Commissioner of Income Tax, Bombay v. *Gomedalli Lakshminarayan*

AIR 1935 Bom. 412

BEAUMONT, C.J. – This is a reference made by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, and the first question raised is:

> Whether, in the circumstances of the case, the income received by right of survivorship by the sole surviving male member of a Hindu undivided family can be taxed in the hands of such male member as his own individual income, or it should be taxed as the income of a Hindu undivided family, for the purposes of assessment to super-tax, under S. 55. Income-tax Act, 1922.

The facts are that there was a joint Hindu family consisting of a father and his wife and a son and his wife, the son being the present assessee. The father died in 1929 before the year of assessment, so the joint Hindu family then consisted of the son, his mother and his wife and the question raised by the Commissioner appears to me to admit the existence of a joint Hindu family. Of such existence, I think there can be no question. It is clear law that you may have a joint Hindu family consisting of one male member and female members who are entitled to maintenance, although that does not mean that every Hindu who possesses a wife and a mother is necessarily a member of a joint Hindu family as Lord- Williams, J., seems to think in the Calcutta case referred to below. The question raised is whether the assessee is to be assessed as an individual or as a member of the joint Hindu family, and the importance of the question lies in this, that for the purposes of super-tax he will be allowed a large exemption if he is taxed as the manager of a joint Hindu family than if he is taxed as an individual.

The Income-tax Act refers in various sections to a Hindu undivided family, though that expression is nowhere defined. A Hindu undivided family is a unit for taxation under Ss. 3 and 55 and under S. 14 (1) it is provided, that the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family, which seems to mean that as a Hindu undivided family is taxed as a unit, the individual members thereof are not liable to be charged in respect of what each member received as his or her share of the joint income. The nature of a Hindu undivided family was perfectly well-known to the legislature when the Income-tax Act was drafted, and it was well-known that the expression "Hindu undivided family" includes females and is much wider than the expression "coparcenary" which includes only the males in whom the joint family property is vested. It is argued by the Advocate-General that the Act, dealing as it does with property, when it refers to a Hindu undivided family, really means to denote the coparceners, that is to say, male members of the family in whom the family property is vested. I see no ground for arriving at that conclusion, since the meaning of the two expressions was well-known when the Act was drafted, and the legislature has thought fit to use the wider expression rather than narrow one. I have no doubt that this was deliberate. The more liberal allowance to a joint family in respect of super-tax was presumably given because the whole income of the family would not go to one individual. If there were a large number of male members, each member would get only a small portion of the income, and it would be hard to charge the family with super-tax merely because the joint income was over the limit at which super-tax commences for an individual. But the same principle would apply, though perhaps to a less extent, to the case of

a Hindu joint family consisting of one male member and several female members entitled to maintenance, where maintenance might absorb a large share of the family income.

It has been held by a special bench of the Madras High Court in ***Vedathanni* v. *CIT*** [56 Mad 1] that one male member and the widows of deceased coparceners can form a joint Hindu family, and that therefore the arrears of maintenance received by a widow of a deceased coparcener are exempt from tax under S. 14 (1) of the Act. If we were to accept the view contended for by the Advocate-General, I think we should have to differ from the basis of that decision, and I see no reason for so doing. I think therefore the first question submitted to us must be answered by saying that the income of the assessee should be taxed as the income of a Hindu undivided family for the purposes of super-tax under S. 55. The second question "whether, under the circumstances of the case, the assessment as levied in this case in the order" must be answered in the negative.

RANGNEKAR, J. - The question raised on this reference is whether the assessee is liable to be taxed as an individual or a representative of an undivided Hindu family. The importance of the question lies in the fact that an undivided Hindu family is treated as a single unit for assessment under S. 3 of the Act and is also entitled to a larger exemption in the matter of assessment to super-tax. The facts are that the assessee, his father, mother and wife formed a joint Hindu family. They were possessed of ancestral property which on the death of his father devolved on the assessee by survivorship, and thereafter he and his widowed mother and his wife continued to live together as members of an undivided Hindu family. Under S. 2(9) Income-tax Act, a Hindu undivided family is included under the definition of 'person', but has not been otherwise defined anywhere in the Act. In my opinion therefore the expression must be construed in the sense in which it is understood under the Hindu law. Under the Hindu law, an undivided Hindu family is composed of (a) males and (b) females. The males are (1) those that are lineally connected in the male line; (2) collaterals; (3) relations by adoption; and (4) poor dependants. The female members are (1) the wife or the "widowed wife" of a male member and (2) maiden daughters. The commentaries mention female slaves and illegitimate sons also as being members of an undivided Hindu family. I shall content myself by referring to two well-known text-books. Mayne in his work at p. 344 observes as follows:

> The whole body of such a family, consisting of males and females… some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share while others are only entitled to maintenance.

Then dealing with what is called coparcenary, the learned author at p. 347 observes:

Now it is at this point that we see one of the most important distinctions between the coparcenary and the general body…

I think perhaps a more accurate description of what a Hindu undivided family means is given by Sir Dinshah Mulla in his ***Principles of Hindu Law*** [Edn. 7, at p. 230], in these words;

> A joint Hindu family consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters.

An undivided Hindu family in this sense differs from which is called a Hindu coparcenary, which is a much narrower body. A Hindu coparcenary includes only those male members who take by birth an interest in the coparcenary property. This is what is known as apratibandha daya or unobstructed heritage, which devolves by survivorship. These are the three generations next to the last holder in unbroken male descent. The Crown contends that the assessee was the sole surviving coparcener and therefore free to deal with the property in any way he liked, and that being so, there was no undivided Hindu family. Now under the Hindu law undoubtedly the sole surviving coparcener has wider powers to deal with property which he takes by survivorship. But these powers are subject to well recognised rights of the female members of the family. Thus the widow of a deceased coparcener has a right to be maintained out of the family property and a right to a due provision for her residence. An unmarried daughter has a right to maintenance and residence and to marriage expenses. Similarly the disqualified heirs, as the blind, the deaf etc., have similar rights. If the rights of these persons are threatened, or if the holder of the estate is dealing with the property in a manner inconsistent with or so as to endanger the rights of these persons, he may be restrained by a proper action from acting in that manner. Similarly, the widow of a deceased coparcener may adopt a son to her deceased husband and he would therefore become a coparcener with the sole surviving coparcener. Then the expenses of religious ceremonies, such as the shraddha relating to deceased coparceners have also to come out of the property. I need not refer to the other restrictions on the power of the sole surviving coparcener. Therefore because there is no coparcenary, it does not follow that there is no undivided Hindu family. The joint status of the family does not come to an end merely because for the time being there is only one member of the family who is in possession of the family property.

It is clear therefore that there is a sharp distinction between what is understood in the Hindu law by the expressions “undivided Hindu family” and “coparcenary”. Now these two expressions which are known to every Hindu lawyer were before the legislature when the Income-tax Act came to be enacted. It is a canon of construction that one cannot impute ignorance to legislature of well known legal expressions. The legislature must be presumed to be acquainted with not only the actual state of the law but with the legal interpretation put upon technical expressions by the Courts. If then the legislature chose to adopt a wider expression like “undivided Hindu family” the Courts have no option left but to construe the wider expression in the way in which it has been construed and understood under the Hindu law. To put a narrower meaning on the expression “undivided Hindu family” as the Crown wants us to do, would, in my opinion, be legislating instead of interpreting the section. The view which we are taking is not without authority, and I need refer only to 56 Mad 1. It is said that that was a decision under S. 14 (1), Income tax Act, but reading the judgment carefully, it seems to me that the point which has arisen before us also arose before the Judges of the Madras High Court, and the whole ratio decendi of that case is that the expression “undivided Hindu family” has to be understood in the sense in which it is understood in the Hindu law. The learned Advocate-General has referred to an unreported decision of the Calcutta High Court and produced an uncertified copy of the judgment. I have no hesitation in saying, with respect to the learned Judges in that case, that their reasoning does not appeal to me and and is opposed to the fundamental principles of the Hindu law. For these reasons, I agree that the questions raised must be answered in the manner proposed by my Lord the Chief Justice.

Moro Vishvanath v. *Ganesh Vithal*

(1873) 57 Bom. H.C. Reports 444

This was a regular appeal from the decision of Chintaman S. Chitnis, First Class Subordinate Judge of Ratnagirh in Suit No. 905 to 1866.

The plaintiffs and defendants are descendants of one Udhav, the acquirer of the property now in dispute between them. The former are beyond and the latter within, the fourth degree from Udhav. The plaintiff's claim for partition was admitted by some of the defendants and opposed by the rest, principally on three groudns, viz., Ist improper valuation of the claim, 2ndly, limitation; and 3rdly, an averment that the parties have been in a state of separation for fifty years.

The Subordinate Judge found for the plaintiff's on all these points, and accordingly gave them a decree, which it is unnecessary here to set out in detail.

WEST, J, - The first argument to be considered (one pressed with much learning and ability by Rav Saheb Vishvanath Narayan Mandlik for the appellants) is that, notwithstanding no partition may have taken place, yet, after three steps of descent from a common ancestor, the acquirer of the family property, all claims to a partition, by the descendants of one son upon those of another, cease. The comment of the Viramitrodaya on the passage of Devala is "A distribution of shares shall take place down to the fourth (descendant) from the common ancestor". The special *Sapinda*, relationship ends with the fourth descendant (inclusive) according to all the principal authorities, and as a great-great-grandson could not inherit, except as a *Gotraja* relation after the widow and many other interposed claimants, it is said that the analogy of the law of inheritance prevents a lineal descendant, beyond the great grandson, from claiming partition at the hands of those who are legally in possession, as descendants from the original sole owner of the family property or any part of it. The enigmatic language of the texts no doubt lends some support to this contention but we think that it misses the true purpose of the rule. The Hindu law does not contemplate a partition as absolutely necessary at any stage of the descent from a common ancestor, yet the result of the construction pressed on us would be to force the great-grandson, in every case, to divide from his co-parceners, unless he desired his own offspring to be left destitute. Where two greatgrandsons lived together as a united family, the son of each would according to the Mitakshara law, acquire, by birth, a co-ownership with his father in the ancestral estate; yet, if the argument is sound, this co-ownership would pass altogether from the son of A or of B, as either happened to die before the other. If a co-parcencer should die, leaving no nearer descendant than a great great grandson, then the latter would no doubt be excluded at once from inheritance and from partition by any nearer heirs of the deceased, as for instance brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment. Jagannatha in ***Colebrooke's Digest*** [(B.V.T. 396, ***Commentary***)] has discussed an argument on a case almost identical with the one before us. The only difference seems to be that it supposes the son of the original owner to have been separated from his father, and the claim to be set up by his great grandson to a share in property left undivided in the first

partition "But as for the opinion", he says, "that (the right to a) partition extends only to the brother, his son, and the son of that son, even when co-heirs die successively, and that no (obligation to) partition can exist beyond those with the great-grandson of the late owner's son may if not be asked to whom then would the property belong?" Then meeting the argument from the "literal sense of the precept" already referred to, that the whole property would belong exclusively to the survivor of the two brothers and his descendants, he says that mere reasonings on the literal sense of the text are out of place, "for the several ancestors dying successively, and the property not having been silently neglected during adverse possession, nothing prevents the transmission of it even to the hundredth decree of lineal consanguinity". Each descendant in succession becomes co-owner with his father of the latter's share, and there is never such a gap in the series as to prevent the next from fully representing the preceding one in the succession. It is on the same principle that the seventh in descent in an emigrant branch, can return and claim a partition of the property. He may be a *Sapinda* in the stricter sense of one who was a *Sapinda* of the ancestor in possession. His great-grandfather may have inherited, as forth in the line a right which he was then capable of transmitting to the fourth in descent from himself. Here the right stops as amongst those who have not emigrated; it stops at the fourth from an owner in possession, through the operation of a law of prescription. Either there has been a failure of three links of the chain of descent, causing the succession to fall to collaterals, or there has been a "silent neglect" to assert the existing right which in the fourth or the seventh generation annuls the title (***Cole. Dig.***, B. V. T. 394, 396 *Com*). The passage cited by Dhirajlal from ***Strange's Manual***, and the case there referred to, involve the same view of the Hindu law as the one just set forth, and are opposed to the notion that a division of a Hindu family necessarily occurs in the fourth generation from the common ancestor independently, or even in spite, of the wishes of the several members.

NANABHAI HARIDAS, J. - One set consisting of three defendants, answered that they were willing to effect a partition and were unnecessarily sued. They in fact, submitted the plaintiffs' claim.

The other set, consisting of nine defendants, among other things, answered that the claim was barred by the law of limitation; that they had been separate from the plaintiffs for upwards of thirty years; and that this suit was the result of a conspiracy between one of the defendants, who admitted the plaintiff's claim, and the palintiffs.

The Subordinate Judge, on remand from the High Court, held, *inter alia*, that the suit was not barred, and that the property in dispute was joint ancestral property. He, accordingly, made a decree for partition thereof on the 4th September 1872, the one now in appeal before us.

Passing over as unimportant the objections, preliminary and otherwise, which were urged, as to the valuation of the appeal and of certain items of the property comprised in the plaint but which do not affect the merits of the case it seems to me that the substantial questions raised in the numerous grounds of objection to the Lower Court's degree, contained in the memorandum of appeal, as argued before us resolve themselves into-

1st - Whether this claim is barred by the law of limitation?

2nd - Whether the plaintiffs are entitled to demand a partition at all assuming them to be members of an undivided family?

3rd - Whether they are members of an undivided family? and

4th - What share, if any, are they entitled to?

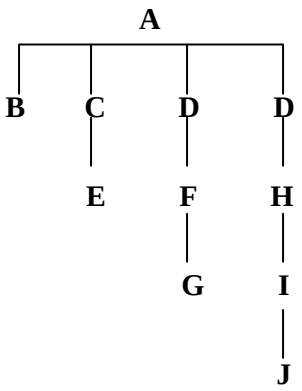
It seems to me that a good deal of the argument on the questions of bar under the law of limitation might have been spared. It is admitted that a portion of the property, of which partition is sought is now in the possession of the plaintiffs, another portion of it in that of the defendants; so that; if the plaintiffs and defendants are still members of an undivided family, the suit cannot be held barred under Cl. 13, Sec. 1, Act XIV of 1859, the law of limitation governing this case ***Sakho Narayan* v. *Narayan Bhikaji***, [6 Bom. H.C. Rep A.C. J.238]. On the other hand, if they do not now bear that character, no partition suit can at all lie between them, except under certain specified circumstances, which are not alleged to exist in this case, and the question of limitation under the Act, therefore, becomes immaterial.

The next question, however, whether, assuming them to be undivided, the plaintiffs are entitled to sue at all for partition, according to Hindu law, is one of considerable importance and difficulty. Learned and ingenious arguments, based upon various original texts, have been addressed to us by the able pleaders on both sides. The plaintiffs and defendants are admittedly descendants of one common aneestor, Uddhav. The defendants are all fourth in descent from him. The plaintiffs, however, are some fifth and others sixth in descent from him; and hence, it is urged, the latter cannot claim from the former any partition of property descended from that common ancestor.

It is argued for the appellants that, since the fifth and remoter descendants are by the law of inheritance, postponed to the fourth and nearer descendants, (between whom and them, moreover, other relations may intervene) the former are not co-parceners with the latter and cannot, therefore, demand a partition from them. In support of this contention are cited the passages of Katyayana and Devala, quoted from the ***Viramitrodaya*** in 2 W and B's Dig. Introduction, III, IV; ***Manu*** [IX 186], with Kulluka's comments on it; Nanda Pandita's ***Comments on Devala***; Apararka on Y***agnyavalkya***; Vyavahara ***Madhava*** ; and Kamalakar. Devala's passage it is urged, aplies to divided and re-united as well as to undivided families and not only to the former according to Nilakantha who regards, by a forced construction the word *Avibhahtavibhatanam* as a *Karmadharaya* in the sense of *those who having been divided have again become undivided [or re-united]* instead of as a *Dvandva* in the sense of divided or undivided as one naturally reads it, all the authorities being opposed Nilakantha on this point. It is further urged that the law of partition is inseparably connected with, and is indeed a part of the law of inheritance which is clearly founded on the spiritual benefit which certain persons according to the religious ideas of the Hindus are supposed to be capable of conferring on the deceased by the gift of the funeral cake; that this capacity of benefiting the deceased does not extend beyond the fourth in descent for Manu says, Chap. IX, 186, "but the fifth has no concern with the gift of the funeral cake;" that this is made clearer by Kulluka in his commentary; and that as the fifth cannot inherit during the lifetime of the fourth in descent, so neither can he claim any partition from the latter. It is also urged that, according to Nanda andita; "Up to the fourth alone are the Kulyas called Sapindas" and that "the great-grandson's son gets no share," that according to Apararka, whose authority is recognized by

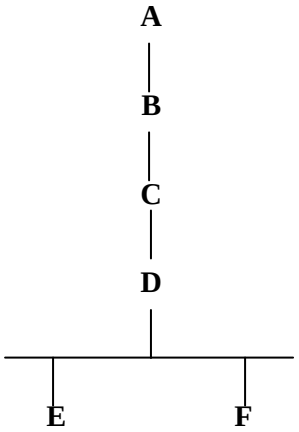
Colebrooke, Stokes 177. "Up to that (*i.e*. the fourth) the *Kulyas* are *Sapindas* after which the *pinda* relationship ceases; and that according to Vyavahar Madhav "after that [i.e. after the great grandson] there is always a stoppage of the division of the wealth of the great great-grandfather."

To this it is replied that the authorities quoted do not support the contention of the appellants; that the doctrine of ancestral property vesting by birth in one's son, grandson, and great-grandson, was overlooked by the other side; that if A died, leaving two or more sons forming an undivided family, and they died each of them, leaving one or more sons, and the same thing happened regularly for several generations all the descendants of A, living in a state of union, as in this case, the authorities quoted did not prevent any such descendants below the fourth demanding a partition of their joint family property : (See Str. Man S. 347) ;



that they only went so far as to lay down that, if A die, leaving B, a son E a grandson, G a great-grandson, and J, a great-great-grandson, the intermediate persons having all predeceased him, J, who stands fifth in descent from A cannot demand a partition of A's property, because J had not vested in him by birth any interest in such property ; that the same view of the texts cited was adopted by the learned authors of the Digest (W. and B Bk. II pp, II, IV); that the right to participate does not necessarily cease at the 4th descent, see Stokes 290 291; that the expression *Aavibhaktavibhaktanam* in the text from Devala must be taken to be a *Karmadharaya* conpound as Nilkantha takes it, and not a *Dvandva* for otherwise the word *bhuyo* (again) which implies a previous partition, becomes inapplicable to one member of that compound; that Nilakantha's authority on this side of India is entitled to more respect than that of Nanda Pandita or of Apararka ; that if Nilkantha is right in his interpretation of devals, the text which apparently limits the right of partition to the fourth in descent refers only to cases of reunited co-parceners and not to undivided ones; that there being no question here of partition among re-united co-parceners the text from Devala does not apply; that in an undivided family *Sapinda* relationship extends to the seventh and in a divided and re-united one cnly to the fourth in descent from the common ancestor that one of the original plaintiffs who was fourth in descent from Udhav the common ancestor and died pending the suit is now represented by his two sons, and that the whole of the property being still the undivided property of the family. Any of the co owners may compel a partition of it.

This is a mere summary of the arguments addressed to us on this part of the case. Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellants' contention that a partition could not, in any case, (other than that of absence in a foreign country) be demanded by descendants of a common ancestor, more than four degrees



removed, of property originally descended from him. Take, for instance, the case put [above]: A, the original owner of the property in dispute, dies, leaving a son B and a grandson C, both members of an undivided family. B dies, leaving C and D, son and grandson, respectively; and C dies, leaving a son D and two grandsons by him, E and F. No partition of the family property has taken place, and D, E, and F, are living in a state of union. Can E and F compel D to make over to them their share of the ancestral property? According to the law prevailing on this side of India they can, sons being equally interested with their father in ancestral property.

In the same way, suppose B and C die, leaving A and D members of an undivided family after which A dies whereupon the whole of his property devolves upon D who thereafter has two sons E and F. They, or either of them, can likewise sue their father D for partition of the said property, it being ancestral.

Now, suppose B and C die, leaving A, D, and DI, members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D and D1 jointly, and that D thereafter has two sons E and F, leaving whom D dies. A suit against D1 for partitition of the joint ancestral property of the family would be perfectly open to E and F; or even to G and F, if E died before the suit. It would be a suit against D1 by a deceased brother's sons or son and grandson : Vyavashsrs Mayukha Chap. IV, Sec. IV, 21.

But E and F are both fifth and G sixth in descent from the original owner of the property, whereas D and D1 are only fourth.

Suppose, however, that A dies after D, leaving a great-grandson D1 and the two sons of D, E, and F. In this case E and F could not sue D1 for partition of property descending from A, because it is inherited by D1 alone, since, E and F, being sons of a great-grandson, are excluded by D1, A's surviving great-grandson, the right of respresentation extending no further.

Introducing B1, C1, D1, E1, and F1 and B2, C2, E2, E2, and F2, as additional descendants of A, all forming an undivided family, might render the case a little more complicated and affect the value of their shares, but could not destroy the right if any, of E and F to share the joint family property with the other members.

The rule, then, which I deduce from the authorities on this subject is not that a partition cannot be demanded by one more then four degrees removed from the acquirer of *original owner* of the property sought to be divided but that it cannot be demanded by one more than four degrees removed from the *last owner* however remote he may be from the original owner thereof.

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Muhammad Husain Khan v. *Babu Kishva Nandan Sahai*

AIR 1937 PC 233

SIR SHADI LAL - This is an appeal from a decree of the High Court of Judicature at Allahabad, dated 23rd January 1933 which reversed a decree of the Subordinate Judge of Banda, dated 17th January 1929 and allowed the plaintiff's claim for possession of a village called Kalinjar Tirhati with mesne profits thereof. One Ganesh Prasad, a resident of Banda in the Province of Agra, was the proprietor of a large and valuable estate, including the village in dispute. He died on 10th May 1914 leaving him surviving a son, Bindeshri Prasad, who was thereupon recorded in the Revenue Records as the proprietor of the estate left by his father.

In execution of a decree for money obtained by a creditor against Bindheshri Prasad the village of Kalinjar Tirhati was sold by auction on 20th November 1924; and the sale was confirmed on 25th January 1925. Bindeshri Prasad then brought the suit, which has led to the present appeal, claiming possession of the property on the ground that the sale was vitiated by fraud. He died on 25th December 1926 and in March 1927 his widow, Giri Bala, applied for the substitution of her name as the plaintiff in the suit. She was admittedly the sole heiress of her deceased husband, and this application was accordingly granted. She also asked for leave to amend the plaint on the ground that under a will made by her father-in-law, Ganesh Prasad, on 5th April 1914 her husband got the estate only for his life, and that on the latter's death his life interest came to an end, and the devise in her favour became operative, making her absolute owner of the estate including the village in question. She accordingly prayed that, even if the sale be held to be binding upon her husband, it should be declared to be inoperative as against her rights of ownership. The trial Judge made an order allowing the amendment, and on 28th May 1927 recorded reasons to justify that order. But in July 1927 when the defendants in their additional pleas again objected to the amendment, the learned Judge framed an issue as to the validity of the amendment. He was, thereafter, transferred from the district; and his successor, who decided the suit, dismissed it on various grounds, and one of these grounds was that the amendment of the plaint changed the nature of the suit and should not have been allowed. The High Court, on appeal by the plaintiff, has dissented from that conclusion, and held that the amendment was necessary for the purpose of determining the real questions in controversy between the parties.

The learned Counsel for the appellants argues that the property inherited by a daughter's son from his maternal grandfather is ancestral property, and he relies, in support of his argument, upon the expression "ancestral property" as used in the judgment of this Board in 29 I A 156 [***Chelikani Venkayyamma Garu* v. *Chelikani Venkataramanayyamma***], in describing the property which had descended from the maternal grandfather to his two grandsons. It is to be observed that the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship. On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died. Thereupon, the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship,

or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which the term is used in the Hindu law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. The brothers took the estate of their maternal grandfather at the same time and by the same title, and there was apparently no reason why they should not hold that estate in the same manner as they held their other joint property. The rule of survivorship, which admittedly governed their other property was held to apply also to the estate which had come to them from their maternal grandfather. In these circumstances it was unnecessary to express any opinion upon the abstract question of whether the property, which a daughter's son inherits from his maternal grandfather, is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him. This question was neither raised by the parties nor determined by the Board. It appears that the phrase "ancestral property", upon which reliance is placed on behalf of the appellants, was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu law which imports the idea of the acquisition of interest on birth by a son jointly with his father.

There are, on the other hand, observations in a later judgment of the Board in 35 I A 206 [***Atar Singh* v. *Thakar Singh***] which are pertinent here. It was stated in that judgment that unless the lands came "by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu law". This case however, related to the property which came from male collaterals and not from maternal grandfather; and it was governed "by the custom of the Punjab", but it was not suggested that the custom differed from the Hindu law on the issue before their Lordships. The rule of Hindu law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely his father, father's father and father's father's father is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applied to it. But the question raised by this appeal, is whether the son acquires by birth an interest jointly with his father in the estate, which the latter inherits from his maternal grandfather. Now, Vijnanesvara, (the author of Mitakshara), expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th *sloka* of the first section of the first chapter of Mitakshara, which deals with inheritance is as follows: "It is a settled point that property in the paternal or ancestral estate is by birth". But Colebrooke apparently used the word 'ancestral' to denote grand-paternal, and did not intend to mean that in the estate, which devolves upon a person from his male ancestor in the maternal line, his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnanesvara, which has been translated by Colebrooek as 'ancestral' is *pitamaha* which means belonging to *pitamaha*. Now, *pitamaha* ordinarily means father's father, and though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to

that of his father. For instance, in the 5th *sloka* of the fifth section of the first chapter, it is laid down that in the property which was acquired by the paternal grandfather…the ownership of father and son is notorious; and therefore partition does take place. For, or because the right is equal, or alike therefore partition is not restricted to be made by the father's choice, nor has he a double share.

Now, this is translation of the *sloka* by Colebrooke himself and it is significant that the Sanskrit word which is translated by him as 'paternal grandfather' is *pitamaha*. There can therefore be no doubt that the expression 'ancestral estate' used by Colebrooke in translating the 27th *sloka* of the first section of the first chapter was intended to mean grand-paternal estate. The word 'ancestor' in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate in which under the Hindu law, a son acquires jointly with his father an interest by birth must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding. The estate which was inherited by Ganesh Prasad from his maternal grandfather cannot in their Lordships' opinion be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kalinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title. For the reasons above stated, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

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C.N. Arunachala Mudaliar v. *C.A. Muruganatha Mudaliar*

1954 SCR 243 : AIR 1953 SC 495

B. K. MUKHERJEA, J.- 2. The suit was commenced by the plaintiff, who is Respondent 1 in this appeal for specific allotment, on partition, of his one-third share in the properties described in the plaint, on the allegation that they were the joint properties of a family consisting of himself, his father, Defendant 1, and his brother, Defendant 2, and that he was entitled in law to one-third share in the same. It appears that the plaintiff and Defendant 2, who are two brothers, are both sons of Defendant 1 by his first wife who predeceased her husband. After the death of plaintiff's mother, Defendant 1 married again and his second wife is Defendant 3 in the suit. The allegations in the plaint, in substance, are that after the step mother came into the house, the relation between the father and his sons became strained and as the father began to assert an exclusive title to the joint family property, denying any rights of his sons thereto, the present suit had to be brought. The properties in respect of which the plaintiff claims partition are described in Schedule B to the plaint. They consist of four items of agricultural land measuring a little over 5 acres in the aggregate, one residential house in the town of Erode and certain jewellery, furniture and brass utensils. In addition to these, it is averred in para 11 of the plaint that there is a sum of about Rs 15,000 deposited in the name of the first defendant in Erode Urban Bank Limited; that money also belongs to the joint family and the plaintiff is entitled to his share therein.

3. Defendant 1 in his written statement traversed all these allegations of the plaintiff and denied that there was any joint family property to which the plaintiff could lay a claim. His case was that Items 1 and 2 of Schedule B lands as well as the house property were the self-acquired properties of his father and he got them under a will executed by the latter as early as in the year 1912. The other items of immovable property as well as the cash, furniture and utensils were his own acquisitions in which the sons had no interest whatsoever. As regards the jewels mentioned in the plaint, it was said that only a few of them existed and they belonged exclusively to his wife, Defendant 3.

4. Defendant 2, who is the brother of the plaintiff, supported the plaintiff's case in its entirety. Defendant 3 in her written statement asserted that she was not a necessary party to the suit and that whatever jewellery there were belonged exclusively to her.

5. After hearing the case the trial Judge came to the conclusion that the properties bequeathed to Defendant 1 by his father should be held to be ancestral properties in his hands and as the other properties were acquired by Defendant 1 out of the income of the ancestral estate, they also became impressed with the character of joint property. The result was that the Subordinate Judge made a preliminary decree in favour of the plaintiff and allowed his claim as laid in the plaint with the exception of certain articles of jewellery which were held to be non-existent.

6. Against this decision, Defendant 1 took an appeal to the High Court of Madras. The High Court dismissed the appeal with this variation that the jewels - such of them as existed - were held to belong to Defendant 3 alone and the plaintiff's claim for partition of the furniture and brass utensils was dismissed. The High Court rejected Defendant 1's application for leave

to appeal to this Court but he succeeded in getting special leave under Article 136 of the Constitution.

7. The substantial point that requires consideration in the appeal is, whether the properties that Defendant 1 got under the will of his father are to be regarded as ancestral or self-acquired properties in his hands. If the properties were ancestral, the sons would become co-owners with their father in regard to them and as it is conceded that the other items of immovable property were mere accretions to this original nucleus, the plaintiff's claim must succeed. If, on the other hand, the bequeathed properties could rank as self-acquired properties in the hands of Defendant 1, the plaintiff's case must fail. The law on this point, as the courts below have pointed out, is not quite uniform and there have been conflicting opinions expressed upon it by different High Courts which require to be examined carefully.

8. For a proper determination of the question, it would be convenient first of all to refer to the law laid down in *Mitakshara* in regard to the father's right of disposition over his self-acquired property and the interest which his sons or grandsons take in the same. Placitum 27, Chapter I, Section 1 of *Mitakshara* lays down:

> "It is settled point that property in the paternal or ancestral estate is by birth, though the father has independent power in the disposal of effects other than the immovables for indispensable acts of duty and for purposes prescribed by texts of law as gift through affection, support of the family, relief from distress and so forth; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether *acquired by himself* or inherited from his father or other predecessors since it is ordained, 'though immovables or bipeds have been acquired by man himself, a gift or sale of them should not be made without convening all the sons'." Mitakshara insists on the religous duty of a man not to leave his family without means of support and concludes the text by saying: "They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support. No gift or sale should therefore be made."

9. Quite at variance with this precept which seems to restrict the father's right of disposition over his self-acquired property in an unqualified manner and in the same way as ancestral lands, there occur other texts in the commentary which practically deny any right of interference by the sons with the father's power of alienation over his self-acquired property. Chapter 1, Section 5, Placitum 9 says:

> "The grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from the grandfather: but he has no right of interference if the effects were acquired by the father. On the contrary he must acquised, because he is dependent."

The reason for this distinction is explained by the author in the text that follows:

> "Consequently the difference is this: although he has a right by birth in his father's and in his grandfather's property; still since he is dependent on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property."

Clearly the latter passages are in flat contradiction with the previous ones and in an early Calcutta case [***Muddun* v. *Ram***, 6 WR 71], a reconciliation was attempted at by taking the view that the right of the sons in the self-acquired property of their father was an imperfect right incapable of being enforced at law. The question came pointedly for consideration before the Judicial Committee in the case of ***Rao Balwant* v. *Rani Kishori*** [25 IA 54] and Lord Hobhouse who delivered the judgment of the Board, observed in course of his judgment that in the text books and commentaries on Hindu law, religious and moral considerations are often mingled with rules of positive law. It was held that the passages in Chapter I, Section 1, Verse 27 of Mitakshara contained only moral or religious precepts while those in Section 5, Verses 9 and 10 embodied rules of positive law. The latter consequently would override the former. It was held, therefore, that the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. This statement of the law has never been challenged since then and it has been held by the various High Courts in India, and in our opinion rightly, that a Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons but he can make a gift of such property to one of his own sons to the detriment of another [***Sital* v. *Madho***, ILR 1 All 394]; and he can make even an unequal distribution amongst his heirs [***Bawa* v. *Rajah***, 10 WR 287].

10. So far the law seems to be fairly settled and there is no room for controversy. The controversy arises, however, on the question as to what kind of interest a son would take in the self-acquired property of his father which he receives by way of gift or testamentary bequest from him, vis-a-vis his own male issue. Does it remain self-acquired property in his hands also, untrammelled by the rights of his sons and grandsons or does it become ancestral property in his hands, though not obtained by descent, in which his male issue become co-owners with him? This question has been answered in different ways by the different High Courts in India which has resulted in a considerable diversity of judicial opinion. It was held by the Calcutta High Court as early as in the year 1863 that such property becomes ancestral property in the hands of his son as if he had inherited it from his father. In the other High Courts the question is treated as one of construction to be decided in each case with reference to its facts as to whether the gifted property was intended to pass to the sons as ancestral or self-acquired property; but here again there is a sharp cleavage of judicial opinion. The Madras High Court has held [***Nagalingham* v. *Ram Chandra***, ILR 24 Mad 429] that it is undoubtedly open to the father to determine whether the property which he has bequeathed shall be ancestral or self-acquired but unless he expresses his intention that it shall be self-acquired, it should be held to be ancestral. The Madras view has been accepted by a Full Bench of the Patna High Court [***Bhagwat* v. *Mst. Kaporni***, ILR 23 Pat 599] and the latest decision of the Calcutta High Court on this point seems to be rather leaning towards it [***Lala Mukti Prasad* v. *Srimati Iswari***, 24 CWN 938]. On the other hand, the Bombay view is to hold such gifted property as self-acquisition of the donee unless there is clear expression of intention on the part of the donor to make it ancestral [***Jugmohan Das* v. *Sir Mangal Das***, 10 Bom 528], and this view has been accepted by the Allahabad and the Lahore High Courts [***Parsotam* v. *Janki Bai***, ILR 29 All 354; ***Amarnath* v. *Guran***, AIR 1918 Lah 394]. This conflict of judicial opinion was brought to the notice of the Privy Council in ***Lal Ram Singh***

v. *Deputy Commissioner of Partapgarh* [64 IA 265] but the Judicial Committee left the question open as it was not necessary to decide it in that case.

11. In view of the settled law that a Mitakshara father has right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest. This extreme view, which is supposed to be laid down in the Calcutta case referred to above, is sought to be supported on a twofold ground. The first ground is the well known doctrine of equal ownership of father and son in ancestral property which is enunciated by Mitakshara on the authority of ***Yagnavalkya***. The other ground put forward is that the definition of "self-acquisition" as given by Mitakshara does not and cannot comprehend a gift of this character and consequently such gift cannot but be partible property as between the donee and his sons.

12. So far as the first ground is concerned, the foundation of the doctrine of equal ownership of father and son in ancestral property is the well known text of ***Yagnavalkya*** [***Yaganavalkya*** Book 2, 129] which says:

> "The ownership of father and son is co-equal in the acquisitions of the grandfather, whether land, corody or chattel."

It is to be noted that Vijnaneswar invokes this passage in Chapter I, Section 5 of his work, where he deals with the division of grandfather's wealth amongst his grandsons. The grandsons, it is said, have a right by birth in the grandfather's estate equally with the sons and consequently are entitled to shares on partition, though their shares would be determined *per stirpes* and not *per capita*. This discussion has absolutely no bearing on the present question. It is undoubtedly true that according to Mitakshara, the son has a right by birth both in his father's and grandfather's estate, but as has been pointed out before, a distinction is made in this respect by *Mitakshara* itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same [**Mayne's *Hindu Law*,** 11th Ed., p. 336] It is obvious, however, that the son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the

property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition. Thus in Chapter I, Section 1, Placitum 19 Mitakshara refers to a text of Narada which says:

> "Excepting what is gained by valour, the wealth of a wife and what is acquired by science which are three sorts of property exempt from partition; and any *favour conferred* by a father."

Chapter I, Section 4 of Mitakshara deals with effects not liable to partition and property "obtained through the father's favour" finds a place in the list of things of which no partition can be directed [Section 4, placitum 28 of ***Mitakshara***]. This is emphasised in Section 6 of Chapter I which discusses the rights of posthumous sons or sons born after partition. In Placitum 13 of the section it is stated that though a son born after partition takes the whole of his father's and mother's property, yet if the father and mother has affectionately bestowed some property upon a separated son, that must remain with him. A text of Yagnavalkya is then quoted that "the effects which have been given by the father and by the mother belong to him on whom they are bestowed" [***Yaganavalkya*** 2, 124].

13. It may be noted that the expression "obtained through favour of the father" which occurs in Placitum 28, Section 4 of *Mitakshara* is very significant. A Mitakshara father can make a partition of both the ancestral and self-acquired property in his hands any time he likes even without the concurrence of his sons; but if he chooses to make a partition, he has got to make it in accordance with the directions laid down in the law. Even the extent of inequality, which is permissible as between the eldest and the younger sons, is indicated in the text [***Mit*** Chapter I, Section 2]. Nothing depends upon his own favour or discretion. When, however, he makes a gift which is only an act of bounty, he is unfettered in the exercise of his discretion by any rule or dictate of law. It is in these gifts obtained through the favour of the father that Vijnaneswar, following the earlier sages, declares the exclusive right of the sons. We hold, therefore, that there is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son constitutes ipso facto ancestral property in the hands of the donee.

14. If this is the correct view to take, as we think it is, it would furnish a complete answer to the other contention indicated above that such gifted property must be held partible between the father and the sons as it does not come within the definition of "self-acquisition", as given by *Mitakshara*. In Chapter I, Section 4 of his work, Vijnaneswar enumerates and deals with properties which are not liable to partition. The first placitum of the section defines what a "self-acquisition" is. The definition is based upon the text of Yagnavalkya that "whatever is acquired by the coparcener himself without detriment to the father's estate as present from a friend or a gift at nuptials, does not appertain to the co-heirs". What is argued is this, that as the father's gift cannot be said to have been acquired by the son without detriment to the father's estate, it cannot be regarded as self-acquisition of the son within the meaning of the definition given above and consequently cannot be exempted from partition. This argument seems to us to be untenable. Section 4 of the first chapter in Mitakshara enumerates various items of property which, according to the author, are exempt from

partition and self-acquisition is only one of them. Father's gifts constitute another item in the exemption list which is specifically mentioned in placitum 28 of the section. We agree with the view expressed in the latest edition of **Mayne's *Hindu Law*** that the father's gift being itself an exception, the provision in placitum 28 cannot be read as requiring that the gift must also be without detriment to the father's estate, for it would be a palpable contradiction to say that there could be any gift by a father out of the estate without any detriment to the estate [**Mayne's *Hindu Law***, 11th ed., para. 280, p. 344]. There is no contradiction really between placitum 1 and placitum 28 of the section. Both are separate and independent items of exempted properties, of which no partition can be made.

15. Another argument is stressed in this connection, which seems to have found favour with the learned Judges of the Patna High Court who decided the Full Bench case ***Bhagwat* v. *Mst. Kaporni*** [ILR 23 Pat 599] referred to above. It is said that the exception in regard to father's gift as laid down in placitum 28 has reference only to partition between the donee and his brothers but so far as the male issue of the donee is concerned, it still remains partible. This argument, in our opinion, is not sound. If the provision relating to self-acquisition is applicable to all partitions, whether between collaterals or between the father and his sons, there is no conceivable reason why placitum 28, which occurs in the same chapter and deals with the identical topic, should not be made applicable to all cases of partition and should be confined to collaterals alone. The reason for making this distinction is undoubtedly the theory of equal ownership between the father and the son in the ancestral property which we have discussed already and which in our opinion is not applicable to the father's gifts at all. Our conclusion, therefore, is that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.

16. As the law is accepted and well settled that a Mitakshara father has complete powers of disposition over his self-acquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. If there are express provisions to that effect either in the deed of gift or a will, no difficulty is likely to arise and the interest which the son would take in such property would depend upon the terms of the grant. If, however, there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well known canons of construction. Stress would certainly have to be laid on the substance of the disposition and not on its mere form. The material question which the court would have to decide in such cases is, whether taking the document and all the relevant facts into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition and what was given to the son was really the share of the property which would normally be allotted to him and in his branch of the family on partition? In other words, the question would be whether the grantor really wanted to make a gift of his properties or to partition the same. As it is open to the father to make a gift or partition of his

properties as he himself chooses, there is, strictly speaking, no presumption that he intended either the one or the other.

17. It is in the light of these principles that we would proceed now to examine the facts of this case. The will of his father under which Defendant 1 got the two items of Schedule B properties is Ex. P-1 and is dated 6-5-1912. The will is a simple document. It recites that the testator is aged 65 and his properties are all his own which he acquired from no nucleus of ancestral fund. He had three sons, the eldest of whom was Defendant 1. In substance what the will provides is that after his death, the A Schedule properties would go to his eldest son, the B Schedule properties to his second son and the properties described in Schedule C shall be taken by the youngest. The sons are to enjoy the properties allotted to them with *absolute rights and with powers of alienation such as gift, exchange, sale etc.* from son to grandson hereditarily. The testator, it seems had already given certain properties to the wives of his two brothers and to his own wife also. They were to enjoy these properties during the terms of their natural lives and after their death, they would vest in one or the other of his sons as indicated in the will. The D Schedule property was set apart for the marriage expenses of his third son and an unmarried daughter. Authority was given to his wife to sell this property to defray the marriage expenses with its sale proceeds.

18. It seems to us on reading the document in the light of the surrounding circumstances that the dominant intention of the testator was to make suitable provisions for those of his near relations whom he considered to have claims upon his affection and bounty. He did not want simply to make a division of his property amongst his heirs in the same way as they themselves would have done after his death, with a view to avoid disputes in the future. Had the testator contemplated a partition as is contemplated by Hindu law, he would certainly have given his wife a share equal to that of a son and a quarter share to his unmarried daughter. His brothers' wives would not then come into the picture and there could be no question of his wife being authorised to sell a property to defray the marriage expenses of his unmarried son and daughter. The testator certainly wanted to make a distribution of his properties in a way different from what would take place in case of intestacy. But what is really material for our present purpose is his intention regarding the kind of interest which his sons were to take in the properties devised to them. Here the will is perfectly explicit and it expressly vests the sons with absolute rights with full powers of alienation by way of sale, gift and exchange. There is no indication in the will that the properties bequeathed were to be held by the sons for their families or male issues and although the will mentions various other relations, no reference is made to sons' sons at all. This indicates that the testator desired that his sons should have full ownership in the properties bequeathed to them and he was content to leave entirely to his sons the care of their own families and children. That the testator did not want to confer upon the sons the same rights as they could have on intestacy is further made clear by the two subsequent revocation instruments executed by the testator. By the document Exhibit P-2 dated 26-3-1914, he revoked that portion of his will which gave the Schedule C property to his youngest son. As this son had fallen into bad company and was disobedient to his father, he revoked the bequest in his favour and gave the same properties to his other two sons, with a direction that they would pay out of it certain maintenance allowance to their youngest brother or to his family if he got married. There was a second

revocation instrument, namely, Exhibit P-3, executed on 14-4-1914, by which the earlier revocation was cancelled and the properties intended to be given to the youngest son were taken away from the two brothers and given to his son-in-law and the legatee was directed to hand them over to the third son whenever he would feel confident that the latter had reformed himself properly. In our opinion, on reading the will as a whole the conclusion becomes clear that the testator intended the legatees to take the properties in absolute right as their own self-acquisition without being fettered in any way by the rights of their sons and grandsons. In other words, he did not intend that the property should be taken by the sons as ancestral property. The result is that the appeal is allowed, the judgments and decrees of both the courts below are set aside and the plaintiff's suit is dismissed.

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Dipo v. *Wassan Singh*

(1983) 3 SCC 376 : AIR 1983 SC 846

O. CHINNAPPA REDDY, J. - Smt Dipo, plaintiff in Suit No. 8 of 1962 in the court of the Subordinate Judge 1st Class, Amritsar is the appellant in this appeal by special leave. She sued to recover possession of the properties which belonged to her brother, Bua Singh, who died in 1952. She claimed to be the nearest heir of Bua Singh. The suit was filed in forma pauperis. The suit was contested by the defendants who are the sons of Ganda Singh, paternal uncle of Bua Singh. The grounds of contest were that Smt Dipo was not the sister of Bua Singh and that even if she was the sister, the defendants were preferential heirs according to custom, as the whole of the land was ancestral in the hands of Bua Singh. The learned Subordinate Judge held that the plaintiff, Smt Dipo was the sister of Bua Singh. He found that most of the suit properties were ancestral properties in the hands of Bua Singh, while a few were not ancestral. Proceeding on the basis that according to the custom, the sister was excluded by collaterals in the case of ancestral property while she was entitled to succeed to non-ancestral property, the learned Subordinate Judge granted a decree in favour of the plaintiff for a 2959/34836 share of the plaint A schedule lands and a 13/80th share of the land described in plaint B schedule. The plaintiff preferred an appeal to the District Judge, Amritsar. The appeal was purported to be filed in forma pauperis. It was dismissed on the ground that the plaintiff did not present the appeal in person as required by Order 33, Rule 3. The defendants also preferred an appeal, but that was also dismissed. There was a second appeal to the High Court of Punjab & Haryana by the plaintiff. The second appeal was dismissed as barred by limitation. It appears that a copy of the trial court's judgment was not filed along with the memorandum of second appeal. Though the memorandum of second appeal was filed within time, the copy of the decree was filed after the expiry of the period of limitation and it was on that ground that the second appeal was dismissed.

2. We do not think that the High Court was justified in dismissing the second appeal on the ground of limitation. The defect was technical as the second appeal itself had been presented in time. It was only a copy of the trial court's judgment that was filed after the expiry of the period of limitation. The delay in filing a copy of the trial court's judgment should have been condoned and the second appeal should have been entertained and disposed of on merits. We are also satisfied that the learned District Judge was in error in dismissing the appeal on the ground that the appellant-plaintiff had not herself presented the memorandum of appeal. The appeal had been admitted by the District Judge earlier and there was no point in dismissing it thereafter on the ground that the memorandum of appeal had not been presented by the party herself. Rules of procedure are meant to advance the cause of justice and not to shortcircuit decision on merits. We have no option, but to set aside the judgments of the District Judge and the High Court. Instead of sending the case back to the District Judge for disposal on merits, we have ourselves heard the appeal on merits. The finding that Smt Dipo is the sister of Bua Singh is a concurrent finding and we accept it. We also proceed on the basis that according to the prevailing custom of the area, collaterals and not the sister are preferential heirs to ancestral property in the hands of a propositus, while the sister and not the collateral is a preferential heir in regard to non-ancestral property. We must

add here that we are not quite satisfied that the custom has been properly established, but for the purposes of the present case, we proceed on the basis that the custom has been established. But that is not the end of the problem before us. No doubt the properties which have been found by the lower courts to be ancestral properties in the hands of Bua Singh are properties which originally belonged to Bua Singh's ancestors. But Bua Singh was the last male holder of the property and he had no male issue. There was no surviving member of a joint family, be it a descendant or otherwise, who could take the property by survivorship. Property inherited from paternal ancestors is, of course, 'ancestral property' as regards the male issue of the propositus, but it is his absolute property and not ancestral property as regards other relations. In **Mulla's *Principles of Hindu Law*** (15th Edition), it is stated at page 289:

> (I)f *A* inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property *as regards his male issue*. If *A* has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. . . .
>
> A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property.

