

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.2007 OF 1996

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A.S.M.P. (SR) No.50138 OF 1997

(CROSS OBJECTIONS)

COMMON JUDGMENT:

The defendant in O.S. No.24 of 1986 on the file of Subordinate Judge Court, Medak, hereinafter referred to as trial court for convenience, preferred this appeal challenging the Decree and Judgment, dated 08.12.1995, whereby the trial court passed preliminary decree, declaring that the plaintiffs 1 and 2 are entitled to 1/3rd share each in 'A' schedule property, while declining to grant any relief for partition of 'B' schedule property, permitting the plaintiffs to file separate application for ascertaining the profits.

02. The plaintiffs in the said suit filed cross-objections aggrieved by rejection of claim in respect of residential house.

03. During pendency of the appeal, the appellant – defendant died and his legal representatives were brought on record as appellants 2 to 5 vide order dated 19.09.2006 in A.S. M.P. No.1845 of 2006.

04. The plaintiffs, dissatisfied with the dismissal of the suit in respect of 'B' schedule property, preferred cross-objections in Sr.No.50138 of 1997.

05. For convenience of reference and to avoid confusion, the ranks given to the parties before the trial court will be adopted through out the judgment.

06. The plaintiffs 1 and 2 are the daughters of late Veldi Nagabhushanam, who died on 18.03.1984 leaving behind the plaintiffs and defendant to succeed his estate. Wife of Nagabhushanam is predeceased to Nagabhushanam. During the life time, Veldi Nagabhushanam own and possessed the schedule property situated at Shankarampet Village and Ambajipet Village, Medak District, known as Sanga Reddy District which are more fully described in the schedules annexed to the plaint.

07. The schedule property is the self acquired property of Nagabhushanam, father of

the plaintiffs. After the death of Nagabhushanam, the plaintiffs and defendant (first appellant) are in possession and enjoyment of the schedule property being class-I legal heirs and entitled to equal share in 'A' and 'B' schedule property as per Hindu Succession Act, 1956. Thus, the suit 'A' and 'B' schedule property is liable to be partitioned in to three equal shares and to allot one such share to plaintiffs 1 and 2 each and to the defendant.

08. The plaintiffs demanded the defendant to cooperate for partition of the schedule property, but for the reasons best known, the defendant, did not cooperate for partition. The plaintiffs are entitled to claim benefit under Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986, whereunder the daughters are coparceners on par with the son. Hence each of the plaintiff is entitled to 1/3rd share in 'A' and 'B' schedule property. Since the defendant did not cooperate for partition of the schedule property, the plaintiffs filed the suit, claiming aforesaid reliefs.

09. The defendant filed written statement admitting relationship between the plaintiffs and first defendant, while denying the right of the plaintiffs to claim partition of the schedule property after the death of Nagabhushanam and his wife. The defendant denied the possession of open plot at Shankarampet Village. Moreover an extent of 45 square yards, adjacent to the school compound wall was purchased by the defendant from the President of Vidya Committee on 10.12.1985 for valid sale consideration of Rs.1,800/-. Therefore, the said property is the separate and exclusive property of the defendant.

10. The deceased – Veldi Nagabhushanam own and possessed agricultural land and open plot at Ambajipet Village which is more fully described in 'A' schedule and in first item 1 of 'B' schedule. Remaining items of the property described in 'B' schedule is the exclusive property of the defendant. He further denied that the property described in 'A' schedule and first item of 'B' schedule is self acquired property of Veldi Nagabhushanam - father of the plaintiffs and first defendant, while contending that 'A' schedule property and item 1 of 'B' schedule property is the ancestral Hindu undivided Coparcenary property of late Nagabhushanam and that the plaintiffs were never in possession and enjoyment of the property along with the defendant at any point of time, more particularly, after the death of Veldi Nagabhushanam.

11. After the death of Veldi Nagabhushanam, the name of the defendant was

mutated in all the revenue records being the sole legal heirs and also in Grampanchayat record, that apart during the life time of Veldi Nagabhushanam, he performed the marriages of the plaintiffs 1 and 2 on 20.04.1967 and 05.06.1975 respectively and presented gold ornaments and other movable property besides substantial amount of cash towards share in the ancestral joint family property. Thus, the plaintiffs have no manner of right to claim partition of schedule property.

12. It is further contended that Veldi Nagabhushanam also executed a memorandum of partition dated 01.04.1977. According to the memorandum of partition, the defendant alone is entitled to claim right in the entire schedule property. Therefore, the plaintiffs are not entitled to claim any right in the schedule property.

13. The defendants denied making any demand by the plaintiffs for partition and their entitlement under the provisions of Hindu Succession (Andhra Pradesh) Amendment the Act 13 of 1986, which came into force on 05.09.1985 and prayed for dismissal of the suit.

14. On the strength of the above pleadings, the trial court framed the following issues:

1. Whether the plaintiffs are entitled for partition and separate possession of suit schedule properties as alleged in the plaint?
2. Whether there was prior partition on 01.04.1977 as alleged in the written statement and suit schedule 'A' and item 1 of 'B' schedule property have fallen to the share of the defendant?
3. Whether the house plot admeasuring 45 square yards is the self acquired property of defendant?
4. To what relief?

