over to a party with no privity to the agreement and that such party is propounding a scheme of arrangement and in terms of that scheme of arrangement, no intervention must at all be made until and unless the scheme of arrangement runs its course in the Courts in Singapore, is rightly rejected by the Learned Arbitral Tribunal. I have also noticed that the Learned Arbitral Tribunal has left multiple substantial avenues of argument open to the parties and has come up with a reasonable approach of computing the values involved, moving them to the date of August 27, 2024 when the matter first came up. One does not know the value of the underlying assets as of today and the Learned Arbitral Tribunal has even provided for a bank guarantee to be submitted by the person in whose custody the assets were and were meant to be safeguarded. It is possible that Zanmai may not have the net worth and strength corresponding to the assets because the assets in the first place never belonged to Zanmai. Equally, the corollary would be that Zanmai, not being the owner of the assets, ought not to have parted with those assets to Zettai, its own parent and without indicating what is the nature of the dispute with Binance that led to the current situation at hand. Even a case of equity is not made out for interfering with the Impugned Order. All that Zanmai has to do is regain control over the assets of its users and provide assurance that they are secure."

59. This Court is in complete agreement with the above findings rendered by the Bombay High Court wherein it was held that the virtual digital asset held electronically are meant to be held in trust with a fiduciary duty owed to the owners of such asset. If the asset is stored digitally on the WazirX platform and that because of a cyber attack, if the entire operation stood frozen, whether it can be held that the asset that was possessed by the applicant will stand eroded due to security lapse or security breach and such erosion can be validly spread across all users of the platform and more particularly when such breach did not take place in so far as the asset held by the applicant in a different wallet namely XRP Coins, is a matter to be adjudicated in terms of the agreement.

60. If, ultimately, based on the modified scheme of arrangement approved by the Singapore High Court on 13.10.2025, the asset held by the applicant stood eroded substantially, the applicant becomes a

vulnerable party, who will be entitled for a protection. This is more so since the main issue with respect to the action initiated by the Zettai and its liquidation proceedings before the Singapore High Court and whether it will have a binding effect on the applicant, is a core question, which will be dealt with by the Arbitral Tribunal. Therefore, the applicant will be certainly entitled to an interim protection in exercise of jurisdiction under Section 9 of the Act.

61. The learned Senior Counsel appearing on behalf of the first respondent raised yet another plea to the effect that there is no intention on the part of the applicant to arbitrate and that therefore, invoking the jurisdiction of this Court under Section 9 of the Act is unsustainable.

62. In the case in hand, after the platform was frozen, everyone was eagerly following up the modified scheme of arrangement pending before the Singapore High Court. That is the reason as to why this application was adjourned from time to time. Now that the Singapore High Court approved the scheme by order dated 13.10.2025, the applicant knows where she exactly stands. Hence, the contention on the side of the first respondent that the applicant has not issued a trigger notice till now cannot be put against her in view of the fact that none of the parties had clarity as to how the proceedings before the Singapore High Court is going to end.

63. This is more so since the Singapore High Court had earlier rejected the scheme of arrangement and later, when the Zettai agreed to transfer its operations to the first respondent under the modified scheme of arrangement, the subsequent order was passed on 13.10.2025. In view of the above, this Court rejects the contention raised on the side of the first respondent that the applicant did not have manifest intention to arbitrate. It goes without saying that the applicant will hereafter issue a trigger notice since the applicant exactly knows where she stands in the light of the order dated 13.10.2025 passed by Singapore High Court.

64. The learned Senior Counsel appearing on behalf of the first respondent made a further submission to the effect that the scheme was sanctioned by a overwhelming majority of 95.7% of the creditors/users present and voting and that when a decision was taken by such majority creditors, the applicant, who did not even participate during the voting, cannot, in a self centered manner, protect her crypto currency.

65. The above submission of the learned Senior Counsel appearing on behalf of the first respondent will revolve around the larger issue that has been raised before this Court as to whether the order dated 13.10.2025 passed by the Singapore High Court will bind the applicant, whose asset is going to stand eroded. Hence, this contention raised on

the side of the first respondent cannot be put against the applicant at this stage and it is a larger issue, which will be dealt with by the Arbitral Tribunal.