Again at page 291, it is stated:

> 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.

3. We are, therefore, of the view that the lower courts were wrong in refusing to grant a decree in favour of the plaintiff as regards property described by them as 'ancestral property'. The defendants were collaterals of Bua Singh and as regards them the property was not 'ancestral property' and hence the plaintiff was the preferential heir. The plaintiff was entitled to a decree in respect of all the plaint properties. The judgments and decrees of the learned Subordinate Judge, District Judge and High Court are set aside and there will be a decree in favour of the plaintiff for all the plaint properties.

* * * * *

Commissioner of Wealth Tax v. *Chander Sen*

(1986) 3 SCC 567 : AIR 1986 SC 1753

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 officer 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*** [(1968) 67 ITR 364 (All)] 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, Ashok Kumar*** [(1968) 67 ITR 164 (All)]. 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, p. 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 Murilidhar 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 Muril 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*** 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.

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* v. *Ram Rakshpal*** 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*** 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 stirpes 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*** [(1977) 108 ITR 417], 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*** [(1978) 114 ITR 523], 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 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*** [(1982) 138 ITR 673] 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 ***CWT* v. *Mukundgirji*** [(1983) 144 ITR 18] 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-à-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*** 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-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.

23. Before we conclude we may state that we have noted the observations of **Mulla's** "***Commentary on Hindu Law***", 15th Edn. dealing with Section 6 of the Hindu Succession Act at 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.

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M/s. Nopany Investments (P) Ltd v. *Santokh Singh (HUF)*

2007 (13) JT 448

TARUN CHATTERJEE, J. - 2. This appeal has been preferred before us, assailing the judgment and decree dated 19th of April, 2007, passed by the High Court of Delhi, whereby, the High Court had dismissed the appeal of the appellant, thereby affirming the judgments of the courts below decreeing the eviction suit filed at the instance of the respondent against the appellant.

4. On 16th of July, 1980, the appellant entered into a lease with Dr. Santokh Singh HUF for a period of 4 years, with respect to the property situated at N-112, Panchsheel Park, New Delhi ("the suit premises"), at a monthly rent of Rs. 3500/-. Accordingly, at the expiry of the aforesaid period of 4 years, a notice of eviction dated 5th of April, 1984 was issued which was followed by filing an eviction petition No. 432 of 1984 before the Additional Rent Controller by Jasraj Singh, claiming himself to be the Karta of Dr. Santokh Singh HUF. The Additional Rent Controller passed an order directing the appellant for payment of rent at the rate of Rs. 3500/-. After coming into force of Section 6A of the Delhi Rent Control Act, a notice dated 9th of January, 1992 was sent by Jasraj Singh, in the above capacity, to the appellant for enhancement of rent by 10 percent and also termination of tenancy of the appellant. In reply to this notice, the appellant denied the right of the respondent to enhance the rent. Another notice dated 31st of March 1992 was sent afresh by the respondent notifying the appellant that the rent stood enhanced by 10 percent while the tenancy stood terminated w.e.f. 16/17th of July, 1992. The aforesaid eviction petition No. 432 of 1984 was withdrawn on 20th of August, 1992 by Jasraj Singh. Thereafter, a notice dated 3rd of September, 1992 was sent by Jasraj Singh asking the appellant to vacate the suit property to which the appellant did not concede and refused to vacate the same by a reply dated 24th of September, 1992. On 6th of February, 1993, Dr. Santokh Singh HUF, through Jasraj Singh, claiming himself to be the Karta of the HUF, instituted a suit seeking eviction of the appellant from the suit premises. The trial court decreed the respondent's suit for possession, against which an appeal was preferred before the Additional District Judge, Delhi. The first appellate court dismissed the appeal summarily. Against this order of the first appellate court, a second appeal, being R.S.A. No. 146 of 2003, was preferred before the High Court of Delhi, which remanded the matter to the first appellate court for fresh consideration. In pursuance of this direction of the High Court, the first appellate court, after fresh consideration of the matter, affirmed the judgment passed by the rial court thereby dismissing the appeal of the appellant herein. Being aggrieved and dissatisfied with the order of the first appellate court, the appellant preferred a second appeal, being R.S.A. No. 209 of 2005, before the High Court of Delhi, which, however, was also dismissed. It is this decision of the High Court of Delhi, which is impugned in this appeal and in respect of which leave has already been granted.

5. The pivotal questions, inter alia, in the facts and circumstances of this case, which warrant our determination are as follows:

(i) Whether Jasraj Singh could file the suit for eviction, in the capacity of the Karta of Dr. Santokh Singh HUF, when, admittedly, an elder member of the aforesaid HUF was alive?

(ii) Whether the High Court was right in concluding that the first appellate court had duly dealt with all the issues involved and re-appreciated evidence as provided under O.41 R.31 of the Code of Civil Procedure (in short "the CPC")?

(iii) Whether the contractual tenancy between the landlord and tenant came to an end merely by filing an eviction petition and whether the landlord could seek enhancement of rent simultaneously or post termination of tenancy?

(iv) Whether the landlord could issue a notice under Section 6A of the Delhi Rent Control Act, 1958 (in short "the Act") for increase of rent without seeking leave of the rent controller during the pendency of an order under Section 15 of the Act directing the tenant to deposit rent on a month to month basis ?

6. We have heard the learned counsel for the parties. As regards the first issue, as noted hereinabove, the learned senior counsel Mr. Gupta appearing on behalf of the appellant had questioned the maintainability of the suit filed at the instance of Jasraj Singh, claiming himself to be the Karta of Dr. Santokh Singh HUF. The learned counsel Mr. Gupta strongly argued before us that in view of the settled principal of law that the junior member in a joint family cannot deal with the joint family property as Karta so long as the elder brother is available, the respondent herein, who is admittedly a junior member of the family, could not have instituted the eviction suit, claiming himself to be the Karta of the family. In support of this argument, the learned senior counsel Mr. Gupta has placed reliance on the decisions of this court in ***Sunil Kumar* v. *Ram Prakash*** [(1988) 2 SCC 77] and ***Tribhovan Das Haribhai Tamboli* v. *Gujarat Revenue Tribunal*** [(1991) 3 SCC 442]. Before we look at the views expressed by the High Court on this question, it would be pertinent to note the ratios of the two authorities cited before us. In ***Sunil Kumar* v. *Ram Prakash***, this court held as follows: -

> In a Hindu family, the Karta or Manager occupies a unique position. It is not as if anybody could become Manager of a joint Hindu family. As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property.From a reading of the aforesaid observation of this court in ***Sunil Kumar* v. *Ram Prakash***, we are unable to accept that a younger brother of a joint Hindu family would not at all be entitled to manage the joint family property as the Karta of the family. This decision only lays down a general rule that the father of a family, if alive, and in his absence the senior member of the family would be entitled to manage the joint family property. Apart from that, this decision was rendered on the question whether a suit for permanent injunction, filed by co-parcerners for restraining the Karta of a joint hindu family from alienating the joint family property in pursuance of a sale agreement with a third party, was maintainable or not. While considering that aspect of the matter, this court considered as to when could the alienation of joint family property by the Karta be permitted. Accordingly, it is difficult for us to agree with Mr. Gupta, learned senior counsel appearing for the appellant, that the decision in ***Sunil Kumar* v. *Ram Prakash*** [supra] would be applicable in the present case which, in our view, does not at all hold that when the elder member of a joint hindu family is alive, the younger

member would not at all be entitled to act as a manager or Karta of the joint family property.

In ***Tribhovandas*** case, this court held as follows:

> The managership of the joint family property goes to a person by birth and is regulated by seniority and the karta or the manager occupies a position superior to that of the other members. A junior member cannot, therefore, deal with the joint family property as manager so long as the karta is available except where the karta relinquishes his right expressly or by necessary implication or in the absence of the manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family or in the absence of the father whose whereabouts were not known or who was away in remote place due to compelling circumstances and that his return within the reasonable time was unlikely or not anticipated

From a careful reading of the observation of this court in ***Tribhovandas*** case, it would be evident that a younger member of the joint hindu family can deal with the joint family property as manager in the following circumstances:-

(i) if the senior member or the Karta is not available;

(ii) where the Karta relinquishes his right expressly or by necessary implication;

(iii) in the absence of the manager in exceptional and extra ordinary circumstances such as distress or calamity affecting the whole family and for supporting the family;

(iv) in the absence of the father: -

(a) whose whereabouts were not known or

(b) who was away in a remote place due to compelling circumstances and his return within a reasonable time was unlikely or not anticipated.

Therefore, in ***Tribhovandas*** case, it has been made clear that under the aforesaid circumstances, a junior member of the joint Hindu family can deal with the joint family property as manager or act as the Karta of the same.

7. From the above observations of this court in the aforesaid two decisions, we can come to this conclusion that it is usually the father of the family, if he is alive, and in his absence the senior member of the family, who is entitled to manage the joint family property. In order to satisfy ourselves whether the conditions enumerated in ***Tribhovandas*** case have been satisfied in the present case, we may note the findings arrived at by the High Court, which are as follows: -

(i) Jasraj Singh, in his cross examination before the trial court had explained that his eldest brother Dhuman Raj Singh (supposed to be the Karta of the HUF) has been living in United Kingdom for a long time. Therefore, the trial court had rightly presumed that Dhuman Raj Singh was not in a position to discharge his duties as Karta of the HUF, due to his absence from the country.

(ii) The respondent produced the xerox copy of the power of attorney given by Dhuman Raj Singh to Jasraj Singh.

(iii) The trial court relied upon the law discussed in the books namely, "***Principles of Hindu Law***" by Mulla and Mulla and "**Shri S.V. Gupta on *Hindu Law***", wherein it has been observed that ordinarily, the right to act as the Karta of HUF is vested in the senior-most male member but in his absence, the junior members can also act as Karta.

(iv) There was no protest by any member of the joint Hindu family to the filing of the suit by Jasraj Singh claiming himself to be the Karta of the HUF. There was also no whisper or protest by Dhuman Raj Singh against the acting of Jasraj Singh as the Karta of the HUF. It may also be noted that the High Court relied on the decision of this court in ***Narendrakumar J. Modi* v. *Commissioner of Income Tax, Gujarat II, Ahmedabad*** [(AIR) 1976 SC 1953], wherein it was held that so long as the members of a family remain undivided, the senior member of the family is entitled to manage the family properties and is presumed to be manager until contrary is shown, but the senior member may give up his right of management, and a junior member may be appointed manager. Another decision in ***Mohinder Prasad Jain* v. *Manohar Lal Jain*** [2006 II AD (SC) 520], was also relied upon by the High Court wherein it has been held at paragraph 10 as follows:

> 10. A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceeding before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event, a co-owner objects thereto, the same may be a relevant fact.

In the instant case, nothing has been brought on record to show that the co-owners of the respondent had objected to eviction proceedings initiated by the respondent herein.Having relied on the aforesaid decisions of this Court and a catena of other decisions and the findings arrived at by it, as noted hereinabove, the High Court rejected the argument of the appellant that Jasraj Singh could not have acted as the Karta of the family as his elder brother, namely, Dhuman Raj Singh, being the senior most member of the HUF, was alive. In view of our discussions made herein earlier and considering the principles laid down in ***Tribhovandas*** case and ***Sunil Kumar*** case, we neither find any infirmity nor do we find any reason to differ with the findings arrived at by the High Court in the impugned judgment. It is true that in view of the decisions of this court in ***Sunil Kumar's*** case and ***Tribhovandas*** case, it is only in exceptional circumstances, as noted herein earlier, that a junior member can act as the Karta of the family. But we venture to mention here that Dhuman Raj Singh, the senior member of the HUF, admittedly, has been staying permanently in the United Kingdom for a long time. In ***Tribhovandas*** case itself, it was held that if the Karta of the HUF was away in a remote place, (in this case in a foreign country) and his return within a reasonable time was unlikely, a junior member could act as the Karta of the family. In the present case, the elder brother Dhuman Raj Singh, who is permanently staying in United Kingdom was/is not in a position to handle the joint family property for which reason he has himself executed a power of attorney in favour of Jasraj Singh. Furthermore, there has been no protest, either by Dhuman Raj Singh or by any member of the HUF to the filing of the suit by Jasraj Singh. That apart, in our view, it would not be open to the tenant to raise the question of maintainability of the suit at the instance of Jasraj Singh as we find from the record that Jasraj Singh has all along been

realizing the rent from the tenant and for this reason, the tenant is now estopped from raising any such question. In view of the discussions made herein above, we are, therefore, of the view that the High Court was fully justified in holding that the suit was maintainable at the instance of Jasraj Singh, claiming himself to be the Karta of the HUF.

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Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree*

(1854-1857) 6 Moore's Ind. App. 393 (PC)

This was an appeal from a decree of the Sudder Dewanny Court of Agra, which reversed the judgment of the Principal Sudder Ameen of the District of Goruckpore, pronounced in favour of the Appellant, in a suit which was brought by Lal Inderdowun Singh, since deceased, and now represented by the Respondent, his son, against the Appellant, the chief Defendant, and *Ranee Degumber Koonweree*.

The object of the suit was, first, to recover possession of certain ancestral estates called Daree Deha, Mohundur, & c. situate in the Pergunnah Nugger Bustee, in the District of Goruckpore, with mesne profits and interest; and, secondly, to set aside a mortgage Bond, dated Assar Soodee Poornumashee, Fuslee (July, 1839), and to cancel the Appellant's name as mortgagee in the Collector's records.

The circumstances under which the suit arose were these:-

The Appellant, a Banker, carrying on business in the District of Goruckpore, was in the habit of making advances and loans to the neighbouring landholders. His father, Buccus Panday, before him, had been engaged in the same business, and in the course of the latter's transactions he had advanced the sum of Rs. 8,002, to Raja Tobraj Singh, the paternal ancestor of Lal Seetla Buksh Bahadur Singh, of whom the Respondent was guardian. On the occasion of this advance, Raja Tobraj Singh executed several deeds, conveying certain villages, part of his estate, by way of usufruct mortgage, to the Appellant's father. In 1235 Falguni Samvat (F.S.), Fuslee, after the death of Raja Tobraj Singh, an adjustment of accounts took place between Appellant's father and Raja Sheobuksh Singh, the son and heir of Raja Tobraj Singh, when a balance of Rs. 5,252, as against Raja Sheobuksh Singh, was agreed on. For this sum Bonds were given and certain lands and villages were assigned to Appellant's father by Raja Sheobuksh Singh by way of usufruct mortgage. Raja Sheobuksh Singh died shortly after this transaction, leaving an only son, Lal Inderdowun Singh, an infant, whereupon his widow, Ranee Degumber Koonweree, assumed the proprietorship of the estates of her late husband, and the guardianship of his infant son. Her name was registered with that of Lal Inderdowun Singh, the infant, on the records, until he attained his majority, when a deed of gift having been executed by the Ranee in his favour, her name was removed from the Government register of landowners by a petition for mutation in the ordinary way. In 1239, Fuslee, after the death of Raja Sheobuksh Singh, another adjustment of accounts took place between the Appellant (who had in the meantime succeeded to the business and property of his father, then deceased) and Ranee Degumber Koonweree, as the representative of her husband, in which a balance of Rs. 3,200 was agreed to be debited to the Ranee. In the same year, the family estates being in arrear of the revenue payable to Government, and in danger of sequestration by reason of such arrear, the Appellant, under authority of an order from Ranee Degumber Koonweree, paid into the local Collectorate, to the account of such arrears, Rs. 3,000, for which sum the Ranee afterwards executed three several Bonds, of Rs. 1,000 each, and bearing date respectively Phagoon Soodee Poornumashee F. S. 1243, Assar Soodee Poornumashee F. S. 1243, and Katikbudee Poornumashee F. S. 1244. Previous to executing the abovementioned Bonds, the Ranee had, in consideration of Rs. 1,200 part of the

balance before found to be due to the Appellant, and of a further loan of Rs. 600 from Goordial Panday (which was afterwards repaid by the Appellant), executed to the Appellant and Goordial Panday a Bond and deed of mortgage, conveying to them the Mouzas Mohunder and Dee Mar in usufruct, granting at the same time a lease of the same to him for the whole term of the mortgage. In the month Sawun, in the same year, the Ranee executed a mortgage to the Appellants, charging 200 beegahs of land lying in Bundeheree, in consideration of Rs. 1,000 part of the balance of Rs. 2,000, then remaining unsecured. In F. S. 1244, the Appellant, having paid off certain incumbrances of the amount of Rs. 4,000, which the Ranee had previously effected on the lands of the Raj, received from her a Deed dated Teyt Soodee Poornumashee F. S. 1244, conveying to him in usufructuary mortgage the villages Dee Mar, Daree Deha, and Mohunder, also a pottah for the same, bearing the same date; the consideration for the whole being Rs. 5,000 of which sum Rs. 1,000 was the balance due on the original account, and Rs. 4,000 the amount of incumbrance paid off by the Appellant. In F. S. 1246 a final adjustment of accounts took place between the Appellant and Ranee Degumber Koonweree, in which the items stood as follows: - Monies paid by Appellant to Tahsildah on account of Government revenue due from the Raj, Rs. 5,186; amount of monies secured by mortgage of Mohunder, Daree Deha, and lands in Dee Mar, Rs.. 5,000; amount secured by mortgage of Bundeheree, Rs. 1,000; amount secured by three several Bonds of Ranee Degumber Koonweree for Rs. 1,000 each, Rs. 3,000; amount due, being balance of Rs. 1,500 secured by Bond, Rs. 814; making in the whole, Rs. 15,000. On this balance having been ascertained, the Ranee and Lal Inderdowun Singh, then a minor, by a mortgage Bond, dated Assar Soodee Poornumashee F.S. 1246, conveyed to the Appellant in usufructuary mortgage Daree Deha, Dee Mar, Bundeheree, Raja baree, Mohunder, and Gundherea Faiz, which transaction formed the subject of the present suit. In this Bond the Ranee was described as being possessed of the mortgaged property in proprietary right.

Apart from these transactions of loan and mortage, Raja Sheobuksh Singh granted to the Appellant in Birt some thirty beegahs of waste land lying in Bundeheree, in consequence of which grant Appellant expended much money in reclaiming the waste, erecting buildings, and otherwise improving the land. Ranee Degumber Koonweree afterwards, finding that Appellant possessed no evidence of his Birt title, compelled him to pay Rs. 500 for a Birt puttee, which she executed. Besides this portion of Birt lands the Appellant had purchased three and a half beegahs, lying in Dee Mar, from Gosain Musan Nath Fakir, to whom they had been granted for religious services by Raja Pirthee Pal Singh, the ancestor of the original Plaintiff.

On the 10th December, 1849, Lal Inderdowun Singh, having then attained his majority, filed a plaint in the Zillah Court of the Principal Sudder Ameen of Goruckpore against the Appellant and Ranee Degumber Koonweree, for the possession of Zemindary right, unincumbered by Birt, of Daree Deha, Mohunder, Gundherea Faiz and of certain lands lying in Bundeheree, Dee Mar, and Rajabaree; also to set aside the mortgage Bond before mentioned, bearing date Assar Soodee Poornumashee F. S. 1246, and to oust the Appellant. The plaint alleged that Ranee Degumber Koonweree had acted as the guardian of the Plaintiff and managed his affairs for him during his minority; that she being a Purdah Nasheen and totally ignorant of matters of business, and been imposed on and deceived by her servants and

agents, who had, without her knowledge or authority, made contracts of loan and mortgage with divers parties, and effected encumbrances on the Plaintiff's property; that the Appellant, among others, had by collusion and fraud obtained from them, under pretence of mortgage, the possession of certain lands and villages; that the villages and lands so unlawfully possessed by the Appellant were component parts of Plaintiff's ancestral Raj, and inalienable by the act of a guardian.

The answer of the Appellant set forth the circumstances above stated under which the debts were contracted and the mortgage Bonds executed, and traversed the allegations respecting the Ranee's ignorance of matters of business and the Appellant's collusion with the Ranee's agents; and alleged that the Plaintiff, in F. S. 1255, after he had attained majority, had personally acknowledged the validity of the mortgage Bond and the debt due under it; that the Appellant in expressing a desire to redeem Gundherea Faiz and Baree (which second village was not included in the suit), had proposed to execute a fresh mortgage of Mohunder, Daree Deha, and the lands in Bundeheree, De Mar and Rajabaree, and that the Plaintiff, since attaining majority, had borrowed money on Bond from the Appellant, and the Appellant by his answer finally insisted that the amount of mesne profits was greatly exaggerated.

The answer of the Ranee Degumber Koonweree averred ignorance of the matters in issue, asserting that the Appellant had been for some time employed by her in the capacity of Manager.

Lal Inderdowun Singh having died, Mussumat Babooee Munraj Koonweree, the Respondent, was admitted by the Court to prosecute the suit as guardian of Lal Seetla Buksh Bahadur singh, the infant son and heir of Lal Inderdowun Singh.

By a proceeding of the Principal Sudder Ameen of Goruckpore, had on the 3rd of April, 1850, the issues to be disposed of were settled. The first was upon a point of practice arising out of and alleged irregularity of the replication; the second was, whether the mortgage Bond was the act and deed of Ranee Degumber Koonweree; and whether it ought to have effect against the mortgaged villages; also if the mesne profits, as stated, were correct.

Evidence was entered into on both sides, the effect of which is contained in the Sudder Ameen's judgment.

On the 23rd of December, 1850, the suit was heard by the Principal Sudder Ameen, who by his judgment and decree dismissed the suit. The material part of his judgment was as follows:-

> My opinion on the second point is this - That the mortgage Bond was written, and that it exists at this time, neither of the parties in their pleadings call it into question; for the witnesses on both sides depose that it was executed on the part of Ranee Degumber Koonweree and Lal Inderdowun Singh. The only dispute is, that the Plaintiff avers it was made without the knowledge of Ranee Degumber Koonweree, the second-named Defendant; while the first-named Defendant declares that Ranee Degumber Koonweree was cognizant of its execution. My opinion is, that the Plaintiff's plea of the Bond having been made without the knowledge of Ranee Degumber Koonweree, the second-named Defendant, is opposed to facts, and on several grounds inadmissible. First; several witnesses, among whom are some who attested the Bond, others who were precipient

witnesses of the transaction, have deposed on both sides, especially some who are the servants, dependants, and Malgoozars of the Raja, have deposed to the fact. It is, therefore, impossible that so many persons should be aware of the transaction, and yet the Ranee and Raja remain in ignorance, as stated by the Plaintiff's witnesses. Secondly; had this Bond, by which certain property was mortgaged, been made without the Ranee's knowledge, seeing that she was the Manager of the Raj, the Defendant would not have been able to get possession of the property mortgaged by the Bond; for when the Defendant attempted to take possession he would have been opposed by the Ranee. Thirdly; that at the settlement the Defendant's name would not have been recorded as mortgagee. Fourthly; assuming the Plaintiff's statement to the effect that the Karindas colluded with the Defendant, and executed the Bond as he dictated, and that they moreover filed a petition admitting the mortgage in the settlement, it is obvious that there was nothing to prevent the Defendant, in collusion with the Karindas, from fabricating a deed of sale conveying the disputed property to him: he would not, seeing that he had such great influence, have been content with the mortgage Bond. Hence it is clear to me that Ranee Degumber Koonweree, being in want, and also wishing to satisfy former debts in order to preserve the estates in her hands, mortgaged the estates in order to pay the debts and put the Defendant in possession; otherwise it is not possible to credit, that in the face of such dishonesty on the part of the Karindas, she should refrain from complaining in the Courts, and preventing Defendant from entering upon the estates; for her experience and sagacity are demonstrated by the fact that she has saved the estates of the Raj, and has continued to manage them herself to the present time. Fifthly; were the plea of the Plaintiff to the effect that the Karindas were ungrateful and dishonest, they would not have given their evidence in favour of the Ranee as supporting her statement : they would unequivocally have declared that the Bond was made with the knowledge and sanction of the Ranee. These witnesses, after the lapse of so long a period, not having the fear of eternity before their eyes, depose that they acted under the tutorage of Defendant, and did not acquaint the Plaintiff with the transaction. Then what more is required to prove their attachment and subservience to the Ranee? Indeed, from the fact that the Defendant has been in that possession, the settlement was concluded with him, that Ranee Degumber Koonweree and Lal Inderdowun Singh, deceased, remained silent for so long a period, it is clearly inferred that the statement of the Defendant and his witnesses is true. On these grounds my opinion is, that there can be no doubt that the Bond was made with the knowledge of Ranee Degumber Koonweree, the Manager of the Raj, and that the statement of Plaintiff and of her witnesses is made with dishonest intentions. Several witnesses have been adduced on the part of the Plaintiff, who state that Ranee Degumber Koonweree and her predecessors had no occasion to borrow money. This assertion is sufficiently rebutted by the exhibits filed on the part of the first-named Defendant. It is opposed to commonsense to suppose that although the Raj was to be maintained and that the expenses of the Rajas were gerat, and moreover that a woman was the manager, that there should have been no occasion to borrow money. Indeed, copies of papers obtained from the office of Registrar of Deeds, and more especially the decree of the Moonsiff of Captain Gunj, dated 21st of September, 1847, is conclusive evidence to prove the Plaintiff's statement to be false. The second point remains to be

considered, namely, whether the mortgage pleaded by Defendant is valid and of effect touching the village in dispute. The record shows that Ranee Degumber Koonweree was the manager of the Raj during the infancy of Lal Inderdowun Singh, and that all her acts and deeds are recognised in the Revenue Department and in the Special Commission. During her management, with the object of saving the estates, of paying the debts of her predecessors, and of satisfying the claims of Mahajuns, the mortgage Bond was executed. Seeing, moreover, that the settlement was also made with the Defendant by the Settlement Officer, that a Bond of this nature does not extinguish the title of the infant, it follows then, as a matter of justice and equity, that the Bond is valid and of effect. For if it be held to be invalid, two difficulties will arise - First, that when the Raj is under the management and guardianship of a person, should necessity arise to take money on loan in order to pay the Government Malgoozaree and to pay other necessary expenses of the Raj, no person will be willing to lend the money, and the loss of the estates will be the consequence. Secondly, should any person, on the faith of the Raj, and satisfied that there are assets sufficient to liquidate his loan, advance money to the manager of the Raj, and save the Raj from being lost, and subsequently, should this fact be proved, and on the suit of the proprietor, on his attaining his majority, he should be able to repudiate the loan, it would be gross injustice. There next remains to consider the fact that the name of Lal Inderdowun Singh is associated with that of Ranee Degumber Koonweree in the mortgage Bond. I remark that this is not a suit brought by the Defendant, consequently this point need not be tried and disposed of, since in my opinion the claim must be dismissed; and precedents adduced by the Plaintiff do not apply to this case : on the contrary, it is a legitimate inference that these precedents support my view of the case. Finally, since the Plaintiff's claim is dismissed by me, there remains no necessity for an inquiry into the matter of mesne profits. On the ground above stated, it is ordered, that the Plaintiff's claim be dismissed, with costs.

From this Judgment the Respondent appealed to the Sudder Dewanny Adawlut at Agra. The principal grounds of appeal were, that Lal Inderdowun Singh, at the time the Bond was made, was a mere child, that the Ranee was not designated as guardian in the Bond, but as proprietor, and that the Bond, therefore, was totally invalid, since, under the Ragulations, or the Hindoo law, a deed made by an infant could have no effect or force; that even admitting the Bond to be genuine, Ranee Degumber Koonweree was not competent by the Hindoo law to make such a Bond; that under the law of the Shastras, the son of the deceased living, the Ranee Degumber Koonweree could have no personal title to the property; but as the son was an infant she was competent to act as guardian; but as such she was not competent to make such a transfer of the property as had been made; and, lastly, that the Ranee was not cognizant of the Bond being executed or of the transaction.

The appeal, which was referred to the full Court, came on for herring on the 22nd of January, 1852, when the Messrs. Begbie, Deane, and Brown, the Judges of the Sudder Dewanny Court, by their judgment, held, that the question which the Court had to deal with, related to the right of the Ranee to execute the deed before them. They remarked that the deed itself assigned to the Ranee a proprietary character, and that it was not among the Defendant's pleas that the Ranee acted as her son's guardian, but that he claimed for her the proprietary

character both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. That the Plaintiff, on the other hand, had, throughout, argued for the avoidance of the Bond by denying the Ranee's proprietary right in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the Plaintiff, to the exclusion of the Ranee on the death of the Plaintiff's father, Raja Sheobuksh Singh, had no hesitation in declaring that even on the assumption that the Ranee voluntarily executed the Bond and received full consideration for it, the Bond was not binding on the Plaintiff, and that neither he nor his ancestral property could be made liable in satisfaction of it. That it was needless for the Court, their inquiries being thus stopped in limine, to enter on the real merits of the transaction as between the Ranee and Hunoomanpersaud Panday; but that a final judgment could not then be pronounced, the amount of the waisilat (mesne profits) being disputed, and no investigation on that point having been made by the Court below. The Court, therefore, decreed to the Plaintiff, in alteration of the Principal Sudder Ameen's Judgment, so much of his claim as related to the avoidance of the Bond, and remitted the suit, with directions, to the Principal Sudder Ameen, that he determine what amount of mesne profits from the date from which they were claimed the Plaintiff was entitled to recover. It was ordered, therefore, ''that the judgment of the Principal Sudder Ameen of Goruckpore, dated 23rd of December, 1850, be amended; that the Bond set up by the Defendant be set aside; and that a decree do pass in favour of Plaintiff, and that the costs be awarded in the decree to the extent of the jumma of the property claimed."

Against this decree the present appeal was brought.

The principal points submitted to the court in the argument, were:-

First. As to the validity of the mortgage Bond, whether it was executed by the Ranee at all, and further, as the Bond purported to be executed by her in a beneficial character, if it constituted a valid encumbrance on the Raj.

Second. Whether the incumbrance created by Raja Sheobuksh Singh entitled the Appellant to retain possession of the villages and lands in the mortgage Bond executed by him until such incumbrance was paid off, or whether it was a personal charge only on the heir; and the Appellant had not a right to stand in the place of the Ranee in respect of the monies he had advanced.

Third. Whether it was competent by the Hindoo law to the Ranee, as the registered proprietor of the family estate and curator of the infant's property, to charge ancestral estates by way of mortgage, in consideration of the advances made for the benefit of the minor's estate, to prevent a sequestration and probable confiscation.

Fourth. Whether after the Factum of the mortgage Bond was establised, and proof of the advances made, the presumption of law was not in favour of the charge, and the onus probandi was not upon the heir to disprove the necessity of the advances.

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE – The complainant in the original suit, was Lal Inderdowun Singh, described in the plaint as proprietor of the Raj of Pergunnah Munsoor Nuggur Bustee. The suit was against the present Appellant, the chief

Defendant, and Ranee Degumber Koonweree, the second Defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immovable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage Bond bearing date Assar Soodee Poorunmashee, 1246 Fuslee, set up by the Appellant; to oust the Appellant, to cancel the name of the Appellant as mortagagee in the Collector's records, and to recover mesne profits.

To this suit the Defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the Defendant alleged his title as mortgagee (except as to some Birt lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the Defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state, that in the result the Sudder Ameen decided in favour of the security, and dismissed the claim generally, but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned.

The reasons for the decision of the appellate Court are contained in their judgment. The Court says, "The Question with which the Court have first to deal, respects the right of the Ranee to execute the instrument before them." They then remark, "that the Bond itself assigns to the Ranee a proprietary character, and that it was not amongst the Defendant's pleas that the Ranee acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The Plaintiff, on the other hand, has throughout argued for the avoidance of the Bond, by denying the Ranee's proprietary title in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the Plaintiff, to the exclusion of the Ranee, on the death of the Plaintiff's father, Raja Sheobuksh Singh, have no hesitation in declaring that, even on the assumption that the Ranee voluntarily executed the Bond, and received full consideration for it, the Bond is not binding on the Plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their inquiries being thus stopped in limine, to enter on the real merits of the transaction as between the Ranee and Hunoomanpersaud Panday."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship to the further consideration whether the Appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in whole or in part, as a charge effected by a de facto Manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view:

First: Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly. Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? And,

Thirdly. Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted?

On the first point their Lordships think it right to observe, that it is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for the decision of the real points in dispute.

But their Lordship think that if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal Sudder Ameen states the issue on this point are: ''whether it (the mortgage Bond) ought to have effect against the mortgaged villages.'' It was not an issue limited to the particular description or character in which this act was done, and a misdescription or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the Sudder Dewanny Adawlut, upon the first point, that the real question in dispute between these parties, namely, whether the charge bound the lands in the hands of the heir, was not substantially included in the issues, which were evidently intended to raise it. Neither can their Lordships adopt the reasoning nor the conclusion of the Sudder Dewanny Adawlut, upon the second point, as to the relation in which the Ranee meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the Ranee, which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, pro tanto, a claim adverse to her son; and it is conceded by the Respondent's counsel that she did not claim adversely to her son. The terms of ''proprietor'' and of ''heir'' when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as a Manager, inaccurately and erroneously described as ''Proprietor,'' or ''heir"; and it is to be observed, that the Collector

takes this view, for, whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as ‘‘Surberakar.’’ If the whole context of all these documents and pleadings be taken into consideration and the construction proceed on every part, and not on portions of them, they are sufficient, in their Lordship’s judgment, to show the real character of her proprietorship.

Upon the third point, it is to be observed that under the Hindoo law, the right of a bonafide incumbrancer who has taken from a de facto Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto, with the de jure title. Therefore, had the Ranee intruded into the estate wrongfully, and even practiced a deception upon the Court of Wards, or the Collector, exercising the powers of the Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the warship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then to the Ranee’s assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently, even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee’s act, as not having been done by her as guaradian, been correct, their decision against the charge without further inquiry would not have been well-founded. It would not have been accordant with the principles of the Hindoo law, as declared in Coleb. Dig., vol. I., p. 302, and in the case of ***Gopee Churun Burral* v. *Mussusmmaut Ishwaree Lukhee Dibia***, [(3, Sub. Dew. Adaw. Rep. 93)], and as illustrated by the case cited for the Appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say, that they see any ground of probability for the assertion, that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this Raj cannot readily be supposed to have been unknown in the Collector’s office, nor is it probable that the Ranee could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence discloses, as it is contended for the Respondent that it does disclose, no prima facie case of charge at all on this ancestral estate, then, as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which

lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief, is made out; but if, on the other hand, the evidence discloses even a prima facie case of charge, some inquiry at least ought, as it seems to their Lordships, to have been directed.

The question next to be considered is, whether a prima facie case of a subsisting charge is made out by the Appellant. The Question involves the consideration of two points: first, the actual factum of the deed; and next the consideration for it.

First, as to the factum the execution of the Bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on behalf of the Respondent, that the Court ought not to act on their evidence. Some discrepancies, such, however, as are not unfrequently found in honest cases in native testimony—were dwelt upon. The Sudder Ameen, who decided this case originally, has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the Bond is the deed of the Ranee. The decision by a native Judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this Bond and that the mortgage was inscribed in that character as proprietor on the records of the Collector. He was, therefore, put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further, that his receipt of the rents and profits of the lands included in this conveyance would □ipher□h, pro tanto, the annual income of the estate, which would come to be administered by the Ranee and that this state of things continued for several years after the execution of the Bond. The Ranee's ignorance, then, of such title, possession, receipt, and diminution, is as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition - that the Ranee was a mere □ipher, and entirely ignorant of that which was done in her name. This however, does not appear to have been the case; she herself denied it on a subsequent contest as to the managership; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect and mismanagement, which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranee's allegations of her own competency; that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the Sudder Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranee's execution of the deed. The story of her non-exeution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the Respondent give as to the factum of the instrument. The story told by the witnesses, Heera Lal and Gyapershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the Respondent, this Bond was fraudulently executed in the name of the Ranee, without her sanction or knowledge, in order to fix a false charge of Rs. 15,000 in the Defendant's favour, on the property of the infant Raja. The Defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses, who give nearly verbatim the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet such is at once the impatience and the folly of these conspiring parties, that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy; and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment are both without motive according to the account which is given to us. And the story of this utterly needless communication of his crime, is told of a man used to business, intelligent, and described by the Respondents as the habitual accomplice of crafty and designing men, the *karindas,* in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the *Sudder Ameen* as to it.

Next, as to the consideration for the Bond. The argument for the Appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewanny Adawlut at Agra, in the case of ***Oomed Rai* v. *Heera Lall*** [(6 Sud. Dew. N. W. P. 218)], was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career; would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this dictum may perhaps

be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the dictum does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances; and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title, to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the Manager accompanying the loan as part of the *res gesta*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such prima facie proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's "Digest", seems the foundation of this practice. (See also the case of ***Brown* v. *Ram Kunaee Dutt***, 11 Sud. Dew. Adaw. Rep. 791).

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the Appellant would be reasonable. The case before their Lordships is one of mixed character; the existing security represents loans and transactions at various times and under varying circumstances: it is a consolidating security; and as to part, at least - namely, the ancestral debt - there is, in the opinion of their Lordships, ground to raise a prima facie presumption in the Appellant's favour of a consideration that binds the estate. It is unnecessary to the decision to pursue the inquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least prima facie proved as against the estate. And, as to the whole charge, there is also at least prima facie evidence in the admissions of the Plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not, according to the law current in the North-Western Provinces, be charged, in the hands of the heir, for an ancestor's debt. But it is to be observed as to the change of security, that there was a reduction of interest; it is, therefore, a transaction, prima facie, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the Decisions of the Sudder Dewanny Adawlut, North-Western

Provinces, incidentally show,. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a prima facie case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether, in taking the account between these parties, the Defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the *pottah*. It is said for the Appellant, the *Sudder Dewanny Adawlut* did not set aside the *pottah*. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage Bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation such as this *pottah* evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage security, and forfeiting the claim of the mortgagee to his principal and interest : but Mr. Palmer contends that where there is no such evasion, and a bonafide and fair rent is fixed upon as representing communibes annis, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of ***Roy Fuswunt Lall* v. *Sreekishen Lall***, reported in the decisions of the Sud. Dew. Adaw, in 1852, vol. 14. p. 577, the Court seems to have thought that where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken but it appears from that case, that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further inquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bonafide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own erring, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted malafide, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bonafide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms:-

“Their Lordships are of opinion that the *Ranee* ought to be deemed to have executed the mortgage Bond, dated *Assar Soodee Poornumashee*, in the pleadings mentioned, as and in the character of guardian of the infant *Lal Inderdowun Singh*.

“And their Lordships are of opinion that the validity, force, and effect of the Bond, as to all and each of the sums, of which the sum of Rs. 15,000 thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the Appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

“And their Lordships are also of opinion that, assuming the Bond to be invalid and ineffectual, the Appellant would, nevertheless, be entitle to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the Bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

"And their Lordships, therefore, are of opinion that the decrees of the *Zillah* and *Sudder* Courts respectively ought to be reversed, and the cause remitted to the *Sudder* Court, with directions that inquiry be made into the several matters aforesaid, and that all such accounts be taken and such other inquiries made as having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the *Sudder* Court do proceed therein as may be just, both with respect to the said mortgage Bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the *Sudder Court*."

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Sunil Kumar v. *Ram Parkash*

(1988) 2 SCC 77

RAY, J. - The defendant-Respondent 1, Ram Parkash as Karta of Joint Hindu family executed on February 7, 1978 an agreement to sell the suit property bearing M. C. K. No. 238/9, in Mohalla Qanungaon at Kaithal for a consideration of Rs 21,400 and he received a sum of Rs 5000 as earnest money. As Respondent 1 refused to execute the sale deed, Defendant 2, Jai Bhagwan instituted a Suit No. 570 of 1978 in the court of Sub-Judge, First Class, Kaithal for specific performance of the agreement to sell and in the alter native for a decree for recovery of Rs 10,000. In the said suit Appellants 1 and 2 and Respondent 11 who are the sons of defendant-Respondent 1 made an application for being impleaded. This application, however, was dismissed. Thereafter the three sons of Defendant 1 as plaintiffs instituted Civil Suit No. 31 of 1982 in the court of Sub-Judge, Second Class, Kaithal for permanent injunction stating inter alia that the said property was joint Hindu family coparcenary property of the plaintiffs and Defendant 1; that there was no legal necessity for sale of the property nor it was an act of good management to sell the same to Defendant 2 without the consent of the plaintiffs and without any legal necessity. It was, therefore, prayed that a decree for permanent injunction be passed in favour of the plaintiffs and against Defendant 1 restraining him from selling or alienating the property to Defendant 2 or to any other person and also restraining Defendant 2 from proceeding with the suit for specific performance pending in the civil court.

2. Defendant 2, Jai Bhagwan since deceased, filed a written statement stating inter alia that Defendant 1 disclosed that the suit property was owned by him and that he was in need of money for meeting the expenses of the family including the education expenses of the children and also for the marriage of his daughters. It has also been pleaded that the house in question fetched a very low income from rent and as such Defendant 1 who has been residing in Delhi, did not think it profitable to keep the house. It has also been stated that the suit was not maintainable in law and the injunction as prayed for could not be granted.

3. The trial court after hearing the parties and considering the evidences on record held that the house property in question was the ancestral property of the joint Hindu Mitakshara family and Defendant 1 who is the father of the plaintiffs was not competent to sell the same except for legal necessity or for the benefit of the estate. Since the plaintiffs' application for impleading them as party in the suit for specific performance of contract of sale, was dismissed the filing of the present suit was the only remedy available to the plaintiffs. The plaintiffs being coparceners having interest in the property, the suit in the present form is maintainable. The trial court further held that:

> It is well-settled law that karta of the joint Hindu family cannot alienate the coparcenary property without legal necessity and coparcener has right to restrain the karta from alienating the coparcenary property if the sale is without legal necessity and is not for the benefit of the estate. This view of mine is supported by case title ***Shiv Kumar* v. *Mool Chand*** [AIR 1972 P & H 147] thus, the proposed sale is without any legal necessity and is not for the benefit of the estate, therefore the suit of the plaintiff is decreed with no orders as to costs.

4. Against this judgment and decree the defendants, the legal representatives of the deceased Defendant 2, preferred an appeal being Civil Appeal No. 199/13 of 1984. The lower appellate court following the decision in ***Jujhar Singh* v. *Giani Talok Singh*** [AIR 1987 P&H 34] held that a coparcener has no right to maintain a suit for permanent injunction restraining the Manager or karta from alienating the coparcenary property and the coparcener has the right only to challenge the alienation of the coparcenary property and recover back the property after alienation has come into being. The court of appeal below further held:

> That Ram Parkash, father of the plaintiffs and karta of the joint coparcenary property cannot be restrained by way of injunction from alienating the coparcenary property to Defendant 2. In consequent the appeal is accepted and the judgment and decree of the trial court under attack are set aside.

5. Against this judgment and decree, the instant appeal on special leave has been preferred by the appellants i.e. the sons of defendant-Respondent 1, the karta of the joint Hindu family.

6. In this appeal we are called upon to decide the only question whether a suit for permanent injunction restraining the karta of the joint Hindu family from alienating the house property belonging to the joint Hindu family in pursuance of the agreement to sell executed already in favour of the predecessor of the appellants, Jai Bhagwan, since deceased, is maintainable. It is well settled that in a joint Hindu Mitakshara family, a son acquires by birth an interest equal to that of the father in ancestral property. The father by reason of his paternal relation and his position as the head of the family is its Manager and he is entitled to alienate joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt. The power of the Manager of a joint Hindu family to alienate a joint Hindu family property is analogous to that of a Manager for an infant heir as observed by the Judicial Committee in ***Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*** [(1856) 6 Moo IA 393]:

> The power of a Manager for an infant heir to charge ancestral estate by loan or mortgage, is, by the Hindu Law, a limited and qualified power, which can only be exercised rightly by the Manager in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner would make in order to benefit the estate, a bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, or the criteria to be regarded. If that danger arises from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his favour against the heir, grounded on a necessity which his own wrong has helped to cause.
>
> A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly, the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money.

7. At the outset it is to be noticed that in a suit for permanent injunction under Section 38 of the Specific Relief Act by a coparcener against the father or Manager of the joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property. Sub-section (*h*) of Section 41 of Specific Relief Act bars the grant of such an injunction in the suit. Secondly, the plaintiff-respondents brought this suit for permanent injunction restraining their father, Defendant 1, from selling or alienating the property to Defendant 2 or any other person and also restraining Defendant 2 from proceeding with the suit for specific performance of the agreement to sell pending in the civil court. Thus the relief sought for is to restrain by permanent injunction the karta of the joint Hindu Mitakshara family i.e. Defendant 1 from selling or alienating the house property in question. Defendant 1 as karta of the joint Hindu family has undoubtedly, the power to alienate the joint family property for legal necessity or for the benefit of the estate as well as for meeting antecedent debts. The grant of such a relief will have the effect of preventing the father permanently from selling or transferring the suit property belonging to the joint Hindu Undivided Family even if there is a genuine legal necessity for such transfer. If such a suit for injunction is held maintainable the effect will be that whenever the father as karta of the joint Hindu coparcenary property will propose to sell such property owing to a bona fide legal necessity, any coparcener may come up with such a suit for permanent injunction and the father will not be able to sell the property for legal necessity until and unless that suit is decided.

8. The judgment in ***Shiv Kumar Mool Chand Arora*** **v.** ***Mool Chand Jaswant Ram Arora*** wherein it was held that a suit for permanent injunction against the father to restrain him from alienating the joint Hindu family property was maintainable has been offset by the Division Bench in ***Jujhar Singh*** **v.** ***Giani Talok Singh*** wherein it has been held that a suit for permanent injunction by a coparcener against the father for restraining him from alienating the house property belonging to the joint Hindu family for legal necessity was not maintainable because the coparcener had got the remedy of challenging the sale and getting it set aside in a suit subsequent to the completion of the sale. Following this decision the High Court allowed the appeal holding that the suit was not maintainable reversing the judgment and decree of the trial court. We do not find any infirmity in the findings arrived at by the High Court.