15. During the trial, on behalf of plaintiffs, P.Ws.1 and 2 were examined and Exs.A.1 to A.6 were marked. On behalf of defendant, D.Ws.1 to 3 were examined and Exs.B.1 to B.17 were marked.

16. Upon hearing the argument, and considering the oral and documentary evidence, the trial court passed preliminary decree for partition of 'A' schedule property into three equal shares and for profits on application filed by the plaintiffs for ascertaining the profits by appointing an advocate commissioner while declining to pass decree for partition of 'B' schedule property.

17. The defendant aggrieved by preliminary decree, for partition of 'A' schedule property into three equal shares and for allotment of two such shares to the plaintiffs and for permitting the plaintiffs to file application for ascertaining the profits, filed the present appeal raising several contentions.

18. The main contentions urged in the grounds of appeal are as follows:

- a. The trial court erroneously held that the 'A' schedule property is the self acquired property of late Veldi Nagabhushanam, but in fact it is his consistent case from the material that 'A' schedule property is the ancestral property, it devolved on Veldi Nagabhushanam, in such case the plaintiffs are not coparceners, not entitled to any share in the property. But the trial court did not consider the specific plea.
- b. The trial court did not appreciate the evidence on record in proper perspective, recorded an erroneous finding holding that 'A' schedule property is the self acquired property and consequential relief of ascertaining of profits.

19. Whereas the plaintiffs being aggrieved by the dismissal of the suit in respect of 'B' schedule property filed cross-objections only on one ground that the trial court misconstrued Section 23 of Hindu Succession Act, 1956, and after the death of the father of the plaintiffs and defendant, the plaintiffs and defendant alone residing in the house along with open land, and to attract section 23 of Hindu Succession Act, 1956, there must be more than one male heir jointly enjoying the house, but admittedly the defendant alone is the male heir, in such case, the property is liable for partition. But the trial court on erroneous appreciation of law negated the claim for partition of 'B' schedule property. Finally, prayed to set aside the Decree and Judgment passed by the trial court negating the partition of 'B' schedule property.

20. Learned counsel for the appellants/ defendants, Sri K. Raghuveera Reddy, would contend that the plaintiffs are not entitled to claim any share in the property as the succession was opened on the date of death of Nagabhushanam i.e. on 18.03.1984. According to the law prevailing on the date of opening of succession, the plaintiffs are not coparceners. Therefore, they are entitled to claim benefit neither under Sections 4(a) and 29 – A of Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986, nor under Section 6 of Hindu Succession Act, 1956 amended by Central Act 39 of 2005. Therefore, they are disentitled to claim any right over the property in view of the law applicable to the plaintiffs and defendants on the date of opening succession. In support of his contention, he placed reliance on the

expressions of the Apex Court reported in

i) ***Anar Devi and others v. Parmeshwari Devi and others***,

ii) ***Sheela Devi and others v. Lal Chand and another***,

iii) ***Ms. Vaishali Satish Ganorkar and another v. Satish Keshorao Ganorkar and others***

iv) ***G. Sekar v. Geetha and others***

21. The main endeavour of the defendants is that the law declared by this Court in **M. Sujatha and others v. M. Surender Reddy and others** is totally in conflict with the Judgment of the Coordinate Bench in **B. Chandrakala v. A. Anuradha**. When the Division Bench of this Court is disagreeing with the principle laid down by earlier Division Bench, the above question shall be referred to the Full Bench, but instead of referring the matter, the Division Bench, pronounced the Judgment contrary to the law declared by this Court in **B. Chandrakala's** case referred supra, that apart no such question about the application of Section 6 of Hindu Succession Act, 1956 amended by Central Act 39 of 2005 retrospectively was raised before the Division Bench of this Court in **M. Sujatha's** case referred above. The Judgment in **M. Sujatha's** case was an uncontested Judgment by applying Rule of **Sub-Silentio**. It cannot be relied on to uphold the rights of the plaintiffs and finally prayed to set aside the preliminary Decree and Judgment passed by the trial court for partition of 'A' schedule property and other consequential relief.

22. Whereas the learned counsel for the plaintiffs (cross-objectors), Sri K. Govardhan Reddy, mainly relied on **M. Sujatha's** case referred supra to contend that Section 6 of Hindu succession Act, 1956 (amended by Central Act 39 of 2005) operates retrospectively and in such case, the plaintiffs are entitled to claim partition of 'B' schedule property as Section 23 was repealed. On this ground alone, 'B' schedule property was liable for partition.

23. He further refuted the contention of Sri K. Raghuveer Reddy, learned counsel for the appellants, on the ground that when the Act operates retrospectively in view of judgment in

M. Sujatha's case referred supra, the plaintiffs are entitled to claim rights as coparceners and entitled to share along with defendant's son either in view of A.P.

Amendment or Central Amendment to Hindu Succession Act, 1956.

24. Therefore, the decree for partition of 'A' schedule property is totally inconsistent with the law declared by this Court and by the Apex Court in **Ganduri Koteshwaramma and another v. Chakiri Yanadi and another** and prayed to pass decree for partition of item 1 of 'B' schedule property while upholding decree for partition of 'A' schedule property.