66. The conspectus of the above discussions leads to the only conclusion that the applicant is entitled to an interim protection under Section 9 of the Act.

67. Accordingly, there shall be a direction to the first respondent to furnish a bank guarantee for a sum of Rs. 9,56,000/- (*Rupees nine lakhs and fifty six thousand only*) in favour of the applicant and it shall be renewed from time to time till the end of the arbitration proceedings or in the alternative, the first respondent shall deposit the said sum in an escrow for the purpose of preservation of the subject matter till the arbitration proceedings comes to an end.

68. This application is disposed of in the above terms.

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2J

(BEFORE SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.)

JOGI RAM

.. Appellant;

Versus

SURESH KUMAR AND OTHERS

.. Respondents.

Civil Appeals Nos. 1543-44 of 2019[†], decided on February 1, 2022

A. Family and Personal Laws — Hindu Succession Act, 1956 — Ss. 14(1) & (2) and S. 30 — Held, a restricted estate can be created by a will in favour of a female, so long as it is a new and independent right and does not amount to the recognition of a pre-existing right as per the principles laid down in *V. Tulasamma*, (1977) 3 SCC 99

— Objective of S. 14(1) is to create an absolute interest in case of a limited interest of wife where such limited estate owes its origin to the law as it stood then — Objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of — If it is held so it would imply that if wife is disinherited under will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of intent of testator — That cannot be objective of S. 14(1)

— Will bequeathed testator's estate to his son, appellant and his second wife *R* (first wife being deceased whose progeny is appellant) — Property was bequeathed half-and-half to appellant and *R* — However, nature of bequest was different for the two — Appellant was given absolute ownership rights to extent of his share of property whereas *R* was given a limited ownership for her enjoyment during her lifetime with respect to her share of land with a specific provision that she would not alienate, transfer or create third-party rights over the same — Thereafter property was to vest absolutely in appellant after her lifetime — Testator in present case, had taken all care for needs of maintenance of his wife by ensuring that revenue generated from estate would go to her alone — He, however, wished to give only a limited life interest to her as second wife with son inheriting complete estate after her lifetime — Thus, held, it would be provisions of S. 14(2) which would come into play in such a scenario and *R* only had a life interest in her favour — Natural sequitur is that respondent vendees cannot inherit a better title than what vendor *R* had and, thus, view taken by trial court and first appellate court is the correct view and sale deeds in favour of respondents by *R* cannot be sustained — Property Law — Transfer of Property Act, 1882 — Ss. 7 and 8 — *Nemo dat quod non habet*

[†] Arising from the Judgment and Order in *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978 (Punjab and Haryana High Court, RSA No. 210 of 2011, dt. 22-2-2018) [Reversed]

- B. Civil Procedure Code, 1908 — S. 11 — Declaratory decree — When binding as res judicata — Principle as clarified in *Shakuntla Devi*, (2005) 5 SCC 390, that if the earlier declaratory decree which is sought to be made the basis of res judicata is delivered by a court without jurisdiction or is contrary to the existing law at the time the issue comes up for reconsideration, such earlier declaratory decree cannot be held to be res judicata in a subsequent case unless protected by any special enactment — Held, not applicable in present case, as declaratory decree in question was passed by competent court and there was no change in law post passing of the said decree**

- In earlier round of litigation daughter of *R* sought a collusive decree when she had no interest in property — She then sought to create lease interest in the property — Both these aspects were held against *R* and her daughter right up to the Supreme Court in the first round of litigation where it was finally held that *R* had only a limited estate in the property in question

- Rights of respondent vendees are derived only from *R* and once judgment is binding on *R* it cannot be said that she can create rights contrary to judgment in favour of third parties and that too was done during pendency of litigation — Held, repeated endeavours of *R* and her daughter to establish an absolute interest had failed and thus, their transferees could not claim a better right than them — Furthermore, as the respondent vendees were not bona fide purchasers, they could not take the benefit of the proviso to S. 41 TPA — Property Law — Transfer of Property Act, 1882 — S. 41 proviso — Evidence Act, 1872 — S. 41 — Specific Relief Act, 1963, Ss. 34 and 35