9. It has, however, been submitted on behalf of the appellant that the High Court should have held that in appropriate cases where there are acts of waste, a suit for permanent injunction may be brought against the karta of the joint Hindu family to restrain him from alienating the property of the joint Hindu family. This question is not required to be considered as we have already held that the instant suit for injunction as framed is not maintainable. We, of course, make it clear that in case of waste or ouster an injunction may be granted against the Manager of the joint Hindu family at the instance of the coparcener. But nonetheless a blanket injunction restraining permanently from alienating the property of the joint Hindu family even in the case of legal necessity, cannot be granted. It further appears that Defendant 1, Ram Parkash entered into the agreement of sale stating that he is the owner of the suit property. The plaintiff-appellants claim the suit property as ancestral property and they as coparceners of joint Hindu Mitakshara family have equal shares with their father in

the suit property. The question whether the suit property is the self-acquired property of the father or it is the ancestral property has to be decided before granting any relief. The suit being one for permanent injunction, this question cannot be gone into and decided. It is also pertinent to note in this connection that the case of specific performance of agreement of sale bearing Suit No. 570 of 1978 had already been decreed on May 11, 1981 by the Sub-Judge, First Class, Kaithal.

10. For the reasons aforesaid we affirm the judgment and decree made by the High Court and dismiss the appeal without any order as to costs.

JAGANNATHA SHETTY, J. (*concurring*) - I agree that this appeal should be dismissed but I add a few words of my own. The question raised in the appeal is whether interference of the court could be sought by a coparcener to interdict the karta of Hindu undivided family from alienating coparcenary property. The question is of considerable importance and there seems to be but little authority in decided cases.

12. The facts of the case lie in a narrow compass. In February 1978, Ram Parkash entered into an agreement for sale of certain house property in favour of Jai Bhagwan. The property has been described in the agreement as self-acquired property of Ram Parkash. It was agreed to be sold for Rs 21,400. Jai Bhagwan paid Rs 5000 as earnest money on the date of agreement. He promised to pay the balance on the date of execution of the sale deed. Ram Parkash, however, did not keep up his promise. He did not execute the sale deed though called upon to do so. Jai Bhagwan instituted a suit for specific performance of the agreement. In that suit, Rakesh Kumar and his brothers who are the sons of Ram Parkash wanted to be impleaded as parties to the suit. They wanted to resist the suit for specific performance. But the court did not permit them. The court said that they were unnecessary parties to the suit. Being unsuccessful in that attempt, they instituted a suit for permanent injunction against their father. They wanted the court to restrain their father from alienating the house property to Jai Bhagwan, or to anybody else. Their case was that the said house was their coparcenary property and the proposed sale was neither for legal necessity nor for the benefit of the joint family estate.

13. The suit for injunction was practically tried as a suit for declaration. A lot of evidence was adduced on various issues including the nature of the suit property. The trial court ultimately decreed the suit with the following findings: The suit property was coparcenary property of the joint family consisting of Ram Parkash and his sons. Jai Bhagwan has failed to prove that the proposed sale was for legal necessity of the joint family. He has also failed to prove that the intended sale was for benefit of the estate. Ram Parkash being the manager of the family cannot alienate coparcenary property in the absence of those two requirements. The sons could restrain their father from alienating the coparcenary property since the proposed sale was without justification.

14. Jai Bhagwan died during the pendency of the suit. His wife and children challenged the decree of the trial court in an appeal before the Additional District Judge, Kurukshetra. By then, the Punjab and Haryana High Court had declared in *Jujhar Singh* v. *Giani Talok Singh* that a suit for injunction to restrain karta from alienating coparcenary property is not maintainable. The learned District Judge following the said decision reversed the decree of

the trial court and dismissed the suit. The plaintiff preferred second appeal which was summarily dismissed by the High Court.

15. The plaintiffs, by special leave, have appealed to this Court. The arguments for the appellants appear to be attractive and are as follows:

> There is no presumption under law that the alienation of joint family property made by karta is valid. The karta has no arbitrary power to alienate joint family property. He could do so only for legal necessity or for family benefit. When both the requirements are wanting in the case, the coparceners need not vainly wait till the transaction is completed to their detriment. They are entitled to a share in the suit property. They are interested in preserving the property for the family. They could, therefore, legitimately move the court for an action against the karta in the nature of a *quia timet* .

16. As a preliminary to the consideration of the question urged, it will be necessary to examine the structure of joint Hindu family, its incidents and the power of karta or Manager thereof. The status of the undivided Hindu family or the coparcenary is apparently too familiar to everyone to require discussion. I may, however, refer in laconic details what is just necessary for determining the question urged in this appeal.

Joint Hindu Family

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 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

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 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 coparcenership 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 ministration to an ancestor. Only males can be coparceners. [See: *Hindu Law* by N. R. Raghavachariar, 8th Edn., p. 202]

19. In an early case of the Madras High Court in ***Sudarsanam Maistri* v. *Narasimhulu Maistri*** [(1902) ILR 25 Mad 149] Bhashyam Ayyangar, J. made the following pregnant observations about the nature of the institution and its incidents at p. 154:

> The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body (***Gan Savant Bal Savant* v. *Narayan Dhond Savant*** 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 for 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 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.

20. Adverting to the nature of the property owned by such a family, learned Judge proceeded to state at p. 155:

> 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.

21. This statement of law has been approved by the Supreme Court in ***Bhagwan Dayal* v. *Reoti Devi*** [AIR 1962 SC 287].

Managing Member and his Powers

22. In a Hindu family, the karta or Manager occupies a unique position. It is not as if anybody could become Manager of a joint Hindu family. "As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property." The Manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them.

23. The legal position of karta or Manager has been succinctly summarised in the Mayne's ***Hindu Law*** (12th Edn., para 318) thus:

> *318. Manager's legal position.*- The position of a karta or manager is sui generis; the relation between him and the other members of the family is not that of principal and agent, or of partners. It is more like that of a trustee and cestui que trust. But the fiduciary relationship does not involve all the duties which are imposed upon trustees.

24. The managing member or karta has not only the power to manage but also power to alienate joint family property. The alienation may be either for family necessity or for the benefit of the estate. Such alienation would bind the interests of all the undivided members of the family whether they are adults or minors. The oft-quoted decision in this aspect, is that of the Privy Council in ***Hunoomanpersaud* v. *Babooee*** . There it was observed at p. 423: "That power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate." This case was that of a mother, managing as guardian for an infant heir. A father who happens to be the Manager of an undivided Hindu family certainly has greater

powers to which I will refer a little later. Any other manager however, is not having anything less than those stated in the said case. Therefore, it has been repeatedly held that the principles laid down in that case apply equally to a father or other coparcener who manages the joint family estate.

Remedies against Alienations

25. Although the power of disposition of joint family property has been conceded to the Manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in fact or that he made proper and bona fide enquiry as to the existence of such necessity. It would be for the alienee to prove that he did all that was reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of Manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the Manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's ***Hindu Law***, 11th Edn., para 396]

26. In the light of these principles, I may now examine the correctness of the contentions urged in this appeal. The submissions of Mr H.N. Salve, as I understand, proceeded firstly on the premise that a coparcener has as much interest as that of karta in the coparcenary property. Second, the right of coparcener in respect of his share in the ancestral property would remain unimpaired, if the alienation is not for legal necessity or for the benefit of the estate. When these two rights, are preserved to a coparcener, why should he not prevent the karta from dissipating the ancestral property by moving the court? Why should he vainly wait till the purchaser gets title to the property? This appears to be the line of reasoning adopted by the learned Counsel.

27. I do not think that these submissions are sound. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by karta, but that right is not inclusive of the right to obstruct alienation. For the right to obstruct alienation could not be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled to it.

Therefore, he cannot move the court to grant relief by injunction restraining the karta from alienating the coparcenery property.

28. There is one more difficulty for the sustainability of the suit for injunction with which we are concerned. Temporary injunction can be granted under sub-section (1) of Section 37 of the Specific Relief Act, 1963. It is regulated by the Code of Civil Procedure, 1908. A decree for perpetual injunction is made under sub-section (2) of Section 37. Such an injunction can be granted upon the merits of the suit. The injunction would be to restrain the defendant perpetually from the commission of an act, which would be contrary to the rights of the plaintiff. Section 38 of the Specific Relief Act governs the grant of perpetual injunction and sub-section (3) thereof, reads:

> When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:
>
> (*a*) Where the defendant is trustee of the property for the plaintiff;
>
> (*b*) Where there exists no standard for ascertaining the actual damage caused or likely to be caused, by the invasion;
>
> (*c*) Where the invasion is such that compensation in money would not afford adequate relief;
>
> (*d*) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

29. The provisions of Section 38 to be read along with Section 41. Section 41 provides that an injunction cannot be granted in the cases falling under clauses (*a*) to (*j*). Clause (*h*) thereunder provides that an injunction cannot be granted when a party could obtain an efficacious relief by any other usual mode of proceeding (except in case of breach of trust). The coparcener has adequate remedy to impeach the alienation made by the karta. He cannot, therefore, move the court for an injunction restraining the karta from alienating the coparcenary property. It seems to me that the decision of the Punjab and Haryana High Court in ***Jujhar Singh* v. *Giani Talok Singh*** has correctly laid down the law. There it was observed at p. 348:

> If it is held that such a suit would be competent the result would be that each time the manager or the karta wants to sell property, the coparcener would file a suit which may take number of years for its disposal. The legal necessity or the purpose of the proposed sale which may be of pressing and urgent nature, would in most cases be frustrated by the time the suit is disposed of. Legally speaking unless the alienation in fact is completed there would be no cause of action for any coparcener to maintain a suit because the right is only to challenge the alienation made and there is no right recognised in law to maintain a suit to prevent the proposed sale. The principle that an injunction can be granted for preventing waste by a manager or karta obviously would not be applicable to such a suit because the proposed alienation for an alleged need of the benefit of the estate cannot be said to be an act of waste by any stretch of reasoning. We are, therefore, of the considered view that a coparcener has no right to maintain a suit for permanent injunction restraining the manager or the

karta from alienating the coparcenary property and his right is only to challenge the same and to recover the property after it has come into being.

30. From the above discussion of the principles of Hindu Law and in the light of the provisions of the Specific Relief Act, I think, therefore, there ought to be no hesitation on my part to dismiss this appeal and I dismiss the same with cost.

* * * * *

Dev Kishan v. *Ram Kishan*

AIR 2002 Raj. 370

SUNIL KUMAR GARG, J. – The plaintiffs Ram Kishan and Kailash filed a suit in the Court of Civil Judge, Bikaner on 18-3-1969 against the appellant-defendant No. 1 and also against the defendant Nos. 2 to 5 with the prayer that the sale deed dated 12-5-1967 (Ex. A/3) and rent deed Ex. A/4 be declared null and void against the plaintiffs as well as against the defendant Nos. 2 to 5. It was alleged in the plaint that the plaintiffs and defendant Nos. 2 to 5 were members of joint Hindu Family, but the defendant No. 2 Madanlal, who was Karta of the family, was under the influence of the appellant-defendant No. 1. It was further alleged in the plaint that two houses mentioned in para No. 2 of the plaint were joint properties of that joint Hindu family and the plaintiffs in the month of Jan., 1969 came to know that the defendant No. 2 on 12-5-1967 sold the said two houses to the appelalnt-defendant No. 1 through registered sale deed Ex. A/3 for a consideration of Rs. 2000/- though the value of these two houses was about Rs. 16,000/- and not only this, the defendant No. 2 also got the signatures of the defendant Nos. 3 to 5 on that sale deed by undue influence and the amount taken by the defendant No. 2 after sale was not distributed by him to any other members of the family. Thereafter, the plaintiffs approached the appellant-defendant No. 1 and asked him to show the documents and upon this, the appellant-defendant No. 1 first tried to avoid, but then he showed to the plaintiffs the sale deed dated 12-5-1967 (Ex. A/3) and mortgage deed dated 19-5-1964 (Ex. A/2) and in that mortgage deed Ex. A/2 dated 19-5-1964, there was mention of another mortgage deed dated 6-12-1962 (Ex. A/1). The further case of the plaintiffs was that the defendant No. 2 under the influence of appellant-defendant No. 1 first mortgaged the properties in question in favour of the appellant-defendant No. 1 for a consideration of Rs. 500/- on 6-12-1962 and that mortgage deed is Ex. A/1 and furthermore, the same properties were further mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 on 19-5-1964 for a consideration of Rs. 900/- and that mortgage deed is Ex. A/2 and since the sale deed dated 12-5-1967 (Ex. A/3) was got executed by the appellant-defendant No. 1 through defendant No. 2 in his favour after making influence over defendant No. 2, therefore, it should be declared null and void against the interest of the plaintiff and defendant Nos. 2 to 5 and similarly, the rent deed Ex. A/4 by which the plaintiffs and defendant Nos. 2 to 5 were termed as tenants of appellant-defendant No. 1 be also declared as null and void on various grounds mentioned in para 8 of the plaint and one of them was that there was no legal necessity for mortgaging as well as for selling the properties in question in favour of the appellant-defendant No. 1 by the defendant No. 2 and if, at the most, properties were sold for the illegal and immoral purposes, for that the plaintiffs were not bound. Hence, it was prayed that the suit be decreed.

The suit of the plaintiffs was contested by the appellant-defendant No. 1 by filing written statement on 4-8-1969 and in that written statement, it was alleged by the appellant-defendant No. 1 that the defendant No. 2 was Karta of the family and he took loan from him for the legal necessity of the family or that loan should be termed as antecedent debt and for that, the plaintiffs and defendant Nos. 2 to 5 were bound to pay. The allegations of influence and immoral or illegal transactions were denied by the appellant-defendant No. 1 and it was

further averred that from the mortgage deed dated 6-12-1962 (Ex. A/1), it was clear that the properties in question were mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 for the purpose of marrying his daughter Vimla and later on, the same properties were further mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 through mortgage deed dated 19-5-1964 (Ex. A/2) for the purpose of marrying Vimla and Pushpa. Hence, all the transactions were for legal necessity and thus, the suit of the plaintiffs be dismissed.

After hearing both the parties and taking into consideration the entire evidence and materials available on record, the learned Munsiff, Bikaner through his judgment and decree dated 30-9-1977 decreed the suit of the plaintiffs against the appellant-defendant No. 1 and declared the sale deed dated 12-5-1967 (Ex. A/3) in respect of two houses mentioned in the plaint and rent deed Ex. A/4 to be null and void against the plaintiffs and defendant Nos. 2 to 5. In decreeing the suit of the plaintiffs, the learned Munsiff came to the following conclusions on issue No. 1:-

(1) That from persuing the mortgage deed dated 6-12-1962 (Ex. A/1), it clearly appears that Rs. 500/- were taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his daughter Vimla and through another mortgage deed dated 19-5-1964 (Ex. A/2), Rs. 900/- were taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying Vimla and Pushpa and through registered sale deed dated 12-5-1967 (Ex. A3), the amount was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying Ram Kishan, plaintiff No. 1.

(2) That Vimla, Pushpa and Ram Kishan were all minors when the properties were mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 and when sale deed Ex. A/3 was executed by the defendant No. 2 in favour of the appellant-defendant No. 1.

(3) That the loan taken by the defendant No. 2 from the appellant-defendant No. 1 cannot be termed as loan for payment of antecedent debt as the loan was taken by the defendant No. 2 for the purposes of marrying his minor daughters and, thus, the learned Munsiff came to the conclusion that the present transactions cannot be regarded as transactions for payment of antecedent debt.

(4) That the learned Munsiff also did not find the case of legal necessity as the expenses in the marriage of Vimla, Pushpa and Ram Kishan (plaintiff No. 1) were not incurred by the defendant No. 2 and furthermore, there was no necessity for taking loan for their marriages.

(5) That apart from that, the age of Vimla and Pushpa at the time of their marriages was 12 and 8 years respectively and, therefore, taking loan for their marriages could have not been visualised looking to their age and thus, the submission that the loan was taken for their marriages was wrong.

(6) That even for the sake of argument, the loans were taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his minors after executing mortgage deeds and sale deed, such transactions became void being opposed to public policy in view of prohibition of child marriage under the Child Marriage Restraint Act, 1929 (hereinafter referred to as “the Act of 1929”) and, therefore, the amount, if spent on the marriages of minor children, cannot be termed as legal necessity.

(7) That sale deed Ex. A/3 dated 12-5-1967 was executed on the same day when there was marriage of Ram Kishan, plaintiff No. 1 and, therefore, when the marriage of plaintiff No. 1 Ram Kishan was going to be performed on the date of execution of sale deed Ex. A/3, to say that the amount taken by the defendant No. 2 from the appellant-defendant No. 1 through sale deed Ex. A/3 dated 12-5-1967 was to be utilised for the purpose of marriage of Ram Kishan, plaintiff No. 1 was wrong one and thus, the learned Munsiff came to the conclusion that amount even of sale deed Ex. A/3 dated 12-5-1967 was not utilised by the defendant No. 2 for the marriage of Ram Kishan, plaintiff No. 1.

(8) That it is difficult to believe that the properties worth Rs. 7000-8000/- would be mortgaged or sold for a consideration of Rs. 400-500/- on the pretext of marrying minor daughters, as according to the learned Munsiff, other brothers and mother of these minor daughters were earning members and, therefore, in no case, the properties were mortgaged for taking loan for the purposes of marrying minor daughters.

In these circumstances, since the properties were not mortgaged and sold by the defendant No. 2 in favour of the appellant defendant No. 1 for the purposes of legal necessity and there was no question of payment of antecedent debt, therefore, the learned Munsiff came to the conclusion that the plaintiffs and defendant Nos. 2 to 5 would not be bound by the terms of the sale deed dated 12-5-1967 (Ex. A/3) and that should be declared null and void against them. Thus, the learned Munsiff decided issue No. 1 in favour of the plaintiffs and against the appellant-defendant No. 1 and decreed the suit of the plaintiffs in the manner as indicated above.

Aggrieved from the said judgment and decree dated 30-9-1977 passed by the learned Munsiff, Bikaner, the appellant-defendant No. 1 preferred first appeal before the learned District Judge, Bikaner, which was transferred to the learned Civil Judge, Bikaner and the learned Civil Judge, Bikaner through his judgment and decree dated 15-9-1980 dismissed the appeal of the appellant-defendant No. 1 and upheld the judgment and decree dated 30-9-1977 passed by the learned Munsiff, Bikaner holding inter alia:-

(1) That the debt was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purpose of marriages of his minor daughters through mortgage deeds dated 6-12-1964, 19-5-1964 and that debt was opposed to public policy because of prohibition of child marriage under Act of 1929 and in this respect, the learned Civil Judge placed reliance on the decision of the Orissa High Court in ***Maheshwar Das* v. *Sakhi Dei*** [AIR 1978 Orissa 84] and the law laid down in ***Parasram* v. *Smt. Naraini Devi*** [AIR 1972 All 357] and ***Rulia* v. *Jagdish*** [AIR 1973 P & H 335] was not found favourable by the learned Civil Judge. Thus, he confirmed the findings of the learned Munsiff on that point.

(2) That the expenses of the marriages of Vimla, Pushpa and Ram Kishan were not borne by the defendant No. 2, father of these minor children, but on the contrary the expenses were borne by their mother and brothers, as they were earning members and thus, the amount taken by the defendant No. 2 from the appellant-defendant No. 1 was not utilized for the welfare of the family.

(3) That no liability of the plaintiffs was found in respect of the antecedent debt also and in this respect, the learned Civil Judge also confirmed the findings of the learned Munsiff.

Aggrieved from the said judgment and decree dated 15-9-1980 passed by the learned Civil Judge, Bikaner, this second appeal has been filed by the appellant-defendant No. 1.

3. This Court while admitting this second appeal framed the following substantial questions of law on 22-1-1981:-

(1) Whether the taking of the debt by a major member of the family for the marriage of a minor member of the family is a debt incurred for a legal necessity or is for illegal purpose?

(2) Whether the debts incurred by the father for satisfying the earlier mortgages should be considered to have been incurred for legal necessity?

(3) Whether the sale for satisfying the earlier mortgage debt of the Joint Hindu Family and for performing the marriage of a minor member of the family was rightly held to be void by the learned first appellate Court ?

4. I have heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and gone through the record of the case.

Substantial Question No. 1

5. There is no dispute on the point that through mortgage deed dated 6-12-1962 (Ex. A/1) and 19-5-1964 (Ex. A/2), the defendant No. 2 mortgaged the properties in question in favour of the appellant defendant No. 1 for a consideration of Rs. 500/- and Rs. 900/- respectively and the ground for mortgaging the properties in question was marriages of his daughters Vimla and Pushpa. There is also no dispute on the point that Vimla and Pushpa were minors when the properties in question were mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1.

6. The question is whether taking loan through mortgage deeds Ex. A/1 and Ex. A/2 by the defendant No. 2 from the appellant defendant No. 1 for the purposes of marrying his minor daughters can be regarded as legal necessity or not and this question has to be answered keeping in mind the findings of both the Courts below that in fact the amount which was taken by the defendant No. 2 after mortgaging the properties in question in favour of the appellant-defendant No. 1, was not spent by the defendant No. 2 on the marriage of his minor daughters.

7. On this point, it was submitted by the learned counsel appearing for the appellant-defendant No. 1 that the debt was taken by the defendant No. 2 for the purposes of marrying his minor daughters, after executing mortgage deeds Ex. A/1 and Ex. A/2 in favour of the appellant-defendant No. 1 and the debt incurred by major members for marriage of a minor though restrained under the Act of 1929 is a debt for legal necessity. Thus, taking of debt by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his minor daughters was legal necessity. Hence, the findings of the Courts below that the properties were not mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 for legal necessity are wholly erroneous one and cannot be sustained. In this respect, he has placed reliance on the decision of the Allahabad High Court in Parasram's case (supra), where it was held para 5:-

"Marriage of a Hindu male below 18 years of age with a Hindu girl below 15 years of age is not invalidated or rendered illegal by the force of Child Marriage Restraint Act, 1929. The object of the Act is to restrain a marriage of minors but does not prohibit the marriage rendering it illegal or invalid. A debt incurred by major members of joint Hindu family for marriage of minor is not for an illegal purpose, as the marriage is legal. The debt is binding on joint family property".

He has further placed reliance on the decision of Punjab and Haryana High Court in ***Rulia*** case, where it was held that where the Karta effected sale of the ancestral land to make provision for the marriage of his son who was nearing the age when he could have been lawfully married, the sale was a valid sale for necessity. It was further held that where the necessity for two-thirds of the sale price of the ancestral land was shown to exist and the balance of the sale price was proved to have been paid to the alienor the alienation was one for necessity.

8. On the other hand, the learned counsel appearing for the respondents submitted that the debt was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his minor daughters and since the child marriage was prohibited under the Act of 1929, therefore, the debt was not lawful debt and alienation on that ground cannot be regarded as lawful alienation binding upon the minors. The expenses incurred in connection with marriage of minor child cannot constitute legal necessity, in view of the prohibition of child marriage under the Act of 1929.

9. It may be stated here that the Manager of a joint Hindu family has power to alienate for value, joint family property, so as to bind the interest of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate.

10. An alienation by the Manager of a joint family made without legal necessity is not void, but viodable at the option of the other coparceners.

11. The marriage expenses of male coparceners and of the daughters of coparceners with no doubt can be termed as legal necessity.

12. In the case of ***Panmull Lodha*** case the Calcutta High Court held as under:-

"The Child Marriage Restraint Act makes punishable the marriage of a minor when performed in British India.

The Court should not facilitate conduct which the Legislature has made penal as being socially injurious merely on the ground that the parties agree to perform it at a place where the performance of such marriage is not punishable by the law of the place. Moreso when the minor's estate is in the hands of the receiver appointed by the Court and an application is made on behalf of the minor for the sanction of expenditure for the marriage of his minor sister with a minor boy, the Court should not sanction such expenditure for facilitating the child marriage within the meaning of the Act in British India or elsewhere".

13. In the case of ***Hansraj Bhuteria***, the Calcutta High Court further held that the application could not be granted as the Court should not facilitate conduct which the

Legislature in British India had made penal even if such marriage was not punishable according to law of Bikaner.

14. In the case of ***Rambhau Ganjaram***, the Bombay High Court held that where the marriage of the minor was performed in violation of the provisions of Child Marriage Restraint Act of 1929, the debt, having been incurred by the de facto guardian for purposes which were not lawful, the alienation effected for purposes of satisfying those debts cannot be regarded as a lawful alienation binding upon the minors.

15. The Orissa High Court in ***Maheswar Das*** case held that where the consideration under sale deed was for marriage expenses of minor girl (under age of 14), the sale was a void transaction being opposed to public policy.

16. In this case, both the Courts below came to the conclusion that the debt was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marriage of his minor daughters and since the marriage of minor daughters was prohibited by the provisions of the Act of 1929, therefore, the debt was opposed to the public policy, in view of the prohibition of child marriage under the Act of 1929. In this respect, the learned first appellate Court placed reliance on the decision of the Orissa High Court in the case of Maheswar Das (supra) and the law laid down by the Allahabad High Court in Parasram's case (supra) and by the Punjab and Haryana High Court in ***Rulia*** case was not found favourable by the learned first appellate Court.

17. Both the Courts below further came to the conclusion that though the money as per the both mortgage deed Ex. A/1 and Ex. A/2 was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying minor daughters, but that amount was not spent by him on their marriages and thus, the properties were not mortgaged by the defendant No. 2 in favour of the appellant-defendant No. 1 for legal necessity of the joint Hindu family. Hence, the loan taken by the defendant No. 2 from the appellant-defendant No. 1 cannot be termed as taking of loan for legal necessity of the joint Hindu family.

18. In my considered opinion, where the marriage of the minor was performed in violation of the provisions of the Act of 1929, the debt having been incurred for that purpose, which was not lawful, cannot be regarded as a lawful debt and alienation on that ground cannot be regarded as lawful alienation binding upon the minors. If the property was mortgaged or sold for the purpose of marrying minors, such transactions would be opposed to public policy, in view of the prohibition of child marriage under the Act of 1929. The Court is in full agreement with the view expressed by the Calcutta High Court in the cases of ***Hansraj Bhuteria*** and ***Panmull Lodha***; Bombay High Court in the case of ***Rambhau*** and Orissa High Court in the case of ***Maheswar Das***. The law laid down by the Allahabad High Court in the case of ***Parasram*** and Punjab and Haryana High Court in the case of ***Rulia*** does not appear to be sound law.

19. In the present case, since the debt was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his minor daughters and as the child marriage is prohibited under the Act of 1929, therefore, such debt is opposed to the public policy and cannot be termed as lawful debt and alienation on that ground cannot be regarded

as a lawful alienation binding upon the minors. The expenses incurred in connection with the marriage of a child cannot constitute legal necessity.

20. Thus, both the Courts below were right in holding that since the child marriage is prohibited under the Act of 1929, therefore, taking of debt by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marriages of his minor daughters cannot constitute legal necessity and such debt cannot be regarded as lawful debt. The findings of fact recorded by both the Courts below on that point are based on correct appreciation of fact and law. It cannot be said that the above findings of fact recorded by both the Courts below are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it there appears error of law or procedure.

21. Thus, the substantial question No. 1 is answered in the manner that taking of debt by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marrying his minor children cannot be regarded as lawful debt and cannot constitute legal necessity.

Substantial Question No. 2

22. It may be stated here that a debt may be contracted by a Hindu male for his own private purpose, or it may be contracted by him for the purposes of the joint family.

23. In the present case, as already held above, the debt was not taken by the defendant No. 2 for the purposes of legal necessity of the family.

24. Both the Courts below have concurrently held that the properties in the present case were not alienated by the defendant No. 2 in favour of the appellant-defendant No. 1 for the payment of antecedent debt. Now, these findings are to be judged.

25. "Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the transaction impeached. A borrowing made on the occasion of the grant of a mortgage is not an antecedent debt. The father of joint Hindu family may sell or mortgage the joint family property including the son's interest therein to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons provided -

(a) the debt was antecedent to the alienation, (b) and it was not incurred for an immoral purpose.

26. In the present case, the Courts below came to the conclusion that the debt taken by the defendant No. 2 from the appellant-defendant No. 1 cannot be regarded as debt for payment of antecedent debt. The properties were not mortgaged or sold by the defendant No. 2 in favour of the appellant-defendant No. 1 for the purpose of discharging a debt contracted by him for his own personal benefit, but for the purposes of marrying his minor children and since the loan was taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marriage etc., the present transactions cannot be regarded as transaction for payment of antecedent debt.

27. Apart from that, as already held above, the debt taken by the defendant No. 2 from the appellant-defendant No. 1 for the purposes of marriages of his minor children, which were not lawful, was not a lawful debt. Furthermore, expenses incurred in the marriage of minor

children, which has taken place in contravention of the Act of 1929, cannot constitute legal necessity.

28. In my considered opinion, both the Courts below have rightly held that the debt taken by the defendant No. 2 from the appellant-defendant No. 1 cannot be termed as debt for payment of antecedent debt because the debt was taken by the defendant No. 2 for the purposes of marriage of his minor children. The findings of fact recorded by both the Courts below on that point are based on correct appreciation of fact and law. It cannot be said that the findings of fact recorded by both the Courts below are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it there appears error of law or procedure.

29. Hence, the substantial question No. 2 is answered in the manner that the debt incurred by the defendant No. 2 for satisfying the earlier mortgages should not be considered to have been incurred for legal necessity.

Substantial Question No. 3

30. As already stated above, since the debt taken by the defendant No. 2 from the appellant-defendant No. 1 was not a lawful debt and it was not taken for the welfare of the joint Hindu family and furthermore, the debt was not taken for the payment of antecedent debt, therefore, in these circumstances, the learned first appellate Court rightly held that the sale deed Ex. A/3 dated 12-5-1967 was void against the interest of the plaintiffs.

31. Thus, in view of the discussion made above, the substantial question No. 3 is answered in the manner that the sale for satisfying the earlier mortgage debt of the joint Hindu family and for performing the marriage of a minor member of the family was rightly held to be void by the learned first appellate Court.

32. It has been submitted by the learned counsel appearing for the appellant-defendant No. 1 that since the sale deed Ex. A/3 was executed not only by the defendant No. 2, but also by defendant Nos. 3 to 5, therefore, it should be held as legal sale deed so far as the defendant Nos. 2 to 5 are concerned and it could not be set aside against them.

33. In my considered opinion, this argument is not tenable because of the fact that the sale deed Ex. A/3 has been challenged in this case by the plaintiffs, who were minors when the said sale deed Ex. A/3 was executed and, therefore, no doubt the sale is not per se void, but becomes voidable as soon as the option is exercised by the minors through their guardian and same thing has happened in this case and in these circumstances, the plaintiffs have got right to challenge that sale deed Ex. A/3 in toto. In this respect, the decision of the Hon'ble Supreme Court in ***Faqir Chand* v. *Sardarni Harnam Kaur*** [AIR 1967 SC 727], may be referred to where it was held that mortgage of joint family property by father as manager for discharging his debt not for legal necessity or for payment of antecedent debt, his son is entitled to impeach mortgage even after mortgagee has obtained preliminary or final decree against his father or mortgager meaning thereby since in this case, both Courts below have come to the conclusion that the transactions were not for legal necessity and not for payment of antecedent debt, therefore, present plaintiffs are entitled to challenge the sale deed Ex. A/3 in toto.

34. The learned counsel appearing for the appellant-defendant No. 1 placed reliance on the Full Bench decision of the Andhra Pradesh High Court in ***Pinninti Venkataramana* v. *State*** [AIR 1977 AP 43], where it was held that marriage in contravention of clause (iii) of Section 5 of the Hindu Marriage Act is neither void nor voidable. The point involved in that case and the present case is some what different in nature and, therefore, this ruling would not be helpful to the appellant-defendant No. 1.

35. So far as the ruling relied upon by the learned counsel appearing for the appellant/ defendant No. 1 in ***Fakirappa* v. *Venkatesh*** [AIR 1977 Kant. 65], is concerned, the same would not be helpful to the appellant-defendant No. 1 inasmuch as, in this case, neither legal necessity nor theory of antecedent debt was accepted.

36. In view of the discussions made above this second appeal deserves to be dismissed and the findings of the Courts below are liable to be confirmed. Accordingly, this second appeal filed by the appellant-defendant No. 1 is dismissed, after confirming the judgment and decree dated 15-9-1980 passed by the learned Civil Judge, Bikaner.

* * * * *

Balmukand v. *Kamla Wati*

(1964) 6 SCR 321 : AIR 1964 SC 1385

J. B. MUDHOLKAR, J. - This is a plaintiff's appeal from the dismissal of his suit for specific performance of a contract for the sale of 3/20th share of land in certain fields situate in Mauza Faizpur of Batala in the State of Punjab. He had instituted the suit in the Court of Sub-Judge, First Class, Batala, who dismissed it in its entirety. Upon appeal the High Court of Punjab, while upholding the dismissal of the plaintiff's claim for specific performance, modified the decree of the trial court in regard to one matter. By that modification the High Court ordered the defendants to repay to the plaintiff the earnest money which he had paid when the contract of sale was entered into by him with Pindidas. It may be mentioned that Pindidas died during the pendency of the appeal before the High Court and his legal representatives were, therefore, substituted in his place. Aggrieved by the dismissal of his claim for specific performance the plaintiff has come up to this Court by a certificate granted by the High Court under Article 133 of the Constitution.

2. The plaintiff owned 79/120th share in Khasra Nos. 494, 495, 496, 497, 1800/501, 1801/501, and 529 shown in the zamabandi of 1943-44, situate at Mauza Faizpur of Batala. In October 1943 he purchased 23/120th share in this land belonging to one Devisahai. He thus became owner of 17/20th share in this land. The remaining 3/20th share belongs to the joint Hindu family of which Pindidas was the Manager and his brother Haveliram, Khemchand and Satyapal were the members. According to the plaintiff he paid Rs 175 per marla for the land which he purchased from Devisahai. In order to consolidate his holding, the plaintiff desired to acquire the 3/20th share held by the joint family of Pindidas and his brothers. He, therefore, approached Pindidas in the matter and the latter agreed to sell the 3/20th share belonging to the family at the rate of Rs 250 per marla. The contract in this regard was entered into on October 1, 1945 with Pindidas and Rs 100 was paid to him as earnest money. As the Manager of the family failed to execute the sale deed in his favour, the plaintiff instituted the suit and made Pindidas and his brothers defendants thereto.

3. The suit was resisted by all the defendants. Pindidas admitted having entered into a contract of sale of some land to the plaintiff on October 1, 1945 and of having received Rs 100 as earnest money. According to him, however, that contract pertained not to the land in suit but to another piece of land. He further pleaded that he had no right to enter into a contract on behalf of his brothers who are Defendants 2 to 4 to the suit and are now Respondents 13 to 15 before us. The Defendants 2 to 4 denied the existence of any contract and further pleaded that even if Pindidas was proved to be the *Karta* of the joint family and had agreed to sell the land in suit the transaction was not binding upon them because the sale was not for the benefit of the family nor was there any necessity for that sale. The courts below have found in the plaintiff's favour that Pindidas did enter into a contract with him for the sale of 3/20th share of the family land in suit and received Rs 100 as earnest money. But they held that the contract was not binding on the family because there was no necessity for the sale and the contract was not for the benefit of the family.

4. It is not disputed before us by Mr N.C. Chatterjee for the plaintiff that the defendants are persons in affluent circumstances and that there was no necessity for the sale. But

according to him, the intended sale was beneficial to the family inasmuch as it was not a practical proposition for the defendants to make any use of their fractional share in the land and, therefore, by converting it into money the family stood to gain. He further pointed out that whereas the value of the land at the date of the transaction was Rs 175 per marla only, the plaintiff had agreed under the contract to purchase it at Rs 250 per marla the family stood to make an additional gain by the transaction. The substance of his argument was that the Manager of a joint Hindu family has power to sell the family property not only for a defensive purpose but also where circumstances are such that a prudent owner of property would alienate it for a consideration which he regards to be adequate.

5. In support of his contention he has placed reliance on three decisions. The first of these is ***Jagatnarain* v. *Mathura Das*** [ILR 50 All 969]. That is a decision of the Full Bench of that High Court in which the meaning and implication of the term "benefit of the estate" is used with reference to transfers made by a Manager of a joint Hindu family. The learned Judges examined a large number of decisions, including that in ***HunoomanPersaud Pandey* v. *Babooee Munraj Koonweree*** [(1856) 6 Moo IA 393]***; Sahu Ram Chandra* v. *Bhup Singh,*** [ILR 39 All 437] and ***Palaniappa Chetty* v. *Sreemath Dawasikamony Pandara Sannadhi*** [44 IA 147] and held that transactions justifiable on the principle of benefit to the estate are not limited to those which are of a defensive nature. According to the High Court, if the transaction is such as a prudent owner of property would, in the light of circumstances which were within his knowledge at that time, have entered into, though the degree of prudence required from the Manager would be a little greater than that expected of a sole owner of property. The facts of that case as found by the High Court were:

> "(T)he adult mambers of the family found it very inconvenient and to the prejudice of the family's interests to retain property, 18 or 19 miles away from Bijnor, to the management of which neither of them could possibly give proper attention, that they considered it to the advantage of the estate to sell that property and purchase other property more accessible with the proceeds, that they did in fact sell that property on very advantageous terms, that there is nothing to indicate that the transaction would not have reached a profitable conclusion…."

We have no doubt that for a transaction to be regarded as one which is of benefit to the family it need not necessarily be only of a defensive character. But what transaction would be for the benefit of the family must necessarily depend upon the facts of such case. In the case before the Full Bench the two members of family found it difficult to manage the property at all with the result, apparently, that the family was incurring losses. To sell such property, and that too on advantageous terms, and to invest the sale proceeds in a profitable way could certainly be regarded as beneficial to the family. In the present case there is unfortunately nothing in the plaint to suggest that Pindidas agreed to sell the property because he found it difficult to manage it or because he found that the family was incurring loss by retaining the property. Nor again is there anything to suggest that the idea was to invest the sale proceeds in some profitable manner. Indeed there are no allegations in the plaint to the effect that the sale was being contemplated by any considerations of prudence. All that is said is that the fraction of the family's share of the land owned by the family bore a very small proportion to the land which the plaintiff held at the date of the transaction. But that was indeed the case even before

the purchase by the plaintiff of the 23/120th share from Devisahai. There is nothing to indicate that the position of the family vis-a-vis their share in the land had in any way been altered by reason of the circumstance that the remaining 17/20th interest in the land came to be owned by the plaintiff alone. Therefore, even upon the view taken in the Allahabad case the plaintiff cannot hope to succeed in this suit.

6. The next case is ***Sital Prasad Singh* v. *Ajablal Mander*** [ILR 18 Pat 306]. That was a case in which one of the questions which arose for consideration was the power of a manager to alienate part of the joint family property for the acquisition of new property. In that case also the test applied to the transaction entered into by a manager of a joint Hindu family was held to be the same, that is, whether the transaction was one into which a prudent owner would enter in the ordinary course of management in order to benefit the estate. Following the view taken in the Allahabad case the learned Judges also held that the expression "benefit of the estate" has a wider meaning than mere compelling necessity and is not limited to transactions of a purely defensive nature. In the course of his judgment Harries, C.J. observed:

> "(T)he *karta* of a joint Hindu family being merely a manager and not an absolute owner, the Hindu Law has, like other systems of law, placed certain limitations upon his power to alientate property which is owned by the joint family. The Hindu law-givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. The only reasonable limitation which can be imposed on the *karta* is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct."

After observing that the transaction entered into by a manager should not be of a speculative nature the learned Chief Justice observed:-

> "In exceptional circumstances, however, the court will uphold the alienation of a part of the joint family property by a *karta* for the acquisition of new property as, for example, where all the adult members of the joint family with the knowledge available to them and possessing all the necessary information about the means and requirement of the family are convinced that the proposed purchase of the new property is for the benefit of the estate."

These observations make it clear that where adult members are in existence the judgment is to be not that of the Manager of the family alone but that of all the adult members of the family, including the manager. In the case before us all the brothers of Pindidas were adults when the contract was entered into. There is no suggestion that they agreed to the transaction or were consulted about it or even knew of the transaction. Even, therefore, if we hold that the view expressed by the learned Chief Justice is right it does not help the plaintiff because the facts here are different from those contemplated by the learned Chief Justice. The other Judge who was a party to that decision, Manohar lal J., took more or less the same view.

7. The third case relied on is ***A.T. Vasudevan*** [AIR 1949 Mad 260]. There a Single Judge of the High Court held that the manager of joint .Hindu family is competent to alienate joint family property if it is clearly beneficial to the estate even though there is no legal necessity justifying the transaction. This view was expressed while dealing with an application under

clause 17 of Letters Patent by one Thiruvengada Mudaliar for being appointed guardian of the joint family property belonging to, inter alia to his five minor sons and for sanction of the sale of that property as being beneficial to the interests of the minor sons. The petitioner who was *karta* of the family had, besides the five minor sons, two adult sons, his wife and unmarried daughter who had rights of maintenance. It was thus in connection with his application that the learned Judge considered the matter and from that point of view the decision is distinguishable. However, it is a fact that the learned Judge has clearly expressed the opinion that the Manager has power to sell joint family property if he is satisfied that the transaction would be for the benefit of the family. In coming to this conclusion he has based himself mainly upon the view taken by V. Subba Rao, J., in ***Selleppa* v. *Suppan*** [AIR 1937 Mad 496]. That was a case in which the question which arose for consideration was whether borrowing money on the mortgage of joint family property for the purchase of a house could be held to be binding on the family because the transaction was of benefit to the family. While holding that a transaction to be for the benefit of the family need not be of a defensive character the learned Judges, upon the evidence before them, held that this particular transaction was not established by evidence to be one for the benefit of the family.

8. Thus, as we have already stated that for a transaction to be regarded as of benefit to the family it need not be of defensive character so as to be binding on the family. In each case the court must be satisfied from the material before it that it was in fact such as conferred or was reasonably expected to confer benefit on the family at the time it was entered into. We have pointed out that there is not even an allegation in the plaint that the transaction was such as was regarded as beneficial to the family when it was entered into by Pindidas. Apart from that we have the fact that here the adult members of the family have stoutly resisted the plaintiff's claim for specific performance and we have no doubt that they would not have done so if they were satisfied that the transaction was of benefit to the family. It may be possible that the land which was intended to be sold had risen in value by the time the present suit was instituted and that is why the other members of the family are contesting the plaintiff's claim. Apart from that the adult members of the family are well within their rights in saying that no part of the family property could be parted with or agreed to be parted with by the Manager on the ground of alleged benefit to the family without consulting them. Here, as already stated, there is no allegation of any such consultation.

9. In these circumstances we must hold that the courts below were right in dismissing the suit for specific performance. We may add that granting specific performance is always in the discretion of the court and in our view in a case of this kind the court would be exercising its discretion right by refusing specific performance.

10. No doubt Pindidas himself was bound by the contract which he has entered into and the plaintiff would have been entitled to the benefit of Section 15 of the Specific Relief Act which runs thus:

> "Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can

> perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

However, in the case before us there is no claim on behalf of the plaintiff that he is willing to pay the entire consideration for obtaining a decree against the interest of Pindidas alone in the property. In the result the appeal fails and is dismissed with costs.

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Guramma Bhratar Chanbasappa Deshmukh v. *Mallappa Chanbasappa*

(1964) 4 SCR 497 : AIR 1964 SC 510

K. SUBBA RAO, J. - These two appeals by certificate arise out of Special Civil Suit No. 47 of 1946 filed by Nagamma, wife of Chanbasappa, for partition and possession of one-sixth share in the plaint scheduled properties with mesne profits. Chanbasappa died possessed of a large extent of immovable property on January 8, 1944. He left behind him three wives, Nagamma, Guramma and Venkamma and two widowed daughters, Sivalingamma and Neelamma, children of his pre-deceased wife. It is alleged that at the time of his death Venkamma was pregnant and that she gave birth to a male child on October 4, 1944. It is also alleged that on January 30, 1944, Nagamma, the senior most widow, took her sister's son, Malappa, in adoption. A few days before his death, Chanbasappa executed gift and maintenance deeds in favour of his wives, widowed daughter, a son of an illegitimate son, and a relative. Long before his death, he also executed two deeds - one a deed of maintenance and another a gift deed of some property in favour of Nagamma. We shall deal with these alienations in detail in appropriate places.

12. The next question is whether the two gifts were binding on the family. We shall now take the two gift deeds Ex. Section 370 and 371 executed by Chanbasappa the former in favour of the 7th defendant and the latter in favour of the 8th defendant. The High Court, agreeing with the learned Civil Judge, set aside the gifts on the ground that the donor had no power to make a gift of the family property. Learned counsel for the legal representatives of the said defendants seeks to sustain the validity of the said two gifts. We shall consider the validity of the two gift deeds separately.

13. Ex. 370 dated January 4, 1944, is a gift deed executed by Chanbasappa in favour of Channappa, the 7th defendant, in respect of immovable property valued at Rs 1500. The donee was described as the donor's relative. The gift was made in token of love for the services rendered by the donee to the donor during the latter's lifetime. The gift was made, as it was narrated in the document, out of love and affection for the donee. It is contended that the said gift was for pious purposes and, therefore, valid in law. Can it be said that a gift of this nature to a relative out of love and affection is a gift for "pious purposes" within the meaning of that expression in Hindu law? In ***Mitakshara*** [Chapter l, Section 1, v. 28], it is stated:

> "Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family and especially for pious purposes."

In support of his contention that pious purposes include a charitable purpose, learned counsel relies upon certain passages in **Mukherjea's *Hindu Law of Religious and Charitable Trust*** 2nd Edn. The learned author says at p. 12:

> "In the Hindu system there is no line of demarcation between religion and charity. On the other hand charity is regarded as part of religion.... All the Hindu sages concur in holding that charitable gifts are pious acts *par excellence,* which bring appropriate regards to the donor."

The learned author proceeds to state, at p. 58:

> "Religious and charitable purposes have nowhere been defined by Hindu lawyers. It was said by Sir Subramanya Ayer, J. in ***Partha Sarathi Pillai* v. *Tiruvengade*** [(1907) ILR 30 Mad 340] that the expression 'dharma' when applied to gifts means and includes, according to Hindu text writers, what are known as *Istha* and *Purtta* works. As I have said already in the first lecture, no exhaustive list of such works has been drawn up by the Hindu lawgivers, and they include all acts of piety and benevolence whether sanctioned by Vedas or by the popular religion, the nature of the acts differing at different periods of Hindu religious history."

The learned author defines the words *Istha* and *Purtta* briefly thus, at p. 10:

> "By *Istha* is meant Vedic sacrifices, and rites and gifts in connection with the same; *Purtta* on the other hand means and signifies other pious and charitable acts which are unconnected with any *Srouta* or Vedic sacrifice."

It may, therefore, be conceded that the expression "pious purposes" is wide enough, under certain circumstances, to take in charitable purposes though the scope of the latter purposes has nowhere been precisely drawn. But what we are concerned with in this case is the power of a manager to make a gift to an outsider of a joint family property. The scope of the limitations on that power has been fairly well settled by the decisions interpreting the relevant texts of Hindu law. The decisions of Hindu law sanctioned gifts to strangers by a manager of a joint Hindu family of a small extent of property for pious purposes. But no authority went so far, and none has been placed before us, to sustain such a gift to a stranger however much the donor was beholden to him on the ground that it was made out of charity. It must be remembered that the manager has no absolute power of disposal over joint Hindu family property. The Hindu law permits him to do so only within strict limits. We cannot extend the scope of the power on the basis of the wide interpretation give to the words "pious purposes" in Hindu law in a different context. In the circumstances, we hold that a gift to a stranger of a joint family property by the manager of the family is void.