25. Considering the facts and circumstances of the case, argument advanced by both the counsel, Judgment and Decree passed by the trial court, the points that arise for consideration are as follows:

- I) whether the suit schedule property is self acquired property of Veldi Nagabushanam, father of the plaintiffs and defendant? If not, whether the plaintiffs are entitled to claim benefit under Section 29 - A of the Hindu Succession (Andhra Pradesh) Amendment Act, 13 of 1986?
- II) Whether the plaintiffs are entitled to claim benefit under Section 6 of Hindu Succession Act, 1956 as amended by Central Act 39 of 2005? If so, whether the plaintiffs are entitled to claim share in item 1 of 'B' schedule residential house and other property?

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Point No. I:

26. The basis for claim as pleaded in the plaint is that the schedule property is the self acquired property of the father of the plaintiffs and defendant, thereby the plaintiffs and defendant are entitled to 1/3rd share each. The plaintiffs also further contended that in case the plaint schedule property is held to be ancestral property, the plaintiffs are entitled to claim benefit under Section 29 –A introduced in Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986. Whereas, the defendant in the written statement specifically denied the nature of the property while contending that 'A' schedule property and other items of 'B' schedule property except item 1 is the ancestral property of their father Nagabushanam. Therefore, the plaintiffs, whose marriages were performed long prior to Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986 came into force, disentitled to claim any share in the property.

27. The trial court did not frame any issue with regard to the nature of property, whether it is self acquired or ancestral property of Veldi Nagabushanam, but

concluded that the schedule property is the self acquired property of Veldi Nagabushanam. Thereby, granted preliminary decree for partition of 'A' schedule property while declining to grant decree for partition of residential house in view of bar under Section 23 of the Hindu Succession Act, 1956.

28. The reason for such conclusion referred in earlier para is that the defendant did not deny the nature of acquisition of property as pleaded by the plaintiffs. In page 13 of the Judgment, 11th line onwards, the trial court observed as follows:

"No where the defendant pleaded either in written statement or in his evidence that the suit properties are joint ancestral family properties when plaintiffs specifically pleaded and deposed that the suit properties are specifically pleaded and deposed that the suit properties are acquired by father of plaintiff and defendant alone. In the absence of specific plea by the defendant that suit 'A' schedule properties are ancestral joint family properties the court has no option except to come to conclusion that suit 'A' schedule properties acquired by father of the plaintiffs alone and that the plaintiffs are entitled to seek for partition as heirs of Nagabushanam along with defendant in plaint 'A' schedule property."

29. The basis for finding of the trial court is non traversal by the defendant regarding the nature of property in the written statement, so also in the evidence. This reason is *ex-facie* false, since the plaintiffs themselves are uncertain about the nature of property. At one stage, in page 2 of the plaint, the plaintiffs contended that 'A' and 'B' schedule property is self acquired property of Nagabushanam, whereas in the same page at paragraph 4, the plaintiffs contended that if for any reason, it is held that 'A' and 'B' schedule property is ancestral property, the plaintiffs are entitled to seek benefit under Section 29 – A of the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986, as the plaintiffs became coparceners.

30. When I adverted to the written statement filed by the defendant, there is clear denial about the nature of the property. In page 2 paragraph 5 of the written statement, the defendant asserted as follows:

"It is utterly false and baseless to say that suit 'A' & 'B' schedule properties are the self acquired properties of late Veldi Nagabushanam. As a matter of fact the suit 'A' schedule properties and the item No.1 property of 'B' schedule are the ancestral and joint family properties of late Veldi Nagabushanam and the defendant."

31. In view of specific contention that 'A' schedule property and item 1 of 'B'

schedule property is the ancestral property, while denying the plea of the plaintiffs, the reasons recorded by the trial court to accept the contention of the plaintiffs that the schedule property is the self acquired property of Nagabushanam is perverse.

32. The trial court also recorded that the defendant did not deny the nature of the property, as pleaded by the plaintiffs, in the written statement and it is also one of the reason for accepting that the schedule property is the self acquired property of Veldi Nagabushanam, father of the plaintiffs and defendant. In view of the above reasons, it is necessary to advert to the evidence on record.

33. In the examination-in-chief, P.W.1 – Nagamani, the first plaintiff in the said suit categorically testified that the schedule property was acquired by her father during his life time. In the cross-examination at page 3 dated 30.01.1990, 9th line onwards a specific suggestion was put to P.W.1 that 'A' schedule property and item 1 of 'B' schedule property is the ancestral and joint family property of her father and defendant and she denied the said suggestion, while deposing voluntarily that the property was acquired by her father.

34. The defendant while denying the nature of acquisition of property in the written statement suggested to P.W.1 that 'A' schedule and item 1 of 'B' schedule property is the ancestral property. Even in the evidence of D.W.1, though his examination-in-chief is silent regarding nature of property, curiously the counsel for the defendant in the cross-examination dated 22.12.1994 at page 3 elicited that the suit schedule property is the ancestral property. Similarly, in the cross-examination of D.W.2 – K. Narasimulu, the plaintiffs counsel elicited that entire property possessed by D.W.1 is ancestral property not acquired by Veldi Nagabushanam. Therefore, the consistent pleas at every stage of the pleading and evidence is that 'A' schedule property and item 1 of 'B' schedule property is the ancestral property, it devolved upon Veldi Nagabushanam, father of the plaintiffs and defendant and the defendant never admitted that the schedule property is the self acquired property of Veldi Nagabushanam.