- Allowing the appeals, the Supreme Court

Held :

- Conclusion (4) in para 62 of *V. Tulasamma*, (1977) 3 SCC 99 explains where Section 14(2) of the 1956 Act would apply, and this does inter alia apply to a will which creates an independent and new title in favour of females for the first time, so long as the same is not a recognition of a pre-existing right. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) of the 1956 Act will not operate in that sphere. (Para 34)

V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99, explained and applied

Jayanti Subbiah v. Alamelu Mangamma, 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45;

Yellawa v. Bhimangavda, 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452, considered

- Sadhu Singh v. Gurdwara Sahib Narike*, (2006) 8 SCC 75; *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*, (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390; *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105, cited

- Objective of Section 14(1) of the 1956 Act is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to the law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife

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if all other aspects including maintenance are taken care of. If it was to be held so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective of Section 14(1) of the 1956 Act. (Para 35)

The testator in the present case, *T*, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. Hence, it would be the provisions of Section 14(2) of the 1956 Act which would come into play in such a scenario and *R* only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained. (Para 36)

The sequence of litigations can hardly be said to classify the respondents as bona fide purchasers, so as to claim the benefit of the proviso to Section 41 of the TP Act, 1882. The first endeavour was by the daughter of *R* by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against *R* and her daughter's right till the Supreme Court in the first round of litigation clearly opining that *R* had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor *R*. (Paras 37, 38, 11 and 28)

Jupudy Pardha Sarathy v. Pentapati Rama Krishna, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569; *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390, distinguished on fact

The rights of the respondents are derived only from *R* and once the judgment is binding on *R*, it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. From the facts on record it can be said that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will, the respondents being third parties. The repeated endeavour of *R* and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from *R*. (Para 39)

Suresh Kumar v. Jogi Ram, 2018 SCC OnLine P&H 6978, reversed

Ram Devi v. Jogi Ram, RSA No. 1700 of 1999, order dated 23-10-2001 (P&H); *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293; *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752; *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127, referred to

Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613, cited

Appeals allowed

RM-D/68476/CV

Advocates who appeared in this case :

Gagan Gupta (Advocate-on-Record), Advocate, for the Appellant;
Manish Kr. Choudhary, Ashutosh Kumar, Bhaskar Mishra, Ms Namita Choudhary (Advocate-on-Record), Ms Srishti Khurana, Ms Nikita Jain and Ms Srishti Choudhary, Advocates, for the Respondents.

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	13. 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45, <i>Jayanti Subbiah v. Alamelu Mangamma</i>	284g
	14. 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452, <i>Yellawa v. Bhimangavda</i>	284g

d The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.—

Background

e 2. The consequences of a testamentary disposition by a will dated 15-4-1968 by one Tulsi Ram, who passed away on 17-11-1969 is still pending resolution before us after half a century.

f 3. The will aforesaid bequeathed the testator's estate to his son, the appellant herein, and his second wife Ram Devi (the first wife being deceased whose progeny is the appellant). Land measuring 175 kanals and 9 marlas, a residential house and a Bara in Village Jundla, Haryana was bequeathed half-and-half to the appellant and Ram Devi. However, the nature of bequeath was different for the two. The appellant was given absolute ownership rights to the extent of his share of land and property whereas Ram Devi was given a limited ownership for her enjoyment during her lifetime with respect to her share of the land with a specific provision that she could not alienate, transfer or create third-party rights over the same. Thereafter the property was to vest absolutely in the appellant after her lifetime.

g 4. It appears that the properties were enjoyed as per the will after the demise of Tulsi Ram in 1969 for quite a few years till the first round of litigation began — Bimla Devi, daughter of Ram Devi instituted a suit in the Court of Sub-Judge, 1st Class, Karnal for declaration against her mother, Ram Devi, claiming that she had become owner in possession of half-share of the land willed to Ram Devi by Tulsi Ram, which resulted in a decree being passed on **h** 15-1-1986. It may be stated at this stage itself that by very nature the suit was collusive.

