

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:01.03.2017

DATE OF DECISION:28.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.874 of 2008

M.Krishnamoorthy

... Appellant/3<sup>rd</sup> Defendant

Vs

1.K.Pondeepankar  
2.M.Palanilsamy  
3.Nanjappa Gounder  
4.Easwari  
5.Sevathal

..Respondent/Plaintiff

... Respondents

(RR2 to RR5 him in givenup)

This appeal is filed under Section 96 of C.P.C. against the judgment and decree dated 20.06.2008 made in O.S.No.3 of 2007 on the file of the Additional District Court-Fast Track Court No.4, Bhavani.

For Appellants : Mr.T.Murugamanikam  
Senior Counsel for Mr.V.Rajesh  
For Respondents : Mr.Naveenkumar Murthy for R1  
Respondents 2 to 5 given up

#### J U D G E M E N T

The 3<sup>rd</sup> defendant is O.S.No.3 of 2007 is the appellant. It is a suit for partition, where the plaintiff claimed  $\frac{1}{4}$ th share in the A and C-schedule properties and half share in the B-schedule properties with a direction to the 3<sup>rd</sup> defendant to render true and correct account of the suit A and B schedule properties.

2. According to the plaintiff, the suit properties belong to the joint family of the defendants 1 to 3. The 1<sup>st</sup> defendant is the father of the defendants 2 and 3. The plaintiff is the son of the 3<sup>rd</sup> defendant. In a partition that took place on 15.11.1985 between the defendants 1 to 3, the suit B and D schedule properties were exclusively allotted to the 3<sup>rd</sup> defendant. In so far as C-schedule property is concerned, the 1<sup>st</sup>

defendant was given life interest and after his life time, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants will take the C-schedule properties equally. The other property in which life interest was given to the 1<sup>st</sup> defendant was to be taken by the 2<sup>nd</sup> defendant absolutely. The 3<sup>rd</sup> defendant married plaintiff's mother Radhika in the year 1984 and the plaintiff was born out of the wedlock on 06.12.1984.

3. The 3<sup>rd</sup> defendant started living leading a wayward life and started ill treating the plaintiff and his mother. In August 2005, the 3<sup>rd</sup> defendant left the plaintiff and his mother and started living at Sellakuttipalayam, Bhavani Taluk. Despite the request by the plaintiff's mother, the 3<sup>rd</sup> defendant refused to live with the plaintiff's mother. Accusing the 3<sup>rd</sup> defendant of desertion, the plaintiff has sought for partition.

4. The original suit was filed claiming half share in B and D schedule properties and the 3<sup>rd</sup> defendant filed his written statement contending that he already sold the D-schedule property on 14.09.1993. The plaintiff after having verified the records, found that the suit A-schedule property was purchased out of the sale proceeds of suit D-schedule properties. Therefore, the plaint was amended seeking  $\frac{1}{4}$ th share in the suit A-schedule properties also. The 3<sup>rd</sup> defendant, who contested the suit filed a written statement, which was adopted by the defendants 1 and 2. He has claimed that in July 2005, there was actually an oral family arrangement between the plaintiff and his mother and the 3<sup>rd</sup> defendant. At the instance of well wishers of the family, there has been a complete partition of the properties by metes and bounds. The 3<sup>rd</sup> defendant would claim that certain suit properties were allotted to him and certain suit properties were allotted to the plaintiff also. He would also claim that certain amounts were paid in lump sum towards maintenance of the plaintiff's mother as well as the plaintiff. On the above allegations, the 3<sup>rd</sup> defendant has sought for dismissal of the suit. An additional written statement was also filed by the 3<sup>rd</sup> defendant after the amendment of the plaint seeking share in the A-schedule properties. The learned Trial Judge upon a consideration of pleadings, framed the following issues:

- 1) Whether the plaintiff is entitled to the relief of partition?
- 2) Whether the 3<sup>rd</sup> defendant is bound to account for the income from the Suit A and B schedule properties?
- 3) To what other relief, the plaintiff is entitled to?

5. The plaintiff was examined as PW1 and Exs.A1 to A5 were marked. The 3<sup>rd</sup> defendant was examined as DW1 and Exs.B1 to B5 were marked.

6. Considering the above oral and

documentary evidence as well as the arguments of the learned counsel on either side, the learned Trial Judge concluded that the defendants have not established the alleged oral partition pleaded by them and therefore, the plaintiff is entitled to a decree for partition as prayed for.

7. Aggrieved 3<sup>rd</sup> defendant has filed the above appeal. It is not in dispute that the 1<sup>st</sup> defendant died pending suit and the life interest granted in his favour came to an end.

8. I have heard Mr.Murugamanickam, learned Senior Counsel for Mr.Rajesh, the learned counsel for the appellant and Mr.Naveenkumar Murthy, the learned counsel appearing for the 1<sup>st</sup> respondent and the respondents 2 to 5 have been given up.