35. On the other hand, both in the written statement filed by him, in the cross-examination of P.W.1 and in the cross-examination of D.Ws.1 and 2, specific case of the defendant is that 'A' schedule property and item 1 of 'B' schedule property is the ancestral property, it devolved upon Veldi Nagabushanam. The trial court for the reasons best known to it recorded such finding that the defendant did not deny the

nature of property in the written statement and in the evidence, and such finding recorded by the trial court ignoring the pleadings and evidence can be said to be perverse. Therefore, the conclusion arrived by the trial court for the reason that the defendant did not deny the nature of property is erroneous on the face of record.

36. When the plaintiffs asserted that the suit schedule property is the self acquired property of Veldi Nagabushanam, father of plaintiffs and first defendant, while contending that in case the court comes to conclusion that the schedule property is the ancestral property, they are entitled to claim benefit under Section 29-A of the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986. The initial onus of proof is on the plaintiffs to prove that the suit schedule property is the self acquired property of Veldi Nagabushanam by adducing cogent and satisfactory evidence.

37. To substantiate their contention, the first plaintiff herself was examined as P.W.1. As usual, in examination-in-chief she asserted that the suit schedule property is the self acquired property of her father - Veldi Nagabushanam. In the cross-examination she denied in clear terms that the schedule property is not the self acquired property of Nagabushanam. Similarly, in paragraph 5 page 2 of the written statement, the defendant clearly asserted that the schedule property is not the self acquired property of Veldi Nagabushanam, but it is ancestral property of Veldi Nagabushanam. Though D.Ws.1 and 3 did not assert in the examination-in-chief about the nature of property, in the cross-examination of D.Ws.1 and 3, a specific fact was elicited by the plaintiffs counsel that 'A' schedule property and item 1 of 'B' schedule property is the ancestral property but not followed by any suggestion denying the same. Therefore, the oral evidence on record is only oath against oath. If for any reason, the contention of the plaintiffs that suit schedule property is the self acquired property of their father Veldi Nagabushanam, there must be some documentary evidence. To substantiate their contention, P.W.1 just relied upon Exs.A.1 to A.6, certified copy of pahani patrik for the years 1983-84, 1984-85, and certified copy of chowfasla for the years 1983-84 and 1984-85. At best, in these documents, the revenue authorities recorded in column 11 of Exs.A.1 to A.4 that Nagabushanam is the owner of the property, but in column No.17, it is noted that the defendant, V. Gangadhar is cultivating the agricultural land for all the years. The column No.2 in Chowfalsi marked as Exs.A.5 and A.6 also disclosed that Veldi Nagabushanam is the owner of property. At best these documents are helpful to establish that Veldi Nagabushanam is the recorded owner of suit 'A' schedule

property and these documents would not establish that the property was acquired by Veldi Nagabushanam, father of the plaintiffs and defendant. Similarly, the defendant also produced Exs.B.1 and B.2, which disclosed that the original owner was Veldi Nagabushanam and the land is being cultivated by V. Gangadhar, the defendant herein. Curiously in column No.12 of Ex.B.3, it is noted that for 'A' schedule property, as original pattadar died, the legal heirs were not shown in faisal patti as there is dispute. In any view of the matter, none of the documents produced by both the parties to establish that the schedule property is the self acquired property or the property devolved upon Veldi Nagabushanam from his ancestors. When the plaintiffs specifically contended that the schedule property is the self acquired property of Veldi Nagabushanam, it is for them to establish the nature of acquisition in view of Section 101 of the Indian Evidence Act, 1872, since the alleged factum of self acquisition of 'A' and item 1 of 'B' schedule property by Veldi Nagabushanam is within the knowledge of the plaintiffs, according to the plea raised in the plaint. In any view of the matter, the onus of proof on the defendant is lighter than the onus of proof which rests on the plaintiffs, for the reason that there exists a presumption in regard to continuity of the joint family. The entire evidence adduced by P.W.1 is not sufficient to accept her contention that the schedule property is the ancestral property. Even the evidence of P.W.2, the farm servant of Veldi Nagabushanam is silent as to the nature of acquisition. Thus, the plaintiffs failed to discharge their burden of proof which rests initially on them.

38. When I turned to the evidence of the defendant, D.W.1 himself asserted that it is the separate ancestral property and the same is supported by the evidence of D.W.3, who is their village elder. If the property was acquired by means of conveyance or any other mode of transfer, there must be a document whether it is a transfer inter vivos or testamentary dispossession. But no such document was produced before the trial court to establish the contention of the plaintiffs that the schedule property is the self acquired property of Veldi Nagabushanam. Thus, they miserably failed to conclude that the suit schedule property is the self acquired property of Veldi Nagabushanam, who was the father of the plaintiffs and the first defendant. But, the trial court only on the alleged non traversal of the plaintiffs' plea and failure to adduce evidence by the defendant, ignoring the initial onus of proof, erroneously concluded that the suit schedule property is the self acquired property of Veldi

Nagabushanam.