5. On the decree being passed Bimla Devi executed a lease deed in favour of one Amar Singh on 17-6-1986 in respect of land falling within Ram Devi's limited share. This prompted the appellant to file Civil Suit No. 94 of 1993 for declaration and permanent injunction before the Senior Sub-Judge, Karnal impleading Ram Devi, Bimla Devi and Amar Singh. The gravamen of the suit was that Ram Devi having only a limited life interest the decree of declaration by Bimla Devi had been obtained through collusion and the lease deed was a bogus document which would not have any effect upon the rights of the appellant to inherit the property after the demise of Ram Devi. The suit was, however, contested only by Ram Devi with the other two defendants being proceeded ex parte. The suit resulted in a judgment and decree dated 27-9-1995 to the effect that the appellant having proved the will executed by Tulsi Ram, the case clearly fell under Section 14(2) of the Hindu Succession Act, 1956 (hereinafter referred to as "the said Act") which was in the nature of an exception as it precluded the benefits of Section 14(1) of the said Act to accrue with respect of a property inter alia inherited under a will with a restricted right in such a property. Thus, it was concluded that the limited estate of Ram Devi could not be expanded to an absolute estate and the decree of the civil court dated 15-1-1986 and the lease deed dated 17-6-1986 were consequently set aside.

6. It may be noted that even though the suit was pending in the interregnum period Ram Devi executed two sale deeds dated 29-4-1993 qua land measuring 38 kanals 14 marlas in favour of one Dharam Singh and 11 kanals 3 marlas in favour of Kanta Devi. Another sale deed was subsequently executed on 8-6-1998/9-6-1998 in favour of Baldeva for land measuring 40 kanals 8 marlas. All these were part of the suit land. The latter was during the pendency of the appeal by Ram Devi before the Additional District Judge, Karnal which appeal was also finally dismissed vide judgment dated 15-4-1999. Insofar as the appeal qua Baldeva was concerned, that was also dismissed due to inability of Ram Devi to serve notice on Baldeva despite sufficient opportunity.

7. In the third round of the same litigation Ram Devi's second appeal under Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as "the PC Act") also met the same fate vide judgment dated 23-10-2001 in *Ram Devi v. Jogi Ram*¹. The whole matter ought to have received a quietus thereafter as the special leave petition was also dismissed vide order dated 29-4-2002². It may be noticed that in the interregnum period Ram Devi also passed away on 26-8-1999. This is as far as the story of the first round of litigation.

8. The second round of litigation began when the appellant instituted Civil Suit No. 256/157 of 2008 before the Civil Judge, SD, Karnal for declaration and injunction challenging the sale deeds executed by Ram Devi. This suit was also decreed vide judgment and decree dated 13-8-2009 in favour of the appellant.

¹ RSA No. 1700 of 1999, order dated 23-10-2001 (P&H)

² *Ram Devi v. Jogi Ram*, 2002 SCC OnLine SC 1293

9. Once again the gravamen of the decision of the learned Civil Judge was the earlier judgment and decree dated 27-9-1995 opining that Ram Devi had only a limited ownership right and could not have alienated the suit property. There being no change in law, the previous decree in favour of the appellant was held binding among the parties and their successors-in-interest. The sale deeds executed, thus, found to be unsustainable being against the decree of the lower court. Once again, opinion was the same as to the construction of Sections 14(1) and 14(2) of the said Act as any contrary interpretation would tantamount to proscribing the right of a Hindu to execute a will as envisaged under Section 30 of the said Act. The court granted a decree of possession to the appellant being the rightful owner of the same. The court also noted that the title of the purchasers could not be better titled than Ram Devi possessed as they had acquired their rights from her and could not even be considered bona fide purchasers for value in view of the history of the litigation.