14. The second document is. Ex. 371, dated July 4, 1941. Under that document, Chanbasappa created a life-interest in a property of the value of about Rs 5000 in favour of his widowed daughter, the 8th defendant. In the document it is recited thus:

> "You are my own daughter and your husband is dead. After his death you have been living in my house only. For your well being and maintenance during your life time I have already given some property to you. As the income from the said property is not sufficient for your maintenance, you have asked me to give some more property for your maintenance. I have therefore gladly agreed (to the same) and passed a deed of maintenance in your favour regarding the below mentioned property and delivered it to your possession to-day only."

Under the said deed the daughter should enjoy the property during her lifetime and thereafter it sould go to the 5th defendant. The gift-over would inevitably be invalid. But the question is whether the provision for the daughter's maintenance during her lifetime would also be invalid. The correctness of the recitals are not questioned before us. It is in evidence that the family possesses a large extent of property, worth lakhs. The short question is

whether the father could have validly conferred a life-interest in a small bit of property on his widowed daughter in indigent circumstances for her maintenance. It is said that the Hindu law does not permit such a gift. In ***Jinnappa Mahadevappa* v. *Chimmava*** [(1935) ILR 59] Bom 459, 465, the Bombay High Court accepted that legal position. Rangnekar, J. held that under the *Mitakshara* school of Hindu law, a father has no right to make a gift even of a small portion of joint family immovable property in favour of his daughter, although it is made on the ground that she looked after him in his old age. The learned Judge distinguished all the cases cited before him on the ground that they were based upon long standing custom; and ended his judgment with the following observations:

> "Undoubtedly, the gift is a small portion of the whole of the property; but, if one were to ignore the elementary principles of Hindu law out of one's sympathy with gifts of this nature, it would be difficult to say where the line could be drawn, and it might give rise to difficulties which no attempt could overcome."

We agree with the learned Judge that sympathy is out of place in laying down the law. If the Hindu law texts clearly and expressly prohibit the making of such a gift of the family property by the father to the widowed daughter in indigent circumstances, it is no doubt the duty of the Court to accept the law, leaving it to the legislature to change the law. We shall, therefore, consider the relevant Hindu law texts bearing on the subject.

15. At the outset it would be convenient to clear the ground. Verses 27, 28 and 29 in Chapter I***, Mitakshara***, describe the limitations placed on a father in making gifts of ancestral estate. They do not expressly deal with the right of a father to make provision for his daughter by giving her some family property at the time of her marriage or subsequently. The right is defined separately by Hindu law texts and evolved by long catena of decisions, based on the said texts. The relevant texts have been collected and extracted in ***Vettorammal* v. *Poochammal*** [(1912) 22 MLJ 321]. Section 7 of Chapter I, *Mitakshara*, deals with provision for widows, unmarried daughters etc. Placitum 10 and 11 provide for portions to sisters when a partition is made between the brothers after the death of the father. The allotment of a share to daughters in the family is regarded as obligatory by Vignaneswara. In Chapter I Section 7, pp. 10 and 11, he says:

> "The allotment of such a share appears to be indispensably requisite, since the refusal of it is pronounced to be a sin."

He relies on the text of *Manu* to the effect that they who refuse, to give it shall be degraded: Manu Chapter IX, Section 118. In ***Placitum*** 11, [Chapter I], withholding of such a portion is pronounced to be a sin. In ***Madhaviya,*** [pp. 41 and 42], a text of Katyayana is cited authorizing the gift of immovable property by a father to his daughters besides a gift of movables up to the amount of 2000 phanams a year. In ***Vyavahara Mayukha,*** p. 93, the following text of Brihaspati is also cited by the author of the *Madhaviya* to the same effect:

> "Let him give-adequate wealth and a share of land also if he desires."

Devala says:

> "To maidens should be given a nuptial portion of the father's estate" — ***Colebrooke's Digest,*** Vol. 1, p. 185.

Manu says

> "To the unmarried daughters by the same mother let their brothers give portions out of their allotments respectively, according to the class of their several mothers. Let each give one-fourth part of his own distinct share and those who refuse to give it shall be degraded."

These and similar other texts indicate that Hindu law texts not only sanction the giving of property to daughters at the time of partition or at the time of their marriage, as the case may be, but also condemn the dereliction of the said duty in unequivocal terms. It is true that these Hindu law texts have become obsolete. The daughter has lost her right to a share in the family property at the time of its partition. But though the right has been crystallized into a moral obligation on the part of the father to provide for the daughter either by way of marriage provision or subsequently. Courts even recognised, making of such a provision not only by the father but also after his death by the accredited representative of the family and even by the widow. The decision in ***Kudutamma* v. *Narasimhacharyalu*** [(1897) 17 MLJ 528] is rather instructive. There, it was held that a Hindu father was entitled to make gifts by way of marriage portions to his daughters out of the family property to a reasonable extent. The first defendant was the half-brother of the plaintiffs and the father of the 2nd defendant. After the death of his father and after the birth of the 2nd defendant he for himself and as guardian of the 2nd defendant executed a deed of gift to the plaintiffs jointly, of certain portions of the joint family property. The question was whether that gift was good. It will be seen from the facts that the gift was made by the brother to his half-sisters not at the time of their marriage but subsequently. Even so, the gift was upheld. Wallis, J. in his judgment pointed out that unmarried daughters were formerly entitled to share on partition and that right fell into desutude, a gift made to a daughter was sustained by courts as a provision for the married couple. The learned Judge summarised the position thus, at p. 532:

> "... although the joint family and its representative, the father or other managing member, may no longer be legally bound to provide an endowment for the bride on the occasion of her marriage, they are still morally bound to do so, at any rate when the circumstances of the case make it reasonably necessary."

If such a provision was not made at the time of marriage, the learned Judge indicated that such moral obligation could be discharged subsequently by a representative of the family. To quote his observations - "Mere neglect on the part of the joint family to fulfil a moral obligation at the time of the marriage cannot, in my opinion, be regarded as putting an end to it, and I think it continued until it was discharged by the deed of gift now sued on and executed after the father's death by his son, the 1st defendant, who succeeded him as managing member of the joint family." Another Division Bench of the Madras High Court considered the question in ***Sundaramya* v. *Seethamma*** [(1911) 21 MLJ 695, 699] and declared the validity of a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land. The marriage took place about forty years before the gift. There was no evidence that the father then had any intention to give any property to the daughter. The legal position was thus expounded by the learned Judges. Munro and Sankran Nair, JJ:

> "The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of the marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage but only some time later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899."

Another Division Bench of the Madras High Court in ***Ramaswamy Aiyer* v. *Vengudusami Iyer*** [(1899) 21 MLJ 695, 699], held that a gift of land made by a widow, on the occasion of her daughter's marriage, to the bridegroom was valid. Sundara Aiyer and Spencer, JJ. held in ***Vettorammal* v. *Poochammal*** that a gift made by a father to his own daughter or by a managing member to the daughter of any of his coparceners, provided it be of a reasonable amount, is valid as against the donor's son. After elaborately considering the relevant texts on the subject and the case law bearing thereon, the learned Judges came to the conclusion that the plaintiff's father was competent to make a gift of ancestral property to the 1st defendant, his brother's daughter. The learned Judges also held that the validity of the gift would depend upon its reasonableness. The legal basis for sustaining such a gift was formulated by the learned Judges at p. 329 thus:

> "No doubt a daughter can no longer claim as of right a share of the property belonging to her father, but the moral obligation to provide for her wherever possible is fully recognised by the Hindu community and will support in law any disposition for the purpose made by the father."

In ***Bachoo* v. *Mankorebai*** [(1907) ILR 31 Bom 373], the Judicial Committee held that a gift by a father, possessed of considerable ancestral property, of a sum of Rs 20,000 to his daughter was valid. No doubt this was not a gift of immovable property, but there is no difference in the. application of the principles to a gift of immovable property as illustrated by the decision of the Judicial Committee in ***Ramalinga Annavi* v. *Narayana Annavi*** [(1922) 49 IA 168, 173]. There, both the Subordinate Judge and the High Court held that the assignments by a member of a joint Hindu family to his daughters of a sum of money and of a usufructuary mortgage were valid as they were reasonable in the circumstances in which they were made. The Privy Council confirmed the finding of the High Court. In considering the relevant point, Mr Ameer Ali observed at p. 173 thus:

> "The father has undoubtedly the power under the Hindu law of making within reasonable limits, gifts of movable property to a daughter. In one case the Board upheld the gift of a small share of immovable property on the ground that it was not shown to be unreasonable."

Venkataramana Rao, J. in ***Sithamahalakshmamma* v. *Kotayya*** [(1936) 71 MLJ 259] had to deal with the question of validity of a gift made by a Hindu father of a reasonable portion of ancestral immovable property to his daughter without reference to his son. Therein, the learned Judge observed at p. 262:

> "There can be no doubt that the father is under a moral obligation to make a gift of a reasonable portion of the family property as a marriage portion to his daughters

> on the occasion of their marriages It has also been held that it is a continuing obligation till it is discharged by fulfilment thereof. It is on this principle a gift of a small portion of immovable property by a father has been held to be binding on the members of the joint family."

Adverting to the question of the extent of property he can gift, the learned Judge proceeded to State:

> "The question whether a particular gift is reasonable or not will have to be judged according to the State of the family at the time of the gift, the extent of the family immovable property, the indebtedness of the family, and the paramount charges which the family was under an obligation to provide for, and after having regard to these circumstances if the gift can be held to be reasonable, such a gift will be binding on the joint family members irrespective of the consent of the members of the family."

The legal position may be summarized thus: the Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But, it became, crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one.

17. Applying the aforesaid principles, we have no doubt that in the present case, the gift made by the father was within his right and certainly reasonable. The family had extensive properties. The father gave the daughter only a life-estate in a small extent of land in addition to what had already been given for her maintenance. It has not been stated that the gift made by the father was unreasonable in the circumstances of the case. We, therefore, hold that the said document is valid to the extent of the right conferred on the 8th defendant.

21. In the result, Civil Appeal No. 335 of 1960 filed by the plaintiff and Defendant 3 is dismissed and Civil Appeal No. 334 of 1960 filed by Defendants 1, 2, 4, 5, the legal

representatives of Defendant 7 and Defendant 8 except to the extent of the 8th defendant's right to maintenance under Ex. 371, is dismissed. So far as the 8th defendant is concerned, the appeal filed by her is allowed.

* * * * *

R. Kuppayee v. *Raja Gounder*

(2004) 1 SCC 295

BHAN, J. - Aggrieved by the judgment and decree passed by the courts below in dismissing the suit filed by the plaintiff-appellants (hereinafter referred to as "the appellants"), the appellants have come up in this appeal.

2. Shortly stated, the facts are: The appellants are the daughters of the defendant-respondent (hereinafter referred to as "the respondent"). By a registered settlement deed, Exhibit A-1 dated 29-8-1985, the respondent hereinabove settled an extent of 12 cents of land comprised in S. No. 113/2, Thathagapatti village, Salem district in favour of the appellants. As per recitals in the settlement deed, the settlement was made by the respondent out of natural love and affection for the appellants and the possession of the property was handed over to them on the day the settlement deed was executed. The schedule of the settlement deed shows that the total extent of the property owned by the family was 3.16 acres. The gift made was of 12 cents along with Mangalore-tiled house standing on the gifted land. It was also stated in the settlement deed that in future neither the respondent nor any other male or female heirs would have a right over the settled property.

3. After nearly 5 years, on 22-4-1990, the respondent and his associates asked the appellants to vacate the property and tried to trespass into the property. Because of the attempt made by the respondent to trespass into the property, the appellants filed Original Suit No. 451 of 1990 in the Court of the District Munsif, Salem seeking relief of restraining the respondent and his associates from interfering with the appellants' peaceful possession and enjoyment of the suit property in any way by way of a permanent injunction, or, for grant of relief deemed fit in the circumstances of the case. The respondent resisted the suit and in the written statement filed by him, he took the stand that he had not executed any settlement deed. That his son-in-law i.e. husband of Appellant 1 had purchased a house site and the respondent was taken to the Sub-Registrar's office to witness the sale deed. That he was used to taking liquor and taking advantage of his addiction to liquor the appellants and their respective husbands fraudulently by misrepresentation instead got the sale deed executed from him. The property in dispute being a joint Hindu family property consisting of himself and his son could not be gifted under any circumstances.

4. In support of their respective pleas, the parties led their evidence. Appellant 1 stepped into the witness box as PW 1. She admitted that the property was ancestral. That her father had settled the property on her and her sister of his own will, out of natural love and affection for them. PW 2, the attesting witness to Exhibit A-1 stated that he knew the respondent. While he was standing on the road and talking to some persons, he was called by the respondent to witness the document. He went to the Sub- Registrar's office along with the respondent. The respondent put his signatures on Exhibit A-1 after reading the same. That he (himself) and Govindasamy signed Exhibit A-1 as witnesses. Govindasamy has died. In the cross-examination he stated that he did not know the contents of the document, Exhibit A-1. He showed his ignorance as to when, where or in whose name the stamp papers were purchased. He denied having knowledge of the fact as to whether the respondent was in the habit of drinking liquor. The respondent in order to prove his case stepped into the witness

box as DW 1. He stated that the property was a joint Hindu family property as the same had been purchased with the sale proceeds of the ancestral property. That his son-in-law who was working in TVS had purchased some property and he was taken by his son-in-law to sign as a witness. He denied having executed the settlement deed in favour of the appellants. He denied that he knew PW 2. It was stated that the possession of the appellants was permissive as they were allowed to reside in the house to enable them to send their children to school. He denied his signatures on the settlement deed, on the "vakalatnama" given by him to his counsel as well as on the summons sent to him by the court. It was denied that he knew English. It was also stated by him that his signatures were obtained fraudulently on the pretext of signing as a witness on the document by which his son-in-law had purchased a house site. That the total extent of the family-holding was 3.16 acres of land. He admitted that his son was residing separately for the last 3 to 4 years but denied that he was retracting from the settlement deed on the advice of his son. That he was in the habit of drinking.

5. No other evidence was led by any of the parties.

6. The trial court believed the evidence of the respondent. It was held that the respondent was taken to the Sub-Registrar's office to witness a document whereas a deed of settlement was got executed from him. Testimony of PW 2, the attesting witness was discarded. It was held that the deposition of PW 2 in fact supported the case put forth by the respondent to the effect that the respondent was taken to the Sub-Registrar's office to sign as a witness. The trial court further held that since the property in dispute was ancestral in nature, the respondent had no power/authority to make a gift of a part of the ancestral property in favour of his daughters. The suit was dismissed. The order of the trial court was affirmed by the first appellate court as well as by the High Court, aggrieved against which the present appeal has been filed.

7. It is submitted by the counsel for the appellant that the findings recorded by the courts below are wrong on facts as well as in law. Finding of fact regarding due execution of Exhibit A-1 is vitiated due to misreading of the statement of the attesting witness, PW 2. That the father being the *karta* had the authority to make a gift of ancestral immovable property to a reasonable extent out of the joint Hindu family property in favour of his daughters. That such authority of the father is recognised in old Hindu textbooks as well as by the courts in recent times. Counsel appearing for the respondent has controverted the submissions made by the counsel for the appellants. It was argued that there was no misreading of evidence and that the finding recorded by the courts below on facts could not be interfered with by this Court at this stage of the proceedings. The respondent had no authority to make a gift of a part of the ancestral immovable property and in any case, he could not have gifted the only residential house possessed by the family.

8. The two points which arise for consideration in this appeal are:

(*i*) whether the judgments of the courts below are vitiated because of the misreading of the evidence of PW 2, the attesting witness to the settlement deed;

(*ii*) whether the gift/settlement made by the father in favour of his married daughters of a reasonable extent of immovable property out of the joint Hindu family property is valid.

12. The trial court held that since the property was ancestral in nature, the respondent had no authority/power to make a gift of a portion of the ancestral property in favour of his daughters. In appeal the first appellate court accepted that the father could give away a small portion of the ancestral property to his daughters out of the total holding of the family property but since in this case the total extent of property owned by the family had not been proved, it could not be held that the property gifted by the father was of a reasonable portion of the total holding of the family. The High Court affirmed the finding recorded by the first appellate court.

13. The High Court of Madras in a series of judgments has taken the view that a father could make a gift within reasonable limits of ancestral immovable property to his daughter as a part of his moral obligation at the time of her marriage or even thereafter.

14. In ***Anivillah Sundararamayya* v. *Cherla Seethamma*** [(1911) 21 MLJ 695] it was held that a small portion of the ancestral immovable property could be given to the daughter at the time of her marriage or thereafter and such a gift would be a valid gift. In this case 8 acres of ancestral immovable property out of 200 acres of land possessed by the family were given in gift by the father to his daughter after her marriage. Upholding the gift it was observed:

> "*P. Narayana Murthi for the first respondent*
>
> The present case is stronger than ***Kudutamma* v. *Narasimhacharyulu*** [(1907) 17 MLJ 528] as it is the father that has given the property and not the brothers. A gift made to the son-in-law belongs also to the daughter - vide **Ghose's *Hindu Law*** [2nd Edn., p. 313], footnote. There is a text of Vyasa to that effect. See *Ghose* , p. 389, for translation; vide p. 360 also vice versa. A gift to the daughter would belong to the son-in-law. If it is proper to make gifts at the time of marriage it would be equally proper if made afterwards. Though the texts do not require gifts to be made to daughters at the time of marriage, if made, they are not invalid. ***Churaman Sahu* v. *Gopi Sahu*** [ILR (1909) 37 Cal 1] referred to, where Mookerji, J. approves of ***Kudutamma* v. *Narasimhacharyulu (supra)*; *Bachoo* v. *Mankorebai*** [ILR (1907) 31 Bom 373]."

15. The same view was taken by the Madras High Court in ***Pugalia Vettorammal* v. *Vettor Goundan*** [(1912) 22 MLJ 321]. In this case it was held that a father could make gift to a reasonable extent of the ancestral immovable property to his daughter. Gift made of 1/6th of the total holding of the ancestral property was held to be valid. The same view has later been taken by the Madras High Court in ***Devalaktuni Sithamahalakshmamma* v. *Pamulpati Kotayya*** [AIR 1936 Mad 825] and ***Karuppa Gounder* v. *Palaniammal*** [(1963) 1 MLJ 86]. A Full Bench of the Punjab and Haryana High Court in *CGT* v. *Tej Nath* [(1972) 74 Punj LR 1] and the High Court of Orissa in ***Tara Sahuani* v. *Raghunath Sahu*** [AIR 1963 Ori 50] have also taken the same view.

16. The powers of the father or the managing member of the joint Hindu family vis-vis coparcenary property have been summarised in paragraphs 225, 226 and 258 of **Mulla's *Hindu Law*** which reads:

225. Although sons acquire by birth rights equal to those of a father in ancestral property both movable and immovable, the father has the power of making within reasonable limits gifts of ancestral movable property without the consent of his sons for the purpose of performing 'indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth'.

226. A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable property for 'pious purposes'. However, the alienation must be by an act *inter vivos* , and not by will. A member of a joint family cannot dispose of by will a portion of the property even for charitable purposes and even if the portion bears a small proportion to the entire estate. However, now see Section 30 of the Hindu Succession Act, 1956.

258. (*1*) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

(*2*) As to disposition by will after the coming into operation of the Hindu Succession Act, 1956, see Section 30 of the Act.

17. Combined reading of these paragraphs shows that the position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can, however, make a gift within reasonable limits of ancestral immovable property for "pious purposes". However, the alienation must be by an act inter vivos, and not by will. This Court has extended the rule in paragraph 226 and held that t he father was competent to make a gift of immovable property to a daughter, if the gift is of reasonable extent having regard to the properties held by the family.

18. This Court considered the question of extended meaning given in numerous decisions for "pious purposes" in ***Kamla Devi* v. *Bachulal Gupta*** [AIR 1957 SC 434]. In the said case, a Hindu widow in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of marriage of her daughter, executed a registered deed of gift in respect of four houses allotted to her share in a partition decree, in favour of her daughter as her marriage dowry, after two years of her marriage. The partition decree had given her the right to the income from property but she had no right to part with the corpus of the property to the prejudice of the reversioners. Her stepsons brought a suit for declaration that the deed of gift was void and inoperative and could not bind the reversioners. The trial court and the High Court dismissed the suit holding that the gift was not valid. This Court accepted the appeal and held that the gift made in favour of the daughter was valid in law and binding on the reversioners.

19. This point was again examined in depth by this Court in ***Guramma Bhratar Chanbasappa Deshmukh* v. *Mallappa Chanbasappa Deshmukh*** [(1964) 4 SCR 497] and it was held:

> *18.* The legal position may be summarized thus: The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. *The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard-and-fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances* . If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one." (emphasis supplied)

20. Extended meaning given to the words "pious purposes" enabling the father to make a gift of ancestral immovable property within reasonable limits to a daughter has not been extended to the gifts made in favour of other female members of the family. Rather, it has been held that a husband could not make any such gift of ancestral property to his wife out of affection on the principle of "pious purposes". Reference may be made to *Ammathayee* v. *Kumaresan* [AIR 1967 SC 569]. It was observed "we see no reason to extend the scope of the words 'pious purposes' beyond what has already been done in the two decisions of this Court" and the contention rejected that a husband could make any such gift of ancestral property to his wife out of affection on the principle of pious purposes.

21. On the authority of the judgments referred to above, it can safely be held that a father can make a gift of ancestral immovable property within reasonable limits, keeping in view, the total extent of the property held by the family in favour of his daughter at the time of her marriage or even long after her marriage.

22. The only other point which remains for consideration, is as to whether a gift made in favour of the appellants was within the reasonable limits, keeping in view, the total holding of the family. The total property held by the family was 3.16 acres. 12 cents would be approximately 1/26th share of the total holding. The share of each daughter would come to

1/52nd or 1/26th share of the total holding of the family, which cannot be held to be either unreasonable or excessive under any circumstances. Question as to whether a particular gift is within reasonable limits or not has to be judged according to the status of the family at the time of making a gift, the extent of the immovable property owned by the family and the extent of property gifted. No hard-and-fast rule prescribing quantitative limits of such a gift can be laid down. The answer to such a question would vary from family to family.

23. This apart, the question of reasonableness or otherwise of the gift made has to be assessed *vis-a-vis* the total value of the property held by the family. Simply because the gifted property is a house, it cannot be held that the gift made was not within the reasonable limits. As stated earlier, it would depend upon a number of factors such as the status of the family, the total value of the property held by the family and the value of the gifted property and so on. It is basically a question of fact. However, on facts, if it is found that the gift was not within reasonable limits, such a gift would not be upheld. It was for the respondent to plead and prove that the gift made by the father was excessive or unreasonable, keeping in view, the total holding of the family. In the absence of any pleadings or proof on these points, it cannot be held that the gift made in this case was not within the reasonable limits of the property held by the family. The respondent has failed to plead and prove that the gift made was to an unreasonable extent, keeping in view, the total holding of the family. The first appellate court and the High Court, thus, erred in non-suiting the appellants on this account.

24. For the reasons stated above, we accept the appeal, set aside the judgments and the decrees passed by the courts below. It is held that the respondent had the capacity to make a gift to a reasonable extent of ancestral immovable property in favour of his daughters. The gift was not vitiated by fraud or misrepresentation. The appellants are held to be the absolute owners of the suit property and the respondent is injuncted from interfering with the peaceful possession and enjoyment of the suit property by the appellants perpetually. Parties shall bear their own costs.

* * * * *

Arvind v. *Anna*

(1980) 2 SCC 387 : AIR 1980 SC 645

O. CHINNAPPA REDDY, J. - On April 15, 1930 Parisa Chougule, executed Ex. 93, a deed of mortgage in favour of Ganesh Dattatraya Kulkarni (father of the appellants) for a sum of Rs 1600 in respect of a single item of land. On August 25, 1933, Parisa Chougule executed Ex. 92 another deed of mortgage in favour of the same mortgagee for a sum of Rs 1000 in respect of ten items of land including the land previously mortgaged under Ex. 93. Both the mortgages were possessory mortgages but it appears from the evidence that the land was leased back to the mortgagor for a stipulated rent. Parisa Chougule died on June 15, 1934 leaving behind him three sons Bhopal, an adult, and Anna and Dhanpal, minors. On July 11, 1934, Bhopal borrowed a further sum of Rs 131 and executed a simple mortgage Ex. 91 in respect of the very ten items of land covered by Ex. 92. On May 1, 1935, Bhopal purporting to act as the Manager of the joint family and the guardian of his minor brothers executed a deed of sale Ex. 90 in favour of Ganesh Dattatraya Kulkarni in respect of four out of the ten items of land mortgaged under Exs. 93, 92 and 91. The consideration for the sale was Rs 3050 and was made up of the amounts of Rs 1600, Rs 1000 and 131 due under the three mortgages Exs. 93, 92 and 91 respectively and a sum of Rs 200 received in cash by Bhupal on the date of sale. Six of the items which were mortgaged were released from the burden of the mortgages. On September 23, 1946, Anna second son of Parisa became a major. On August 31, 1951, Dhanpal third son of Parisa became a major. On August 27, 1953 Anna and Dhanpal filed the suit out of which this appeal arises for a declaration that the sale deed dated May 1, 1935 was not for legal necessity and not for the benefit of the estate and therefore, not binding on them. They also prayed that joint possession of their two-third share may be given to them. The trial Court found that there was legal necessity for the sale to the extent of Rs 2600 only, that the consideration of Rs 3050 for the sale was inadequate as the lands were worth about Rs 4000, that there was no such compelling pressure on the estate as to justify the sale and therefore, the sale was not for the benefit of the family and hence not binding on the two plaintiffs. A decree was granted in favour of the two plaintiffs for joint possession of two-third share of the lands subject to their paying a sum of Rs 1733/5 ans./4 ps., to the second defendant. On appeal by the second defendant the Assistant Judge, Kolhapur affirmed the finding of the trial Court that there was legal necessity to the extent of Rs 2000 only, that the value of the land was Rs 4000 and that there was no pressure on the estate justifying the sale. The Assistant Judge found that there was no evidence to show that the defendant made any bona fide enquiry to satisfy himself that there was sufficient pressure on the family justifying the sale. He however, held that the suit of the first plaintiff was liable to be dismissed as it was barred by limitation. He, therefore, modified the decree of the trial Court by granting a decree in favour of the second plaintiff only for possession of a one-third share in the lands subject to payment of a sum of Rs 866.66 ps. to the second defendant. The first plaintiff as well as the second defendant preferred second appeals to the High Court.

2. It is clear that these appeals have to be allowed. The facts narrated above show that out of the consideration of Rs 3050 for the sale there was undoubted legal necessity to the extent of Rs 2600, the total amount due under the two deeds of mortgage executed by the father of

the plaintiffs. Out of the ten items of land which were mortgaged, only four were sold and the remaining six items were released from the burden of the mortgages. The family was also relieved from the burden of paying rent to the mortgagee under the lease back. Surely all this was for the benefit of the family. The value of the land sold under the deed of sale was found by the courts below to be Rs 4000. Even if that be so, it cannot possibly be said that the price of Rs 3000 was grossly inadequate. It has further to be remembered that there were continuous dealings between the family of the plaintiffs and the family of the second defendant, over a long course of years. In those circumstances it is impossible to agree with the conclusion of the courts below that the sale was not binding on the plaintiffs. The courts below appeared to think that notwithstanding the circumstance that there was legal necessity to a large extent it was incumbent on the second defendant to establish that he made enquiry to satisfy himself that there was sufficient pressure on the estate which justified the sale. We are unable to see any substance in the view taken by the courts below. When the mortgagee is himself the purchaser and when the greater portion of the consideration went in discharge of the mortgages, we do not see how any question of enquiry regarding pressure on the estate would arise at all. Where ancestral property is sold for the purpose of discharging debts incurred by the father and the bulk of the proceeds of the sale is so accounted, the fact that a small part of the consideration is not accounted for will not invalidate the sale. In ***Gauri Shankar* v. *Jiwan Singh*** [AIR 1927 PC 246], it was found that Rs 500 out of the price of Rs 4000 was not fully accounted for and that there was legal necessity for the balance of Rs 3500. The Privy Council held that if the purchaser had acted honestly, if the existence of a family necessity for a sale was made out and the price was not unreasonably low, the purchaser was not bound to account for the application of the whole of the price. The sale was upheld. In ***Niamat Rai* v. *Din Dayal*** [AIR 1927 PC 121], the manager of a joint family sold family property for Rs 34,500 to satisfy pre-existing debts of the extent of Rs 38,000. It was held that it was sufficient to sustain the sale without showing how the balance had been applied.

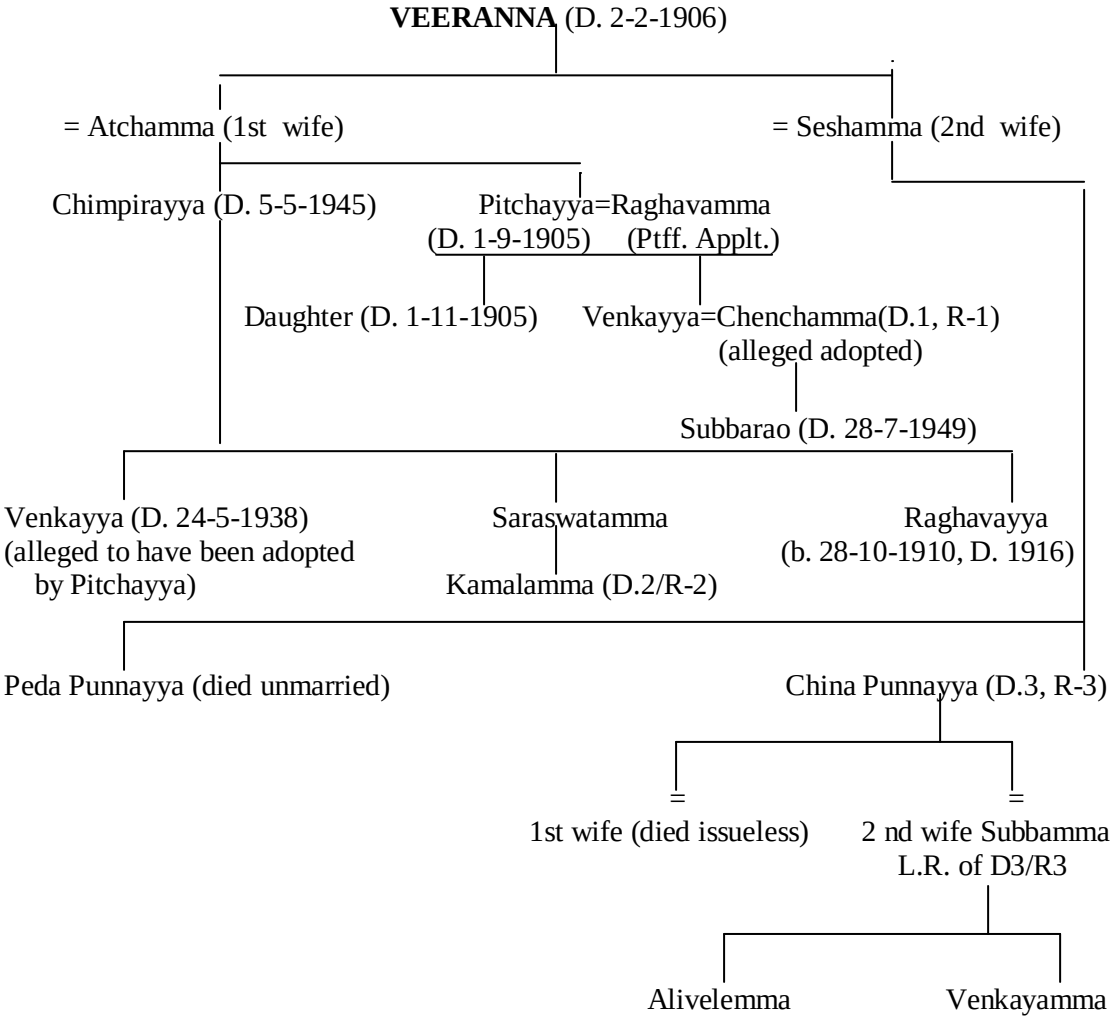
3. In ***Ram Sundar Lal* v. *Lachhmi Narain*** [AIR 1929 PC 143], the vendee the sale in whose favour was questioned fourteen years after the sale, was able to prove legal necessity to the extent of Rs 7744 out of a total price of Rs 10767. The Privy Council after quoting a passage from the well-known case of ***Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree*** [(1855) 7 MIA 393], upheld the sale. The principle of these decisions has been approved by this Court in ***Radhakrishnadas* v. *Kaluram*** [AIR 1967 SC 574]**.**

5. The learned counsel for the respondent relied upon the decision of this Court in ***Balmukand* v. *Kamla Wati*** [AIR 1964 SC 1385]. That was a suit for specific performance of an agreement of sale executed by the manager of the family without even consulting the other adult members of the family. The object of the sale was not to discharge any antecedent debts of the family nor was it for the purpose of securing any benefit to the family. The only reason for the sale of the land was that the plaintiff wanted to consolidate his own holding. The court naturally found that there was neither legal necessity nor benefit to the estate by the proposed sale and the agreement therefore, could not be enforced. We do not see what relevance this case has to the facts of the present case. We accordingly allow the appeals.

A. Raghavamma v. *A. Chenchamma*

(1964) 2 SCR 933 : AIR 1964 SC 136

K. SUBBA RAO, J. - This appeal by certificate is preferred against the Judgement and Decree of the High Court of Andhra Pradesh confirming those of the Subordinate Judge, Bapatla, dismissing the suit filed by the appellants for possession of the plaint schedule properties. The following genealogy will be useful in appreciating the facts and the contentions of the parties:



It will be seen from genealogy that Veeranna had two wives and that Chimpirayya and Pitchayya were his sons by the first wife and Peda Punnayya and China Punnayya were his sons by the second wife. Veeranna died in the year 1906 and his second son Pitchayya had predeceased him on 1-9-1905 leaving his widow Raghavamma. It is alleged that sometime

before his death, Pitchayya took Venkayya, the son of his brother Chimpirayya in adoption; and it is also alleged that in or about the year 1895, there was a partition of the joint family properties between Veeranna and his four sons, Chimpirayya, Pitchayya, Peda Punnayya and China Punnayya, Veeranna taking only 4 acres of land and the rest of the property being divided between the four sons by metes and bounds. Venkayya died on May 24, 1938, leaving behind a son Subbarao. Chimpirayya died on May 5, 1945 having executed a will dated January 14, 1945 whereunder he gave his properties in equal shares to Subbarao and Kamalamma, the daughter of his pre-deceased daughter Saraswatamma; thereunder he also directed Raghavamma, the widow of his brother Pitchayya, to take possession of the entire property belonging to him, to manage the same, to spend the income therefrom at her discretion and to hand over the property to his two grandchildren after they attained majority and if either or both of them died before attaining majority, his or her share or the entire property, as the case may be would go to Raghevamma. The point to be noticed is that his daughter-in-law, Chenchamma was excluded from management as well as from inheritance after the death of Chimpirayya. But Raghavamma allowed Chenchamma to manage the entire property and she accordingly came into possession of the entire property after the death of Chimpirayya. Subbarao died on July 28, 1949. Raghavamma filed a suit on October 12, 1950 in the Court of the Subordinate Judge, Bapatala, for possession of the plaint scheduled properties; and to that suit, Chenchamma was made the first defendant; Kamalamma the second defendant; and China Punnayya, the second son of Veeramma by his second wife, the third defendant. The plaint consisted of A, B, C, D, D-1 and E schedules, which are alleged to be the properties of Chimpirayya. Raghavamma claimed possession of A, B and C scheduled properties from the 1st defendant, for partition and delivery of half share in the properties covered by plaint-schedule D and D-1 which are alleged to belong to her and the 3rd defendant in common and a fourth share in the property covered by plaint-schedule E which are alleged to belong to her and the 1st and 3rd defendants in common. As Kamalamma was a minor on the date of the suit, Raghavamma claimed possession of the said properties under the will - half in her own right in respect of Subbarao's share, as he died before attaining majority and the other half in the right of Kamalamma, as by then she had not attained majority, she was entitled to manage her share till she attained majority.

2. The first defendant denied that Venkayya was given in adoption to Pitchayya or that there was a partition in the family of Veeranna in the manner claimed by the plaintiff. She averred that Chimpirayya died undivided from his grandson Subbarao and, therefore, Subbarao became entitled to all the properties of the joint family by right of survivorship. She did not admit that Chimpirayya executed the will in a sound and disposing frame of mind. She also did not admit the correctness of the schedules attached to the plaint. The second defendant filed a statement supporting the plaintiff. The third defendant filed a statement denying the allegations in the plaint and disputing the correctness of the extent of some of the items in the plaint schedules. He also averred that some of the items belonged to him exclusively and that Chimpirayya had no right to the same.

3. On the pleadings various issues were raised and the main issues, with which we are now concerned, are Issues 1 and 2, and they are: (*1*) whether the adoption of Venkayya was true and valid; and (*2*) whether Pitchayya and Chimpirayya were divided as alleged by the

plaintiff. The learned Subordinate Judge, after considering the entire oral and documentary evidence in the case, came to the conclusion that the plaintiff had not established the factum of adoption of Venkayya by her husband Pitchayya and that she also failed to prove that Chimpirayya and Pitchayya were divided from each other; and in the result he dismissed the suit with costs.

4. On appeal, a Division Bench of the Andhra High Court reviewed the entire evidence over again and affirmed the findings of the learned Subordinate Judge on both the issues. Before the learned Judges another point was raised, namely, that the recitals in the will disclose a clear and unambiguous declaration of the intention of Chimpirayya to divide, that the said declaration constituted a severance in status enabling him to execute a will. The learned Judges rejected that plea on two grounds, namely, (*1*) that the will did not contain any such declaration; and (2) that, if it did, the plaintiff should have claimed a division of the entire family property, that is, not only the property claimed by Chimpirayya but also the properly alleged to have been given to Pitchayya and that the suit as framed would not be maintainable. In the result the appeal was dismissed with costs. The present appeal has been preferred by the plaintiff by certificate against the said judgment.

5. Learned Advocate-General of Andhra Pradesh, appearing for the appellant, raises before us the following points: (1) The findings of the High Court on adoption as well as on partition were vitiated by the High Court not drawing the relevant presumptions permissible in the case of old transactions, not appreciating the great evidentiary value of public documents, ignoring or at any rate not giving weight to admissions made by parties and witnesses and by adopting a mechanical instead of an intellectual approach and perspective and above all ignoring the consistent conduct of parties spread over a long period inevitably leading to the conclusion that the adoption and the partition set up by the appellant were true. (2) On the assumption that there was no partition by metes and bounds, the Court should have held on the basis of the entire evidence that there was a division in status between Chimpirayya and Pitchayya, conferring on Chimpirayya the right to bequeath his divided share of the family property. (3) The will itself contains recitals emphasizing the fact that he had all through been a divided member of the family and that on the date of execution of the will he continued to possess that character of a divided member so as to entitle him to execute the will in respect of his share and, therefore, the recitals in the will themselves constitute an unambiguous declaration of his intention to divide and the fact that the said manifestation of intention was not communicated before his death to Subbarao or his guardian Chenchamma could not affect his status as a divided member. And (4) Chenchamma, the guardian of Subbarao, was present at the time of execution of the will and, therefore, even if communication was necessary for bringing about a divided status, it was made in the present case.

18. The next question is whether the concurrent finding of fact arrived at by the Courts below on the question of partition calls for our interference. In the plaint neither the details of the partition nor the date of partition are given. In the written-statement, the first respondent states that Chimpirayya died undivided from his son Subbarao and so Subbarao got the entire property by survivorship. The second issue framed was whether Chimpirayya and Pitchayya were divided as alleged by the plaintiff. The partition is alleged to have taken place in or

about the year 1895; but no partition deed was executed to evidence the same. The burden is certainly on the appellant who sets up partition to prove the said fact. PW 1, though she says that Veeranna was alive when his sons effected the partition, admits that she was not present at the time of partition, but only heard about it. PW 2, the appellant, deposes that her husband and his brothers effected partition after she went to live with him; she adds that in that partition her father-in-law took about 4 acres of land described as *Bangala Chenu* subject to the condition that after his death it should be taken by his four sons, that at the time of partition they drew up partition lists and recited that each should enjoy what was allotted to him and that the lists were written by one Manchella Narasinhayya; she also admits that the lists are in existence, but she has not taken any steps to have them produced in Court. She says that each of the brothers got pattas according to the partition, and that the pattas got for Pitchayya's share are in his house; yet she does not produce them. She says that she paid kist for the lands allotted to Pitchayya's share and obtained receipts; but the receipts are not filed. She admits that she has the account books; but they have not been filed in Court. On her own showing there is reliable evidence, such as accounts, Pattas, receipts, partition lists and that they are available; but they are not placed before the Court. Her interested evidence cannot obviously be acted upon when all the relevant evidence has been suppressed.

22. Some argument is made on the question of burden of proof in the context of separation in a family. The legal position is now very well settled. The Court in ***Bhagwati Prasad Shah* v. *Dulhin Rameshwari Juer*** [(1951) SCR 603, 607], stated the law thus:

> "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 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 coparceneres continued to be joint. There is no presumption on the other 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."

Whether there is a partition in a Hindu joint family is, therefore, a question of fact; notwithstanding the fact that one or more of the members of the joint family were separated from the rest, the plaintiff who seeks to get a specified extent of land on the ground that it fell to the share of the testator has to prove that the said extent of land fell to his share; but when evidence has been adduced on both sides, the burden of proof ceases to have any practical importance. On the evidence adduced in this case, both the Courts below found that there was no partition between Chimpirayya and Pitchayya as alleged by the appellant. The finding is one of fact. We have broadly considered the evidence only for the purpose of ascertaining whether the said concurrent finding of fact is supported by evidence or whether it is in any way vitiated by errors of law. We find that there is ample evidence for the finding and it is not vitiated by any error of law.

23. Even so, learned Advocate-General contends that we should hold on the evidence that there was a division in status between Chimpirayya and the other member of the joint Hindu family i.e. Subbarao, before Chimpirayya executed the will, or at any rate on the date when he executed it.

24. It is settled law that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty. Omitting the Will, the earlier documents filed in the case do not disclose any such clear intention. We have already held that there was no partition between Chimpirayya and Pitchayya. The register of changes on which reliance is placed does not indicate any such intention. The statement of Chimpirayya that his younger brother's son is a sharer in some lands and, therefore, his name should be included in the register, does not ex facie or by necessary implication indicate his unambiguous declaration to get divided in status from him. The conflicting descriptions in various documents introduce ambiguity rather than clarity in the matter of any such declaration of intention. Be it as it may, we cannot therefore hold that there is any such clear and unambiguous declaration of intention made by Chimpirayya to divide himself from Venkayya.

25. Now we shall proceed to deal with the will, Ex. A-2(*a*), on which strong reliance is placed by the learned Advocate-General in support of his contention that on January 14, 1945, that is, the date when the Will was executed Chimpirayya must be deemed to have been divided in status from his grandson Subbarao. A will speaks only from the date of death of the testator. A member of an undivided coparcenary has the legal capacity to execute a will; but he cannot validly bequeath his undivided interest in the joint family property. If he died as an undivided member of the family, his interest survives to the other members of the family, and, therefore, the will cannot operate on the interest of the joint family property. But if he was separated from the family before his death, the bequest would take effect. So, the important question that arises is whether the testator in the present case, became separated from the joint family before his death.

26. The learned Advocate-General raises before us the following contention in the alternative: (*1*) Under the Hindu law a manifested fixed intention contradistinguished from an undeclared intention unilaterally expressed by member to separate himself from the joint family is enough to constitute a division in status and the publication of such a settled intention is only a proof thereof. (*2*) Even if such an intention is to be manifested to the knowledge of the persons affected, their knowledge dates back to the date of the declaration that is to say, the said member is deemed to have been separated in status not on the date when the other members have knowledge of it but from the date when he declared his intention. The learned Advocate-General, develops his argument in the following steps: (*1*) The Will, Ex. A-2(*a*), contains as unambiguous intention on the part of Chimpirayya to separate himself from Subbarao; (*2*) he manifested his declaration of fixed intention to divide by executing the Will and that the Will itself was a proof of such an intention; (*3*) when the Will was executed, the first respondent, the guardian of Subba Rao was present and therefore, she must be deemed to have had knowledge of the said declaration; (*4*) even if she had no such knowledge and even if she had knowledge of it after the death of Chimpirayya, her knowledge dated back to the date when the Will was executed, and, therefore, when

Chimpirayya died he must be deemed to have died separated from the family with the result that the Will would operate on his separate interest.

27. The main question of law that arises is whether a member of a joint Hindu family becomes seperated from the other members of the family by mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge of the other member of the family. In this context a reference to Hindu law texts would be appropriate, for they are the sources from which Courts evolved the doctrine by a pragmatic approach to problems that arose from time to time. The evolution of the doctrine can be studied in two parts, namely, (*1*) the declaration of the intention, and (*2*) communication of it to others affected thereby. On the first part the following texts would throw considerable light. They are collected and translated by Viswanatha Sastri, J., who has a deep and abiding knowledge of the sources of Hindu law in ***Adiyalath Katheesumma* v. *Adiyalath Beechu*** [ILR 1930 Mad 502] and we accept his translations as correct and indeed learned counsel on both sides proceeded on that basis. ***Yajnavalkya***, [*Chapter II, Section 121*]. "In land, corrody (annuity, etc.), or wealth received from the grandfather, the ownership of the father and the son is only equal." Vijnaneswara commenting on the said sloka says:

> "And thus though the mother is having 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." (**Setlur's *Mitakshara***, [pp. 646-48].

***Saraswati Vilase**, placitum 28.*

> "From this it is known that without any speech (or explanation) even by means of a determination (or resolution) only, partition is effected, just as an appointed daughter is constituted by mere intention without speech."

Viramitrodaya of Hitra Misra (*Chapter II, Pl. 23*).

> "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).

***Vyavahara Mayukha of Nilakantabhatta**:* (*Chapter IV, Section iii-I*).

> "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)."

The Sanskrit expressions "sankalpa" (resolution) in Saraswati Vilas, "akechchaya" (will of single coparcener) in Viramitrodaya "budhivisesha" (particular state or condition of the mind) in Vyavahara Mayukha, bring out the idea that the severance of joint status is a matter of individual direction. The Hindu law texts, therefore, support the proposition that severance in status is brought about by unilateral exercise of discretion.

28. Though in the beginning there appeared to be a conflict of views, the later decisions correctly interpreted the Hindu law texts. This aspect has been considered and the law pertaining thereto precisely laid down by the Privy Council in a series of decisions. In ***Syed***

Kasam* v. *Jorawar Singh [(1922) ILR 50 Cal 84 (PC)], the Judicial Committee, after reviewing its earlier decision laid the settled law on the subject thus:

> "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...."