39. After reappraisal of entire evidence on record, I hold that the plaintiffs miserably failed to establish that the schedule property was the self acquired property of Veldi Nagabushanam, however, the defendants himself admitted that 'A' schedule and item 1 of 'B' schedule property is the ancestral property of Veldi Nagabushanam and the defendant himself. In view of admission and in the absence of proof of partition, the presumption is that Nagabushanam and the defendant continued joint family members. Hence, I hold that 'A' schedule and item 1 of 'B' schedule is the ancestral property of Veldi Nagabushanam, father of the plaintiffs and defendant.

40. One of the contention raised in paragraph 4 of the plaint is that in case, the court holds that 'A' and 'B' schedule property is the ancestral property of Veldi Nagabushanam, the plaintiffs became coparceners by virtue of the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986 and entitled to claim share in 'A' and 'B' schedule property. But the defendant denied their entitlement to claim share as coparceners, in the written statement specifically.

41. To claim benefit under the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986 i.e. Section 29-A the plaintiffs have to satisfy certain requirements. Section 29-A declared that the daughter is a coparcener notwithstanding anything contained in Section 6 of the Hindu Succession Act, 1956 and entitled to claim share in a Hindu undivided family governed by Mitakshara Law as daughter became coparcener by birth on par with the son. It further says that if the marriage of daughter shall take place prior to commencement of the Act, the daughter is not entitled to claim right on par with son.

42. In the present case, the first plaintiff examined herself as P.W.1. During cross-examination (dated 09.12.1988) in first three lines she deposed as follows:

"I was married in the year 1967. My younger sister was married about 10 or 12 years ago. It is true that my marriage and the marriage of my younger sister were celebrated by our father during his life time."

43. Taking advantage of these admission, learned counsel for the defendant would submit that the marriage of both the plaintiffs were performed, long prior to commencement of the A.P. Amendment Act 13 of 1986 they attained majority, they are not entitled to claim partition of the schedule property even under the Hindu

Succession (Andhra Pradesh) Amendment Act 13 of 1986. The suit was filed in the year 1986, whereas the marriage of the first plaintiff was performed in the year 1967 almost 19 years prior to filing of the suit. Similarly, the second plaintiff's marriage was performed about 12 years prior to filing of the suit, in such case they are disentitled to claim benefit under the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986. This contention of the defendant holds substance for the reason that both the plaintiffs are not minors by the date of commencement of the Hindu Succession (Andhra Pradesh) Amendment Act 13 of 1986 and even otherwise their marriage were performed long prior to commencement of the Act. Therefore the plaintiffs are not entitled to claim benefit under the A.P. Amendment Act 13 of 1986.

44. On overall consideration of the material on record, the plaintiffs miserably failed to establish that the schedule property was the self acquired property of Veldi Nagabushanam and failed to establish that they were minors or their marriages were not performed by the date of commencement of the A.P. Amendment Act 13 of 1986. On the other hand, they themselves admitted that their marriages were performed long prior to commencement of the A.P. Amendment Act 13 of 1986. In such case they are disentitled to claim share as coparceners in the ancestral property in view of the A.P. Amendment Act 13 of 1986. Accordingly, the point is held against the plaintiffs and in favour of the defendant.

Point No.II:

45. One of the contentions raised, during hearing the appeal, by the learned counsel for the plaintiffs is that if for any reason the Court holds that the plaintiffs are not entitled to claim share since the plaintiffs failed to establish that the suit schedule property is the self acquired property of Nagabushanam - their father, are entitled to claim benefit under Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005) and they are entitled to claim share as coparcener on par with the son. In support of his contention, he placed reliance on a Judgment of this Court in **M. Sujatha's** case referred supra. By applying the principle laid down in **M. Sujatha's** case referred above, requested this court to pass a decree for partition of 'A' schedule property and pass a decree for partition of item 1 of 'B' schedule property i.e. residential house, as Section 23 of Hindu Succession Act, 1956 was repealed, entitling the daughter to claim share even in the residential house removing the

disability on daughter.

46. *Per contra*, Sri K. Raghuvver Reddy, learned counsel for the defendant, contended that the Judgment in **M. Sujatha's** case is totally in conflict with the Judgment of Coordinate Bench in **B. Chandrakals's** case referred supra, which was decided earlier in point of time and the subsequent Coordinate Bench came to a different conclusion than the law declared by the earlier Coordinate Bench. The option left open to the subsequent Coordinate Bench is to refer the matter to the Full Bench, but instead of resorting to such procedure, the Division Bench in **M. Sujatha's** case referred supra came to a different conclusion holding that Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005) is retroactive. Therefore, the subsequent Judgment is not applicable to the present facts of the case as Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005) has no retrospective effect, but it has prospective effect, placed reliance on a Judgment in **Anar Devi's** case, **Sheela Devi's** case, **Ms. Vaishali Satish Ganorkar's** case, **G. Sekar's** case and **B. Chandrakala's** case referred supra.