10. Kanta Devi, legal heirs of Baldev and Dharam Singh then preferred an appeal against the said judgment dated 13-8-2009, which was dismissed vide judgment dated 7-10-2010 in Civil Appeal No. 56 of 2009. That gave rise to the second appeal before the High Court, being RSA No. 210 of 2011.

11. The respondents pleaded before the High Court by relying upon the judgment of this Court in *V. Tulasamma v. Sesha Reddy*³ to contend that Ram Devi's right over the suit property granted under the will had crystallised into an absolute ownership right making her competent to transfer the same. The subsequent judgment of this Court in *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*⁴ was also referred to in support of the said proposition. The decree in the first round of litigation was contended not to operate as res judicata in the second suit as the judgment in the earlier suit was contrary to the law prevailing at the time of their consideration (*Shakuntla Devi v. Kamla*⁵ which referred to *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy*⁶). Without prejudice to the same the respondents also claimed to be bona fide purchasers for value and, thus, were protected under Section 41 of the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act").

12. On the other hand the appellant contended that the doctrine of res judicata would apply in view of the earlier adjudication as the matter of Ram Devi having a limited estate has been upheld right till the Supreme Court. The appellant had also taken possession of the suit property and execution of the judgments was under challenge before the High Court.

³ (1977) 3 SCC 99

⁴ (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

⁵ (2005) 5 SCC 390

⁶ (1970) 1 SCC 613

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13. The fate of the respondents after the amendment turned favourable as they succeeded before the High Court in terms of the impugned judgment dated 22-2-2018⁷. The discussion in the impugned judgment revolves around three aspects: a

13.1. Whether the first round of litigation operate as res judicata for the appeal.

13.2. Whether Ram Devi's limited right over the suit property conferred through the will had crystallised into an absolute right under Section 14(1) of the said Act. b

13.3. Whether the High Court was mandated to frame a substantial question of law in deciding the second appeal.

14. On the first aspect the High Court found that the factual scenario and legal principles enunciated in *Shakuntla Devi case*⁵ would be squarely applicable to the facts of the present case. In the factual scenario of that case, one Uttamdasi was the successor of the suit property and had alienated the same through a sale deed and gift deed. The daughter of Uttamdasi, Takami, successfully challenged the alienation and the decree became final. Uttamdasi thereafter executed a will with respect to the same suit property. Tikami instituted a suit for possession on the basis of a previous declaratory decree wherein she had been held to have ownership right of the property. This Court opined that the case would constitute as a principle of res judicata. The first declaratory decree in favour of Tikami was granted on the basis of a limited right held by Uttamdasi in the suit property. By the time the second decree was tried, the Supreme Court in *V. Tulasamma case*³ had declared the law under Section 14 of the said Act to the extent that the beneficiary under a will such as Uttamdasi with limited rights would become the absolute owner of the same. Since the law had been altered since the first declaratory decree, the same would not operate as res judicata in a decree for possession. The judgment in *V. Tulasamma case*³ was not retrospective but a declaratory decree simpliciter would not attain finality if it is used in a future decree of possession and it would be open for a defendant in a future suit for possession to establish that the earlier declaratory decree was not lawful. Thus, the respondents were held entitled to challenge the appellant's possession of the suit property. c
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15. On the second aspect the High Court has taken a view that *V. Tulasamma case*³ had sufficiently resolved any uncertainty under Sections 14(1) & 14(2) of the said Act. A Hindu female has a right to maintenance on a property if a charge was created for her maintenance, the right would become legally enforceable irrespective, even without a charge, the claim for maintenance was a pre-existing right so that any transfer declaring such right would not confer a new title but merely confirm pre-existing rights and Section 14(2) of the said g

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

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a Act cannot be interpreted in a manner that would dilute Sections 14(1) and 14(2) of the said Act. Only in a scenario where the instrument created a new title in favour of the wife for the first time, would Section 14(2) would come into play and not where there was a pre-existing right. Ram Devi was held to have been conferred with a limited right which would translate into an absolute right over the suit property as it was only a confirmation of the pre-existing right over the property.

b 16. On the last aspect it was held that in view of the decision of this Court in *Pankajakshi v. Chandrika*⁸, the High Court was not required to frame a substantial question of law while deciding the plea as Section 97(1) of the Civil Procedure Code, 1908 (hereinafter referred to as “the said Code”) would have no applicability to the PC Act.

c 17. On the appellant approaching this Court notice was issued⁹ in the SLP on 4-7-2018 with the direction to maintain status quo as on the date as the appellant had already taken over possession in the execution of the decree. Leave was granted on 4-2-2019¹⁰ and the interim order⁹ made absolute.