So far, therefore, the law is well settled, namely, that a severance in estate is a matter of individual discretion and that to bring about that state there should be an unambiguous declaration to that effect are propositions laid down by the Hindu law texts and sanctioned by authoritative decisions of Courts. But the difficult question is whether the knowledge of such a manifested intention on the part of the other affected members of the family is a necessary condition for constituting a division in status. Hindu law texts do not directly help us much in this regard, except that the pregnant expressions used therein suggest a line of thought which was pursued by Courts to evolve concepts to meet the requirements of a changing society. The following statement in Vyavahara Mayukha is helpful in this context:

> "...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)."

One cannot declare or manifest his mental state in a vacuum. To declare is to make known, to assert to others. "Others" must necessarily be those affected by the said declaration. Therefore a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate. The process of manifestation may vary with circumstances. This idea was expressed by learned Judges by adopting different terminology, but they presumably found it as implicit in the concept of declaration. Sadasiva Iyer, J., in ***Soun-dararaian* v *Arunachalam Chetty*** [(1915) ILR 39 Mad 159 (PC)] said that the expression "clearly expressed" used by the Privy Council in ***Suraj Narain* v. *Iqbal Narain*** [(1912) ILR 35 All 80 (PC)] meant "clearly expressed to the definite knowledge of the other coparceners". In ***Girja Bai* v. *Sadashive Dhundiraj*** [(1916) ILR 43 Cal 1031 (PC)], the Judicial Committee observed that the manifested intention must be "clearly intimated" to the other coparceners. Sir George Lownles in ***Bal Krishna* v. *Ram Ksishna*** [(1931) ILR 53 All 300 (PC)] took it as settled law that a separation may be effected by clear and unequivocal declaration on the part of one member of a joint Hindu family to his coparceners of his desire to separate himself from the joint family. Sir John Wallis in ***Babu Ramasray Prasad Choudhary* v. *Radhika Devi*** [(1935) 43 LW 172 (PC)] again accepted as settled law the proposition that "a member of a joint Hindu family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declaration of a fixed intention to become separate.…" Sir John Wallis, C.J., and Kumaraswami Sastri, J. in ***Kamepalli Avilamma* v. *Mannem Venkataswamy*** [(1913) 33 MLJ 746)] were emphatic when they stated that if a coparcener did not communicate, during his life time, his intention to become divided to the other coparceners, the mere declaration of his intention, though expressed or manifested, did not effect a severance in status. These decisions authoritatively laid down the proposition that the knowledge of the members of the family of the manifested intention of one of them to separate from them is a necessary

condition for bringing about that member's severance from the family. But it is said that two decisions of the Madras High Court registered a departure from the said rule. The first of them is the decision of Madhavan Nair, J. in ***Rama Ayyar* v. *Meenakshi Ammal*** [(1930) 33 LW 384]. There, the learned Judge held that severance of status related back to the date when the communication was sent. The learned Judge deduced this proposition from the accepted principle that the other coparceners had no choice or option in the matter. But the important circumstance in that case was that the testator lived till after the date of the service of the notice. If that was so, that decision on the facts was correct. We shall deal with the doctrine of relating back at a later stage. The second decision is that of a Division Bench of the Madras High Court, consisting of Varadachariar and King, JJ., in ***Narayana Rao* v. *Purushotama Rao*** [ILR 1938 Mad 315, 318]. There, a testator executed a will disposing of his share in the joint family property in favour of a stranger and died on August 5, 1926. The notice sent by the testator to his son on August 3, 1926 was in fact received by the latter on August 9, 1926. It was contended that the division in status was effected only on August 9, 1926, when the son received the notice and as the testator had died on August 5, 1926 and the estate had passed by survivorship to the son on that date the receipt of the notice on August 9, 1926 could not divest the son of the estate so vested in him and the will was, therefore, not valid. Varadachariar, J., delivering the judgment of the Bench observed thus:

> "It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners."

After pointing out the various anomalies that might arise in accepting the contention advanced before them, the learned Judge proceeded to state:

> "It may be that if the law is authoritatively settled, it is not open to us to refuse to give effect to it merely on the ground that it may lead to anomalous consequences; but when the law has not been so stated in any decision of authority and such a view is not necessitated or justified by the reason of the rules, we see no reason to interpret the reference to 'communication' in the various cases as implying that the severance does not arise until notice has actually been received by the addressee or addressees."

We regret our inability to accept this view. Firstly, because, as we have pointed out earlier, the law has been well settled by the decisions of the Judicial Committee that the manifested intention should be made known to the other members of the family affected thereby; secondly, because there would be anomalies on the acceptation of either of the views. Thirdly, it is implicit in the doctrine of declaration of an intention that it should be declared to somebody and who can that somebody be except the one that is affected thereby.

31. We agree with the learned Judge insofar as he held that there should be an intimation, indication or expression of the intention to become divided and that what form that manifestation should take would depend upon the circumstances of each case. But if the learned Judge meant that the said declaration without it being brought to the knowledge of the other members of the family in one way or other constitutes a severance in status, we find it difficult to accept it. In our view, it is implicit in the expression "declaration" that it should be

to the knowledge of the person affected thereby. An uncommunicated declaration is no better than a mere formation or harbouring of an intention to separate. It becomes effective as a declaration only after its communication to the person or persons who would be affected thereby.

32. It is, therefore, clear that Hindu law texts suggested and Courts evolved, by a process of reasoning as well as by a pragmatic approach that, such a declaration to be effective should reach the person or person affected by one process or other appropriate to a given situation.

33. This view does not finally solve the problem. There is yet another difficulty. Granting that a declaration will be effective only when it is brought to the knowledge of the other members affected, three question arise namely, (*i*) how should the intention be conveyed to the other member or members; (*ii*) when it should be deemed to have been brought to the notice of the other member or members; and (*iii*) when it was brought to their notice, would it be the date of the expression of the intention or that of knowledge that would be crucial to fix the date of severance. The questions posed raise difficult problems in a fast changing society. What was adequate in a village polity when the doctrine was conceived and evolved can no longer meet the demands of a modern society. Difficult questions, such as the mode of service and its sufficiency, whether a service on a manager would be enough, whether service on the major members or a substantial body of them would suffice, whether notice should go to each one of them, how to give notice to minor members of the family, may arise for consideration. But, we need not express our opinion on that said questions, as nothing turns upon them, for in this appeal there are only two members in the joint family and it is not suggested that Subba Rao did not have the knowledge of the terms of the will after the death of Chimpirayya.

34. The third question to be decided in this appeal is this: what is the date from which severance in status is deemed to have taken place? Is it the date of expression of intention or the date when it is brought to the knowledge of the other members? If it is the latter date, is it the date when one of the members first acquired knowledge or the date when the last of them acquired the said knowledge or the different dates on which each of the members of the family got knowledge of the intention so far as he is concerned? If the last alternative be accepted, the dividing member will be deemed to have been separated from each of the members on different dates. The acceptance of the said principle would inevitably lead to confusion. If the first alternative be accepted, it would be doing lip service to the doctrine of knowledge, for the member who gets knowledge of the intention first may in no sense of the term be a representative of the family. The second alternative may put off indefinitely the date of severance, as the whereabouts of one of the members may not be known at all or may be known after many years. The Hindu law texts do not provide any solution to meet these contingencies. The decided cases also do not suggest a way out. It is, therefore, open to this Court to evolve a reasonable and equitable solution without doing violence to the principles of Hindu law. The doctrine of relation back has already been recognized by Hindu law developed by courts and applied in that branch of the law pertaining to adoption. There are two ingredients of a declaration of a member's intention to separate. One is the expression of the intention and the other is bringing the expression to the knowledge of the person or persons affected. When once the knowledge is brought home - that depends upon the facts of

each case - it relates back to the date when the intention is formed and expressed. But between the two dates, the person expressing the intention may lose his interest in the family property; he may withdraw his intention to divide; he may die before his intention to divide is conveyed to the other members of the family: with the result his interest survives to the other members. A manager of a joint Hindu family may sell away the entire family property for debts binding on the family. There may be similar other instances. If the doctrine of relation back is invoked without any limitation thereon, vested rights so created will be affected and settled titles may be disturbed. Principles of equity require and common sense demands that a limitation which avoids the confusion of titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? By imposing such a limitation we are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate the right accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.

35. Applying the said principles to the present case, it will have to be held that on the death of Chimpirayya his interest devolved on Subbarao and, therefore, his will, even if it could be relied upon for ascertaining his intention to separate from the family, could not convey his interest in the family property, as it has not been established that Subbarao or his guardian had knowledge of the contents of the said will before Chimpirayya died.

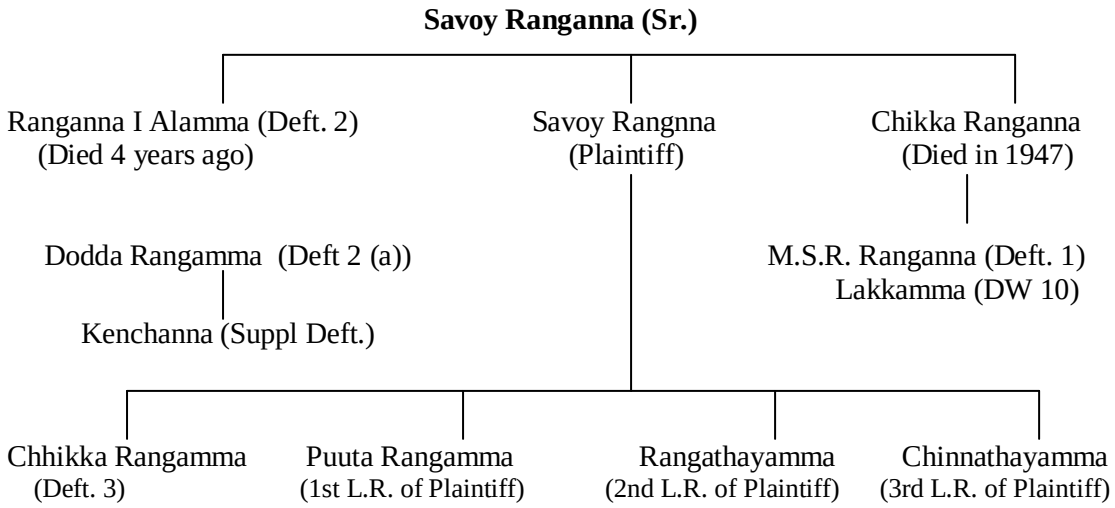
36. It is contended that the first respondent, as the guardian of Subbarao, had knowledge of the contents of the Will and, therefore, the Will operates on the interest of Chimpirayya. Reliance is placed upon the evidence of PW 11, one Komanduri Singaracharyulu. He deposed that he was present at the time the Will was executed by Chimpirayya and that he signed it as an identifying witness. In the cross-examination he said that at the time of the execution of the Will the first defendant-respondent was inside the house. This evidence is worthless. The fact that she was inside the house cannot in itself impute to her the knowledge of the contents of the Will or even the fact that the Will was registered that day. DW 4 is the first respondent herself. She says in her evidence that she did not know whether the Sub-Registrar came to register the Will of Chimpirayya, and that she came to know of the Will only after the suit was filed. In that state of evidence it is not possible to hold that the first respondent, as guardian of Suobarao, had knowledge of the contents, of the Will. In the result, the appeal fails and is dismissed.

* * * * *

Puttrangamma v. *M.S. Ranganna*

(1968) 3 SCR 119 : AIR 1968 SC 1018

V. RAMASWAMI, J. - 2. The appellants and Respondent 4 are the daughters and legal representatives of Savoy Ranganna who was the plaintiff in OS 34 of 1950-51 instituted in the Court of the District Judge, Mysore. The suit was filed by the deceased plaintiff for partition of his share in the properties mentioned in the schedule to the plaint and for granting him separate possession of the same. Respondent 1 is the brother's son of the Plaintiff. The relationship of the parties would appear from the following pedigree:



3. The case of the plaintiff was that he and the defendants lived together as members of a joint Hindu family till January 7, 1951, plaintiff being the karta. The plaintiff had no male issue but had only four daughters, Chikka Rangamma, Putta Rangamma, Rangathayamma and Chinnathayamma. The first 2 daughters were widows. The fourth daughter Chinnathayamma was living with her husband. Except Chinnathayamma, the other daughters with their families had been living with the joint family. The plaintiff became ill and entered Sharda Nursing Home for treatment as an in-patient on January 4, 1951. In order to safeguard the interests of his daughters the plaintiff, Savoy Ranganna issued a notice on January 8, 1951 to the defendants declaring his unequivocal intention to separate from them. After the notices were registered at the post office certain well-wishers of the family intervened and wanted to bring about a settlement. On their advice and request the plaintiff notified to the post office that he intended to withdraw the registered notices. But as no agreement could be subsequently reached between the parties the plaintiff instituted the present suit on January 13, 1951 for partition of his share of the joint family properties. The suit was contested mainly by Respondent 1 who alleged that there was no separation of status either because of the notice of January 8, 1951 or because of the institution of the suit on January 13, 1951. The case of Respondent 1 was that Savoy Ranganna was 85 years of age and in a weak state of health and was not in a position to understand the contents of the plaint or to affix his

signature or thumb impression thereon as well as on the vakalatnama. As regards the notice of January 8, 1951, Respondent 1 asserted that there was no communication of any such notice to him and, in any case, the notices were withdrawn by Savoy Ranganna unconditionally from the post office. It was therefore contended that there was no disruption of the joint family at the time of the death of Savoy Ranganna and the appellants were not entitled to a decree for partition as legal representatives of Savoy Ranganna. Upon the examination of the evidence adduced in the case the trial court held that Savoy Ranganna had properly affixed his thumb impression on the plaint and the Vakalatnama and the presentation of the plaint was valid. The trial court found that Savoy Ranganna was not dead by the time the plaint was presented. On the question whether Savoy Ranganna was separate in status the trial court held that the notices dated January 8, 1951 were a clear and unequivocal declaration of the intention of Savoy Ranganna to become divided in status and there was sufficient communication of that intention to Respondent 1 and other members of the family. The trial court was also of the opinion that at the time of the issue of the notices dated January 8, 1951 and at the time of execution of the plaint and the Vakalatnama dated January 13, 1951 Savoy Ranganna was in a sound state of mind and conscious of the consequences of the action he was taking. The trial court accordingly granted a decree in favour of the appellants. Respondent 1 took the matter in appeal to the Mysore High Court which by its judgment dated December 5, 1960 reversed the decree of the trial court and allowed the appeal. Hegde, J. one of the members of the Bench held that the suit could not be said to have been instituted by Savoy Ranganna as it was not proved that Savoy Ranganna executed the plaint. As regards the validity of the notice Ex. A, and as to whether it caused any disruption in the joint family status, Hegde, J. did not think it necessary to express any opinion. The other member of the Bench, Mir Iqbal Husain, J., held that the joint family of which the deceased Savoy Ranganna was a member had not been disrupted by the issue of the notice dated January 8, 1951. The view taken by Mir Iqbal Husain, J. was that there was no proof that the notice was communicated either to Respondent 1 or to other members of the family and, in any event, the notice had been withdrawn by Savoy Ranganna and so there was no severance of joint status from the date of the notice.

4. The first question to be considered in this appeal is whether Savoy Ranganna died as a divided member of the joint family as alleged in the plaint. It is admitted that Savoy Ranganna was very old, about 85 years of age and was ailing of chronic diarrhoea. He was living in the family house till January 4, 1951 when he was removed to the Sharda Nursing Home where he died on January 13, 1951 at 3 p.m. According to the case of Respondent 1 Savoy Ranganna had a paralytic stroke in 1950 and was completely bed-ridden thereafter and his eyesight was bad for 5 to 6 years prior to his death. It was alleged in the written statement that Savoy Ranganna was unconscious for some days prior to his death. The case of Respondent 1 on this point is disproved by the evidence of DW 6, Dr Venkata Rao who was in charge of the Sharda Nursing Home on the material dates. This witness admitted that the complaint of Savoy Ranganna was that he was suffering from chronic diarrhoea for over five months. He was anaemic but he was not suffering from any attack of paralysis. As regards the condition of Savoy Ranganna on January 8, 1951, the evidence of PW 1, Dr Subbaramiah is important. This witness is the owner of the Sharda Nursing Home and he has testified that the notice Ex. A was read over to Savoy Ranganna and after getting it read the latter affixed his thumb mark thereon. The witness asked Savoy Ranganna whether he was able to understand

the contents of the notice and the latter replied in the affirmative. The witness has certified on the notice, Ex. A-1 that Savoy Ranganna was conscious when he affixed his left thumb mark, to the notice in his presence. No reason was suggested on behalf of the respondents why the evidence of this witness should be disbelieved. The trial court was highly impressed by the evidence of this witness and we see no reason for taking a different view. The case of the appellants is that Respondent 1 had knowledge of the notice, Ex. A because he was present in the Nursing Home on January 8, 1951 and he tried to snatch away the notice from the hands of PW 1 but he was prevented from so doing. PW 5, Chinnanna stated in the course of the evidence that after PW 1 had signed the certificate in all the three copies, Respondent 1 and one Halappa came to the ward and tried to snatch away the notices. The first respondent tried to snatch away the copy Ex. A-1 that was in the hands of Dr Subbaramiah and attempted to tear it. Dr Subbaramiah somehow prevented Respondent 1 from taking away Ex. A and handed it over to PW 5. The evidence of PW 5 with regard to the "snatching incident" is corroborated by Dr Subbaramiah who stated that after Savoy Ranganna had executed the notices and he had signed the certificates, one or two persons came and tried to snatch the document. PW 1 is unable to identify the first respondent as one of the persons who had taken part in the "snatching incident". The circumstance that PW 1 was unable to identify Respondent 1 is not very material, because the incident took place about three years before he gave evidence in the court, but his evidence with regard to the "snatching incident" strongly corroborates the allegation of PW 5 that it was Respondent 1 who had come into the Nursing Home and attempted to snatch the notice. There is also another circumstance which supports the case of the appellants that Respondent 1 had knowledge of the contents of Ex. A and of the unequivocal intention of Savoy Ranganna to become divided in status from the joint family.

According to PW 5 Respondent 1 and his wife and mother visited Savoy Ranganna in the Nursing Home later on and pressed him to withdraw the notices promising that the matter will be amicably settled. Sowcar T. Thammanna also intervened on their behalf. Thereafter the deceased plaintiff instructed his grandson PW 5 to withdraw the notice. Accordingly PW 5 prepared two applications for the withdrawal and presented them to the postal authorities. The notice, Ex. A meant for the first respondent and Ex. E meant for the original second defendant were withheld by the postal authorities. These notices were produced in court by the postal authorities during the hearing of the case. In our opinion, the evidence of PW 5 must be accepted as true, because it is corroborated by the circumstance that the two notices, Exs. A and E were intercepted in the post office and did not reach their destination. This circumstance also indicates that though there was no formal communication of the notice, Ex. A to the first respondent, he had sufficient knowledge of the contents of that notice and was fully aware of the clear and unequivocal intention of Savoy Ranganna to become separate from other members of the joint family.

5. 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. It is not necessary that there should 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 expounded by the early writers of Hindu Law. The relevant portion of the commentary of ***Vijnaneswara*** states as follows:

[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]"

6. ***Saraswathi Vilasa***, placitum 28 states:

> [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.]

7. ***Viramitrodaya*** of Mitra Misra (Ch. 11. pl. 23) is to the following effect:

> [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)].

8. ***Vyavahara Mayukha*** of Nilakantabhatta also states:

> [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).

Emphasis is laid on the "budhivisesha" (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*** [ILR 35 All 80], the Judicial Committee made the following categorical statement of the legal position:

> "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 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."

In a later case - ***Girja Bai* v. *Sadashiv Dhundiraj*** [ILR 43 Cal 1031] - 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:

> "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."

In ***Syed Kasam* v. *Jorawar Singh*** [ILR 50 Cal 84], Viscount Cave, in delivering the judgment of the Judicial Committee, observed:

> "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."

These authorities were quoted with approval by this Court in ***Addagada Raghavamma* v. *Addagada Chenchamma*** [(1964) 2 SCR 933] and it was held that a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to other members of his family from whom he seeks to separate. The correct legal position therefore is that in a case of a joint Hindu family subject to Mitakshara law, severance of status is effected by an unequivocal declaration on the part of one of the jointholders of his intention to hold the share separately. It is, however, necessary that the member of the joint Hindu family seeking to separate himself must make known his intention to other member of the family from whom he seeks to separate. The process of communication may, however, vary in the circumstances of each particular case. It is not necessary that there should be a formal despatch to or receipt by other members of the family of the communication announcing the intention to divide on the part of one member of the joint family. The proof of such a despatch or receipt of the communication is not essential, nor its absence fatal to the severance of the status. It is, of course, necessary that the declaration to be effective should reach the person or persons affected by some process appropriate to the given situation and circumstances of the particular case. Applying this principle to the facts found in the present case, we are of opinion that there was a definite and unequivocal declaration of his intention to separate on the part of Savoy Ranganna and that intention was conveyed to Respondent 1 and other members of the joint family and Respondent 1 had full knowledge of the intention of Savoy Ranganna. It follows therefore that there was a division of status of Savoy Ranganna from the joint Hindu family with effect from January 8, 1951 which was the date of the notice.

9. It was, however, maintained on behalf of the respondents that on January 10, 1951 Savoy Ranganna had decided to withdraw the two notices, Exs. A & E and he instructed the postal authorities not to forward the notices to Respondent 1 and other members of the joint family. It was contended that there could be no severance of the joint family after Savoy Ranganna had decided to withdraw the notices. In our opinion, there is no warrant for this argument. As we have already stated, there was a unilateral declaration of an intention by Savoy Ranganna to divide from the joint family and there was sufficient communication of

this intention to the other coparceners and therefore in law there was in consequence a disruption or division of the status of the joint family with effect from January 8, 1951. When once a communication of the intention is made which has resulted in the severance of the joint family status it was not thereafter open to Savoy Ranganna to nullify its effect so as to restore the family to its original joint status. If the intention of Savoy Ranganna had stood alone without giving rise to any legal effect, it could, of course, be withdrawn by Savoy Ranganna, but having communicated the intention, the divided status of the Hindu joint family had already come into existence and the legal consequences had taken effect. It was not, therefore, possible for Savoy Ranganna to get back to the old position by mere revocation of the intention. It is, of course, possible for the members of the family by a subsequent agreement to reunite, but the mere withdrawl of the unilateral declaration of the intention to separate which already had resulted in the division in status cannot amount to an agreement to reunite. It should also be stated that the question whether there was a subsequent agreement between the members to reunite is a question of fact to be proved as such. In the present case, there is no allegation in the written statement nor is there any evidence on the part of the respondents that there was any such agreement to reunite after January 8, 1951. The view that we have expressed is borne out by the decision of the Madras High Court in ***Kurapati Radhakrishna* v. *Kurapati Satyanarayana*** [(1948) 2 MLJ 331], in which there was a suit for declaration that the sales in respect of certain family properties did not bind the plaintiff and for partition of his share and possession thereof and the plaint referred to an earlier suit for partition instituted by the 2nd defendant in the later suit. It was alleged in that suit that "the plaintiff being unwilling to remain with the defendants has decided to become divided and he has filed this suit for separation of his one-fifth share in the assets remaining after discharging the family debts separated and for recovery of possession of the same". All the defendants in that suit were served with the summons and on the death of the 1st defendant therein after the settlement of issues, the plaintiff in that action made the following endorsement on the plaint: "As the 1st defendant has died and as the plaintiff had to manage the family, the plaintiff hereby revokes the intention to divide expressed in the plaint and agreeing to remain as a joint family member, he withdraws the suit." It was held by the Madras High Court that a division in status had already been brought about by the plaint in the suit and it was not open to the plaintiff to revoke or withdraw the unambiguous intention to separate contained in the plaint so as to restore the joint status and as such the members should be treated as divided members for the purpose of working out their respective rights.

10. We proceed to consider the next question arising in this appeal whether the plaint filed on January 13, 1951 was validly executed by Savoy Ranganna and whether he had affixed his thumb impression thereon after understanding its contents. The case of the appellants is that Sri M.S. Ranganathan prepared the plaint and had gone to the Sharda Nursing Home at about 9.30 or 10 a.m. on January 13, 1951. Sri Ranganathan wrote out the plaint which was in English and translated it to Savoy Ranganna who approved the same. PW 2, the clerk of Sri Ranganathan has deposed to this effect. He took the ink-pad and affixed the left thumb impression of Savoy Ranganna on the plaint and also on the vakalatnama. There is the attestation of Sri M.S. Ranganathan on the plaint and on the vakalatnama. The papers were handed over to PW 2 who after purchasing the necessary court-fee stamps filed the plaint and the vakalatnama in the court at about 11.30 a.m. or 12 noon on the same day. The

evidence of PW 2 is corroborated by PW 5 Chinnanna. Counsel on behalf of the respondents, however, criticised the evidence of PW 2 on the ground that the doctor, DW 6 had said that the mental condition of the patient was bad and he was not able to understand things when he examined him on the morning of January 13, 1951. DW 6 deposed that he examined Savoy Ranganna during his usual rounds on January 13, 1951 between 8 and 9 a.m. and found "his pulse imperceptible and the sounds of the heart feeble". On the question as to whether Savoy Ranganna was sufficiently conscious to execute the plaint and the Vakalatnama, the trial court has accepted the evidence of PW 2, Keshavaiah in preference to that of DW 6. We see no reason for differing from the estimate of the trial court with regard to the evidence of PW 2. The trial court has pointed out that it is difficult to accept the evidence of D.W 6 that Savoy Ranganna was not conscious on the morning of January 13, 1951. In cross-examination DW 6 admitted that on the night of January 12, 1951 Savoy Ranganna was conscious. He further admitted that on January 13, 1951 he prescribed the same medicines to Savoy Ranganna as he had prescribed on January 12, 1951. There is no note of the necessary data in the case sheet, Ex. 1 to suggest that Savoy Ranganna was not conscious on January 13, 1951. It is therefore not unreasonable to assume that the condition of Savoy Ranganna was the same on January 13, 1951 as on January 12, 1951 and there was no perceptible change noticeable in his condition between the two dates. In these circumstances it is not possible to accept the evidence of DW 6 that Savoy Ranganna was unconscious on the morning of January 13, 1951. It was pointed out on behalf of the respondents that DW 7, Miss Arnold has also given evidence that the condition of Savoy Ranganna became worse day by day and on the last day his condition was very bad and he could not understand much, nor could he respond to her calls. The trial court was not impressed with the evidence of this witness. In our opinion, her evidence suffers from the same infirmity as of DW 6, because the case sheet, Ex. 1 does not corroborate her evidence. It is also difficult to believe that DW 7 could remember the details of ***Savoy Ranganna*** case after a lapse of three years without the help of any written case sheet. There is also an important discrepancy in the evidence of DW 7. She said that on January 13, 1951 she called DW 6 at 12 noon since the condition of the patient was very bad, but DW 6 has said that he did not visit Savoy Ranganna after 8 or 9 a.m. on that date. Comment was made by Counsel on behalf of the respondents that Sri Ranganathan was not examined as a witness to prove that he had prepared the plaint and Savoy Ranganna had affixed his thumb impression in his presence. In our opinion, the omission of Sri Ranganathan to give evidence in this case is unfortunate. It would have been proper conduct on his part if he had returned the brief of the appellants and given evidence in the case as to the execution of the plaint and the vakalatnama. But in spite of this circumstance we consider that the evidence of the appellants on this aspect of the case must be accepted as true. It is necessary to notice that the plaint and the vakalatnama are both counter-signed by Sri Ranganathan a responsible advocate and it is not likely that he would subscribe his signatures to these documents if they had been executed by a person who was unable to understand the contents thereof. As we have already said, it is unfortunate that the Advocate Sri Ranganathan has not been examined as a witness, but in spite of this omission we are satisfied that the evidence adduced in the case has established that Savoy Ranganna validly executed the plaint and the vakalatnama and that he was conscious and was in full possession of his mental faculties at the time of the execution of these two documents. It follows therefore that the appellants and

Respondent 4 who are the daughters and legal representatives of Savoy Ranganna are entitled to a decree in the terms granted by the District Judge of Mysore.

11. For the reasons expressed, we hold that this appeal should be allowed, the judgment of the Mysore High Court dated December 5, 1960 in R.A. No. 81 of 1956 should be set aside and that of the District Judge, Mysore dated October 31, 1955 in OS No. 34 of 1950-51 should be restored. The appeal is accordingly allowed with costs.

* * * * *

Kakumanu Pedasubhayya v. *Kakumanu Akkamma*

1959 SCR 1249 : AIR 1958 SC 1042

T.L.VENKATARAMA AIYAR, J. - This appeal arises out of a suit for partition of joint family properties instituted on April 2, 1942 in the Court of the District Munsif, Ongole, on behalf of one Kakumanu Ramanna, a minor of the age of about 2½ years by his maternal grandfather, Rangayya, as his next friend. The first defendant is his father. The second and third defendants are the sons of the first defendant by his deceased first wife. The fourth defendant is the second wife of the first defendant and the mother of the plaintiff. The fifth defendant is the daughter of the first defendant by the fourth defendant.

2. In the plaint, three grounds were put forward as to why the minor plaintiff should have partition: (*1*) It was said that the mother of the plaintiff was ill-treated, and there was neglect to maintain her and her children. Both the District Munsif and the Subordinate Judge on appeal, held that this had not been established, and no further notice need be taken of it. (*2*) It was then said that there had been a sale of the family properties to one Akkul Venkatasubba Reddi for Rs 2300, that there was no necessity for that sale, and that its object was only to injure the plaintiff. That sale is dated May 9, 1939. (*3*) Lastly, it was alleged that Item 2 had been purchased on June 1, 1938 and Item 11 on June 14, 1939 with joint family funds, but that the sale deeds had been taken in the names of the second and third defendants with a view to diminish the assets available to the plaintiff. In addition to these allegations, it was also stated in the plaint that the family was in good circumstances, and that there were no debts owing by it. On June 20, 1942 the defendants filed their written statements, wherein they claimed that the purchase of Items 2 and 11 had been made with the separate funds of the second and third defendants, and that the joint family had no title to them. They further alleged that the family had debts to the extent of Rs 2600. Sometime in January 1943, the minor plaintiff died, and his mother who was the fourth defendant was recorded as his legal representative, and transposed as the second plaintiff.

3. The suit was in the first instance decreed, but on appeal, the Subordinate Judge remanded the case for trial on certain issues. At the re-hearing, it was proved that the first plaintiff was born on December 20, 1939. On that, the District Munsif held that the sale of the family properties to Akkul Venkatasubba Reddi and the purchase of Items 2 and 11 in the names of the second and third defendants having been anterior to the birth of the minor plaintiff, no cause of action for partition could be founded thereon. The District Munsif also held on the evidence that the purchase of Items 2 and 11 was not shown to have been made with separate funds, and that therefore they belonged to the joint family and further that the family owed no debts and that the allegations contra in the statements were not made out. But he held, however, that this did not furnish a cause of action for partition. In the result, he dismissed the suit. There was an appeal against this judgment to the Court of the Subordinate Judge of Bapatla, who affirmed the findings of the District Munsif that Items 2 and 11 belonged to the joint family, and that there were no debts owing to it. But he also agreed with him that as the sale and purchases in question were prior to the birth of the minor plaintiff, the suit for partition based thereon was not maintainable. He accordingly dismissed the appeal. The second plaintiff took the matter in second appeal to the High Court of Madras, and that

was heard by Satyanarayana Rao, J., who held that as the defendants had falsely claimed that Items 2 and 11 were the separate properties of the second and third defendants, their interest was adverse to that of the minor and that the suit for partition was clearly beneficial to him. He accordingly granted a preliminary decree for partition. The present appeal has been brought against it on leave granted by this Court under Article 136.

4. The learned Attorney-General who appeared for the appellants advanced two contentions in support of the appeal: (*1*) that there was a concurrent finding by both the courts below that the suit was not instituted for the benefit of the minor, and that the High Court had no power to reverse it in second appeal; and (*2*) that, in any event, as the minor plaintiff had died before the suit was heard and before the Court could decide whether the institution of the suit was for his benefit, the action abated and could not be continued by his mother as his legal representative.

5. On the first question, the contention of the appellants is that it is a pure question of fact whether the institution of a suit is for the benefit of a minor or not, and that a finding of the courts below on that question is not liable to be interfered with in second appeal. But it must be observed that the finding of the Subordinate Judge was only that as the impugned sale and purchases were made before the minor plaintiff was born, no cause of action for partition could be founded by him thereon, and that, in our opinion, is a clear misdirection. The transactions in question were relied on by the minor plaintiff as showing that the defendants were acting adversely to him, and that it was therefore to his benefit that there should be a partition. It is no doubt true that as the plaintiff was not born on the date of those transactions, the defendants could not have entered into them with a view to injure him, though even as to this it should be noted that in May and June 1939 when the transactions were concluded, the first plaintiff was in the womb, and the first defendant admits knowledge of this, in his evidence. But assuming that there was no intention to defeat the rights of the first plaintiff at the time when the transactions in question were entered into, that does not conclude the matter. The real point for decision is whether the defendants were acting adversely to the minor, and if, after he was born, they used documents which might have been innocent when they came into existence, for the purpose of defeating his rights to the properties comprised therein, that would be conduct hostile to him justifying partition. Now, what are the facts? In the written statements which were filed shortly after the institution of the suit while the first plaintiff was alive, Defendants 1 to 3 combined to deny his title to Items 2 and 11, and at the trial, they adduced evidence in support of their contention that they were the separate properties of Defendants 2 and 3. Even in the court of appeal, the defendants persisted in pressing this claim, and further maintained that the joint family had debts, and both the courts below had concurrently held against them on these issues. These are materials from which it could rightly be concluded that it was not to the interest of the minor to continue joint with the defendants, and that it would be beneficial to him to decree partition. In holding that as the transactions in question had taken place prior to his birth the minor could not rely on them as furnishing a cause of action, the courts below had misunderstood the real point for determination, and that was a ground on which the High Court could interfere with their finding in second appeal. We accept the finding of the High Court that the suit was instituted for the benefit of the minor plaintiff, and in that view, we proceed to consider the second

question raised by the learned Attorney-General - and that is the main question that was pressed before us - whether the suit for partition abated by reason of the death of the minor before it was heard and decided.

6. The contention on behalf of the appellants is that while in the case of an adult coparcener a clear and unambiguous expression on his part of an intention to become divided will have the effect of bringing about a division in status and the filing of a suit for partition would amount to such an expression, that rule can have no application in the case of a minor, as under the law he is incapable of a volition of his own. It is conceded by the appellants that a suit for partition could be entertained on behalf of a minor plaintiff, and decreed if the Court decides that it is in the interests of the minor. But it is said that in such a case, the Court exercises on behalf of the minor a volition of which he is incapable, that it is not until that volition is exercised by the Court that there can be a division in status, and that, therefore, when a minor plaintiff dies before the Court adjudicates on the question of benefit to him, he dies an undivided coparcener and his interest survives to the other coparceners and does not devolve on his heirs by inheritance. The contention of the respondents, on the other hand, is that a suit for partition instituted on behalf of a minor coparcener stands on the same footing as a similar suit filed by an adult coparcener, with this difference that if the suit is held by the Court not to have been instituted for the benefit of the minor it is liable to be dismissed, and no division in status can be held to result from such an action. In other words, it is argued that a suit for partition on behalf of a minor effects a severance in status from the date of the suit, conditional on the Court holding that its institution is for the benefit of the minor.

7. The question thus raised is one of considerable importance, on which there has been divergence of judicial opinion. While the decisions in ***Chelimi Chetty* v. *Subbamma*** [(1917) ILR 41 Mad 442], ***Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*** [(1920) ILR 42 All 461]and ***Hari Singh* v. *Pritam Singh*** [AIR 1936 Lah 504], hold that when a suit for partition is filed on behalf of a minor plaintiff there is a division in status only if and when the Court decides that it is for his benefit and passes a decree, the decisions in ***Rangasayi* v. *Nagarathnamma*** [(1933) ILR 57] Mad 95, ***Ramsing* v. *Fakira,*** [ILR (1939) Bom 256] and ***Mandliprasad* v. *Ramcharanlal*** [ILR (1947) Nag 848], lay down that when such a suit is decreed, the severance in status relates back to the date of the institution of the suit. While ***Chelimi Chetty* v. *Subbamma*** decides that when a minor on whose behalf a suit is filed dies before hearing, the action abates, it was held in ***Rangasayi* v. *Nagarathnamma*** and ***Mandliprasad* v. *Ramcharanlal*** that such a suit does not abate by reason of the death of the minor before trial, and that it is open to his legal representatives to continue the suit and satisfy the Court that the institution of the suit was for the benefit of the minor, in which case there would be a division in status from the date of the plaint and the interests of the minor in the joint family properties would devolve on his heirs. To decide which of these two views is the correct one, we shall have to examine the nature of the right which a minor coparcener has, to call for partition and of the power which the Court has, to decide whether the partition in question is beneficial to the minor or not.

8. Under the Mitakshara law, the right of a coparcener to share in the joint family properties arises on his birth, and that right carries with it the right to be maintained out of those properties suitably to the status of the family so long as the family is joint and to have a

partition and separate possession of his share, should he make a demand for it. The view was at one time held that there could be no partition, unless all the coparceners agreed to it or until a decree was passed in a suit for partition. But the question was finally settled by the decision of the Privy Council in ***Girja Bai* v. *Sadashiv Dhundiraj*** [(1916) LR 43 IA 151], wherein it was held, on a review of the original texts and adopting the observation to that effect in ***Suraj Narain* v. *Ikbal Narain*** [(1912) LR 40 IA 40, 45] that every coparcener has got a right to become divided at his own will and option whether the other coparceners agree to it or not, that a division in status takes place when he expresses his intention to become separate unequivocally and unambiguously, that the filing of a suit for partition is a clear expression of such an intention, and that, in consequence, there is a severance in status when the action for partition is filed. Following this view to its logical conclusion, it was held by the Privy Council in ***Kawal Nain* v. *Prabhu Lal*** [(1917) LR 44 IA 159], that even if such a suit were to be dismissed, that would not affect the division in status which must be held to have taken place, when the action was instituted. Viscount Haldane observed:

> "A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

9. The law being thus settled as regards coparceners who are sui juris, the question is whether it operates differently when the coparcener who institutes the suit for partition is a minor acting through his next friend. Now, the Hindu law makes no distinction between a major coparcener and a minor coparcener, so far as their rights to joint properties are concerned. A minor is, equally with a major, entitled to be suitably maintained out of the family properties, and at partition, his rights are precisely those of a major. Consistently with this position, it has long been settled that a suit for partition on behalf of a minor coparcener is maintainable in the same manner as one filed by an adult coparcener, with this difference that when the plaintiff is a minor the court has to be satisfied that the action has been instituted for his benefit. Vide the authorities cited in ***Rangasayi* v. *Nagarathnamma***. The course of the law may be said, thus far, to have had smooth run. But then came the decision in ***Girja Bai* v. *Sadashiv Dhundiraj*** which finally established that a division in status takes place when there is an unambiguous declaration by a coparcener of his intention to separate, and that the very institution of a suit for partition constituted the expression of such an intention. The question then arose how far this principle could be applied, when the suit for partition was instituted not by a major but by a minor acting through his next friend. The view was expressed that as the minor had, under the law, no volition of his own, the rule in question had no application to him. It was not, however, suggested that for that reason no suit for partition could be maintained on behalf of a minor, for such a stand would be contrary to the law as laid down in a series of decisions and must, if accepted, expose the estate of the minor to the perils of waste and spoilation by coparceners acting adversely to him. But what was said was that when a court decides that a partition is for the benefit of a minor, there is a division brought about by such decision and not otherwise. It would follow from this that if a minor died before the Court decided the question of benefit he would have died an undivided coparcener of his family and his heirs could not continue the action.

10. In ***Chelimi Chetty* v. *Subbamma*** the point directly arose for decision whether on the death of a minor plaintiff the suit for partition instituted on his behalf could be continued by his legal representatives. It was held that the rule that the institution of a suit for partition effected a severance of joint status was not applicable to a suit instituted on behalf of a minor, and that when he died during the pendency of the suit, his legal representative was not entitled to continue it. The ground of this decision was thus stated:

> "It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which, if proved, would be good justification for the court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor."

This decision was cited with approval in ***Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*** wherein it was observed:

> "The effect, therefore, we think, of an action brought by a minor through his next friend is not to create any alteration of status of the family, because a minor cannot demand as of right a separation; it is only granted in the discretion of the Court when, in the circumstances, the action appears to be for the benefit of the minor."

11. In ***Hari Singh* v. *Pritam Singh***, a suit for partition instituted on behalf of a minor was decreed, the Court found that it was for the benefit of the minor. The question then arose as to the period for which the *karta* could be made liable to account. It was held, following the decisions in ***Chelimi Chetty* v. *Subbamma*** and ***Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*** that as the severance in status took place only on the date of the decision and not when the suit was instituted, the liability to account arose only from the date of the decree and not from the date of the suit. It may be mentioned that in ***Chhotabhai* v. *Dadabhai,*** [AIR (1935) Bom 54], Divatia, J. quoted the decision in ***Chelimi Chetty* v. *Subbamma*** with approval, but as pointed out in ***Ramsing* v. *Fakira*** and by the learned Judge himself in ***Bammangouda* v. *Shankargouda*** [AIR 1944 Bom 67], the point now under consideration did not really arise for decision in that case, and the observations were merely *obiter*. It is on the strength of the above authorities that the appellants contend that when the minor plaintiff died

in January 1943, the suit for partition had abated, and that his mother had no right to continue the suit as his heir.

12. Now, the ratio of the decision in ***Chelimi Chetty* v. *Subbamma*** - and it is this decision that was followed in ***Lalta Prasad*** case, ***Hari Singh* v. *Pritam Singh*** and ***Chhotabhai* v. *Dadabhai*** - is that the power to bring about a division between a minor and his coparceners rests only with the Court and not with any other person, and that, in our judgment, is clearly erroneous. When a court decides that a suit for partition is beneficial to the minor, it does not itself bring about a division in status. The Court is not in the position of a super-guardian of a minor expressing on his behalf an intention to become divided. That intention is, in fact, expressed by some other person, and the function which the Court exercises is merely to decide whether that other person has acted in the best interests of the minor in expressing on his behalf an intention to become divided. The position will be clear when regard is had to what takes place when there is a partition outside Court. In such a partition, when a branch consisting of a father and his minor son becomes divided from the others, the father acts on behalf of the minor son as well; and the result of the partition is to effect a severance in status between the father and his minor son on the one hand and the other coparceners on the other. In that case, the intention of the minor to become separated from the coparceners other than his father is really expressed on his behalf by his father. But it may happen that there is a division between the father and his own minor son, and in that case, the minor would normally be represented by his mother or some other relation, and a partition so entered into has been recognised to be valid and effective to bring about a severance in status. The minor has no doubt the right to have the partition set aside if it is shown to have been prejudicial to him; but if that is not established, the partition is binding on him. And even when the partition is set aside on the ground than it is unfair, the result will be not to annul the division in status created by the partition but to entitle the minor to a re-allotment of the properties. It is immaterial that the minor was represented in the transaction not by a legal guardian but by a relation. It is true, as held in ***Gharib-Ul-Lah* v. *Khalak Singh*** [(1903) LR 30 IA 165] that no guardian can be appointed with reference to the coparcenary properties of a minor member in a joint family, because it is the *karta* that has under the law the right of management in respect of them and the right to represent the minor in transactions relating to them. But that is only when the family is joint, and so where there is disruption of the joint status, there can be no question of the right of a *karta* of a joint family as such to act on behalf of the minor, and on the authorities, a partition entered into on his behalf by a person other than his father or mother will be valid, provided that person acts in the interests of and for the benefit of the minor.

13. If, under the law, it is competent to a person other than the father or mother of a minor to act on his behalf, and enter into a partition out of court so as to bind him, is there any reason why that person should not be competent when he finds that the interests of the minor would best be served by a division and that the adult coparceners are not willing to effect a partition, to file a suit for that purpose on behalf of the minor, and why if the court finds that the action is beneficial to the minor, the institution of the suit should not be held to be a proper declaration on behalf of the minor to become divided so as to cause a severance in status? In our judgment, when the law permits a person interested in a minor to act on his

behalf, any declaration to become divided made by him on behalf of the minor must be held to result in severance in status, subject only to the court deciding whether it is beneficial to the minor; and a suit instituted on his behalf if found to be beneficial, must be held to bring about a division in status. That was the view taken in a Full Bench decision of the Madras High Court in ***Rangasayi* v. *Nagarathnamma***, wherein Ramesam, J., stated the position thus:

> "These instances show that the object of the issue whether the suit was for the benefit of the minor is really to remove the obstacle to the passing of the decree. It is no objection to.: the maintainability of the suit …. In my opinion therefore in all such cases the severance is effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor."

The same view has been taken in ***Ramsing* v. *Fakira*** and ***Mandliprasad* v. *Ramcharanlal***, and we agree with these decisions.

14. On the conclusion reached above that it is the action of the person acting on behalf of a minor that brings about a division in status, it is necessary to examine what the nature of the jurisdiction is which the courts exercise when they decide whether a suit is for the benefit of a minor or not. Now, the theory is that the Sovereign as *parens partriae* has the power, and is indeed under a duty to protect the interests of minors, and that function has devolved on the Courts. In the discharge of that function, therefore, they have the power to control all proceedings before them wherein minors are concerned. They can appoint their own officers to protect their interests, and stay proceedings if they consider that they are vexatious. In **Halsbury's *Laws of England*** [Vol. XXI, p. 216, para 478], it is stated as follows:

> "Infants have always been treated as specially under the protection of the Sovereign, who, as *parens patriae*, had the charge of the persons not capable of looking after themselves. This jurisdiction over infants was formerly delegated to and exercised by the Lord Chancellor; through him it passed to the Court of Chancery, and is now vested in the Chancery Division of the High Court of Justice. It is independent of the question whether the infant has any property or not."

It is in the exercise of this jurisdiction that Courts require to be satisfied that the next friend of a minor has while instituting a suit for partition acted in his interest. When, therefore, the Court decides that the suit has been instituted for the benefit of the minor and decrees partition, it does so not by virtue of any rule, special or peculiar to Hindu law but in the exercise of a jurisdiction which is inherent in it and which extends over all minors. The true effect of a decision of a court that the action is beneficial to the minor is not to create in the minor *proprio vigore* a right which he did not possess before but to recognise the right which had accrued to him when the person acting on his behalf instituted the action. Thus, what brings about the severance in status is the action of the next friend in instituting the suit, the decree of the Court merely rendering it effective by deciding that what the next friend has done is for the benefit of the minor.

16. All the contentions urged in support of the appeal have failed, and the appeal is accordingly dismissed with costs.

17. The amounts paid by the appellants to the respondents in pursuance of the order of this Court dated 7th March 1958 will be taken into account in adjusting the rights of the parties under this decree.