47. He further contended that the decision in **M. Sujatha's** case was an *ex parte* judgment as the case was decided in the absence of the respondents in the said appeal and none raised such contention about retroactive effect of Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005), as such the judgment of the Division Bench in **M. Sujatha's** case is *sub silentio* and placed reliance on judgments reported in **M/S. A-One Granites V. State Of U.P. and others Arnit Das V. State Of Bihar, State of U.P. and another Versus Synthetics and Chemicals Ltd, Shanker Raju vs Union Of India**, in support of his contention.

48. In view of rival contentions, it is for this Court to decide whether the amended Section 6 of Hindu Succession Act is retroactive or retrospective in operation. The Legislation enacted by the Central Government amending Section 6 of Hindu Succession Act is declaratory in nature and it is dealing with a substantive, vested rights governed by Hindu Law. In other words, it is an amendment of a Statute regulating the succession among Hindus. No doubt, Section 6 of Hindu Succession Act was amended with a view to remove disabilities of women to succeed the estate of the deceased father in the ancestral property and to elevate the status of women to the higher pedestal so as to claim equal share on par with a son based on gender justice. Therefore any provision amended to subsequent to the Act come into force which is declaratory in nature has to be construed based on the language used in

the provision. The ordinary principles of interpretation of any statute is that regarding its applicability either prospectively or retrospectively depends upon the language used in the amended provision. As a general rule, a statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.

49. But a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing or that a prospective benefit is in certain cases to be measured by or depends on antecedent facts. (*vide Construction of Deeds and Statutes by Odgers 5th edition page 281*)

50. The principles that have to be applied for interpretation of statutory provisions of this nature are well-established. The first of these is that statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication the Legislature has made them retrospective; and the retrospective operation will be limited only to the extent to which it has been so made by express words, or by necessary implication. The second rule is that the intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal, grammatical meaning. The third rule is that if in any legislation, the general object of which is to benefit a particular class of persons, any provision is ambiguous so that it is capable of two meanings, one which would preserve the benefit and another which would take it away, the meaning which preserves it should be adopted. The fourth rule is that if the strict grammatical interpretation gives rise to an absurdity or inconsistency such interpretation should be discarded and an interpretation which will give effect to the purpose the Legislature may reasonably be considered to have had will be put on the words, if necessary, even by modification of the language used (**Mahadeolal Kanodia vs The Administrator-General of West Bengal**).

51. In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, the Court ought to add that retroactive operation of a

statutory provision can be inferred even in cases where such retroactive operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur (**Rafiquennessa vs. Lal bahadur chetri (dead) through his representatives**)

52. Retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively the Court has to be satisfied that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed. However, a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The general scope and purview of the statute and at the remedy sought to be applied must be looked into and what was the former State of Law and what the legislation contemplated has to be considered. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention. (**Mithilesh Kumari & Anr vs Prem Behari Khare**)

53. From the law laid down by the Apex Court, it is for this Court to decide whether a particular amended provision in the statute takes away the vested right or substantive right and creates a new obligation. The pre amended and post amended provisions have to be looked into besides the intention of the Legislature in the present case. For better appreciation, the old provision and new provision are extracted hereunder:

Pre amended provision:

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

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

Amended provision:

[6 Devolution of interest in coparcenary property. —

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005*, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005*, nothing contained in this sub-section shall affect—*

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. —For the purposes of clause (a), the expression “son”, “grandson” or “great-grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.*

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation. —For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]

54. A bare reading of the amended provision and pre amended provision, it is clear that the amended provision intend to confer certain benefit on a woman as a coparcener to claim share in the ancestral property on par with the son, but subject to certain limitations contained therein. In such case, basing on the language used

in Section 6 after amendment, would give rise to the presumption that it operates prospectively for the reason that the words “**On and from the commencement of the Hindu Succession (Amendment) Act, 2005**” the devolution of interest in coparcenary property. From these words used “on and from the commencement of Hindu Succession (Amendment) Act, 2005” indicates the intention of the legislature that the amended provision operates prospectively not retrospectively. In such case based on the language used, the Court has to construe the amended provision which takes away the substantial rights vested on the parties based on the law existing then. If such Rule is applied, the amended Section 6 has to be given prospective effect not retrospective.

55. On the other hand while interpreting the statutes enacted in regulating the succession, the Court has to follow certain guidelines referred above and the law declared by the Apex Court in **Fateh Bibi Etc vs Charan Dass**. A similar question came up for consideration before the Apex Court, the Full Bench of the Apex Court relying on the earlier judgment of the Privy Council in **Lala Dunichand v. Anarkali** wherein the Privy Council held as follows:

“The Act which altered the order of succession of certain persons mentioned therein and which came into operation on February 21, 1929 applies not only to the case of a Hindu male dying intestate on or after February 21, 1929 but also to the case of such a male dying intestate before that date if he was succeeded by a female heir who died after that date. The Judicial Committee, has further held that succession in such cases to the estate of the last Hindu male who died intestate did not open until the death of the life-estate holder, the reversioners in Hindu Law have no vested interest in the estate and that they have a mere spes successionis.”