18. In the conspectus of the aforesaid, the matter was heard by us.

The arguments

d 19. In order to appreciate the provisions of the said Act, it may be appropriate to reproduce Section 14 of the said Act as under:

e “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.

f *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.

g (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.”

h 20. There is no doubt that Section 14 of the said Act is the part of the said Act to give rights of a property to a Hindu female and was a progressive step. Sub-section (1) of Section 14 of the said Act makes it clear that it applies to properties acquired before or after the commencement of the said Act. Any

8 (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

9 *Jogi Ram v. Suresh Kumar*, 2018 SCC OnLine SC 3752

10 *Jogi Ram v. Suresh Kumar*, 2019 SCC OnLine SC 2127

property so possessed was to be held by her as full owner thereof and not as a limited owner. The Explanation to sub-section (1) of Section 14 of the said Act defines the meaning of “property” in this sub-section to include both movable and immovable property acquired by the female Hindu by inheritance or devise or a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, or by her skill or exertion, or by purchase or by prescription or in any other manner whatsoever, including *stridhana*. The Explanation is quite expansive.

21. Sub-section (2) of Section 14 of the said Act is in the nature of a proviso. It begins with a “non obstante clause”. Thus, it says that “[n]othing 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....”, etc. where a restricted estate in such property is prescribed. In our view the objective of sub-section (2) above is quite clear as enunciated repeatedly by this Court in various judicial pronouncements i.e. there cannot be a fetter in a owner of a property to give a limited estate if he so chooses to do including to his wife but of course if the limited estate is to the wife for her maintenance that would mature in an absolute estate under Section 14(1) of the said Act.

22. Before considering the submissions it would be appropriate to turn to the will itself. The will while conferring a limited estate on Ram Devi, Tulsi Ram had clearly stated that she will earn income from the property for her livelihood. The income, thus, generated from the property is what has been given for maintenance and not the property itself. The next clarification is that after the lifetime of Ram Devi, the appellant will get the ownership of the remaining half portion also. It is specified that in case Ram Devi pre-deceases Tulsi Ram, then all the properties would go absolutely to the appellant and that the other children will have no interest in the property.

23. We may note that Tulsi Ram had six children. One son and four daughters are from the first wife and Bimla Devi was the daughter from the second wife. At the stage when the will was executed one of the daughters was unmarried and the will also provided that in case for performing the marriage Ram Devi needs money she will have the right to mortgage the property and earn money from the same and will further have the right to gain income even prior to the marriage.

24. We have set forth the terms and conditions of the will to understand the intent of the testator. The testator is, at least, clear in terms that the income derived from the property is what is given to the second wife as maintenance while insofar as the properties are concerned, they are divided half-and-half with the appellant having an absolute share and the wife having a limited estate which after her lifetime was to convert into an absolute estate of the appellant.

25. Now turning to the submissions of the learned counsel for the parties.

26. The learned counsel for the appellant contended that the life estate was not given to Ram Devi in lieu of recognition of any pre-existing right of Ram Devi or in lieu of maintenance and, thus, Section 14(2) of the said Act would apply and not Section 14(1) of the said Act. The plea of res judicata was again reiterated. It was urged that the High Court proceeded on an erroneous premise as if the law had changed from the first round of litigation while the fact was that the law was the same at both stages of time. The distinction which was sought to be made was that *Shakuntla Devi case*⁵ was wrongly relied upon as the will in that case was dated 1-10-1935 and it was, thus, a pre-1956 will and, thus, that judgment was not precedent for factual scenario in question. The suit property was a self-acquired property of Tulsi Ram and, thus, he was competent to execute the will.