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Namdev Vyankat Ghadge v. *Chandrakant Ganpat Ghadge*

(2003) 4 SCC 71

SHIVARAJ V. PATIL, J. - This appeal is by the plaintiffs challenging the validity and the correctness of the judgment and decree dated 27-6-1994 passed in Second Appeal No. 405 of 1994 by the High Court of Bombay affirming the concurrent findings of the trial court and that of the first appellate court. In order to appreciate the contentions urged before us, it has become necessary to state the facts to the extent necessary for deciding the questions that arise for consideration. The family pedigree of the parties is as set out below:

2. Bali had two sons, namely, Vyankat and Anand Rao. Anand Rao died on 6-7-1930 in joint family. Defendant 2 was the wife of Anand Rao. After death of Anand Rao, Vyankat became absolute owner of the suit property. The share of Anand Rao in suit property merged and Defendant 2 had only right of maintenance being a widow in the joint family of the plaintiffs and Defendant 1. The plaintiffs and Defendant 1 are sons of the said Vyankat and Defendants 3 to 5 are the daughters of the said Vyankat. Defendant 6 is the adopted son of Defendant 2. After death of Anand Rao, maintenance used to be given to Defendant 2. On 8-2-1978, Vyankat also died and thereafter Defendant 1 in collusion with Defendant 2 got the name of Defendant 2 mutated in records showing half share in the suit property and got half share mutated in his name in the suit properties being the *karta* of the family. It is the further case of the plaintiffs that as per Hindu law, Defendant 2 had no right over the suit property, the plaintiffs filed complaint about the said mutation entry; however, Defendant 1 with the help of Defendant 2 obstructed their possession over the suit property. Hence, the plaintiffs filed a suit for partition of their shares in the suit property collectively claiming that they had 7/12th share, Defendant 1 having 7/24th and Defendants 3 to 5 each having 1/8th share in the suit property and that Defendant 2 had only right to maintenance. During the pendency of the suit, Defendant 2 also died and the plaintiffs and Defendants 1, 3 to 5 are her legal heirs. It was also the case of the plaintiffs that Defendant 2 had not taken Defendant 6 in adoption. Defendant 1 in collusion with Defendant 2 set up the adoption of Defendant 6 who is the grandson of Defendant 1 through his daughter Sindutai. Defendants 3 and 5 remained absent in the suit and were proceeded ex parte. Defendants 1 and 2 filed joint written statement and contested the suit, contending that on 10-6-1978, Defendant 2 had taken Defendant 6, grandson of Defendant 1, namely, Dattatraya in adoption after performing some due ceremony; hence Defendant 6 is having share in the suit property; Defendant 2 denied that she had only right of maintenance; Defendants 1 and 2 denied that after the death of Anand Rao, his share merged and the said Vyankat became absolute owner of the suit property; according to them, the plaintiffs would not get more than 7/48th share in the suit property. Defendant 4 filed written statement and denied that after the death of Anand Rao, the said Vyankat became absolute owner of the suit property being the sole surviving coparcener. It was further the case of Defendant 4 that in Items 2 to 4 of the suit schedule property, the said Vyankat being the tenant, after the regrant, he became owner of those grants as self-acquired property. Consequently, Defendant 2 and the alleged adopted son have no share in the said lands. Defendant 6 suo motu appeared and he was allowed to take part in the proceedings after the death of Defendant 2. The trial court held that the adoption of Defendant 6 was valid and

decreed the suit of the plaintiffs declaring Plaintiffs 1 and 2 and Defendant 1 each having 7/48th share, Defendants 3 to 5 having 1/48th share in the suit property.

3. Aggrieved by the decree passed by the trial court, the plaintiffs filed appeal before the District Judge. The learned District Judge, concurring with the findings recorded by the trial court, dismissed the appeal. Thereafter, the plaintiffs filed second appeal before the High Court. The High Court also dismissed the second appeal declining to interfere with the concurrent findings of both the lower courts. Hence, this appeal.

4. In view of the concurrent findings of fact the learned counsel for the appellants did not question the validity of the adoption of Defendant 6. However, he urged that clause (*c*) of Section 12 of the Hindu Adoptions and Maintenance Act, 1956 precluded Defendant 6 from claiming share in the property, already vested in the heirs of Vyankat before his adoption, and that the restriction imposed on the rights of the adopted child under clause (*c*) of Section 12 is applicable to the interest vested in the sole surviving coparcener when the adoption was made subsequent to the death of the sole surviving coparcener.

5. He urged that the decision in ***Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*** [AIR 1988 SC 845] is clearly distinguishable and the courts were wrong in holding that the ratio of that case applied to the facts of the present case on all fours. The courts have failed to notice that it was a case where adoption had taken place during the lifetime of the sole surviving coparcener but in the present case, Defendant 6 was adopted after the death of the sole surviving coparcener, namely, Vyankat which makes all the difference.

6. The learned counsel for the respondents made submissions in support of the impugned judgment. He also contended that the question of law now sought to be urged, having not been raised in the courts below, cannot be permitted to be urged for the first time in this Court. Since the facts are not disputed and nothing more is to be done except interpretation and application of law to the facts of the present case that no further evidence is required to decide this question of law, we consider it appropriate in the interest of justice to consider them by permitting the appellants to raise the said pure question of law.

7. Learned counsel for the appellants was not in a position to dispute the validity and factum of adoption of Defendant 6 Dattatraya by Defendant 2 Krishnabai. It is useful to notice a few important dates having bearing on the decision in this appeal. Anand Rao, the husband of Defendant 2, died in 1930. Vyankat, his only brother, died on 8-2-1978. Defendant 2, the widow, adopted Dattatraya (Defendant 6) on 10-6-1978. Relationship between the parties is also not disputed. In these circumstances the only question that arises for consideration is whether the adopted son Dattatraya could divest the property, which devolved on the heirs of Vyankat and vested in them prior to his adoption so as to claim share in the suit property. Vyankat died on 8-2-1978. Adoption of Defendant 6 by Defendant 2 took place on 10-6-1978 i.e. about four months after the death of Vyankat. The first appellate court placed reliance on the judgment of this Court in ***Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*** in dismissing the appeal of the appellants while confirming the judgment of the trial court. The High Court dismissed the second appeal summarily at the stage of admission stating that there was no need to interfere with the concurrent findings of both the lower courts. The trial court and the first appellate court, after detailed consideration and appreciation of evidence, held

that adoption of Defendant 6 was valid and settled the shares of parties on that basis. In doing so reliance was placed on the aforementioned decision of this Court in the case of ***Dharma Shamrao*.**

8. It is not necessary for us to look into the evidence in view of the concurrent findings and admitted facts in order to decide the question of law that arises for consideration. Whether adoption of Defendant 6, after the death of the sole surviving coparcener, makes any difference in determining the rights of the adopted son in relation to the family properties. If the adoption had taken place during the lifetime of Vyankat, there would have been no difficulty whatsoever in confirming the judgment under challenge in the light of the decision of this Court in ***Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*** aforementioned.

9. In the case of ***Dharma Shamrao*** the question that came up for consideration was whether a person adopted by a Hindu widow after coming into force of the Hindu Adoptions and Maintenance Act, 1956 ("the Act"), can claim a share in the property which had devolved on a sole surviving coparcener on the death of the husband of the widow, who took him in adoption. The facts in that case were that one Shamrao, who was governed by the Mitakshara Hindu law, died leaving behind him two sons Dharma and Miragu. Miragu died issueless in the year 1928 leaving behind him his widow Champabai. The joint family properties of Dharma and Miragu passed on to the hands of Dharma, the sole surviving coparcener on the death of Miragu. Champabai had only right of maintenance in the joint family properties under the law, as it stood then. She took Pandurang in adoption on 9-8-1968, long after the Act came into force. Immediately thereafter the adopted son Pandurang and Champabai filed a regular civil suit for partition and separate possession of one-half share in the properties of the joint family. Before the adoption took place two items of the joint family properties had been sold in favour of others for consideration. Dharma resisted the suit on the ground that the adopted son Pandurang was not entitled to claim any share in the properties, which originally belonged to the joint family in view of clause (*c*) of the proviso to Section 12 of the Act.

10. In ***Vasant* v. *Dattu*** [AIR 1987 SC 398], interpreting clause (*c*) of the proviso to Section 12 of the Act, Chinnappa Reddy, J., speaking for the Bench, observed that where the joint family properties had passed on to the hands of the remaining members of the coparcenary on the death of one of the coparceners no vesting of the property actually took place in the remaining coparceners while their share in the joint family properties might have increased on the death of one of the coparceners, which could decrease on the introduction of one more member into the family either by birth or by adoption. It did not involve any question of divesting any person of any estate vested in him and that the joint family continued to hold the estate, but, with more members than before with introduction of a member into the joint family by adoption; there was no fresh vesting or divesting of the estate in any way.

11. This Court in the case of ***Dharma*** aforementioned respectfully agreed with the above observations made in ***Vasant* v. *Dattu*** as stated in para 9 of the said judgment thus:

> "*9.* We respectfully agree with the above observations of this Court in ***Vasant*** case. The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole

surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted."

12. Finally, this Court concluded that the joint family property continued to remain in the hands of Dharma, the appellant, as joint family properties and that on his adoption Pandurang, the first respondent, became a member of the coparcenary entitled to claim one-half share in them except the items, which had been sold by Dharma, the appellant.

13. From the facts in ***Dharma*** case it is clear that adoption of Pandurang took place during the lifetime of Dharma and as such Pandurang became a member of the coparcenary to claim the share.

14. In the present case with which we are concerned now, it is not disputed that adoption of Dattatraya took place after the death of Vyankat, the sole surviving coparcener. In our view this makes all the difference for the reasons to be stated hereinafter.

15. On the date of death of Vyankat the properties of the joint family in his hands devolved on his heirs i.e. his sons and daughters as per Section 6 of the Hindu Succession Act, 1956, subject to rights of maintenance of Defendant 2 Krishnabai. Opening of succession and devolving of properties operated immediately on the death of Vyankat and the joint family properties stood vested in the heirs of Vyankat. Defendant 6 was adopted by Defendant 2 about four months after the death of Vyankat by which time the properties had already been vested in his heirs as stated above.

16. It is appropriate to extract Section 12 of the Act, which reads:

"12. *Effect of adoptions*.- An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes *with effect from the date of the adoption and* from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that -

(*a*) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(*b*) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(*c*) the adopted child shall not divest any person of any estate which vested in him or her before the adoption." (emphasis supplied)

17. It is plain and clear that an adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect *from the date of adoption* as is evident from the main part of Section 12. Proviso (*c*) to Section 12 in clear terms states that the adopted child *shall not divest* any person of any estate, which vested in him or her before the adoption.

18. In the case of ***Dharma*** aforementioned, the adopted son became a member of the coparcenary with Dharma and there was no question of divesting of any property already vested in the view expressed by this Court in ***Vasant***.

19. But on the death of Vyankat, in the present case, property in his hands devolved and vested in his heirs. In view of proviso (*c*) of Section 12 of the Act Defendant 6 Dattatraya by virtue of his adoption four months after the death of Vyankat could not divest the properties vested in the heirs of Vyankat so as to claim his share.

20. The Full Bench of the Bombay High Court in ***Jivaji Annaji*** **v.** ***Hanmant Ramchandra*** [AIR 1950 Bom 360] dealing with a case of adoption after the collateral's death and the principle of relation back, after referring to a number of Privy Council decisions, held that any adoption after the death of the collateral will not allow the adopted son to come in as an heir of the collateral. Adoption relates back to the death of the adopting father and an adopted son must be looked upon as if he was in existence at the date of the death of the adopting father. But it is not a correct proposition to say that the rights of the adopted son are in all respects identical with that of a natural-born son. The principle of relation back is not an absolute principle but it has certain limitations. Chagla, C.J., speaking for himself and on behalf of Gajendragadkar and Shah, JJ., in para 2 of the said judgment, has stated thus:

"*2*. Now, it has been observed by the Privy Council in several cases that an adoption relates back to the death of the adoptive father and an adopted son must be looked upon as if he was in existence, at the date of the death of the adoptive father. But it is not a correct proposition to say that the rights of an adopted son are in all respects identical with that of a natural-born son. The principle of relation back is not an absolute principle but it has certain limitations. For instance, one limitation is that any lawful alienations made by the last absolute owner would be binding on the adopted son, *and the question that we have to consider in this Full Bench is whether there is a further limitation on the rights of the adopted son and the limitation that is contended for is that if the property by inheritance goes to a collateral and the adopted son is adopted after the death of the collateral, the adoption cannot divest the property which has vested in the heir of the collateral.* Reliance is placed on the Privy Council decision in ***Bhubaneswari Debi*** **v.** ***Nilcomul Lahir*** [ILR (1885) 12 Cal 18 (PC)]. *There it was expressly held that according to Hindu law an adoption after*

the death of a collateral does not entitle an adopted son to come in as heir to the collateral. Mr Madbhavi has attempted to distinguish this case by pointing out that Sir Barnes Peacock, both while arguments were going on at the Bar and in the judgment of the Privy Council which he delivered, emphasized the fact that the adopted son was not in existence at the time of the death of the widow in whom the property was vested. But in our opinion that particular fact cannot be looked upon as the deciding factor in the decision. That is certainly not the ratio which led the Privy Council to come to the conclusion. It is immaterial whether an adopted son is or is not in existence at the time of the death of the person whose property is attempted to be divested. The question is, what is the effect of the adoption which for certain purposes relates back to the death of the adoptive father. But whatever might have been said of the decision of the Privy Council in ***Bhubaneswari*** case all doubt has been set at rest by the manner in which the Privy Council has reaffirmed and re-emphasised that principle in the recent decision of ***Anant Bhikappa Patil* v. *Shankar Ramchandra Patil*** [AIR 1943 PC 196]. At p. 9 Their Lordships say:

> 'Neither the present case nor ***Amarendra Man Singh Bhramarbar Rai* v. *Sanatan Singh,*** [AIR 1933 PC 155], brings into question the rule of law considered in ***Bhubaneswari Debi* v. *Nilcomul Lahiri*** and stated by the Board to be that:
>
> > "*According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral.*"

This is not a stray observation. It is the considered view of the Privy Council that the rule of law as laid down in ***Bhubaneswar****i* case is still good law notwithstanding the decision of ***Anant Bhikappa* v. *Shankar Ramchandra***." (emphasis supplied)

21. We are in respectful agreement with the statement of law made in the aforesaid judgment on the point touching the controversy in the present case.

22. A Bench of three learned Judges of this Court in ***Sawan Ram* v. *Kalawanti*** [AIR 1967 SC 1761], after referring to ***Nara Hanumantha Rao* v. *Nara Hanumayya*** [ILR 1966 AP 140], was unable to accept the interpretation placed by the Andhra Pradesh High Court on Sections 12 and 13 of the Hindu Adoptions and Maintenance Act but however, found that the conclusion arrived at in that case by the Andhra Pradesh High Court was correct. In that case, the question that arose for consideration was whether *E* after the adoption by *D*, the widow of *B* could divest *C* of the rights which had already vested in *C* before the adoption. By the year 1936, *C* was the sole male member of the Hindu joint family which owned the disputed property. *B* died in the year 1924 and *A* died in 1936 before the Hindu Women's Rights to Property Act had come into force and, consequently, *C* as the sole male survivor of the family became full owner of the property. This Court further observed:

> "In these circumstances, it was clear that after the adoption of *E* by *D*, *E* could not divest *C* of the rights already vested in him in view of the special provision contained in clause (*c*) of the proviso to Section 12 of the Act. It appears that, by making such a provision, the Act has narrowed down the rights of an adopted child as

> compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (*c*) of the proviso to Section 12, and Section 13 of the Act were incorporated."

23. This being the legal position Defendant 6, having been adopted after the death of Vyankat and after the properties vested in his heirs, is not entitled for share in the suit properties. In this view the impugned judgment and decree of the High Court affirming the decrees of both the courts below cannot be upheld. Consequently and necessarily they are set aside and the suit of the plaintiff-appellants stands decreed.

24. The appeal is allowed accordingly.

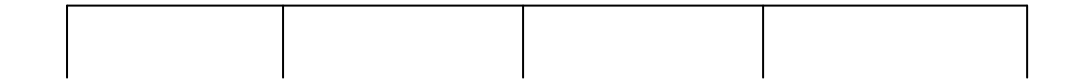
* * * * *

Gurupad Khandappa Magdum v. *Hirabai Khandappa Magdum*

(1978) 3 SCC 383 : AIR 1978 SC 1239

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

KHANDAPPA SANGAPPA MAGDUM
= HIRABHAI (Plaintiff)



Gurupad (Deft. 1)	Biyawwa (Deft. 3)	Bhagirathibai (Deft. 4)	Dhandubai (Deft. 5)	Shivapad (Deft. 2)

2. Khandappa died on June 27, 1960 leaving him surviving his wife Hirabai, who is the plaintiff, two sons Gurupad and Shivapad, who are defendants 1 and 2 respectively, and three daughters, defendants 3 to 5. On November 6, 1962 Hirabai filed special civil suit No. 26 of 1963 in the court of the Joint Civil Judge, Senior Division, Sangli for partition and separate possession of a 7/24th share in two houses, a land, two shops and movables on the basis that these properties belonged to the joint family consisting of her husband, herself and their two sons. If a partition were to take place during Khandappa's lifetime between himself and his two sons, the plaintiff would have got a 1/4th share in the joint family properties, the other three getting a 1/4th share each. Khandappa's 1/4th share would devolve upon his death on six sharers: the plaintiff and her five children, each having a 1/24th share therein. Adding 1/4th and 1/24th, the plaintiff claims a 7/24th share in the joint family properties. That, in short, is the plaintiff's case.

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

3. The trial court by its judgment dated July 13, 1965 rejected defendant 1's case that the properties were Khandappa's self-acquisitions and that he had partitioned them during his lifetime. Upon that finding the plaintiff became indisputably entitled to a share in the joint family properties but, following the judgment of the Bombay High Court in ***Shiramabai Bhimgonda* v. *Kalgonda*** [AIR 1964 Bom 263], the learned trial judge limited that share to 1/24th, refusing to add 1/4th and 1/24th together. As against that decree, defendant 1 filed first appeal No. 524 of 1966 in the Bombay High Court, while the plaintiff filed cross-objections. By a judgment dated March 19, 1975 a Division Bench of the High Court dismissed defendant 1's appeal and allowed the plaintiff's cross-objections by holding that the suit properties belonged to the joint family, that there was no prior partition and that the

plaintiff is entitled to a 7/24th share. Defendant 1 has filed this appeal against the High Court's judgment by special leave.

4. Another Division Bench of the Bombay High Court in ***Rangubai Lalji* v. *Laxman Laljim*** [AIR 1966 Bom 169], had already reconsidered and dissented from the earlier Division Bench judgment in ***Shiramabai Bhimgonda***. In these two cases, the judgment of the Bench was delivered by the same learned Judge, Patel J. On further consideration the learned Judge felt that ***Shiramabai*** was not fully argued and was incorrectly decided and that on a true view of law, the widow's share must be ascertained by adding the share to which she is entitled at a notional partition during her husband's lifetime and the share which she would get in her husband's interest upon his death. In the judgment under appeal, the High Court has based itself on the judgment in ***Rangubai Lalji*** endorsing indirectly the view that ***Shiramabai*** was incorrectly decided.

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

6. The Hindu Succession Act came into force on June 17, 1956. Khandappa having died after the commencement of that Act, June 27,1960, and since he had at the time of his death an interest in Mitakshara coparcenary property, the pre-conditions of Section 6 are satisfied and that section is squarely attracted. By the application of the normal rule prescribed by that section, Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. But, since the widow and daughter are amongst the female relatives specified in class I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to Section 6 comes into play and the normal rule is excluded. Khandappa's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship. Testamentary succession is out of question as the deceased had not made a testamentary disposition though, under the explanation to Section 30 of the Act, the interest of a male Hindu in Mitakshara coparcenary property is capable of being disposed of by a will or other testamentary disposition.

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

8. Before considering the implications of Explanation 1, it is necessary to remember that what Section 6 deals with is devolution of the interest which a male Hindu has in a Mitakshara coparcenary property at the time of his death. Since Explanation 1 is intended to be explanatory of the provisions contained in the section, what the Explanation provides has to be co-related to the subject-matter which the section itself deals with. In the instant case the plaintiff's suit, based as it is on the provisions of Section 6, is essentially a claim to obtain a share in the interest which her husband had at the time of his death in the coparcenary property. Two things become necessary to determine for the purpose of giving relief to the

plaintiff: One, her share in her husband's share and two, her husband's own share in the coparcenary property. The proviso to Section 6 contains the formula for fixing the share of the claimant while Explanation 1 contains a formula for deducing the share of the deceased. The plaintiff's share, by-the application of the proviso, has to be determined according to the terms of the testamentary instrument, if any, made by the deceased and since there is none in the instant case, by the application of the rules of intestate succession contained in Sections 8, 9 and 10 of the Hindu Succession Act. The deceased Khandappa died leaving behind him two sons, three daughters and a widow. The son, daughter and widow are mentioned as heirs in class I of the Schedule and therefore, by reason of the provisions of Section 8(*a*) read with the 1st clause of Section 9, they take simultaneously and to the exclusion of other heirs. As between them the two sons, the three daughters and the widow will take equally, each having one share in the deceased's property under Section 10 read with Rules 1 and 2 of that section. Thus, whatever be the share of the deceased in the coparcenary property, since there are six sharers in that property each having an equal share, the plaintiff's share therein will be 1/6th.

9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that the interest of a Hindu Mitakshara coparcener shall be *deemed to be* the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the plaintiff, not being a coparcener, was not entitled to demand partition yet if a partition were to take place between her husband and his two sons she would be entitled to receive a share equal to that of a son. (See **Mulla's *Hindu Law***. Fourteenth Edition page 403 at 315). In a partition between Khandappa and his two sons there would be four sharers in the coparcenary property the fourth being Khandappa's wife, the plaintiff. Khandappa would have therefore got a 1/4lh share in the coparcenary property on the hypothesis of a partition between himself and his sons.

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

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

of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

12. The fiction created by Explanation 1 has to be given its due and full effect as the fiction created by Section 18A(9)(6) of the Indian Income-Tax Act, 1922, was given by this Court in ***Commissioner of Income-Tax, Delhi* v. *S. Teja Singh*** [AIR 1959 SC 352]. It was held in that case that the fiction that the failure to send an estimate of tax on income under Section 18A(3) is to be deemed to be a failure to send a return, necessarily involves the fiction that a notice had been issued to the assessee under Section 22 and that he had failed to comply with it. In an important aspect, the case before us is stronger in the matter of working out the fiction because in ***Teja Singh*** case, a missing step had to be supplied which was not provided for by Section 18A(9)(6), namely, the issuance of a notice under Section 22 and the failure to comply with that notice. Section 18A(9)(6) stopped at creating the fiction that when a person fails to send an estimate of tax on his income under Section 18A(3) he shall be deemed to have failed to furnish a return of his income. The section did not provide further that in the circumstances therein stated, a notice under Section 22 shall be deemed to have been issued and the notice shall be deemed not to have been complied with. These latter assumptions in regard to the issuance of the notice under Section 22 and its non-compliance had to be made for the purpose of giving due and full effect to the fiction created by Section 18A(9)(6). In our case it is not necessary, for the purposes of working out the fiction, to assume and supply a missing link which is really what was meant by Lord Asquith in his famous passage in ***East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*** [(1951) 2 All ER 587]. He said:

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

13. In order to ascertain the share of heirs in the property of a deceased coparcener, it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for

calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, *in addition to* the share which he or she received or must be deemed to have received in the notional partition.

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

15. We are happy to find that the view which we have taken above has also been taken by the Bombay High Court in ***Rangubai Lalji* v. *Laxman Lalji*** in which Patel, J., very fairly, pronounced his own earlier judgment to the contrary in ***Shiramabai Bhimgonda* v. *Kalgonda*** as incorrect. Recently, a Full Bench of that High Court in ***Sushilabai Ramachandra Kulkarni* v. *Narayanrao Gopalrao Deshpande*** [AIR 1975 Bom 2570], the Gujarat High Court in ***Vidyaben* v. *Jagdischandra N. Bhatt*** [AIR 1974 Guj 23] and the High Court of Orissa in ***Ananda* v. *Haribandhu*** have taken the same view. The Full Bench of the Bombay High Court in ***Sushilabai*** has considered exhaustively the various decisions bearing on the point and we endorse the analysis contained in the judgment of Kantawala, C.J., who has spoken for the Bench. For these reasons we confirm the judgment of the High Court and dismiss the appeal.

* * * * *

Vellikannu v. *R. Singaperumal*

(2005) 6 SCC 622

A.K. MATHUR, J. - This appeal is directed against the judgment of the learned Single Judge of Judicature at Madras whereby the learned Single Judge by his order dated 6-3-1997 has allowed Second Appeal No. 773 of 1983 filed by the respondent-first defendant herein.

2. Brief facts which are necessary for disposal of this appeal are: That an Original Suit No. 87 of 1978 was filed in the Court of the District Munsif, Melur by the plaintiff-appellant (herein). The schedule properties are the self-acquired properties of the late Ramasami Konar and the first defendant was the only son of Ramasami Konar and the plaintiff is the wife of the first defendant. Wife of Ramasami Konar was already divorced and married with some other person and was residing separately. It is alleged that the first defendant in the suit married the plaintiff-appellant and both were residing as husband and wife. On 10-10-1972 the first defendant murdered his father Ramasami Konar and was convicted under Section 302 IPC for life imprisonment. The conviction of the first defendant was confirmed by the High Court but the High Court recommended the Government to reduce the sentence to the period already undergone. The first defendant was released in July 1975. Since the first defendant murdered his father, he was not entitled to succeed to the estate of his deceased father and as such the claim of the plaintiff was that she alone was entitled to all the properties left by the deceased Ramasami Konar. According to the plaintiff, the first defendant must be deemed to have predeceased as provided under Section 25 read with Section 27 of the Hindu Succession Act. She claimed to be the widow of the first defendant and claimed to be the owner of all the properties left by Ramasami Konar as coparcener. After the release of the first defendant from the prison, the first defendant lived with the plaintiff for some time but after some time she was driven out of the house. The second defendant is already impleaded in the suit as tenant claiming under the first defendant. The plaintiff, therefore, prayed that she may be granted the relief of declaration as she is entitled to inherit the entire estate of the deceased Ramasami Konar. As against this it was contended by the first defendant that the suit was not maintainable as the plaintiff is not the legal heir of Ramasami Konar. It was alleged that all the properties acquired by Ramasami, were joint family properties and the first defendant has acquired the same by survivorship. The trial court by order dated 31-3-1980 held that all the properties are joint family properties of the deceased Ramasami Konar and the first defendant. The second defendant is a cultivating tenant. The first defendant having murdered his father is not entitled to claim any right under Section 6 read with Sections 25 and 27 of the Act but as per proviso to Section 6 of the Hindu Succession Act the plaintiff is entitled to a decree for half share and accordingly it was granted to the plaintiff. This matter was taken up in appeal by Defendant 1. The lower appellate court also confirmed the finding of the trial court but modified the decree that it may be treated as preliminary decree. The lower court also held that the first defendant must be treated as non-existent. The plaintiff became a Class I heir under Schedule 1 of the Hindu Succession Act and she was entitled to a share in the property. The appeal was dismissed.

3. Aggrieved against this, the first defendant preferred a second appeal before the High Court.

4. The High Court at the time of admission of the second appeal, framed the following substantial questions of law:

1. Whether Ext. A-2 judgment in the criminal case is conclusive on the question of exclusion from inheritance in the present proceedings? and

2. Whether the exclusion from inheritance would cover enlargement of interest by survivorship, in the light of Section 6 of the Hindu Succession Act?

So far as Question 1 is concerned, the High Court held that the judgment of the criminal court can be taken into consideration. But the main question which was addressed by the High Court was whether the plaintiff can inherit the properties from the estate of her deceased father-in-law Ramasami Konar and what is the effect of Section 25, Section 27 read with Section 6 and Section 8 of the Hindu Succession Act.

5. It was not disputed that the properties of Ramasami Konar were joint family properties in which Defendant 1 was also one of the members and the parties are governed by the Mitakshara school of Hindu law.

7. Learned Single Judge allowed the appeal of Defendant 1-Respondent 1 (herein) and judgment and decree of the courts below were set aside. The suit was dismissed. Hence the present appeal.

8. Learned counsel for the appellant tried to persuade us that the appellant being the sole female survivor of the joint Hindu property as her husband stands disqualified, she under proviso to Section 6 of the Act, is entitled to the whole of the estate as a sole surviving member of the coparcenary property read with Section 8 of the Act as a Class I heir. As against this, learned counsel for the respondent-defendant has submitted that this disqualification which was attached to the son equally applies in the case of the wife as she is claiming the estate because of her marriage with the respondent and if he is disqualified, then she is also equally disqualified to claim any property being a coparcener from the estate of her deceased father-in-law.

9. In order to appreciate the rival contention, it would be relevant to reproduce provisions of the Hindu Succession Act, Sections 6, 8, 25 and 27 of the Act.

10. As per Section 6 of the Hindu Succession Act, if a male Hindu dies after commencement of this Act, his interest in a Mitakshara coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. At the same time there is proviso to the section which qualifies the main section that if the deceased left a surviving female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be and not by survivorship. So far as the present case is concerned, the concurrent finding of the fact is that the deceased Ramasami Konar was governed by Mitakshara law and the property was the coparcenary property. But he died intestate. Therefore, as per Section 6, the property shall devolve by survivorship upon the surviving members of the coparcenary and not by Section 6 of the Act.

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 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 *Mullas* ***Principles of Hindu Law*** [15th Edn. (1982) at pp. 284 and 285], the learned author has stated thus:

> 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, 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 a partition takes place consist in a common possession and common enjoyment of the coparcenary property. As observed by the Privy Council in ***Katama Natchiar* v. *Rajah of Shivagunga*** [(1863) 9 MIA 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.

12. Likewise, S.V. Gupte, author of ***Hindu Law***, [Vol. 1, 3rd Edn. (1981) at p.162] where the learned author deals with the rights of a coparcener. He says thus:

> Until partition a coparcener is entitled to -
>
> (1) joint possession and enjoyment of joint family property,
>
> (2) the right to take the joint family property by survivorship, and
>
> (3) the right to demand partition of the joint family property.

At p. 164, the learned author deals with the right of survivorship. He says:

> While the family remains joint, its property continues to devolve upon the coparceners for the time being by survivorship and not by succession. Consequently, on the death of a coparcener the surviving coparceners take his undivided interest in the joint family property by survivorship. 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.

The learned author further says:

A coparcener who is disqualified by reason of a disability (such as insanity) from taking a share on partition may nevertheless take the whole property by survivorship.

At p. 165, the learned author has further said thus:

By survivorship a coparcener does not obtain the share of a deceased coparcener as his representative; strictly speaking it does not pass to him; the effect is merely to enlarge his share in what he already owns in the aggregate. Surviving coparceners are not therefore the legal representatives of a deceased coparcener.

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" 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. 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.

14. In this connection, a reference may be made to the case of ***State Bank of India* v. *Ghamandi Ram*** [AIR 1969 SC 1330] in which it was held thus:

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 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, Ch. I, 1-27). The incidents of coparcenership 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 co ncurrence 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.

15. The concept of coparcener as given in the Mitakshara school of Hindu law as already mentioned above, is that of a joint family property wherein all the members of the coparcenary share equally. In this connection a reference may be made to a decision of this Court in the case of ***State of Maharashtra* v. *Narayan Rao Sham Rao Deshmukh*** [(1985) 2 SCC 321] in which Their Lordships have held as follows:

> *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.

16. Therefore, in view of various decisions of this Court it appears that Defendant 1 and the plaintiff who was married to Defendant 1 were members of joint Hindu family. If the defendant-respondent had not incurred the disqualification, then they would have inherited the property as per Mitakshara school of Hindu law. But the question is that when the sole male survivor had incurred the disqualification can he still claim the property by virtue of Mitakshara school of Hindu law? If he cannot get the property by way of survivorship, then the question is whether his wife who succeeds through the husband can succeed to the property? Our answer to this question is in the negative. In fact, prior to the enactment of the Hindu Succession Act, sections like Sections 25 and 27 were not there but the murderer of his own father was disqualified on the principle of justice, equity and good conscience and as a measure of public policy. This position of law was enunciated by the Privy Council way back in 1924 in the case of ***Kenchava Kom Sanyellappa Hosmani* v. *Girimallappa Channappa Samasagar*** [AIR 1924 PC 209] wherein Their Lordships have held as follows:

> In Their Lordships' view it was rightly held by the two courts below that the murderer was disqualified; and with regard to the question whether he is disqualified wholly or only as to the beneficial interest which the Subordinate Judge discussed,

> founding upon the distinction between the beneficial and legal estate which was made by the Subordinate Judge and by the High Court of Madras in the case of ***Vedanayaga Mudaliar* v. *Vedammal*** [ILR (1904)27 Mad 591], Their Lordships reject, as did the High Court here, any such distinction. The theory of legal and equitable estates is no part of Hindu law, and should not be introduced into discussion. The second question to be decided is whether title can be claimed through the murderer. If this were so, the defendants as the murderer's sisters, would take precedence of the plaintiff, his cousin. In this matter also, Their Lordships are of opinion that the courts below were right. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. It may be pointed out that this view was also taken in the *Madras* case just cited.

Their Lordships also explained the decision in the case of ***Gangu* v. *Chandrabhagaba*** [ILR (1908) 32 Bom 275] and held as follows:

> It was contended that a different ruling was to be extracted from the decision of the Bombay High Court in ***Gangu* v. *Chandrabhagaba***. This is not so. In that case, the wife of a murderer was held entitled to succeed to the estate of the murdered man but that was not because the wife deduced title through her husband, but because of the principle of Hindu family law that a wife becomes a member of her husband's gotra, an actual relation of her husband's relations in her own right, as it is called in Hindu law a gotraja-sapinda. The decision therefore has no bearing on the present case.

Therefore, the principle which has been enunciated by Their Lordships in no uncertain terms totally disinherits the son who has murdered his father. Their Lordships have observed as follows:

> A murderer must for the purpose of the inheritance, be treated as if he was dead when the inheritance opened and as not being a fresh stock of descent; the exclusion extends to the legal as well as beneficial estate, so that neither he can himself succeed nor can the succession be claimed through him.

This Privy Council decision made reference to the decisions of the High Courts of Madras and Bombay and Their Lordships have approved the ratio contained in those decisions that a murderer should be totally disinherited because of the felony committed by him. This decision of the Privy Council was subsequently followed in the following cases:

(*i*) *K. Stanumurthiayya* v. *K. Ramappa* [AIR 1942 Mad 277]
(*ii*) *Nakchhed Singh* v. *Bijai Bahadur Singh* [AIR 1953 All 759]
(*iii*) *Mata Badal Singh* v. *Bijay Bahadur Singh* [AIR 1956 All 707]
(*iv*) *Minoti* v. *Sushil Mohansingh Malik* [AIR 1982 Bom 68]

17. This position of law was incorporated by way of Section 25 of the Hindu Succession Act, 1956, which clearly enunciates that a person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder. In fact, the objects and reasons also

makes a reference to the *Privy Council* judgment. The objects and reasons for enacting Section 25 read as under:

> A murderer, even if not disqualified under Hindu law from succeeding to the estate of the person whom he has murdered, is so disqualified upon principles of justice, equity and good conscience. The murderer is not to be regarded as the stock of a fresh line of descent but should be regarded as non-existent when the succession opens.

18. Therefore, once it is held that a person has murdered his father or a person from whom he wants to inherit, he stands totally disqualified. Section 27 of the Hindu Succession Act makes it further clear that if any person is disqualified from inheriting any property under this Act, it shall be deemed as if such person had died before the intestate. That shows that a person who has murdered a person through whom he wants to inherit the property stands disqualified on that account. That means he will be deemed to have predeceased him. The effect of Section 25 read with Section 27 of the Hindu Succession Act, 1956 is that a murderer is totally disqualified to succeed to the estate of the deceased. The framers of the Act in the objects and reasons have made a reference to the decision of the *Privy Council* that the murderer is not to be regarded as the stock of a fresh line of descent but should be regarded as non-existent. That means that a person who is guilty of committing the murder cannot be treated to have any relationship whatsoever with the deceased's estate.

19. Now, adverting to the facts of the present case, the effect of Sections 25 and 27 is that Respondent 1 cannot inherit any property of his father on the principle of justice, equity and good conscience as he has murdered him and the fresh stock of his line of descent ceased to exist in that case. Once the son is totally disinherited then his whole stock stands disinherited i.e. wife or son. The defendant-Respondent 1 son himself is totally disqualified by virtue of Sections 25 and 27 of the Hindu Succession Act and as such the wife can have no better claim in the property of the deceased Ramasami Konar.

20. Therefore, as a result of our above discussion, we are of opinion that the view taken by the learned Single Judge of the High Court of Madras is correct that the plaintiff is not entitled to inherit the estate of the deceased Ramasami Konar and the learned Single Judge has rightly set aside the orders of the two courts below. Since we cannot decide this appeal without deciding the right of Respondent 1 as the right of the appellant flows therefrom as his wife i.e. the plaintiff, therefore, it was necessary for us to first decide whether Respondent 1 could succeed or inherit the estate of his deceased father. When the son cannot succeed then the wife who succeeds to the property through the husband cannot also lay a claim to the property of her father-in-law. The appeal is thus dismissed. No order as to costs.

* * * * *

S. Narayanan v. *Meenakshi*

AIR 2006 Ker.143

K.T. SANKARAN, J.:- The questions of law involved in this Second Appeal are the following: -

(1) Whether a suit for partition at the instance of a daughter of the deceased could be defeated by invoking Section 23 of the Hindu Succession Act by the legal representatives of a deceased son of the intestate?

(2) Whether Section 23 would be applicable in a case where the deceased intestate has left behind him only one male issue and whether it is necessary that there must be more than one male issues to invoke Section 23?

(3) Whether the protection in favour of the male heir under Section 23 of the Hindu Succession Act would be available if he inducts a third party in the dwelling house or any portion thereof?

(4) Whether omission of Section 23 of the Hindu Succession Act by the Hindu Succession (Amendment) Act, 2005 would have any impact on a suit for partition or appeal therefrom pending on the date of the commencement of the Hindu Succession (Amendment) Act, 2005?

(2) The property sought to be partitioned is having only an extent of three cents and it is a Kudikidappu. It was owned by Ramayi who died on 12-9-1976. Ramayi left behind her four daughters including the plaintiff and a son, the defendant. After the death of Ramayi, plaintiff obtained purchase certificate from the Land Tribunal in her name, but on behalf of the other co-owners as well. The three sisters of the plaintiff released their fractional rights in the property to the plaintiff. Thus the plaintiff claimed 4/5 share and contended that the defendant has only 1/5 share.

(3) The defendant contended that Ramayi was not the Kudikidappukari, but her husband was the Kudikidappukaran and that the plaintiff and her sisters were married away before the commencement of the Hindu Succession Act and, therefore, they are not entitled to any share in the property. The defendant contended that the building was constructed by him.

(4) The plaintiff claimed that the old Kudikidappu was demolished by her and a new house was constructed by her. The plaintiff also raised a contention that the defendant unauthorisedly allowed a stranger to occupy a portion of the house for conducting soda business.

(5) Both the Courts below found that the property belonged to Ramayi, the mother of the plaintiff and the defendant. It was also found by the lower Appellate Court, on facts, that the rival claim of the plaintiff and the defendant regarding construction of the house cannot be accepted. Therefore, it is to be taken that Ramayi was the Kudikidappukari and on her death, the rights devolved on her children, namely, the plaintiff, the defendant and their three sisters.

(6) Though the defendant did not put forward a specific contention in the written statement that the suit for partition is not maintainable in view of Section 23 of the Hindu Succession Act, both the Courts below considered the same and arguments were advanced

before this Court also in respect of the same. Though strictly speaking the contention raised by the defendant is not liable to be considered as the defence under Section 23 is not supported by sufficient pleadings, I propose to deal with that contention on the merits rather that to reject the contention on the ground that there was no sufficient pleading.

(7) The trial Court held that the property shall be divided into five shares and that the plaintiff is entitled to get 1/5 share. The claim of the plaintiff on the basis of the release deed executed by the three sisters was negatived on the ground that the document was not proved. The trial Court also held that in view of Section 23 of the Hindu Succession Act, the plaintiff cannot claim partition. On appeal by the plaintiff, the Appellate Court held that the plaintiff is entitled to 4/5 share. The Appellate Court held that Section 23 does not apply since there is only one male heir and that a stranger was inducted by the defendant in a portion of the residential building.

(8) I shall first deal with the question whether the intestate should be survived by more than one male heir in order to apply Section 23 of the Hindu Succession Act. In ***Madhavan Ezhuthasan*** **v.** ***Vellayyappan*** [ILR 1981 Kerala 643], Justice Janki Amma held that Section 23 would apply even if the deceased is survived by only one male heir along with female heir or heirs. In ***Sadasivan*** **v.** ***Vasumathi*** [1987 (1) KLT 592], Justice ***Varghese Kalliath*** doubted the correctness of the view taken by Justice Janaki Amma. But, the case was decided on the ground that there was no sufficient pleading to invoke Section 23 of the Hindu Succession Act. The conflict between the aforesaid two decisions, may not be relevant in view of the decision of the Supreme Court in ***Narashimha Murthy*** **v.** ***Smt. Susheelabai*** [AIR 1996 SC 1826]. The Supreme Court considered the scope and object of Section 23 and held that the object is to prevent fragmentation or disintegration of the family dwelling house at the instance of the female heir to the prejudice of male heirs.

> Though the words the male heirs choose to divide their respective shares, suggest that at least two such male heirs must exist and decide not to partition the dwelling house in which event the right of the female heir is postponed and kept in abeyance until the male heir or heirs of the Hindu Intestate decide to partition it, it does not necessarily lead to the only inevitable conclusion that the operation of S.23 must stand excluded in the case of the Hindu intestate leaving behind him/her surviving only son and daughter ....one way to look at it is that if there is one male heir, the section is inapplicable, which means that a single male heir cannot resist female heir's claim to partition. This would obviously bring unjust results, an intendment least conceived of as the underlying idea of maintenance of status quo would go to the winds. This does not seem to have been desired while enacting the special provision. It looks nebulous that if there are two males, partition at the instance of female heir could be resisted. But if there is one male, it would not. The emphasis on the section is to preserve a dwelling house as long as it is wholly occupied by some or all members of the intestate's family which includes male or males. Understood in this manner, the language in plural with reference to male heirs would have to be read in singular with the aid of the provisions of the General Clauses Act. It would thus read to mean that when there is a single male heir, unless he chooses to take out his share from the dwelling-house, the female heirs cannot claim partition against

> him. It cannot be forgotten that in the Hindu male oriented society, where begetting of a son was a religious obligation, for the fulfillment of which Hindus have even been resorting to adoptions, it could not be visualized that it was intended that the single male heir should be worse off unless he had a supportive second male as a Class I heir. The provision would have to be interpreted in such manner that it carries forward the spirit behind it. The second question would thus have to be answered in favour of the proposition holding that where a Hindu intestate leaves surviving him a single male heir and one or more female heirs specified in Class I of the Schedule, the provisions of Section 23 keep attracted to maintain the dwelling-house impartible as in the case of more than one male heir, subject to the right of re-entry and residence of the female heirs so entitled, till such time the single male heir chooses to separate his share; this right of his being personal to him, neither transferable nor heritable.

In view of the Supreme Court decision in ***Narashimha Murthy*** case, the decision of this Court in 1987 (1) KLT 592 is not good law on the interpretation of Section 23 of the Hindu Succession Act. The view taken by the lower Appellate Court on this point is also erroneous.

10. The next question to be considered is whether the protection available to the male heir under Section 23 would be lost if he inducts a third party in a portion of the dwelling house. It has come out in evidence and it is not disputed as well that a portion of the dwelling house is occupied by a stranger. The expression used in Section 23 of the Hindu Succession Act is "includes a dwelling house wholly occupied by members of his or her family". The Supreme Court in ***Narashimha Murthy*** case held that if strangers are inducted into the dwelling house it must be taken that the male heir had lost his animus possedendi. The Supreme Court held as follows (para 31):

> Thus it appears to us that if the male heirs derive the right under the provision to resist partition of the dwelling house unless they chose to divide their respective shares therein, then correspondingly it is incumbent on the male heirs to keep the property well arranged, inhabited or occupied by themselves keeping the property available for the female heirs to enforce the right to residence therein. But if the latter right is frustrated on creation of third party rights or a contractual or statutory tenancy, there remains no right with the males to resist partition.

In ***Madhavan Ezhuthasan*** **v.** ***Vellayyappan***, it was held:

> The right ceases if the male heirs or their families ceased to use the whole property as a dwelling house and permit a stranger to occupy a portion of it.

11. The protection under Section 23 is not indefeasible. Section 23 curtails the rights of female heirs to claim partition until the male heirs choose to divide their respective shares, only in the contingencies mentioned in Section 23. Section 23 is an exception to the general rule that Class 1 heirs are entitled to claim partition of their shares in the property of their predecessor. The exception is conditioned with the conditions mentioned in Section 23. Section 23 must be strictly construed. The male heirs can claim the benefit only if they fully satisfy all the conditions laid down in Section 23, the defendant admittedly having inducted a stranger in a portion of the dwelling house wherein that stranger is conducting business. I am

of the view that the defendant is not entitled to claim any protection under Section 23 of the Hindu Succession Act. Where a portion of the dwelling house is put in the possession of a stranger, it cannot be said that the dwelling house is wholly occupied by the members of the family of the intestate.

15. The Hindu Succession Amendment Act, 2005, Act 39 of 2005, was enacted on the basis of the 174th report of the Law Commission. The representations made by the various women's organizations were considered by the Law Commission. Even at the time when the Hindu Succession Act, 1956 was enacted, women's organizations had voiced the grievance that though the 1956 Act made commendable in-roads into the erstwhile Hindu system of inheritance, still the gender discrimination against women was not fully done away with by the 1956 Act. As per Section 4 of the Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005), Section 23 of the Hindu Succession Act, 1956 is omitted. The question is whether the omission of Section 23 of the Hindu Succession Act in view of the commencement of Act 39 of 2005 during the pendency of a suit for partition or an appeal or second appeal therefrom has relevance in deciding the question whether the male heir or male heirs could resist the suit for partition under Section 23 of the Act. As held by the Supreme Court and this Court, the right to claim the benefit of Section 23 is personal to the male heir of the deceased Hindu intestate. Such a right is not heritable or alienable. Therefore, it cannot be said that cessation of such personal right during the pendency of a suit for partition would not entitle the female heir to claim partition taking note of the subsequent events, if the contention that the state of affairs as on the date of the suit alone would be relevant is to be accepted, then it would have the effect of indirectly holding that the personal right of the male heir to resist partition could be continued by his legal representatives, in case such male heir dies during the pedency of the suit. I have already held that the personal right of the male heir cannot be claimed by his legal heirs. Therefore, whenever the personal right of a male heir under Section 23 comes to an end, the right of the female heir to claim partition cannot be defeated. In other words, a defaceable right of a male heir would get defeated the moment his personal right of a male heir is taken away by the omission of Section 23 of the Hindu Succession Act, 1956 by the Hindu Succession (Amendment) Act, 2005. The effect of such omission would be retroactive.