56. The Privy Council relied on the earlier Judgment of Lahore High Court reported in **ILR 1936 Lah 124** and basing on the principles laid down in the law declared by the Privy Council and Lahore High Court, the Apex Court held as follows:

“Succession in such cases to the estate of the last Hindu male who died intestate did not open until the death of the life-estate holder. During the life time of estate holder, the reversioner in Hindu Law has no vested right in the estate and they have a mere spes successionis. The point of time for the applicability of the Act is when the succession opens, viz., when the life estate terminates. In consequence, the questions as who is the nearest reversionary heir, or what is the class of reversionary heirs will fall to be settled at the date of the expiry of the ownership for life or lives. The death of a Hindu Female life estate holder opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to the estate.”

57. Similarly in **Erramma v. Veerupana and others** a similar question of

interpretation of Sections 6 and 8 of Hindu Succession Act came up before the Apex Court held as follows:

“Section 6 applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. The language of Section 8 must be construed in the context of Section 6 of the Act. The words “The property of a male Hindu dying intestate” and the words “shall devolve” occurring in Section 8 makes it very clear that the property whose devolution is provided for by that section must be the property of a person who dies after the commencement of this Act. The provisions of Section 8 are, therefore, not retrospective in operation and where a male Hindu died before the Act came into force”

58. By applying the principles laid down in the above Judgments, it is undoubtedly clear that the Law governing to Hindus on the date of opening of Succession alone is applicable to such Hindus, not the law which came into force subsequent opening of succession. A similar question came up before the Apex Court in **Sheela Devi's** case referred supra, wherein the Apex Court held that the law existing on the date of opening succession alone is applicable.

59. In view of the principle laid down in **Sheela Devi's** case by the date of filing the present suit i.e. in the year 1986, Section 6 of Hindu Succession Act, 1956 was not amended. But the Court can take note of the subsequent change in law, however, subject to the restrictions contained in Section 6 of the Hindu Succession Act as amended. There are conflict decisions by various High Courts, about applicability of the amended Section 6 of Hindu Succession Act prospectively or retrospectively, but reference of Law declared by various High Courts is not necessary.

60. In **Badrinarayan Shankar Bhandari and others v. Omprakash Shankar Bhandari** the Full Bench of Bombay High Court held that the amended provision of Section 6 of Hindu Succession Act is retroactive in operation. In brief:

Clause (a) of sub-section (1) of amended [Section 6](#) is prospective in operation;

Clauses (b) and (c) and other parts of sub-section (1) as well as sub-section (2) of amended [Section 6](#) are retroactive in operation, as indicated therein.

61. It is further held that Amended [Section 6](#) applies to daughters born prior to 17 June 1956 or thereafter (between 17 June 1956 and 8 September 2005), provided they are alive on 9 September 2005 that is on the date when the [Amendment Act](#) of 2005 came into force. Admittedly amended [Section 6](#) applies to daughters born on or after 9 September 2005.

62. The Full Bench of the Bombay High Court held that

Ms. Vaishali Satish Ganorkar's case referred supra is *per incuriam* in view of the decision in **Ganduri Koteswaramma's** case referred supra. But the counsel for the defendant placed reliance on **Ms. Vaishali Satish Ganorkar's** case. The principle laid down in the said judgment has no application in view of later judgment of the Full Bench of Bombay High Court. The Division Bench of this Court in **M. Sujatha's** case referred above took a part of the view of the Full Bench of the Bombay High Court placing reliance on **Ganduri Koteswaramma's** case. But **Ganduri Koteswaramma's** case is later in point of time than **Sheela Devi's** case referred supra. In **Ganduri Koteswaramma's** case, the Apex Court did not note the principle laid down in **Sheela Devi's** case though it is judgment of the Coordinate Bench. But in **M. Sujatha's** case referring the **Sheela Devi's** case referred supra held while answering the question in para 11(e), by following the principle laid down in **Ganduri Koteswaramma's** case and **Sheela Devi's** case held that the amended provision of Section 6 of Hindu Succession Act is retroactive in effect. The Judgment of Division Bench in **M. Sujatha's** case is totally contrary to the principle laid down by the coordinate Bench in **B. Chandrakala's** case, wherein the earlier Division Bench took a view that amended provision of Section 6 is prospective effect not retroactive or retrospective.

63. In the later Judgment of the Apex Court in **Prakash and others v. Phulavati and others**, considering the law declared by various High Courts and Apex Court held as follows:

"The proviso to Section [6\(1\)](#) and Sub-section (5) of Section [6](#) clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in Section [6\(1\)](#) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the Appellants are not intended to be done away with for period prior to 20th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question. The rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

64. Thus the Apex Court upheld the view taken in **Sheela Devi's** case, however, in the same judgment, the Apex Court distinguished the principles laid down in various judgments including **G. Sekar's** case, **Ms.Vaishali Satish Ganorkar's** case, referred supra.

65. In view of the law declared by the Apex Court in latest Judgment in **Phulavati's** case and in **Sheela devi's** case referred supra, the law that is applicable on the date of opening succession alone governs the rights of succession of Hindus.