27. We may note that the learned counsel for the appellant did seek to contend that since possession of the property was taken over by the appellant and Ram Devi was not in possession thereof, she cannot claim the benefit of Section 14(1) of the said Act (*Sadhu Singh v. Gurdwara Sahib Narike*¹¹ and *Gaddam Ramakrishnareddy v. Gaddam Ramireddy*¹²). We may, however, note that in our perspective that is not a material consideration as the possession is stated to have been taken over in pursuance of the decree of the trial court.

28. On behalf of the respondents it was, once again, emphasised that the factual scenario was similar to *Shakuntla Devi case*⁵ and the rights of a female Hindu post the said Act have been crystallised and enunciated in *V. Tulasamma case*³ since she was an absolute owner she was entitled to sell the land and the respondents were bona fide buyers who were protected by Section 41 of the TP Act. Further no substantial question of law was required to be framed in view of the Constitution Bench judgment of the Supreme Court in *Pankajakshi case*⁸.

Our view

29. We have extracted the relevant portions of the enactment, the document in question being the will and have already opined on the interpretation of the will. The submissions of the learned counsel for the parties have, thus, to be appreciated in the conspectus of the same.

30. We do believe that there are only two real aspects to be examined in the present case as the issue of even framing a question of law stands settled. The two aspects, in our view are as under:

30.1. (i) In the given factual scenario did Ram Devi become the absolute owner of the property in view of Section 14(1) of the said Act or in view of the will the Explanation under Section 14(2) would apply.

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

¹¹ (2006) 8 SCC 75

¹² (2010) 9 SCC 602 : (2010) 3 SCC (Civ) 887

³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

⁸ *Pankajakshi v. Chandrika*, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105 : AIR 2016 SC 1213

30.2. (ii) What is the effect of the first round of litigation which came up to this Court between the appellant and Ram Devi, the two beneficiaries of the will.

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31. We are of the view that both these questions have to be answered in favour of the appellant and for that reason the impugned judgment is unsustainable.

32. We would first like to turn to the seminal judgment in *V. Tulasamma case*³. In para 20 the propositions emerging in respect of incidents and characteristics of a Hindu woman's right to maintenance have been crystallised as under: (SCC pp. 113-14)

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"20. Thus on a careful consideration and detailed analysis of the authorities mentioned above and the Shastric Hindu Law on the subject, the following propositions emerge with respect to the incidents and characteristics of a Hindu woman's right to maintenance:

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'(1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow;

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(2) though the widow's right to maintenance is not a right to property but it is undoubtedly pre-existing right in property i.e. it is a *jus ad rem not jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court;

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(3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance;

(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right;

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(5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort (*Jayanti Subbiah v. Alamelu Mangamma*¹³ and *Yellawa v. Bhimangavda*¹⁴) of co-owner in the property of her husband, though her co-ownership is of a subordinate nature; and

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³ *V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99

¹³ 1902 SCC OnLine Mad 4 : ILR (1904) 27 Mad 45

¹⁴ 1893 SCC OnLine Bom 3 : ILR (1893) 18 Bom 452

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a (6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance.’ ”

b 33. In the light of the aforesaid passage, Sections 14(1) and 14(2) of the said Act were entered by the Court. The word “possessed” was held to be used in a wide sense not requiring a Hindu woman to be in actual or physical possession of the property and it would suffice if she has a right in the property. The discussion in para 33 thereafter opines that the intention of Parliament was to confine sub-section (2) of Section 14 of the said Act only to two transactions viz. a gift and a will, which clearly would not include property received by a Hindu female in lieu of maintenance or at a partition. The intention of Parliament in adding the other categories to sub-section (2) was merely to ensure that any transaction under which a Hindu female gets a new or independent title under any of the modes mentioned in Section 14(2) of the said Act. The conclusions were thereafter set forth in para 62 of the judgment as under: (SCC pp. 135-36)

d “62. We would now like to summarise the legal conclusions which we have reached after an exhaustive consideration of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

e (1) The Hindu female’s right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

g (2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

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(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