16. In ***Lekh Raj* v. *Muni Lal*** [AIR 2001 SC 996], the Supreme Court held:

> The law on the subject is also settled. In case subsequent event or fact having bearing on the issues or relief in a suit or proceeding, to which any party seeks to bring on record, the Court should not shut its door. All laws and procedures including functioning of Courts are all in aid to confer justice to all who knocks its door. Courts should interpret the law not in derogation of justice but in its aid. Thus bringing on record subsequent event, which is relevant should be permitted to be brought on record to render justice to a party……

In ***Pasupuleti Venkateswarlu* v. *The Motor and General Traders*** [AIR 1975 SC 1409], it was held by the Supreme Court thus:

> If a fact, arising after the lis has come to Court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of

> the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy……..

In ***Ramesh Kumar* v. *Kesho Ram*** [1992 Supp (2) SCC 623: AIR 1992 SC 700], it was held :

> The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties of relief or on aspects which bear on the moulding of the relief occur, the Court is not precluded from taking a cautious cognizance of the subsequent changes of fact and law to mould the relief.

17. The Supreme Court in ***Lekh Raj*** case [AIR 2001 SC 996] quoted with approval the decision of the Supreme Court of the ***United States in Patterson* v. *State of Alabama*** [1934 (244) US 600], wherein it was held thus (para 12):

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or law, which has supervened since the judgment was entered.

The above decisions of the Supreme Court would fortify the conclusion that the omission of Section 23 of the Hindu Succession Act 1956, by the Amendment Act (39 of 2005) would have retroactive effect and the changed law could be taken note of and applied in pending litigations. Therefore, I am of the view that by the omission of Section 23 of the Hindu Succession Act, 1956 as per the Hindu Succession (Amendment) Act, 2005 the right of the male heir to claim the benefit of Section 23 would get defeated even in pending litigations.

For the aforesaid reasons, I hold that the additional appellant is not entitled to succeed in the Second Appeal. The Second Appeal fails and it is dismissed with costs.

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V. Tulasamma v. *Sesha Reddy*

(1977) 3 SCC 99 : AIR 1977 SC 1944

P.N. 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. 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. Rajkunua*** [AIR 1962 SC 1493] "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, 1956 "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 subsection (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 ***Gummalapuri Taggiiw Matada Kolturuswami* v. *Satre Veerayya*** [AIR 1959 SC 577] 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 ***Mongol Singh* v. *Rattno*** [AIR 1967 SC 1767] 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 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*** [(1970) 2 SCR 95]. 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 subsection (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 subsection (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 Legislature 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*** case 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 intendment 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*** case. 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 subsection (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*** [(1969) 3 SCC 628], 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 negatived 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 inheriting 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 subsection (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*** case while quoting with approval the observations made bv the Madras High Court in ***Ransaswami Naicker* v. *Chinnammal*** [AIR 1964 Mad 387] 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 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 subsection (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 i.e.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 of 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*** [(1969) 3 SCR 789] 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. Vide ***Rachawa* v. *Shivayagoppa*** [ILR 18 Bom 679] cited with approval in ***Ranibai*** case. 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*** case, "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 prescribing a restricted estate for her in the property sub-section (2) of Section 14 would have no application in such a case.

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.

FAZAL ALI, J. - 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. Sesha 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 Property Act, 1937. We might further add that the facts narrated above have not been disputed by Counsel for the parties.

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Jagannathan Pillai v. *Kunjithapadam Pillai*

(1987) 2 SCC 572 : AIR 1987 SC 1493

M.P. THAKKAR, J. - Under the same law [Section 14(1) of Hindu Succession Act, 1956] in an identical fact-situation, a Hindu widow who has inherited property in Orissa or Andhra Pradesh would be a 'limited owner' and would not become an 'absolute owner' thereof whereas if she has inherited property in Madras, Punjab, Bombay or Gujarat she would become an 'absolute owner'. That is to say, in a situation where a Hindu widow regains possession of a property (in which she had a limited ownership) subsequent to the commencement of the Act upon the retransfer of the very same property to her by the transferee in whose favour she had transferred it prior to the commencement of the Act. This incongruous situation has arisen because of an interpretation and application of Section 14(1) of the Hindu Succession Act, 1956. In the context of the aforesaid fact-situation the High Courts of Orissa [***Ganesh Mahanta* v. *Sukria Bewa,*** AIR 1963 Ori 167] and Andhra Pradesh [***Venkatarathnam* v. *Palamma***, (1970) 2 Andh WR 264] have proclaimed that she would be only a limited owner of such property on such retransfer whereas the High Courts of Madras [***Chinnakolandai Goundan* v. *Thanji Gounder,*** AIR 1965 Mad 497], Punjab [***Teja Singh* v. *Jagat Singh***, AIR 1964 Punj 403], Bombay [***Ramgowda Aunagowda* v. *Bhausaheb,*** AIR 1927 PC 227] and Gujarat [***Bai Champa* v. *Chandrakanta Hiralal Dahyabhai Sodagar***, AIR 1973 Guj 227] have taken a contrary view and have pronounced that she would become an 'absolute owner' of such a property in the aforesaid situation. We have therefore to undertake this exercise to remove the unaesthetic wrinkles from the face of law to ensure that a Hindu widow has the same rights under the same law regardless of the fact as to whether her property is situated within the jurisdiction of one High Court or the other.

3. The typical facts in the backdrop of which the problem has to be viewed are:

(1) A Hindu female acquired a property, say by reason of the death of her husband, before the commencement of the Act (i.e. before June 17, 1956).

(2) What she acquired was a widow's estate as understood in shastric or traditional Hindu law.

(3) She lost the possession of the property on account of a transaction whereby she transferred the property in favour of an alienee by a registered document of 'sale' or 'gift'.

(4) The property in question was retransferred to her by the said alienee 'after' the enforcement of the Act by a registered document thus restoring to the widow the interest (such as it was) which she had parted with earlier by reversing the original transaction.

It is in this factual background that the question will have to be examined as to whether upon the reconveyance of the very property which she had alienated after enforcement of the Act, she would become a full owner in respect of such a property by virtue of Section 14(1) of the Hindu Succession Act, 1956. Be it realized that the law has been settled by this Court that the limited estate or limited ownership of a Hindu female would enlarge into an absolute estate or full ownership of the property in question in the following fact-situation:

(1) Where she acquired the limited estate in the property before or after the commencement of the Act provided she was in possession of the property at the time of the coming into force of the Act on June 17, 1956.

(2) Even if the property in question was possessed by her in lieu of her right to maintenance as against the estate of her deceased husband or the joint family property, she would be entitled to become a full or absolute owner having regard to the fact that the origin of her right was traceable to the right against her husband's estate.

4. The problem which has arisen in the present appeal is in the context of a fact-situation where while the widow acquired a limited estate from her husband she was not in possession on the date of the enforcement of the Act viz. June 17, 1956. But the possession was restored to her upon the original alienee reconveying the property to her.

5. On an analysis of Section 14(1) of the Hindu Succession Act of 1956, it is evident that the legislature has abolished the concept of limited ownership in respect of a Hindu female and has enacted that any property possessed by her would thereafter be held by her as a full owner. Section 14(1) would come into operation if was in possession of the property at the point of time when she has an occasion to claim or assert a title thereto, or, in other words, at the point of time when her right to the said property is called into question. The legal effect of Section 14(1) would be that after the coming into operation of the Act there would be no property in respect of which it could be contended by anyone that a Hindu female is only a limited owner and not a full owner. [We are for the moment not concerned with the fact that sub-section (2) of Section 14 which provides that Section 14(1) will not prevent creating a restricted estate in favour of a Hindu female either by gift or will or any instrument or decree of a civil court or award provided the very document creating title unto her confers a restricted estate on her.] There is nothing in Section 14 which supports the proposition that a Hindu female should be in actual physical possession or in constructive possession of any property on the date of the coming into operation of the Act. The expression 'possessed' has been used in the sense of having a right to the property or control over the property. The expression 'any property possessed by a Hindu female whether acquired before or after the commencement of the Act' on an analysis yields to the following interpretation:

(1) Any property possessed by a Hindu female acquired *before* the commencement of the Act will be held by her as a full owner thereof and not as a limited owner.

(2) Any property possessed by a Hindu female acquired *after* the commencement of the Act will be held as a full owner thereof and not as a limited owner.

Since the Act in terms applies even to properties possessed by a Hindu female which are acquired '*after*' the commencement of the Act, it is futile to contend that the Hindu female shall be in 'possession' of the property '*before*' the commencement of the Act. If the property itself is acquired '*after*' the commencement of the Act, there could be no question of the property being either in physical or constructive possession of the Hindu female '*before*' the coming into operation of the Act. There is, therefore, no escape from the conclusion that possession, physical or constructive or in a legal sense, on the date of the coming into

operation of the Act is not the sine qua non for the acquisition of full ownership in property. In fact, the intention of the legislature was to do away with the concept of limited ownership in respect of the property owned by a Hindu female altogether. Section 4 of the Act (it needs to be emphasized) provides that any text, rule or interpretation of Hindu law or custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect of any matter for which provision is made in the Act. The legislative intent is therefore, abundantly loud and clear. To erase the injustice and remove the legal shackles by abolishing the concept of limited estate, or the women's or widow's estate once and for all. To obviate hair-splitting, the legislature has made it abundantly clear that whatever be the property possessed by a Hindu female, it will be of absolute ownership and not of limited ownership notwithstanding the position obtaining under the traditional Hindu law. Once it is shown that at the point of time when the question regarding title to property held by a Hindu female arises, she was '*possessed*' of the property on that date, in the eye of law, the property held by her would be held by her as '*full owner*' and not as '*limited owner*'. In other words, all that has to be shown by her is that she had acquired the property and that she was 'possessed' of the property at the point of time when her title was called into question. When she bought the property from the alienee to whom she had sold the property prior to the enforcement of the Act, she 'acquired' the property within the meaning of the explanation to Section 14(1) of the Act. The right that the original alienee had to hold the property as owner (subject to his right being questioned by the reversioner on the death of the female Hindu from whom he had purchased the property) was restored to her when she got back the right that she had parted with. Whatever she had lost 'earlier', was 'now' regained by her by virtue of the transaction. The status quo ante was restored in respect of her interest in the said property. In the eye of law, therefore, the transaction by which the vendee of the Hindu female acquired an interest in the said property was 'reversed' and the Hindu female was restored to the position prevailing before the transaction took place. In other words, in the eye of law the transaction stood obliterated or effaced. What was 'done' by virtue of the document executed in favour of the transferee was 'undone'. Such would be the consequence of a retransfer by the alienee in favour of a Hindu female from whom he had acquired an interest in the property in question. Thus on the date on which her right to the property was called into question, she was '*possessed*' of the property which she had inherited from her husband she having by then re-acquired and regained what she had lost. And by virtue of the operation of Section 14(1) of the Act the limitation which previously inhered in respect of the property disappeared upon the coming into operation of the Act. It is no longer open to anyone now to contend that she had only a 'limited' ownership in the said property and not a 'full' ownership, the concept of limited ownership having been abolished altogether, with effect from the coming into operation of the Act.

6. Whether a challenge was made during her lifetime or it was made after her death, if the question arose as to what was the nature of interest in the property held by the concerned Hindu female after the reversal of the transaction the answer would be that she had a '*full*' ownership and not a '*limited*' ownership. It would have been a different matter if the transferee from the concerned Hindu female had transferred his right, title and interest in the property to a third person instead of transferring it back to her. In that event the principle that the transferor cannot transmit a better title or a title higher than that possessed by the

transferor at the given time would come into play. Not otherwise. When the transaction was reversed and what belonged to her was retransmitted to her, what the concerned Hindu female acquired was a right which she herself once possessed namely, a limited ownership (as it was known prior to the coming into force of the Act) which immediately matures into or enlarges into a full ownership in view of Section 14(1) of the Act on the enforcement of the Act.

The resultant position on the reversal of the transaction would be that the right, title and interest that the alienee had in the property which was under 'eclipse' during the subsistence of the transaction had re-emerged on the disappearance of the eclipse. In other words, the right which was under slumber came to be awakened as soon as the sleep induced by the transaction came to an end. By the reversal of the transaction no right of the reversioner was affected, for he had merely a spes successionis in the property and nothing more. His possible chance of succeeding upon the death of the Hindu female disappeared from the horizon as soon as what she had temporarily parted with was restored to her.

7. The proponents of the view canvassed by the appellant placed strong reliance on the decision rendered by a learned Single Judge of the Orissa High Court in ***Ganesh Mahanta* v. *Sukriya Bewa*** and the decision of the Andhra Pradesh High Court in ***Medicherla Venkatarathnam* v. *Siddani Palamma***, wherein the Andhra Pradesh High Court has concurred with the view of the Orissa High Court. The basis of the reasoning is reflected in the following passage from ***Ganesh Mahanta*** case*:*

> "Section 14(1) does not purport to enlarge the right, title or interest of the alienee from widow with regard to the transfers effected prior to the commencement of the Act. A donee from a widow prior to the commencement of the Act acquires only a widow's estate in the gifted property and even if the donee retransfers the property in favour of the widow after the commencement of the Act, the widow would acquire only a limited interest and not an absolute interest in the property as the donee cannot transmit any title higher than what he himself had."

It appears that the Orissa and the Andhra Pradesh High Court's have been carried away by the argument that the donee or the transferee who retransfers the property to the widow cannot transmit a title higher than the title that they themselves had in the property. In substance, the argument is that as the transferee or the donee had only a limited interest, what he can transmit to the widow is a limited interest. This argument postulates that Section 14(1) of the Act does not come into play in the case of a retransfer (by the donee or the transferee as the case may be), to the widow subsequent to the commencement of the Act. There is a basic fallacy in proceeding on the assumption that Section 14(1) has no impact or that the provision has no role to play in case of such a retransfer. This line of reasoning overlooks the fact that upon retransfer to the widow, the original transaction is obliterated and what transpired by virtue of the consequence of the original transfer stands reversed. The resultant position is that the widow is restored to the original position. Section 14(1) would not be attracted if the widow was not possessed of the property after the coming into force of the Act. But in view of the reversal of the transaction, the widow becomes possessed of the property which she had possessed prior to the transfer to the original alienee or the donee. And Section 14(1) straightway comes into play. By virtue of the reversal of the original transaction, her rights would have to be ascertained as if she became possessed of the property for the first time,

after the commencement of the Act. It is now well settled that even if the widow has acquired the interest in the property and is possessed of the property after the commencement of the Act, her limited right would ripen or mature into an absolute interest or full ownership. The question that has to be asked is as to whether the widow became possessed of the property by virtue of the acquisition of interest subsequent to the operation of the Act and whether such interest was a limited interest. The whole purpose of Section 14(1) is to make a widow who has a limited interest a full owner in respect of the property in question regardless of whether the acquisition was prior to or subsequent to the commencement of the Act. On the date on which the retransfer took place, she became possessed of the property. She became possessed thereof subsequent to the commencement of the Act.

In the result her limited interest therein would enlarge into an absolute interest, for, after the commencement of the Act any property possessed of and held by a widow becomes a property in which she has absolute interest and not a limited interest, the concept of limited interest having been abolished by Section 14(1) with effect from the commencement of the Act. The Orissa High Court and the Andhra Pradesh High Court have fallen in error in testing the matter from the standpoint of the alienee or the donee who retransfers the property. The High Court posed the question as to whether they would be entitled to full ownership in view of Section 14(1), instead of posing the question as to whether the widow who becomes possessed of the property after the commencement of the Act would be entitled to claim that her limited interest had enlarged into an absolute interest. Of course, Section 14(1) is not intended to benefit the alienee or the donee, but is intended and designed to benefit the widow. But the question has to be examined from the perspective of the widow who becomes possessed of the property by virtue of the acquisition pursuant to the retransfer. The Andhra Pradesh High Court has also fallen in error in accepting the fallacious argument that the widow would be in the position of a stranger to whom the property was reconveyed or retransferred. This fallacy is reflected in the following passage:

> Therefore reconveyance will not revive her original right in the property and she will be holding the estate reconveyed just like any other stranger alienee, for the lifetime of the alienor widow, though she happens to be that widow, and there can be no question of one alienation cancelling the other and the status quo ante, the widow's alienation being restored.

The case of the widow who had temporarily lost the right in the property by virtue of the transfer in favour of the alienee or the donee cannot be equated with that of a stranger by forgetting the realities of the situation. Surely, the Act was intended to benefit her. And when the widow becomes possessed of the property, having regained precisely that interest which she had temporarily lost during the duration of the eclipse, Section 14(1) would come to her rescue which would not be the matter in the case of a stranger who cannot invoke Section 14(1). A further error was committed in proceeding on the mistaken assumption that the decision in ***Gummalapura Taggina Matada Kotturuswami* v. *Setra Veeravva*** [AIR 1959 SC 577], supported the point of view which found favour with the Orissa and the Andhra Pradesh High Courts. In ***Kotturuswami*** case the alienation had taken place before the commencement of the Act and the widow had '*trespassed*' on the property and had obtained physical possession as a trespasser without any title. It was not a case where the widow had regained

possession lawfully and become entitled to claim the benefit of Section 14(1) having become possessed of the property by way of a lawful acquisition subsequent to the commencement of the Act. It was overlooked that Section 14(1) in terms used the expression "whether acquired before or after the commencement of the Act". If the legislature had not contemplated a widow becoming possessed of a property by virtue of an acquisition after the commencement of the Act, the aforesaid expression would not have been used by the legislature. The Orissa and the Andhra Pradesh High Courts have failed to give effect to these crucial words and have also failed to apply the principle in ***Kotturuswami*** case properly, wherein the widow obtained possession as a trespasser. In fact the expression "possessed of" pertains to the acquisition of a right or interest in the property and not to physical possession acquired by force or without any legal right. The ratio in ***Kotturuswami*** case was therefore misunderstood and misconceived by the Orissa and the Andhra Pradesh High Courts. We agree with the reasoning of the Madras High Court in ***Chinnakolandai* v. *Thanji*** wherein Ramamurthi, J. has made the point in a very lucid manner in the following passage:

> With respect, I am unable to agree with this view, as the entire reasoning is based upon the view that there is no difference between a reconveyance in favour of the widow herself and alienation in favour of the stranger. In my opinion, there is all the difference between a case of annulment of a conveyance by consent of both the parties and a case of a subsequent alienation by the alienee in favour of a stranger. In the former case the effect of the alienation is completely wiped out and the original position is restored. This distinction has not been noticed in the decision of the Orissa High Court. The acceptance of the contention urged by learned counsel for the appellant would lead to startling results. Take for instance an unauthorised alienation by a guardian. If some cloud is cast on the validity of the alienation, and if the alienee, not willing to take any risk till the attainment of majority, by the minor, conveys back the property to the guardian, it would not be open to the guardian to contend that he had acquired the voidable title of the alienee. In other words, he cannot contend as against the quondam minor that the income from the property would be his, and that till the minor takes proceedings for setting aside the alienation the guardian should be deemed to have acquired the right, title and interest of the alienee. Such a contention on the fact of it is untenable.
>
> The instance of an alienation by a trustee or an executor may also be considered. If after the alienation by the trustee or executor the beneficiary raises some objection about the validity of the alienation whether well-founded or ill-founded and if the alienee who is not prepared to take any risk conveys back the property to the trustee or the executor as the case may be it cannot possibly be contended that the trustee or the executor got back the property in any right or character other than in which it was originally alienated. As a result of the reconveyance the property would form part of the trust estate. In all these cases the alienor suffers under a legal disability from holding the property in any other capacity. It is needless to multiply instances. I am therefore clearly of the opinion that there is nothing in law to prevent an alienation being completely nullified as if it never took effect provided the alienor and the alienee agree to such a course. The position is a fortiori where the title conveyed to the alienee is a voidable one. It cannot be disputed that when the reversioner files the

> suit, it is open to the alienee to submit to a decree. After such a declaratory decree is passed, there is nothing in Hindu law which compels or obliges the alienee to retain and keep the property himself and hand it over to the reversioner. It is certainly open to him to respect the decree and convey back the property to the widow even before her death. It is obvious that what the alienee can do after the termination of the suit can equally be done during its pendency. Surely the alienee is not a trustee for the reversioner to keep the property in trust and deliver the property on the death of the widow.

8. Our own reasons we have already articulated. The reasoning unfolded in the foregoing passage, we fully and wholeheartedly endorse. In the result we uphold the view that in such circumstances the concerned Hindu woman is entitled to become an absolute owner of the property in question. The appeal fails and is dismissed.

* * * * *

Bhagat Ram v. *Teja Singh*

(2002) 1 SCC 210 : AIR 2002 SC 1

K.G. BALAKRISHNAN, J. - One Kehar Singh was the owner of the land admeasuring 280 kanals and 18 marlas in Village Antowali (now in Pakistan). He died prior to partition of India. His widow, Smt Kirpo and two daughters Smt Santi and Smt Indro migrated to India. In lieu of the property owned by Kehar Singh in Pakistan, his widow, Kirpo was allotted some land in India. Kirpo died on 25-12-1951 leaving behind her two daughters, Smt Santi and Smt Indro. They inherited the property equally. Smt Santi died in 1960. The property left by her was thereafter mutated in the name of her surviving sister, Smt Indro. The original appellant, Bhagat Ram (deceased) who had entered into an agreement with Smt Indro on 12-3-1963, filed a suit for specific performance, which was decreed in his favour. The original respondent in the appeal, Shri Teja Singh (deceased) is the brother of Smt Santi's predeceased husband. He filed a suit alleging that, on the death of Smt Santi in 1960, the property in question devolved on him by virtue of clause (*b*) of sub-section (1) of Section 15 of the Hindu Succession Act, 1956. The trial court decreed the suit filed by Teja Singh. The appeal filed against the said decree was dismissed. Bhagat Ram (deceased) then preferred the second appeal before the High Court, which was also dismissed. The High Court held that the property held by Smt Santi on her death devolved on Teja Singh who was the brother of the predeceased husband of Smt Santi. However, on appeal, this Court by its judgment dated 31-3-1999 held that the property held by Smt Santi was the property inherited by her from her mother; therefore, clause (*a*) of sub-section (2) of Section 15 is the relevant provision which governed the succession and Teja Singh had no right in the property left by Smt Santi and that it would only devolve on her sister Smt Indro.

7. The learned Senior Counsel for the respondents Mr Jaspal Singh contended that Smt Santi acquired property from her mother Smt Kirpo who died on 25-12-1951 and at that time Smt Santi had only a limited right over this property, but by virtue of Section 14(1) of the Hindu Succession Act, she became the full owner of the property and, therefore, on her death, the property held by her would be inherited by her legal heirs as per the rule set out in Section 15(1) of the Act. The learned Senior Counsel further contended that prior to the Hindu Succession Act, Smt Santi had only a limited right but for Section 14(1) of the Act, it would have reverted to the reversioners and such a limited right became a full right and, therefore, the property is to be treated as her own property. He also contended that Section 15 of the Hindu Succession Act will have only prospective operation and, therefore, the words used in Section 15(2)(*a*) viz. "any property inherited by a female Hindu" are to be construed as property inherited by a female Hindu after the commencement of the Act.

8. We do not find any merit in the contention raised by the counsel for the respondents. Admittedly, Smt Santi inherited the property in question from her mother. If the property held by a female was inherited from her father or mother, in the absence of any son or daughter of the deceased including the children of any predeceased son or daughter, it would only devolve upon the heirs of the father and, in this case, her sister Smt Indro was the only legal heir of her father. The deceased Smt Santi admittedly inherited the property in question from her mother. It is not necessary that such inheritance should have been after the commencement of the Act.

The intent of the legislature is clear that the property, if originally belonged to the parents of the deceased female, should go to the legal heirs of the father. So also under clause (*b*) of sub-section (2) of Section 15, the property inherited by a female Hindu from her husband or her father-in-law, shall also under similar circumstances, devolve upon the heirs of the husband. It is the source from which the property was inherited by the female, which is more important for the purpose of devolution of her property. We do not think that the fact that a female Hindu originally had a limited right and later, acquired the full right, in any way, would alter the rules of succession given in sub-section (2) of Section 15.

9. A question of similar nature was considered by this Court in ***Bajaya* v. *Gopikabai*** [AIR 1978 SC 793]. In that case, the suit land originally belonged to *G*, son of *D*. *G* died before the settlement of 1918 and thereafter, his land was held by his son, *P* who died in the year 1936. On *P*'s death, the holding devolved on *P*'s widow, *S*. *S* died on 6-11-1956, and thereupon dispute about the inheritance to the land left behind by *S* arose between the parties. The plaintiff claimed that she being the daughter of *T*, a sister of the last male holder, *P* was an heir under Section 15 read with the Schedule referred to in Section 8 of the Hindu Succession Act, 1956, whereas the defendants claimed as "sapindas" of the last male holder under Mitakshara law. Speaking for the Bench, Hon'ble R.S. Sarkaria, J. held that the case would fall under clause (*b*) of sub-section (2) of Section 15 because *S* died issueless and intestate and the interest in the suit property was inherited by her from her husband and the property would go to the heirs of the husband.

10. In ***State of Punjab* v. *Balwant Singh*** [AIR 1991 SC 2301], also, a question of similar nature was considered. In that case, the female Hindu inherited the property from her husband prior to the Hindu Succession Act and she died after the Act. On being informed that there was no heir entitled to succeed to her property, the Revenue Authorities effected mutation in favour of the State. There was no heir from her husband's side entitled to succeed to the property. The plaintiff, who was the grandson of the brother of the female Hindu claimed right over the property of the deceased. The High Court held that the property inherited by the female Hindu from her husband became her absolute property in view of Section 14 and the property would devolve upon the heirs specified under Section 15(1). The above view was held to be faulty and this Court did not accept that. It was held that it is important to remember that female Hindu being the full owner of the property becomes a fresh stock of descent. If she leaves behind any heir either under sub-section (1) or under sub-section (2) of Section 15, her property cannot be escheated.

11. In ***Amar Kaur* v. *Raman Kumari*** [AIR 1985 P & H 86], a contra-view was taken by the High Court of Punjab and Haryana. In this case, a widow inherited property from her husband in 1956. She had two daughters and the widow gifted the entire property in favour of her two daughters. One of the daughters named Shankari died without leaving husband or descendant in 1972. Her property was mutated in favour of her other sister. At the time of death of Shankari, her husband had already died leaving behind another wife and a son. They claimed right over the property left by the deceased female Hindu. In para 4 of the said judgment, it was held as under:

> "... Smt Shankari succeeded to life estate, which stood enlarged in her full ownership under Section 14(1) of the Act. Since smaller estate merged into larger one, the lesser

estate ceases to exist and a new estate of full ownership by fiction of law came to be held for the first time by Smt Shankari. The estate, which she held under Section 14(1) of the Act, cannot be considered to be by virtue of inheritance from her mother or father. In law it would be deemed that she became full owner of this property by virtue of the Act. On these facts it is to be seen whether Section 15(1) of the Act will apply or Section 15(2) of the Act will apply. Section 15(2) of the Act will apply only when inheritance is to the estate left by father or mother, in the absence of which, Section 15(1) of the Act would apply."

12. We do not think that the law laid down by the learned Single Judge in the abovesaid decision is correct. Even if the female Hindu who is having a limited ownership becomes full owner by virtue of Section 14(1) of the Act, the rules of succession given under sub-section (2) of Section 15 can be applied. In fact, the Hindu Succession Bill, 1954 as originally introduced in the Rajya Sabha did not contain any clause corresponding to sub-section (2) of Section 15. It came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament. The reason given by the Joint Committee is found in clause 17 of the Bill, which reads as follows:

"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that, properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

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.

14. This Court in its judgment dated 31-3-1999 held that clause (*a*) of sub-section (2) of Section 15 is the appropriate rule to be applied for succession of the property left by the deceased Smt Santi and we find no reasons to take a different view. Thus, the appeal is allowed.

* * * * *

Omprakash v. *Radhacharan*

2009 (7) SCALE 51

S.B. SINHA, J. - 2. One Smt. Narayani Devi was married to one Dindayal Sharma in the year 1955. She became widow within three months of her marriage. Concededly, she was driven out of her matrimonial home immediately after the death of her husband. After that she never stayed in her matrimonial home. At her parental home, she was given education. She got an employment. She died intestate on 11.7.1996. She had various bank accounts; she left a huge sum also in her provident fund account.

3. Ramkishori, mother of Narayani, filed an application for grant of succession certificate in terms of Section 372 of the Indian Succession Act. Respondents herein also filed a similar application. It now stands admitted that all her properties were self acquired.

4. The question which arose for consideration before the courts below as also before us is as to whether sub-Section (1) of Section 15 of the Hindu Succession Act, 1956 (for short, "the Act") or sub-Section (2) thereof would be applicable in the facts and circumstances of this case.

5. There is no doubt or dispute that the properties of the deceased were self-acquired ones and were not inherited from her parents' side. Appellants before us are her brothers, the original applicant being the mother of the deceased having died. Respondents are the sons of sister of the Narayani's husband.

6. Mr. N.R. Choudhary, learned counsel appearing on behalf of the appellant would contend that in a case of this nature where the husband of the deceased or her in-laws had not made any contribution towards her education or had not lent any support during her life time, sub-Section (2) of Section 15 of the Act should be held to be applicable. It was urged that the Parliamentary intent as contained in clause (a) of sub-Section (2) of Section 15 of the Act should be the guiding factor for interpreting the said provision.

7. Mr. Arvind V. Savant, learned Senior Counsel appearing on behalf of the respondent, however, would support the impugned judgment.

8. Section 15 provides for the general rules of succession in the case of female Hindus. It lays down the mode and manner in which the devolution of interest of a female shall take place. Section 16 provides for the order of succession and manner of distribution amongst the heirs of a female Hindu, stating that the same shall be according to the rules specified therein.

9. It has not been disputed that the respondents are the heirs and legal representatives of Dindayal, husband of Narayani. Sub-Section (1) of Section 15 lays down the ordinary rule of succession. Clause (a) of sub-Section (2) of Section 15 providing for a non-obstante clause, however, carves out an exception viz. when the property is devolved upon the deceased from her parents' side, on her death the same would relate back to her parents' family and not to her husband's family. Similarly, in a case where she had inherited some property from her husband or from her husband's family, on her death the same would revive to her husband's family and not to her own heirs. The law is silent with regard to self-acquired property of a woman. Sub-section (1) of Section 15, however, apart from the exceptions specified in sub-

section (2) thereof does not make any distinction between a self-acquired property and the property which she had inherited. It refers to a property which has vested in the deceased absolutely or which is her own. The self-acquired property of a female would be her absolute property and not the property which she had inherited from her parents.

10. In that view of the matter, we are of the opinion that sub-Section (1) of Section 15 of the Act would apply and not the sub-Section (2) thereof.

This is a hard case. Narayani during her life time did not visit her in-laws' place. We will presume that the contentions raised by Mr. Choudhury that she had not been lent any support from her husband's family is correct and all support had come from her parents but then only because a case appears to be hard would not lead us to invoke different interpretation of a statutory provision which is otherwise impermissible.

It is now a well settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous.

In ***M.D., H.S.I.D.C.*** **v**. ***Hari Om Enterprises*** [2008 (9) SCALE 241], this Court held:

> "54. This Court applied the doctrine of proportionality having regard to a large number of decisions operating in the field. This Court, however, also put a note of caution that no order should be passed only on sympathy or sentiment."

In ***Subha B. Nair*** **v.** ***State of Kerala*** [(2008) 7 SCC 210], this Court held:

> "21. This Court furthermore cannot issue a direction only on sentiment/sympathy."

In ***Ganga Devi*** **v.** ***District Judge***, ***Nainital*** [(2008) 7 SCC 770], this Court held:

> "22. The court would not determine a question only on the basis of sympathy or sentiment. Stricto sensu equity as such may not have any role to play."

If the contention raised by Mr. Choudhury is to be accepted, we will have to interpret sub-section (1) of Section 15 in a manner which was not contemplated by the Parliament. The Act does not put an embargo on a female to execute a will. Sub-section (1) of Section 15 would apply only in a case where a female Hindu has died intestate. In such a situation, the normal rule of succession as provided for by the statute, in our opinion, must prevail.

For the aforementioned purpose, the golden rule of interpretation must be applied.

11. This Court in ***Bhagat Ram*** **v.** ***Teja Singh*** [(1999) 4 SCC 86], held as under:

> "6. On perusal of the two Sub-sections we find that their spheres are very clearly marked out. So far Sub-section (1), it covers the properties of a female Hindu dying intestate. Sub-section (2) starts with the words 'Notwithstanding anything contained in Sub-section (1)'. In other words, what falls within the sphere of Sub-section (2), Sub-section (1) will not apply. We find that Section 15(2)(a) uses the words 'any property inherited by a female Hindu from her father or mother'. Thus property inherited by a female Hindu from her father and mother is carved-out from a female Hindu dying intestate. In other words any property of female Hindu, if inherited by her from her father or mother would not fall under Sub-section (1) of Section 15. Thus, property of a female Hindu can be classified under two heads : Every property

of a female Hindu dying intestate is a general class by itself covering all the properties but Sub-section (2) excludes out of the aforesaid properties the property inherited by her from her father or mother.

7. In addition, we find the language used in Section 15(1) read with Section 16 makes it clearly, the class who has to succeed to property of Hindu female dying intestate. Sub-section (1) specifically state that the property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16. So, in case Sub-section (1) applies, then after the death of Santi, Indro can not inherit by succession but it would go to the heirs of the pre-deceased husband of Santi."

12. For the aforementioned reasons, we find no merit in this appeal. The appeal is dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.

* * * * *

Musa Miya walad Mahammad Shaffi v. *Kadar Bax walad Khaj Bax*

AIR 1928 PC 108

SIR LANCELOT SANDERSON - This is an appeal by Musa Miya walad Mahamad Shaffi, a minor, and Isa Miya alias Mahamad Ismailkhan walad Mahamad Shaffi; who were defendants 18 and 19 in the suit, against the judgment and decree dated 6th December 1923, of the High Court of Bombay, which varied the decree of the learned Subordinate Judge who tried the suit.

The suit was brought on 6th Janauary 1919, by Kadar Bax Khaj Bax, who is now dead; his representatives are the first respondents in this appeal.

The plaintiff claimed as one of the heirs under Mahomedan law of one Abdul Rasul, a Sunni Mahomedan, a three-eighth share of the properties scheduled in the plaint and left by the said Abdul Rasul, who was his brother. He alleged that Abdul Rasul died, leaving him surviving as his heirs a widow, Sahebjan (who was the defendant 1 and who is now dead), a daughter Rahimatbi (who was defendant 2 and who is respondent 2 in this appeal) and his brother, the plaintiff, that according to Mahomedan law the widow was entitled to one-eighth, the daughter to one half, and the plaintiff to three-eighths; he alleged that the widow and the daughter and their tenants (defendants 3 to 17) were in possession of the above mentioned property.

The widow and the daughter filed a joint written statement stating that in 1910 Abdul Rasul gave all his properties to his grandsons the appellants, who are the sons of his daughter Rahimatbi, under an oral gift, and informed their father, Mahamad Shaffi, of the same by a letter; that the grandsons were from their birth brought up by Abdul Rasul and lived with him; that on 18th April 1911, Abdul Rasul wrote another letter to Mahamad Shaffi informing him that the writer's grandsons should be the owners of his property after his (Rasul's) death; that the letter constituted the will of Abdul Rasul; that by virtue of the oral gift or in the alternative of the will, the grandsons have become owners of Abdul Rasul's property; that the grandsons through their father were in possession of the property; and that the plaintiff was not entitled to any relief. The tenants (defendants 3 to 17) did not appear and are not parties to this appeal.

The appellants (defendants 18 and 19) were made parties to the suit on their own application. By their joint written statement they denied the right of Abdul Rasul's heirs to recover any part of his property, and supported the pleas raised by their grandmother and mother with regard to the gift and the will. They further stated that even after the gift they (the appellant) continued to live with their grandfather who managed the properties given to them, that their grandfather believed that his possession was for and on behalf of his minor grandsons, and that the gift to them was valid under Mahomedan law. In the alternative, they pleaded that the letter of 18th April 1911, from Abdul Rasul to their father constituted a will in their favour under Mahomedan law.

The plaintiff, in reply, denied that there was any valid gift or will, and contended that the letters in support of the gift or will were not genuine.

The learned Subordinate Judge held that there was no valid gift in favour of defendants 18 and 19. He, however, held that the letters, Exs. 122 to 126, when read together, expressed an

intention on the part of Abdul Rasul that his grandsons, defendants 18 and 19, should have his property after his death, and that they constituted the will of Abdul Rasul. He decided that the will was invalid according to Mahomedan law for more than one-third of the property of the testator unless the heirs consented thereto after the death of the testator; he held that defendants 1 and 2, viz., the widow and the daughter of Abdul Rasul, had given their consent, and consequently he made a decree in favour of the plaintiff for one-fourth share of the movable and immovable property specified in the decree; he directed a petition, and held that the defendants 18 and 19 were entitled to the remaining three-fourths share.

Both the defendants 18 and 19 and the plaintiff appealed to the High Court against the learned Subordinate Judge's judgment. The two appeals were heard together.

The High Court dismissed the appeal presented by defendants 18 and 19 and allowed the plaintiff's appeal to the extent that in substitution for the decree passed by the trial Court the High Court declared that the plaintiff was entitled on partition to a three-eighths share in the property left by Abdul Rasul, with the exception of certain property mentioned therein, to which it is not necessary to refer in detail.

The learned Judges came to the conclusion that the letters upon which the learned Subordinate Judge relied did not constitute a will of Abdul Rasul.

The learned counsel who appeared for the appellants in this appeal stated that he was not able to support the learned Subordinate Judge's judgment in respect of the will, so that the only point relied on in this appeal was that there was a valid gift by Abdul Rasul to his grandsons on or about 1st October 1910, viz., on the occasion when he is alleged to have given a feast and made an announcement of the gift of his property to his grandsons.

The question is still further narrowed, because the learned counsel agreed that there are concurrent findings of fact by the two Courts in India that there was no transfer of possession of the property by Abdul Rasul to his grandsons, defendants 18 and 19 or to anyone on their behalf, and the learned counsel did not dispute these findings.

The learned counsel, however, argued that in view of the facts of this case and the relationship between Abdul Rasul and his grandsons, the gift was complete without any transfer of possession, according to Mahomedan law, and that the possession and management by Abdul Rasul after the gift was on behalf of his grandsons.

Their Lordships have not had the advantage of hearing counsel on behalf of the respondents, but they are indebted to the learned counsel who appeared for the appellants for drawing their attention to the evidence and to all the points which were material, whether they would weigh against or for the arguments which the learned counsel presented.

There is no doubt that the case has to be decided according to Mahomedan law, and that the chapter on gifts in the Transfer of Property Act, 1882, is not applicable, see S. 129.

Their Lordships are of opinion that a correct statement of the law on the question under consideration is to be found in the material clauses of Ch. 5 of MacNaghten's ***Principles and Precedents of Mohammedan Law*** published in 1825. They are as follows:

(1) A gift is defined to be the conferring of property without a consideration.

(2) Acceptance and seisin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

(4) It is necessary that a gift should be accompanied by delivery of possession and that seisin should take effect immediately or at a subsequent period by desire of the donor.

(8) A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

(9) The case of a house given to a husband by a wife and of property given by a father to his minor child form exceptions to the above rule.

(10) Formal delivery and seisin are not necessary in the case of a gift to a trustee having the custody of the article given, nor in the case of a gift to a minor. The seisin of the guardian in the latter case is sufficient.

The statement of the law in MacNaghten's ***Principles and Precedents of Mohammedan Law*** was approved by the Judicial Committee in ***Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*** [(1874) 2 IA 87], and at p. 104, after referring to the statement of the law made by the High Court their Lordships stated that:

> Where there is on the 'part of a father or other guardian a real and bonafide intention to make a gift, the law will be satisfied without change of possession and will presume the subsequent holding of the property to be on behalf of the minor.

Defendants 18 and 19, grandsons of Abdul Rasul, were minors at the time of the alleged gift, and the real question in this appeal is whether the facts of this case bring it within the above-mentioned exception, for, as already stated, the appeal has to be decided upon acceptance of the finding that there was no delivery of possession of the property by Abdul Rasul to his grandsons, and that there was no relinquishment of control by Abdul Rasul over the said property until his death.

The material facts of this case are as follows: Abdul Rasul was an officer in the Forest Department; he retired about 14 or 15 years before the trial of the suit, which was heard in 1921. His only daughter, Rahimatbi, the mother of defendants 18 and 19, lived with her father, Abdul Rasul, even after her marriage with her husband, whose name is Mahamad Shaffi.

It appears from the evidence of Mahamad Shaffi that, although he owned some lands at a place called Shahada, he was generally living with Abdul Rasul, and only occasionally at Shahada, and their Lordships think it must be taken as a fact that Rahimatbi, her husband Mahamad Shaffi, and her two childern, defendants 18 and 19, lived in the house of Abdul Rasul at one place or another and that they were maintained by Abdul Rasul, if not entirely, at any rate, to a large extent.

In 1910 Abdul Rasul decided to make a pilgrimage to Mecca, and it is the case of the appellants that on 1st October 1910, viz., on the occasion of the 26th day Ramazan, Abdul invited several persons to dinner, and that after the dinner he announced to the persons then

assembled that as he was going to Mecca he had made a gift of his property to his two grandsons and made them the owners thereof, that this announcement was made known to the ladies of the house hold at Abdul Rasul's request, that Mahamad Shaffi was then at Shahada, and that Abdul Rasul wrote to him and informed him that now both the children, Essen Mian and Moosa Mian, are the owners of my property.

There was no mutation of the names and no deed was executed.

Abdul Rasul was away on pilgrimage about three months and returned in January 1911. On his return Abdul Rasul resumed the management of his property; the lands had been previously let to tenants and apparently there was little, if anything, to be done in respect thereof in his absence.

Certain lands which belonged to Abdul Rasul had been purchased for him in the name of his brother, and in September 1913, two deeds of conveyance were executed and the property specified therein was conveyed to Abdul Rasul.

The learned Judge pointed out that though there were several occasions on which Abdul Rasul could have put forth the ownership of the boys, he does not seem to have availed himself of any of them.

The correctness of this finding was not disputed by the learned counsel for the appellants.

Abdul Rasul died at Chopda in June 1918, and it must be taken as a fact that after his return from Mecca in January 1911, he remained in possession of the property and managed it until his death.

Their Lordships' attention has not been drawn to any evidence which would go to show that during that time Abdul Rasul in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf. The suit was brought in January 1919.

The learned Judges of the High Court seem to have been of the opinion that there was no actual gift, though Abdul Rasul had expressed an intention to make a gift of the property to the grandsons.

The learned Judge, who tried the case, however, was apparently of opinion that Abdul Rasul had made the above mentioned announcement of gift, but that the gift was not complete as there was no delivery of possession.

Though not deciding the point, their Lordships are of opinion that it may be assumed for the purposes of this appeal that Abdul Rasul did announce, on 1st October 1910, to his assembled friends that he had made a gift of his property to his grandsons.

The question remains whether, in the absence of any delivery of possession or any relinquishment of control by Abdul Rasul, that was sufficient to constitute a complete gift according to Mahomedan law. In other words, do the above mentioned facts bring this case within the exception to the general rule, which has been herein before referred to?

Their Lordships are of opinion that they are not at liberty to extend the exception and giving to the words thereof their natural meaning they are of opinion that this case is not within the exception.

It is not a case of a gift by a father or mother to a minor; nor is it a case of a guardian making a gift to his charge or charges. It is true that Abdul Rasul seems to have maintained and brought up his grandsons from the time of their birth until his death; but during that time the father and mother of the two minors were also living with Abdul Rasul with occasional visits by the father to his own land.

It is obvious that Abdul Rasul was a man of property and able and willing to support in his own house, his daughter, her husband and family.

Their Lordships are unable to hold that those facts are sufficient to constitute Abdul Rasul a guardian within the meaning of the exception, so as to make a gift by him to them complete without any delivery of possession or relinquishment of control over the property by him.

Considerable reliance was placed by the learned counsel for the appellants on Case 19 Q. 2 R. 2, in the Precedents of Gifts given by Macnagthen in the 1825 edition.

In that case a reference is made to the Hidaya which runs as follows:

> If a father make a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided, etc. The same rule holds when a mother gives something to her infant son whom she maintains and of whom the father is dead and no guardian provided, and so also with respect to the gift of any other person maintaining a child under these circumstances.

In their Lordships' opinion this precedent does not support the appellants' case; on the contrary, it seems to be against their contention.

The rule applies to the case of a mother making a gift to her infant son whom she maintains only when the father is dead and no guardian has been provided.

The rule applies also to the gift by any other person maintaining a child "under these circumstances", i.e. when the father is dead and no guardian has been provided. This seems to imply that when the father, who is the natural guardian of his infant children is alive and has not been deprived of his rights and powers of guardian, the above-mentioned rule will not apply.

At all events it may safely be said that the conditions contemplated in the aforesaid rule cannot be found in this case, because the father of the minors was alive, and was actually living with his wife and children in the house of Abdul Rasul, and was in a position to exercise his rights and powers as a parent and guardian, and to take possession of the property on behalf of his children.

It was not denied that if the alleged gift by Abdul Rasul to the grandsons was not complete according to Mahomedan law, the share decreed by the High Court to the plaintiff was correct.

For these reasons their Lordships are of opinion that the appeal should be dismissed, that as there was no appearance for the respondents no order for costs should be made, and they will humbly advise His Majesty accordingly.

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Valia Peedikakkandi Katheessa Umma* v. *Pathakkalan Narayanath Kunhamu
(1964) 4 SCR 549 : AIR 1964 SC 275

M. HIDAYATULLAH, J. - This appeal by special leave by Defendants 1 to 3 raises an important question under the Muhammadan Law, which may be stated thus:

> "Is a gift by a husband to his minor wife and accepted on her behalf by her mother valid?"

It has been held by the High Court and the courts below that in Muhammadan law such a gift is invalid. The facts leading up to this question may now be stated.

2. One Mammotty was married to Seinaba and he made a gift of his properties including immovable property to Seinaba on April 7, 1944 by a registered deed. Mammotty died on May 3, 1946 without an issue. Seinaba also died soon afterwards on February 25, 1947, without leaving an issue. At the time of the gift Seinaba was 15 years 9 months old. It appears that Mammotty was ill for a long time and was in hospital and he was discharged uncured a month before the execution of the gift deed and remained in his mother-in-law's house afterwards. There are conflicting versions about the nature of the disease and a plea was taken in the case that the gift was made in contemplation of death and was voidable. This plea need not detain us because the trial Judge and the first appellate Judge did not accept it.