66. In the present case, father of the plaintiffs and defendant Veldi Nagabushanam died on 18.03.1984. Thus, it is clear that by the date of commencement of amended provision of Section 6 of Hindu Succession Act, Veldi Nagabushanam was not alive and on the date of death of Nagabushanam succession opened. In such case, the law governing to Hindus, by the date of opening of succession alone is applicable to claim right in the ancestral property on par with the son by a daughter. By the date of death of Veldi Nagabushanam i.e. 18.03.1984 even Andhra Pradesh Amendment Act 13 of 1986 did not come into force, since the Andhra Pradesh Amended Act came into force on 05.09.1985. Even under the provisions of Andhra Pradesh Amendment Act 13 of 1986 i.e. Section 29-A or under Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005), the plaintiffs are not entitled to claim any share as the succession opened on 18.03.1984 itself. Therefore, both the plaintiffs, being the daughters of the deceased Veldi Nagabushanam, who died intestate, are not entitled to claim any share in the schedule property as they were not coparceners on the date of opening succession i.e. on the date of death of their father Veldi Nagabushanam.

67. The plaintiffs filed cross-objections for partition of item 1 of 'B' schedule property on the ground that when Veldi Nagabushanam blessed only with one son and the question of claiming right by any other son does not arise. In such case, female heir needs to wait till partition of property by the son does not arise. No doubt, there is subsistence in the argument advanced by the counsel for the plaintiffs regarding entitlement of the plaintiffs to claim share in the residential house i.e. item 1 of 'B' schedule property, and it always subject to proof that item 1 of 'B' schedule property is self acquired property of Nagabushanam. As discussed by me in point No.1, the plaintiffs failed to establish that item 1 of 'B' schedule property is the self acquired property of Veldi Nagabushanam and consequently, the plaintiffs are not entitled to claim any share in residential house, which is described as item 1 of 'B' schedule

property. Even otherwise in view of the Judgment of Apex Court in **G. Sekar's** case referred supra, on the date of cause of action for filing the suit, amended provision of Section 6 of Hindu Succession Act was not in force and at best on account of change in the Law, the plaintiffs female heir can file a suit, afresh based on the amended provision, if she is entitled to claim right in any residential property in view of repeal of Section 23 of Hindu Succession Act, but not entitled to claim right based on the cause of action that arose in the year 1984 in the present case.

68. In any view of the matter, it is clear from the law declared by the Apex Court, Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005) is prospective in effect and not retrospective in operation and that to claim benefit under Section 6 of the Act, both the coparceners shall alive on 09.09.2005 irrespective of their birth. Here, when the plaintiffs are claiming as coparcener on par with the son in the ancestral property which was devolved upon Nagabushanam, who is coparcener died on 18.03.1984. Therefore, plaintiffs are not entitled to claim any share in the suit schedule property either under Andhra Pradesh Amendment Act 13 of 1986 or under Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005).

69. During the course of hearing, learned counsel for the plaintiffs raised a strange contention that the plaintiffs are entitled to claim benefit under Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005), though no such plea was raised by amending the cross objections or grounds of appeal in view of change of law.

70. According to Rule 1 of Order XLI of the Code of Civil Procedure, 1908, the Court must limit its decision to the objections raised in the memorandum of grounds. At the same time, Rule 2 of Order XLI of the Code permits the Court to decide the appeal on any other ground subject to affording opportunity to meet the same by parties before the appellate court.

71. However, under clause II of Rule 2 of Order XLI of the Code, without leave of the Court, the appellants are not entitled to raise any new ground without affording opportunity to the respondents. In the present case, no leave was obtained. However, this court permitted both the parties to advance argument as to the applicability of amended provision of Section 6 of Hindu Succession Act, 2005, permitting them to advance argument on such ground directly amounts to implied

grant of leave. Therefore clause II of Rule 2 of Order XLI of the Code will not come in the way of this Court to decide the specific objection raised during hearing of this appeal and cross-objections.

72. Learned counsel for the defendants mainly contended that when no specific contention was raised in **M. Sujatha's** case referred supra deciding the point regarding applicability of the amended provision of Section 6 of Hindu Succession Act, 2005 is erroneous and it is hit by principle of *sub-silentio*. The principle of *sub-silentio* is,

A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*. (**vide Professor P.J. Fitzgeralds, editor of the Salmond on Jurisprudence, 12th Edition,**)

73. The learned counsel for the defendant also relied on several decisions about the applicability of principle of ***sub silentio***, which were referred in paragraph 47, but they require no consideration. It is wholly unnecessary to decide the applicability of principle of ***sub silentio*** in view of the latest decision of the Apex Court reported in **Phulavathi's** case referred supra. Therefore, no finding is recorded about the applicability of the principle of ***sub silentio***.

74. In view of the discussion in points I and II, I find that the plaintiffs are not entitled to claim decree for partition of 'A' and 'B' schedule property as they are not entitled to claim benefit under Section 29-A, B and C of Hindu Succession Act (inserted by Andhra Pradesh Amendment Act 13 of 1986) or under Section 6 of Hindu Succession Act (amended by Central Act 39 of 2005) and the suit is liable to be dismissed as the trial court did not advert to both pleadings and evidence on record so also applicability of the provisions under the Andhra Pradesh Amendment Act 13 of 1986 in view of the specific ground raised in paragraph 4 of the plaint.

75. In the result, the appeal is allowed while dismissing the cross-objections, but without costs in the circumstances.

76. Miscellaneous petitions, if any, pending in the appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: -11-2015

by