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(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

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(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

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(6) The words "possessed by" used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

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(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

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34. In our view the relevant aspect of the aforesaid conclusion is Conclusion (4) in para 62 which opines where sub-section (2) of Section 14 of the said Act would apply, and this does inter alia apply to a will which may create independent and new title in favour of females for the first time and is not a recognition of a pre-existing right. In such cases of a restricted estate in favour of a female is legally permissible and Section 14(1) of the said Act will not operate in that sphere.

35. We may add here that the objective of Section 14(1) is to create an absolute interest in case of a limited interest of the wife where such limited estate owes its origin to law as it stood then. The objective cannot be that a Hindu male who owned self-acquired property is unable to execute a will giving a limited estate to a wife if all other aspects including maintenance are taken care of. If we were to hold so it would imply that if the wife is disinherited under the will it would be sustainable but if a limited estate is given it would mature into an absolute interest irrespective of the intent of the testator. That cannot be the objective, in our view.

36. The testator in the present case, Tulsi Ram, had taken all care for the needs of maintenance of his wife by ensuring that the revenue generated from the estate would go to her alone. He, however, wished to give only a limited life interest to her as the second wife with the son inheriting the complete estate after her lifetime. We are, thus, of the view that it would be the provisions of Section 14(2) of the said Act which would come into play in such a scenario and Ram Devi only had a life interest in her favour. The natural sequitur is that the respondents cannot inherit a better title than what the vendor had and, thus, the view taken by the trial court and the first appellate court is the correct view and the sale deeds in favour of the respondents cannot be sustained.

37. On consideration of the second aspect, we must begin by stating that the sequence of litigations can hardly be said to classify the respondents as bona fide purchasers. The first endeavour was by the daughter of Ram Devi by seeking what is undoubtedly a collusive decree when she had no interest in the property. She then sought to create lease interest in the property. Both these aspects were held against Ram Devi and her daughter right till the Supreme Court in the first round of litigation clearly opining that Ram Devi had only a limited estate in the property. Despite having lost right till the Supreme Court, the sale deeds were intervening factors even during the pendency of the litigation which went against the vendor Ram Devi.

38. We may also notice that the reliance on *Shakuntla Devi case*⁵ by the High Court is misplaced as the factual scenario cannot be said to be identical. In fact the most crucial aspect was that the will in question was dated 1-10-1935, a pre-1956 will which is the distinguishing factor. The same factual scenario prevailed in *Jupudy Pardha Sarathy case*⁴. We must also notice that the High

⁵ *Shakuntla Devi v. Kamla*, (2005) 5 SCC 390

⁴ *Jupudy Pardha Sarathy v. Pentapati Rama Krishna*, (2016) 2 SCC 56 : (2016) 1 SCC (Civ) 569

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Court wrongly proceeded on the basis that the first round of litigation would not create any binding precedents because there was change in law after the first round of litigation. There is, in fact, no change in law as all the judgments were much prior in time.

39. We have already stated that the rights of the respondents are derived only from Ram Devi and once the judgment is binding on Ram Devi it cannot be said that she can create rights contrary to the judgment in favour of third parties and that too was done during the pendency of the litigation. We believe from the facts on record that the transactions in question are not only not bona fide but dubious in character to somehow deny the appellant rights conferred under the will respondents being third parties. The repeated endeavour of Ram Devi and her daughter did not succeed earlier and cannot be permitted to succeed qua the purchasers from Ram Devi.

Conclusion

40. The result of the aforesaid is that the appeals are allowed and the impugned judgment⁷ of the learned Single Judge of the High Court is set aside and the decree of the trial court dated 13-8-2009 as affirmed by the appellate court dated 7-10-2010 is reaffirmed. The parties are left to bear their own costs.

⁷ *Suresh Kumar v. Jogi Ram*, 2018 SCC OnLine P&H 6978