3. After the death of Seinaba, the present suit was brought by Kunhamu an elder brother of Mammotty for partition and possession of a 6/16 share of the property which he claimed as an heir under the Muhammadan Law, challenging the gift as invalid. To this suit he joined his two sisters as defendants who he submitted were entitled to a 3/16 share each. He also submitted that the first three defendants (the appellants) were entitled to the remaining 4/16 share as heirs of Seinaba. In other words, Kunhamu's contention was that when succession opened out on the death of Mammotty, his widow Seinaba was entitled to the enhanced share of 1/4 as there was no issue, and the remaining 3/4 was divisible between Kunhamu and his two sisters, Kunhamu getting twice as much as each sister. These shares according to him were unaffected by the invalid gift in favour of Seinaba and accepted on her behalf by her mother. This contention has been accepted and it has been held in this case in all the three courts that a gift by the husband to her minor wife to be valid must be accepted on her behalf by a legal guardian of her property under the Muhammadan Law, that is to say, by the father or his executor or by the grand father and his executor. As Kathessumma the mother of Seinaba was not a legal guardian of the property of Seinaba it was contended by the plaintiff that the gift was void. It was admitted on behalf of the plaintiff that Mammotty could have himself taken over possession of the property as the guardian of his minor wife; but it was submitted that such was not the gift actually made. These contentions raise the question which we have set out earlier in this Judgment.

4. Mr S.T. Desai on behalf of the appellants contends that neither express acceptance nor transfer of possession is necessary for the completion of a gift, when the donor is himself the guardian or the *de facto* guardian or "quasi-guardian" provided there is a real and bona fide intention on the donor's part to transfer the ownership of the subject-matter of the gift to the donee, and that even a change in the mode of enjoyment is sufficient evidence of such an

intention. He further contends that no delivery of possession is necessary in a gift by a husband to his minor wife provided such an intention as above described is clearly manifested. According to him, the law is satisfied without an apparent change of possession and will presume that the subsequent holding of the property was on behalf of the minor wife. Lastly, he submits that in any view of the matter when a husband makes a gift to a minor wife and there is no legal guardian of property in existence the gift can be completed by delivery of the property to and acceptance by any person in whose control the minor is at the time. If their is no such person one can be chosen and appointed by the donor to whom possession can be made over to manifest the intention of departing from the property gifted. Mr Desai seeks to justify these submissions on authority as well as by deductions from analogous principles of Muhammadan law relating to gifts to minors which are upheld though accepted by persons other than the four categories of legal guardian. The other side contends that there is no rule of Muhammadan law which permits such acceptance and that the decision of the High Court is right.

5. A gift (*Hiba*) is the conferring of a right of property in something specific without an exchange (*ewaz*). The word (*Hiba*) literally means the donation of a thing from which the donee may derive a benefit. The transfer must be immediate and complete, (tamlik-ul-ain) for the most essential ingredient of *Hiba* is the declaration "I have given". Since Muhammedan law views the law of gifts as a part of the law of contract there must be a tender (*ijab*) and an acceptance (*qabul*) and delivery of possession (*qabza*). There is, however, no consideration and this fact coupled with the necessity to transfer possession immediately distinguishes gifts from sales.

6. In the present case there is a declaration and a tender by the donor Mammotty and as the gift is by a registered deed no question in this behalf can arise. Insofar as Mammotty was concerned there was delivery of possession and the deed also records this fact. Possession was not delivered to Seinaba but to her mother, the first appellant, and she accepted the gift on behalf of Seinaba. Mammotty could have made a declaration of gift and taken possession on behalf of his wife who had attained puberty and had lived with him, for after the celebration of marriage a husband can receive a gift in respect of minor wife even though her father be living: (***Durrul-Mukhtar***, Vol. 3, p. 104 and ***Fatawa-i-Alamgiri,*** Vol. 5 pp. 239-240] original text quoted at p. 445 of ***Institutes of Mussalman Law*** by Nawab Abdur Rehman). But Mammotty did not complete his gift in this way. His gift included immovable properties and it was accepted by the mother who took over possession on behalf of her minor daughter. A gift to a minor is completed ordinarily by the acceptance of the guardian of the property of the minor (*Wilayat-ul-Mal*). *A* mother can exercise guardianship of the person of a minor daughter (*Hizanat*) till the girl attains puberty after which the guardianship of the person is that of the father if the girl is unmarried and that of the husband if she is married and has gone to her husband. Even under the Guardian and Wards Act, the husband is the guardian of the person after marriage of a girl unless he is considered unfit. The mother was thus not the guardian of the person of Seinaba.

7. Seinaba's mother was also not a guardian of the property of Seinaba. Muhammadan law makes a distinction between guardian of the person, guardian of the property and guardian for the purpose of marriage (*Wilayat-ul-Nikah*) in the case of minor females.

Guardians of the property are father and grandfather but they include also executors (*Wasi*) of these two and even executors of the executors and finally the Kazi's executor. None of these were in existence except perhaps the civil court which has taken the place of the Kazi.

8. Now Muhammadan law of gifts attaches great importance to possession or seisin of the property gifted (*Kabz-ul-Kamil*) especially of immovable property. The *Hedaya* says that seisin in the case of gifts is expressly ordained and *Baillie* (Dig. p. 508) quoting from the Inayah refers to a *Hadis* of the Prophet "a gift is not valid unless possessed". In the *Hedaya* it is stated – "Gifts are rendered valid by tender, acceptance and seisin" (p.482) and in the *Vikayah* "gifts are perfected by complete seisin" (***MacNaghten*** p. 202).

9. The question is whether possession can be given to the wife's mother when the gift is from the husband to his minor wife and when the minor's father and father's father are not alive and there is no executor of the one or the other. Is it absolutely necessary that possession of the property must be given to a guardian specially to be appointed by the civil court? The parties are Hanafis. No direct instance from the authoritative books on Hanafi law can be cited but there is no text prohibiting the giving of possession to the mother. On the other hand there are other instances from which a deduction by analogy (*Rai fi 'l ciyas*) can be made. The Hanafi laws as given in the Kafaya recognises the legality of certain gifts which custom ('*urf*) has accepted. This is because in deciding questions which are not covered by precedent Hanafi jurisprudence attaches importance to decisions based on *istehsan* (liberal construction; lit. producing symmetry) and *istislah* (public policy). The Prophet himself approved of *Mu'izz* (a Governor of a province who was newly appointed) who said that in the absence of guidance from the Koran and Hadis he would deduce a rule by the exercise of reason. But to be able to say that a new rule exists and has always existed there should be no rule against it and it must flow naturally from other established rules and must be based on justice, equity and good conscience and should not be *haram* (forbidden) or *Makruh* (reprobated). It is on these principles that the *Mujtahidis* and *Muftis* have allowed certain gifts to stand even though possession of the property was not handed over to one of the stated guardians of the property of the minor. We shall now refer to some of these cases.

10. The Rules on the subject may first be recapitulated. It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession. The strict view was that the donor must not leave behind even a straw belonging to him to show his ownership and possession. Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child (Macnaghten p. 51 principles 8 and 9). Later it was held that where the donor and donee reside together an overt act only is necessary and *this* rule applies between husband and wife. In ***Mohammad Sadiq Ali Khan* v. *Fakhr Jahan*** [(1932) 59 IA I], it was held that even mutation of names is not necessary if the deed declares that possession is delivered and the deed is handed to the wife. A similar extension took place in cases of gifts by a guardian to his minor Ward (***Wilson Digest of Anglo-Muhammadan law*** 6th Edn. p. 328). In the ease of a gift to an orphan minor the Rule was relaxed in this way:

> "If a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid.… The same rule also holds with respect to a stranger who has charge of the orphan," *Hedaya* p. 484. See also ***Baillie*** p. 539 (Lahore Edn.)

In the case of the absence of the guardian (*Gheebut-i-Moonqutaa*) the commentators agree that in a gift by the mother her possession after gift does not render it invalid. Thus also brother and paternal uncle in the absence of the father are included in the list of persons who can take possession on behalf of a minor who is in their charge: ***Durrul Mukhtar*** [Vol.4 p. 512 (Cairo Edn.)]. In ***Radd-ul-Mukhtar*** it is said:

> "It is laid down in the Barjindi: There is a difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid; and the correct opinion is that it is valid."

Vol. 4, 0.513 (Cairo Edn.) In the ***Bahr-al-Raiq*** Vol. 7 p. 314 (Edn. Cairo)

> "The Rule is not restricted to mother and stranger but means that every relation excepting the father, the grand-father and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge otherwise not."

In ***Fatawai Kazikhan*** [Vol. 4, p. 289] (Lucknow Edn.), the passage quoted above from Radd-ul-Mukhtar is to be found and the same passage is also to be found in ***Fatawai Alamgiri*** [Vol. 4 p. 548] Cairo Edn. All these passages can be seen in the lectures on ***Moslem Legal Institutions*** by Dr. Abdullah al-Mamun Suhrawardy. The Rule about possession is relaxed in certain circumstances of which the following passage from the *Hedaya* p. 484 mentions some:

> "It is lawful for a husband to take possession of any thing given to his wife, being an infant, provided she have been sent from her father's house to his; and this although the father be present, because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with respect to a mother or any others having charge of her; because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent, and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present."

MacNaghten quotes the same rule at p. 225 and at p. 230 is given a list of other writers who have subscribed to these liberal views.

11. The above views have also been incorporated in their text books by the modern writers on Muhammadan law. (See **Mulla's *Principles of Mohammedan Law*** [14th Edn. pp. 139, 142, 144 and 146], **Tyabji's *Muhammadan law*** **[**3rd Edn. pp. 430-435], Sections 397-400, **Amir Ali *Mahommedon Law*** [Vol. 1, pp. 130-131)].

12. The principles have further been applied in some decisions, of the High Courts in India. In ***Nabi Sab* v. *Papiah*** [AIR 1915 Mad. 972], it was held that gift did not necessary fail merely because possession was not handed over to the minor's father or guardian and the donor could nominate a person to accept the gift on behalf of the minor. It was pointed out

that the Mohammedan law of gifts, though strict could not be taken to be made up of unmeaning technicalities. A similar view was expressed in ***Nawab jan* v. *Safiur Rahman*** [AIR 1918 Cal 786]. These cases were followed recently in ***Munni Bai* v. *Abdul Gani*** [AIR 1959 MP 225], where it was held that when a document embodying the intention of the donor was delivered to the minor possessing discretion and accepted by her it amounted to acceptance of gift. It was further pointed out that all that was needed was that the donor must evince an immediate and bona-fide intention to make the gift and to complete it by some significant overt act. See also ***Mst Fatma* v. *Mst Autun*** [AIR 1944 Sind 195], **Mst *Azizi* v. *Sona Mir*** [AIR 1962 J & K 4]and ***Mammad* v. *Kunhali,*** [1992 KLJ 351].

13. In ***Md. Abdul Gyani* v. *Mt. Fakhr Jahan*** [(1922) 49 Ap 195 at p. 209], it was held by the Judicial Committee as follows:

> "In considering what is the Mohammedan law on the subject of gift, *intervivos* Their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan law were promulgated there were not in the contemplation of any one any Transfer of property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates large or small, and that it could not have been intended to laid down for all time what should alone be the evidence that titles to lands had passed. The object of the Mohammedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

Later in ***Mohamad Sadiq Ali Khan* v. *Fakhr Jahan Begum*** [(1932) 59 IA I], it was held by the Privy Council that atleast between husband and wife Muhammadan law did not require an actual vacation by the husband and an actual taking possession by the wife. In the opinion of the Judicial Committee the declaration made by the husband followed by the handing over of the deed was sufficient to establish the transfer of possession.

14. These cases show that, the strict rule of Muhammadan law about giving possession to one of the stated guardians of the minor is not a condition of its validity in certain cases. One such case is gift by the husband to his wife and another where there is gift to a minor who has no guardian of the property in existence. In such cases the gift through the mother is a valid gift. The respondents relied upon two cases reported in ***Suna Mia* v. *S.A.S. Pillai*** [(1932) 11 Rang P. 109], where gift to a minor through the mother was considered invalid. And ***Musa Miya* v. *Kadar Bax*** [ILR 52 Bom 316 PC], where a gift by a grand father to his minor grandsons when the father was alive, without delivery of possession to the father, was held to be invalid. Both these cases involve gifts in favour of minors whose fathers were alive and competent. They are distinguishable from those cases in which there is no guardian of the property to accept the gift and the minor is within the care either of the mother or of other near relative or even a stranger. In such cases the benefit to the minor and the completion of the gift for his benefit is the sole consideration. As we have shown above there is good authority for these propositions in the ancient and modern books of Muhammadan law and in decided cases of undoubted authority.

15. In our judgment the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the house of his mother-in-law and was probably a very sick person though not in *Marzulmaut*. His minor wife who had attained discretion was capable under Muhammadan law to accept the gift, was living at her mother's house and in her care where the husband was also residing. The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been complete under Muhammadan law and it seems impossible to hold that by handing over the deed to his mother-in-law, in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion both on texts and authorities such a gift must be accepted as valid and complete. The appeal therefore succeeds. The Judgment of the High Court and of the courts below are set aside and the suit of the plaintiff is ordered to be dismissed with costs throughout.

* * * * *

Hayatuddin v. *Abdul Gani*

AIR 1976 Bom. 23

CHANDURKAR, J. - This is a plaintiff's appeal challenging the dismissal of his suit for a declaration and injunction that he was lawfully in possession of house property in suit in pursuance of a gift deed dated 10-6-1952 executed in his favour by one Rashidbi and Amnabi. The suit was decreed by the trial Court but was dismissed by the first appellate Court. One Lalmiya had admittedly two wives, Rashidbi and Makboolbi. One Mahaboolbi also claimed to be Lalmiya's wife. Lalmiya had a sister Amnabi. He died in 1948 leaving behind the house property in dispute. Amnabi, Rashidbi and Makbolbi admittedly succeeded to the estate of Lalmiya. Amnabi got 12 annas share and the two widows. Rashidbi and Makpoolbi got 2 annas share each. Amnabi and Rashidbi executed a gift deed in favour of Hayatuddin on 10-6-1952. The recitals in the said gift deed show that they were gifting their house property valued at Rs. 1,000/- to Hayatuddin. The description of the property recited in the gift deed shows that according to the donors a part of this property was already separated and handed over to Makboolbi on account of her share in the estate of Lalmiya. The gift deed also recites that the property gifted was in possession of the donee and that possession was handed over to the donee and the donee being the owner was entitled to make use of the property in any manner he liked. It was further recited in the gift deed that Makboolbi's 2 annas share had been separated, that the donors were gifting in favour of the donee their interest in the property of the value of 14 annas and that none of the heirs of the donors would have any interest in the gifted property.

2. In 1955 the two donors as plaintiffs Nos. 1 and 2 and donee Hayatuddin filed Civil Suit No. 227 of 1955 for a declaration that Hayatuddin was the owner of the property and an alternative relief of partition and separate possession was also claimed in the plaint. The main contestants in that suit were Makboolbi who claimed that the gift in favour of the present plaintiff was not binding on her two annas share in the property of deccased Lalmiya and Mahabolbi who also claimed to be the widow of deceased Lalmiya. The two tenants who were in physical possession of the property in dispute. Sk. Chhotu and Mohd. Gulab, were defendants Nos. 3 and 4 in the suit. The Civil Judge, Class II, Nagpur who decided that suit by his judgment dated 25-1-1956 held that there was no partition in 1950 as alleged by the plaintiff and the house property which was mentioned in the gift deed was not allotted to the plaintiffs Nos. 1 and 2. It however, found that in fact the gift had been made of the portion A B C X Y H I J by the plaintiffs Nos. 1 and 2 to the plaintiff No. 3 on 10-6-1952 but that the said gift did not bind Makboolbi who had 2 annas share in the suit property. It was also found that the plaintiff No. 3 i.e. Hayatuddin was not placed in possession of the property said to have been gifted under the gift deed. The claim of Makboolbi that she was the window of Lalmiya was negatived. Makboolbi's share to the extent of 2 annas having been upheld in that suit, the trial Court passed a decree in favour of the plaintiffs Nos. 1 and 2 defendant No. 1 who were found entitled to get 12 annas, 2 annas and 2 annas share respectively in the suit house and the plaintiffs Nos. 1 and 2 were jointly held entitled to get 7/8th share in the said house which was directed to be separated by metes and bounds subject to their payment of the proportionate amount of dower debt within three months' time from the date of decree to the

defendant No. 1. A commissioner was appointed. It is not now in dispute that after Makboolbi's appeal negativing her status as a widow of Lalmiya came to be dismissed, a final decree for partition was passed allotting to the share of the original plaintiffs Nos. 1 and 2 Amnabi and Rashidbi, the same part of the house property which was gited by them to Hayatuddin. One intervening event which must be referred to is that during the pendency of the appeal filed by Makboolbi, Amnabi died on 18-11-1956 and the present defendants Nos. 1 to 6 were brought on record as her legal representatives in the appeal. While disposing of the civil suit, the trial Court had declined to pass a decree in favour of the plaintiff No. 3 without giving any reasons but the observation made was "rest of the Plff.'s claim seems to me misconceived in view of the facts pleaded by them and as made clear in my discussion above."

3. The suit out of which this appeal arises then came to be filed by Hayatuddin along with Rashidbi who was original plaintiff No. 2 in the earlier suit for a declaration that Hayatuddin was the exclusive owner of the property described in the schedule which, according to him was gifted to him on 10-6-1952 by Rashidbi and Amnabi. The plaintiff alleged that since the date of the gift he has been in possession of the said property and has also introduced tenants therein but that on the strength of the decree passed in Civil Suit No. 277-A of 1955 the defendants who were earlier suit brought on record in the earlier suit as legal representative of Amnabi tried to dispossess him. The present defendants raised a twofold defence to the suit. They firstly relied on the fact that the claim of the present plaintiff who was plaintiff No.3 in the earlier suit was rejected and secondly, they contended that the gift was void and the judgment in the earlier suit operated as res judicata. The trial Court found that the gift deed dated 10-6-1952 would operate in respect of the separate share in the suit property which is represented by the letters A B C X Y H I J in the plaint map, and that the donors Amnabi and Rashidbi admitted to have gifted the said house property to the plaintiff. It also found that the present defendants did not inherit any property from Amnabi and they were not entitled to possession of the suit property. It further found that the decree in Civil Suit No. 227-A of 1955 did not operate as res judicata and the suit field by the plaintiff was competent. In view of this finding a declaration was granted to the plaintiff Hayatuddin that he was the exclusive owner of the suit house as described in the plaint map and the defendants were restrained permanently from disturbing the plaintiff's possession and eniovment of the suit house.

4. In the appeal filed by the defendants the lower appellate Court took the view that the decision of the earlier suit operated as res judicata and there was no partition between Rashidbi and Amnabi on the one hand and Makboolbi on the other until the decree in Civil Suit No. 227-A of 1955 was passed. It held that the two principal findings in the suit were that there was no partition before the gift deed and Hayatuddin was not placed in possession of the property mentioned in the gift deed. Even according to the lower appellate Court, there was no finding about the validity of the gift deed, and one of the questions posed for consideration by the lower appellate Court was whether the gift deed in favour of Hayatuddin was valid. It, however, took the view that since delivery of possession was one of the two prerequisites of a valid gift and properties which were enjoyed by tenants-in-common were incapable of being placed in possession and it held that the property which was gifted to Hayatuddin not having been divided at the time when the gift was made it could not be valid. The question whether

the present gift could be considered as one of undivided share was disposed of by the learned Judge by observing:

> "A portion of an undivided property may be gifted to a co-owner also under certain circumstances but that is not the case here."

It is therefore apparent from the judgment that the validity of the gift considered by the lower appellate Court was only with reference to the fact that the property not having been partitioned prior to the suit of 1955 there could not be delivery of possession by Rashidbi and Amnabi in favour of Hayatuddin. The present appeal has been filed by the plaintiff challenging the judgment of the lower appellate Court

5. Now, the learned counsel appearing on behalf of the defendants was not in a position to dispute the fact that there was no finding by the Court which decided the earlier suit with regard to the validity of the gift. When it was contended on behalf of the appellant that the gift made by the two donors in favour of the present plaintiff was in respect of an undivided portion i.e. 7/8ths share owned by Rashidbi and Amnabi, it was urged on behalf of the defendants that the trial Court had in the earlier suit found that there was no partition at which the property was divided into two shares, one belonging jointly to Rashidbi and Amnabi and the other to Makboolbi, and that the trial Court had also found that possessionwas not given and the logical inference from these two findings therefore would be that the gift was invalid and even though expressly no finding was arrived at by the learned Judge of the trial Court in the earlier suit, such a finding must be read in the judgment with the result that the validity of the gift deed could not again be adjudicated upon in the present suit. It is difficult to accept the contention that though no finding has been reached by the trial Court in the earlier suit that the gift was invalid the judgment in that suit must be read as leading to that inference and it must be assumed that that finding was given and consequently the validity of the gift could not be put in issue in the present suit. Such a course would be contrary to the established principles under S. 11 of the Code of Civil Procedure which contemplates primarily an issue which is decided in the earlier suit and an issue on which parties have gone to trial putting certain matters directly and substantially in issue. A reference to Explanation IV to Section 11 would also not be of any assistance to the defendants because Explanation IV refers to a plea which might or ought to have been taken as a ground of defence of attack in the former suit and which has not been raised. What the learned counsel, however, wants to be done is that the finding is to be read as having been given because that is the natural inference which, according to him follows from the two findings recorded with regard to partition and possession.

6. There is another difficulty which it will be difficult for the defendants to get over. The finding with regard to the validity of the gift was not a finding which was necessary in order to give relief to any of the three plaintiffs in the earlier suit against the defendants in that suit. The present defendants were the legal representatives of one of the plaintiffs in the earlier suit. If the finding was to be res judicata between the present defendants and the plaintiffs in the earlier suit, namely Hayatuddin and Rashidbi then it would have to be shown that there was a conflict of interests between the plaintiffs in the earlier suit and that it was necessary to decide that conflict in order to give relief against the defendants. The pleadings in the earlier suit do not leave anyone in doubt that the plaintiff No. 1 Hayatuddin was wholly supported by

the original plaintiffs Nos. 1 and 2. In fact their whole object in joining as plaintiffs Nos. 1 and 2 in the earlier suit was to indicate that they have acted on the gift made in favour of the plaintiff No. 3 and that they wanted to reiterate the fact that their 7/8ths joint interest in the property left by Lalmiya has been gifted by them to the plaintiff No. 3. In other words, they completely stood by the gift they made in 1952 and that is why they firstly prayed for a declaration with regard to the ownership of the plaintiff No. 3 and alternatively claimed a relief for partition and possession. There was, therefore no conflict of interest between the plaintiffs Nos. 1 and 2 in the earlier suit and the plaintiff No. 3. The fact that the trial Court did not grant a decree in favour of the plaintiff No. 3 but granted a decree in favour of the first two plaintiffs was wholly immaterial. In any case the question about the validity of the gift was a question inter se between the three plaintiffs and was not required to be decided for giving any relief to any one of them inter se because the prayer made by all the three of them was common. There was therefore to be no question of any finding on the validity of the gift being res judicata even assuming that there was any implied adjucication about the gift between the plaintiffs inter se. The learned Judge of the lower appellate Court was right in going into the question of the validity of the gift though it will not be possible to agree with the conclusion which he has reached on the issue.

7. The learned counsel appearing on behalf of the respondents has referred to two decisions. In ***Mohammed Hassan* v. *Mehdi. Hasan*** [(AIR 1946 All 399)] the question was whether a finding with regard to the validity of a will between codefendants who were all interested in having the will upheld would be res judicata between them in later suit and it was observed that where in a suit to challenge the validity of a will the question of the validity of the will is not one between the plaintiff and one of the defendant but is one in which all the defendants who are beneficiaries under the will are interested the decision in the suit operates as res judicata between the (parties and) decision is more or less, like a decision in a partition suit. The main ground on which this decision was reached was that all the defendants were beneficiaries under the will and each one of them was interested in having the will upheld and that finding would bind them. In the second decision in ***Ayya Pillad.* v *Avya durai*** [(AIR 1935 Mad 81)] the learned single Judge of the Madras High Court referred to the three elements which were required to constitute a decision res judicate between co-defendants. These were: (1) There must be conflict of interest between the defendants concerned ; (2) it must be necessary to decide the conflict in order to give plaintiff the relief he claims and (3) the question between the defendants must have been finally decided. The learned Judge further took the view that there need not be any active contest between the co-defendants and a conflict may exist notwithstanding that one of the concerned defendants does not contest at all. It is difficult to see how this decision is of any assistance to the defendants. What was sought to be emphasized by the learned Judge was that what was necessary was not a contest by the co-defendants but a conflict of interest and the very fact that one of defendants did not raise any contest did not prevent a decision being res judicata between the co-defendants if there was a conflict of interest between them.

8. It is, therefore, necessary to decide in this case whether the gift is to operate with regard to the 7/8ths interest of Amnabi and Rashidbi, and when in lieu of the interest certain house property has been allotted to the plaintiff in the earlier suit, the plaintiff was entitled to

a declaration of ownership in respect of the property which was already in his possession. It is true that the gift deed initially proceeds on the footing that Makboolbi's share has been separated and the property described therein is stated to be belonging wholly to the two donors. But at the same time the gift deed unequivocally transfers in favour of Hayatuddin the 14 annas joint interest of the two donors Rashidbi and Amnabi. The finding that there was no partition earlier before the gift was made must be accepted for the purposes of the present litigation. But merely on that account it is not possible to hold that there was no transfer of interest of the two donors in favour of the present plaintiff. There is a clear intention on the part of the donors to divest themselves of their 14 annas interest in the property of Lalmiya and vest that property in the donee. It is also not in dispute that the interest which they purported to transfer was in the house left behind by Lalmiya, and in my view notwithstanding the finding that there was ne earlier partition and the partition came to be made for the first time as a result of the decision of the 1955 suit, the gift must operate in respect of the 14 annas share of the two donors in the house in dispute. It is not disupted that there can be a gift of an undivided share under Mohamadan Law. It will not be correct to say that this is not the claim of the plaintiff. In the earlier suit the plaintiff had no doubt claimed primarily a relief of declaration that the present plaintiff was the owner of the suit property but there was also a claim for an alternative relief of partition and separate possession in the earlier suit itself. The alternative claim could not have been made except on the hypothesis that they had an undivided interest which they wanted to be separated and placed in possession of. It is this alternative prayer which has been granted in the earlier suit. The argument therefore, that at no stage was any claim made that an undivided interest was being transferred cannot be sustained. Even in the present suit the plaintiff's case is that he was the donee of 7/8th interest of Rashidbi and Amnabi and that the house property which is mentioned in the gift deed formed 7/8th interest; it is that of which he is in possession, and that possession is under the gift deed, now and, therefore, he was entitled to peaceful possession and enjoyment of that property. There was hardly any defence to such a suit in the face of the gift deed except the validity of the gift and the technical plea of res judicata. Now, the learned Judge of the lower appellate Court has merely considered the case of the plaintiff on the footing that the gifted property could not be put in possession as separate property. The law relating to the gift of undivided property under Mohammedan Law is put in two parts in paragraphs 159 and 160 of the Principles of Mahammedan Law by Mulla 17th Edition. It is stated;

> **"159*. Gift of mushaa where property indivisible***. A valid gift may be made of an undivided share (mushaa) in property which is not capable of partition.
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> **160. *Gift of mushaa where property divisible***. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid) but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated".

How delivery of possession of immovable property can be given is explained in paragraph 152. It countemplates three kinds of cases (1) where donor is in possession (2) where property is in the occupation of tenants: and (3) where donor and donee both reside in

the property. There is evidence in this case to show that part of the property was in the occupation of tenants and plaintiff Hayatuddin was already residing in a part of the property. A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee; and where the donor and the donees both reside in the property no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift and in such a case, according to Mulla the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. We have in this case three documents Exts. P-1, P-2 and P-3 which indicate the steps taken by the two donors to divest themselves of this property after they had made a gift in favour of Hayatuddin. All these three notices have been issued by Shri Munwarbhai. Advocate, on behalf of the two donors and the donee. Shri Munawarbhai has been examined as P.W. 1 and he has proved these three notices. Ex. P-1 is a notice given by Makboolbi and Makboolbi and it clearly stated that Amnabi and Rashidbi, vide registered gift deed dated 10-6-1952 has gifted their shares in the suit house to Havatuddin and also delivered possession thereof. This notice is dated 8-2-1954 and it is also stated therein that the donors and the donee desired 1/7th share of Makboolbi to be separated by metes and bounds and the remaining portion of the house to be allotted to Hayatuddin exclusively. Exhibit P-2 is a notice dated 19-2-1954 again from the donors and the donee of Makboolbi whose status was in dispute. She had been intimated about the gift deed and delivery of possession to the donee and an allegation was made that in December 1953 she had wrongfully and unauthorisedly entered the house on the western side and forcibly and illegally occupied a portion of the suit house in which she had no interest. Damages were, therefore, claimed by Hayatuddin alone. Ex. P-3 is a notice dated 8-3-1954 on behalf of Hayatuddin alone to the two tenants and they have been intimated that the property which they were occupying had come to Hayatuddin by way of gift from Amnabi and Rashidbi. It appears that these two tenants were put in possession of two parts of property by Makboolbi. They were, therefore asked to vacate and damages were claimed. There is then the evidence of Yakubmiya (P.W.3) who was one of the tenants and who admitted that he had been living in the house for the last ten to eleven years. He was paying rent to plaintiff Hayatuddin and he says that Amnabi and Rashidbi had told him that they had made the plaintiff the owner of the house, and the rent was to be paid to him. According to him, there were two other tenants. Chhotumiya and Gulabbhai. They were also called and told similarly. This part of the evidence does not seem to have been seriously challenged in cross-examination. The defendant No. 1 examined himself as D.W. 2 and he has to admit that plaintiff Hayatuddin had been residing in the suit property since his childhood and according to him, there were tenants in the suit house. This evndence, therefore, shows that in a part of the suit property that plaintiff was living and the recitals in the gift deed also show that it was deceased Lalmiya who had brought up the plaintiff as a child and he was looking after Rashidbi. The property was thus in possession of the tenants and partly in possession of the donee himself. The declaration in the gift deed that possession was handed over to the donee and the intimations given to the tenants orally and subsequently by notices through counsel were sufficient evidence to show that the donors have done everything that was possible in the circumstances to hand over possession of the premises which they wanted to gift to the

present plaintiff. In addition to this there is their conduct in joining with Hayatuddin as co-plaintiffs to have their share separated and delivered possession of. This conduct also shows that the donors had done everything possible to make the gift effective and to divest themselves of possession and to transfer to Hayatuddin said possession of the undivided portion of the property as the donors themselves had. What was necessary to make a gift of an undivided portion capable of partition valid was discussed at some length by a Division Bench of the Allahabad High Court in ***Hamid Ullah* v. *Ahmad Ullah***. [(AIR 1936 All 473)]. In that case the property consisted of six houses and three parcels of land and the donor who was not in physical but constructive possession of the property executed a deed of gift and git it registered. The document recited that the donor was in proprietary possession of the property and was conveying to the donee the same sort of possession which she possessed, that she had given up all proprietary rights in the subject-matter of the gift and that donee was at liberty to make transfers of the property in any way he chose. The Division Bench held that the gift was valid as the donor had done practically all that she was able to do in the way of divesting herself of possession and giving to the donees the same possession as she had herself. In view of the speaking conduct of the donors it is difficult to hold in this case that possession of undivided share of the donors was not transferred by them to the present plaintiff.

9. I might refer with advantage to the observations made by the Privy Council indicating how the doctrine relating to invalidity of gift of mushaa was unadapted to a progressive state of society. In ***Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan***. [(1888-1889) 16 Ind App 205) (PC)] Sir Barnes Peacock, speaking on behalf of the Board, has observed:

> "The authorities relating to gifts of mushaa have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that possession taken under an invalid gift of mushaa transfers the property according to the doctrine of both the Shiah and Soonee Schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules".

Unless therefore, there are compelling reasons it will not be possible for me to invalidate a gift as in the instance case, a gift which has been reiterated by the donors at all possible times whenever occasion arose. In any case it is difficult to entertain a challenge to the gift deed by Amnabi and Rashidbi at the instance of the heirs of Amnabi who really had no estate to inherit as Amnabi had clearly divested herself of her 3/4th share in the estate of Lalmiya by making a gift in favour of the present plaintiff. In my view, the learned Judge of the lower appellate Court was in error in dismissing the plaintiff's suit on the ground that the gift was invalid.

10. In the result the judgment and decree of the lower appellate Court are set aside and the decree passed by the trial Court restored. The plaintiff's appeal is allowed with costs.

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Abdul Hafiz Beg v. *Sahebbi*

AIR 1975 Bom. 165

MASODKAR, J. - On the principles that effect the dispositions under the doctrine of death-illness, law is fairly well settled. In "***The Principles of Mohammedan Law***" by Mulla, the gifts made on the death-bed are the subject-matter of consideration in Chapter X and while explaining the doctrine of marz-ul-maut the learned author says that it is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death. It is further noted that it is an essential condition of marz-ul-maut i.e. of death-illness that the person suffering from the marz, i.e. malady must be under an apprehension of Maut i.e. death. The note of the Explanation goes on to explain the various shades of the malady raising apprehension of death and it is not necessary to refer to all that debate. In the celebrated work "***Principles of Muhammadan Jurisprudence***" by Abdur Rahim, the learned author had made a basic and notable effort to find out the juristic principles behind the Mohammedan precepts of law and has dealt with the topic of death-illness at some great length. In his view, for which he takes his support of Heiaya and Kifava the Marz-ul-maut is an illness from which death is ordinarily apprehended in most cases and in particular cases it has actually ended in death. He observes that:

> "The compilers of Al-Maiallah lay it down that death-illness is that from which death is to be apprehended in most cases, and which disables the patient from looking after his affairs outside his house, if he be a male and if a female the affairs within her house provided the patient dies in that condition before a year has expired whether he has been bed-ridden or not. If the illness protracts itself into a chronic condition and lasts like that for a year, the patient will be regarded as if he was in health and his dispositions will be treated like those of a healthy person….."

Abdul Rahim quotes that "the definitions as given by the Shafil and Nanbali [Hanbali (sic ?)] Jurists are also to the same effect namely that death-illness is illness dangerous to life that is which mostly ends in death provided the patient actually dies of it and he further observes that whether such illness was dangerous should be left to the opinion of the competent doctors. According to the learned author threfore while applying the true test of this doctrine the real question must be the illness and its character from which death could be said to have been apprehended. He observed:

> "It is a cardinal principle of Muhammadan jurisprudence that the law takes note only of perceptible facts. The original authorities do not lay down that the fears entertained by the sick man himself form any criterion of death-illness. In fact, it is an event of nature, the character of which cannot depend upon what the patient might think of it. The law in placing an embargo on a sick person's juristic acts puts it on the ground of illness and not on the apprehension of death by the sick man. The reason or motive underlying the law is that illness weakens a man's physical and mental powers and he is likely therefore as experience shows to act under such circumstances to the detriment of his spiritual interests by disappointing his heirs in their just expectations".

If this proposition on the exposition of the doctrine and the test is the correct one then the apprehension in the mind of the sick man cannot have the higher emphasis than the illness itself. In other words it is the proof of the illness that will be decisive of the matter provided that has caused the eventual death of the man. That proof can alone be tendered by the medical experts and mere subjective apprehension of the person suffering illness could not carry the doctrine to its logical end.

10. If these tests were applied then, it follows that there is some lack of evidence in the present case, that is, no doctors have been examined and further the evidence is somewhat fluid in the sense that 7 days prior Abdul Kadar had been laid ill he had returned from Chinchala and ultimately died on 4th. He was in a position as appears from some evidence to make signs and was thus capable of communicating.

11. However, Abdul Rahim's view about the exposition of this doctrine does not appear to have found clear support in the judicial pronouncements on the present doctrine. In ***Fatima Bibee* v. *Ahammad Baksh*** [(1904) ILR 31 Cal 319], the Calcutta High Court while considering the doctrine of marz-ul-maut known to Mohammedan Law found three things as necessary to answer the same, viz. (i) illness, (ii) expectation of fatal issue and (iii) certain physical incapacities which indicate the degree of illness. The second condition i.e. expectation of fatal issue could be presumed to exist from the existence of the first and third as the incapacities indicated with perhaps the single exception of the case in which a man cannot stand up to say his prayers are no infallible signs of death-illness. These conditions were qualified by stating that a long continued malady would contraindicate the immediate apprehension of death. A person afflicted by such long drawn course of illness can still be possessed of his sense and his dispositions would not be invalid. The view of the Calcutta High Court appears to have been affirmed by the Privy Council in ***Fatima Bibee* v. *Ahmad Baksh*** [(1907) ILR 35 Cal 271 (PC)]. No doubt, it appears that in that case too there was evidence of a doctor. The deed was executed about 6 days before the date of the death. While considering the question of invalidity of such disposition under the law of marz-ul-maut it was observed:

> The test which was treated as decisive of this point in both Courts was, was the deed of gift executed by Dadar Baksh under apprehension of death? This which appears to their Lordships to be the right question is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability.

It is thus obvious that if there is preponderence of probabilities indicating that the gift was made under the apprehension of death by the deceased it is invalid under the law of murz-ul-maut. That is a question of fact to be determined on evidence is also clear on this authority. Further in ***Ibrahim Goolam Ariff* v. *Saiboo*** [(1907) ILR 35 Cal 1 (PC)], the first question that was being canvassed before the Privy Council was about the physical condition of the deceased at the date of the execution of the gift and that was answered by saving that this was a pure question of fact. As to the law the proposition stated is to the following effect:

"The law applicable is not in controversy, the invalidity alleged arises where the gift is made under pressure of the sense of the imminence of the death".

12. As far as this Court is concerned the law has been stated in ***Safia Begum* v. *Abdul Razak*** [AIR 1945 Bom 438]. It was observed by referring to the two Privy Council decisions supra that it may be taken as settled that crucial test of marz-ul-maut is the (proof of the subjective apprehension of death in the) mind of the donor that is to say the apprehension derived from his own consciousness as distinguished from the apprehension caused in the minds of others and the other symptoms like physical incapacities are only the indicia but not infalliable signs or a sine qua non of marz-ul-maut.

13. This expostulation was required to be made so as to explain the earlier decisions of this Court reported in ***Sarabai* v. *Rabiabai*** [(1906) ILR 30 Bom 537] and ***Rashid* v. *Sherbanoo*** [(1907) ILR 31 Bom 264]. In ***Sarabai*** case learned Single Judge of this Court had laid down three conditions which must be satisfied so as to answer the requirements of marzul-maut the same being (1) proximate danger of death so that there is a preponderance of apprehension of death (2) some degree of subjective apprehension of death in the mind of the sick person and (3) some external indicia chief among which would be inability to attend to ordinary avocations. In ***Rashid*** case the Division Bench of this Court doubted as to the existence in every case of the third condition laid down in Sarabai's case, i.e. the physical inability to attend to ordinary avocations of the person must be available. There ***Fatima*** case (1904) ILR 31 Cal 319 was expressly mentioned as laying down the principles on the text of Mohamedan Law. After noting all this passage of decisions in this Court in ***Safia*** case, this Court ultimately found that what is required is subjective apprehension of death in the mind of donor at the time of disposition. The other circumstances and symptoms of incapacities were merely the indicia which may throw light on such mental state of the donor.

14. Thus as far as the decisions of Indian Courts are concerned the law of marz-ul-maut is answered if it is proved that the ailing donor was apprehending death and in that condition had proceeded to effect disposition.

15. Even the Pakistan Courts have not taken any other view of the matter. I may usefully refer to the judgment of the Supreme Court of Pakistan available in 1964 All-Pakistan Legal Decisions at p. 143 ***Shamshad Ali Shah* v. *Syed Hassan Shah*** where the learned Judges have summarised the law of the gifts and the doctrine of marz-ul-maut. There a woman of 65 suffering from pneumonia had succumbed after execution of the deed of gift almost after a period of two hours. The gift made by such woman was held to be affected by the doctrine. While laying down the principles on which the law of murz-ul-maut has to be found out the Supreme Court of Pakistan has stated as to what questions must be raised and the same read as under:-

"(i) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death?

(ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death?

(iii) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations - a circumstance which might create in the mind of the sufferer an apprehension of death?

(iv) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?

In short the Court has to see whether the gift in question was made under the pressure of the sense of imminence of death". (Emphasis provided)

I have extracted the above passage from the judgment of learned Mr. Justice Fazle Akbar with which learned Chief Justice A.R. Cornelius has concurred. In the judgment separately delivered by Kaikaus J., the following observations on the matter in controversy and which help the decision on principle can be usefully extracted:

"If the finding as to the date of death of Mst. Husan Bano is not interfered with no ground remains for interference with the finding of marz-ul-maut in spite of the fact that no doctor had been produced. Mst. Husan Bano was old and ailing and if she died only two hour after the registration of the gift it is easy to accept that she was suffering from some disease which caused serious apprehension of death.

So far as the legal aspect of marz-ul-maut is concerned what is really needed is as pointed out in (1907) ILR 35 Cal I (PC) that the gift should be made under the pressure of the sense of imminence of death'. The rest of the matters which are generally stated in commentaries on Muslim Law as matters requiring investigation in a case of marz-ul-maut are really matters relating to evidence. If the gift had in fact been made "on account of pressure of the sense of imminence of death" the gift would be affected by doctrine of marz-ul-maut". (Emphasis added) This datum-line of the doctrine found by the Supreme Court of Pakistan is clearly in accord with what the Privy Council observed in ***Ibrahim Goolam Arif*** case [(1907) ILR 35 Cal 1 (PC)]. Similarly the law is understood and applied in this Court. Therefore what is required to be proved upon the preponderance of probabilities is whether the gift was made by the ailing person while under the apprehension of the death and further whether in such ailing he met his death.

16. It is true that mere apprehension on the part of an old man who is not afflicted by any malady would not be sufficient to answer the doctrine. Mere accident of death which is a fact certain in human life does not afford good reason to invalidate the dispositions. The basic juridical thinking and the pronouncement of the Courts upon the instant doctrine clearly spell out that the English phrase "death-illness" is not a sufficient adequate of complete connotation of the term 'marz-ul-maut', for that doctrine appears to comprehend an affliction or malady leading unto death or involving the death of the person concerned. Because of that with the proof of death its causation and the condition of person have its own and clear significance. Death is the certain and central fact. Proximate danger of death in an illness it is common experience, casts ominous elongated shadows discernible along the lines of conduct of the person who is subject to the process of dissolution of life. In that there is all the apprehension of withering away of human faculties and rational capacities. Such process may set in and become pronounced as the journey's end comes near. Mind under such condition would get seized by the fright of the final full-stop and all winged and animated spirits involving free will clarity and reasonable and purposeful action may be clipped and caught in

the mesh of progressing paralysis. The apprehension that the curtain is wringing down on the life in such a state would easily grasp all the consciousness as the physical malady surely affects every faculty clouding the will and reason of human being. It is no doubt that when such preponderance of an onset of physical and psychological atrophy operating over the field of free and balanced will can be inferred, the dispositions cannot be validated. The light of reason at such moment is not expected to burn bright as the flame of life itself flickers drawing ghastly shadows on the cold deadly wall of the inevitable. It is conceivable therefore that the pragmatic philosophy of Mohamedan Law thought it wise to put under eclipse the acts and dispositions done upon the promptings of a psychosis indicating apprehension or clear fear of death either induced by or during the last suffering or illness of the person dying. Law assumes that apart from the dominant danger of loss of free will, such person may clearly lose touch with his spiritual dictates and may hasten even against the need of his clear obligations and interests to do the things which he might not have normally and in times of health done. Once the subjective apprehension of death, its posibility or preponderance is established and there is evidence of accelerated dissipation of the life itself leading unto death due to malady or affliction the dispositions made by such person are treated as if it were an outcry against the denomic fear of death itself and thus basically a non-juristic action.

17. Therefore, it is clear that all the circumstance surrounding the disposition itself the physical and psychical condition of the person afflicted the nature of the malady and the proximity of death to the actual act of disposition and further the fact of death are all the matters which should furnish to the Court as a feedback to find out as to whether the disposition is within the mischief of this doctrine. Once probabilities hold out that there was even some degree of subjective apprehension of death in the mind of the sick person who eventually died suffering from his last illness the subjective test implicit in the doctrine is satisfied both on principle and policy. To find that, with the growth of medical and psychological sciences in the modern times, several indicia would be easily available. However, it is not necessary to have any static approach or to put up any given praxis in that regard. Obviously it is all a matter of eminent and entire appreciation of facts and circumstances involved in a given case wherein the ultimate crisis of the drama of life leading unto death will have to be properly scanned and constructed.

18. Therefore, once there is evidence to support the findings reached by the Courts of fact either coming from those who were near the deceased during the relevant period or as may be disclosed by the documentary evidence throwing light on thaperiod, the matter is not open to investigation in second appeal for the provisions of Section 100 Civil P.C. do not permit such a challenge unless the appreciation of evidence can itself be shown to be perverse or against record. Merely because medical evidence is not put forth the principle does not change. Adequacy of evidence and its fullness are still the matters in the ken of considerations that satisfy the conscience of the Court which is required to find facts. By that no question of law is raised. The usual submission based on the principle of onus of proof would be irrelevant once the matter had been understood by the parties and they were obliged to lead evidence on th relevant facets of the doctrine. No doubt the initial burden to prove the requirements of marz-ul-maut is on the person who sets up such a plea as affecting the disposition of a dead person; that can be discharged by the proof of the facts and circumstances in which such

person met his death and the attendant events preceding and succeeding the disposition itself. Once the possibility of a subjective apprehension of death in the mind of suffering person who made the gift is raised clearly the burden shifts to that party who takes under the disposition or sets up the title on its basis. Such party may prove the facts and circumstances which would enable the Court to hold that the disposition itself was not made while the suffering person was under the apprehension of death for as I said earlier there may be several answers to the problem and mere accident of death of the person making the disposition would not be enough. An old man meeting a natural death may be well disposed to see that the matters are settled in his lifetime and such dispositions would be perfectly valid and would not answer marz-ul-maut. It is, therefore, necessary for the party setting up the disposition to rebut the proof that may be indicative that the disposition is within the mischief of marz-ul-maut. That cannot be done by merely relying on the abstract doctrine of onus of proof or insisting upon the evidence of medical experts not tendered by the opposite party. In a given case such evidence may not be at all available.

19. Even assuming that the question is open for being examined in second appeal the facts of the present case bear out that Abdul Kadar was taken seriously ill from before Ist February and he never recovered from that illness. During that illness he was not even able to look after himself and died shortly i.e. on 4th February. He had reached the mental low of such kind as he was asking for his near and dear ones to be by his side and when his daughters came near him he was even unable to express himself. He was merely making signs and shedding tears while looking at his relatives. That shows the sense of helplessness with which Abdul Kadar was seized during his last suffering. All this raises a clear possibility that while he was making the gift which is about 24 hours before death, he was seized or gripped by the subjective and imminent apprehension of his death. In fact the signs of such psychosis had already set in. The malady or illness did not leave him till last. The bed on which he rested proved to be the death-bed and at the mellowed age of eighty this leaf fell from the tree of life.

20. All this unmistakably answers that the gift evidenced by Exh. D-3 is within the law of marz-ul-maut as understood by the Mohamedan precepts and cannot be sanctioned.

21. In the result, therefore, the appeal fails and is dismissed.

T H E E N D