9. Mr.T.Murugamanickam, learned Senior Counsel appearing for the appellant would contend that admittedly the plaintiff was born on 06.12.1984. Therefore, he would not become a coparcener of his father in view of Sections 4 and 8 of the Hindu Succession Act. The learned counsel would rely upon the decisions of the Hon'ble Supreme Court reported in Sheela Devi and Ors. vs. Lal Chand and another reported in 2006 8 SCC 581, in Bhanwar Singh vs. Puran & Ors reported in 2008 3 SCC 87 and the latest judgement in Uttam Vs. Saubhag Singh & Ors reported in 2016 4 L.W. 309. The learned Senior counsel would contend that cumulative effect of the above judgements of the Hon'ble Apex Court would show that Section 4 gave a overriding effect to the Hindu Succession Act and therefore, the son born after 1956 will not get the right by birth to the properties in the hands of father/mother even though they are ancestral properties.

10. Per contra, Mr.Naveenkumarmurthy, learned counsel appearing for the respondents would rely upon the judgement of the Full Bench of this Court in The Additional Commissioner of Income-tax, Madras-1 v. P.L.Karuppan Chettiar reported in AIR 1979 Madras 1 and the judgements in Commissioner of Wealth Tax, Kanpur etc. vs. Chander Sen etc. reported in AIR 1986 SC 1753, in Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors reported in AIR 1988 SC 845, in Smt.Ass Kaur (Deceased) by LRs vs. Kartar Singh (Dead) by LRs. And Ors. Reported in 2007 5 SCC 561, Rohit Chauhan vs. Surinder Singh and Ors. reported in 2013 9 SCC 419 and Prakash vs. Phulavathi reported in 2016 (2) LW 865. The learned counsel would also point out that noticing the difference in opinion between the co equal Benches on the question whether the son who was born after 1956 would become a coparcener or not, a two judge Bench of the Hon'ble Supreme Court in Balhar Singh vs. Sarwan Singh and Ors. reported in 2015 (2) RCR (Civil) 1012 had referred the question to a larger Bench.

11. In the light of the rival submissions, the following points arise for determination:

Whether the plaintiff who was born after 1956 would become a co-parcener by birth along with his father and be entitled to claim share in the ancestral property allotted to his father in a partition between his father and brothers?

12. It is a common knowledge that Hindu Succession Act 1956 made certain changes in the matter of succession amongst Hindus. Section-4 of the said Act gave an overriding effect to the provisions of the Act as against any text, rule or interpretation of Hindu Law or any other custom or usage as part of that law, which was in force immediately before the commencement of this Act. Sub-Section-a of Section 4(1) reads as follows:

" (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which the provision is made in the Act." (Emphasis supplied)

Therefore, it is clear that overriding effect will be in respect of any matter, for which a provision has been made in the Hindu Succession Act 1956. Section-6 of the said Act deals with devolution of interest in the coparcener property. While Section-8 deals with the general rules of Succession. Therefore, it is clear that two different kinds of properties and different Modes of succession were prescribed under the Act itself. Section-6 of the Hindu Succession Act as it stood prior to the amendment by Act 39 of 2005, reads as follows:

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

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 a 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. (Emphasis supplied)

Explanation 1.-For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

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

Section-6 as amended by Act 39 of 2005 reads as follows:

"[ 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 predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such 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.]

As per proviso to unamended Section-6 and Sub Section 3 of the amended Section-6 makes it clear that it is only the interest of the deceased Mitakshara coparcener in the property that would devolve either by testamentary or intestate succession under the Act. The position of law declared by the Hon'ble Supreme Court in various pronouncements regarding the proviso remains unaltered by the amendment of Section 6 by Act 39 of 2005. Sub Section-3 of Section-6 is only a reproduction of proviso to old Section-6. The difference between devolution under Section-6 and the devolution under Section 8 was observed by the Supreme Court in *Eramma vs Verrupanna & Ors* reported in AIR 1966 SC 1879 wherein the Hon'ble Supreme Court pointed out and observed as follows:

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

After elucidating the different contexts under which Sections 6 and 8 would operate, a three judge Bench of the Hon'ble Supreme Court held that Section-8 cannot have retrospective operation and Section 8 should be read in the context of Section-6. The question as to the nature of property which devolves on a male Hindu under Section 6 vis a vis, the property inherited by a male Hindu under Section-8 was considered by a Full Bench of this Court in *Additional Commissioner of Income Tax Madras-I vs. P.C.Karuppan Chettiar* (AIR 1979 Mad 1) . Another three judges Bench of the Hon'ble Supreme Court in *Gurupad Khandappa Magdum vs. Hirabai Kahandappa Magdum and Ors.* reported in AIR 1978 SC 1239 dealing with the consequence of a notional partition, which is to be assumed under explanation 1 to Section-6 as it stood then, observed as follows:

All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be- treated and accepted as a concrete reality, something that

cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition." (Emphasis supplied)

13. In *Additional Commissioner of Income vs. P.L. Karuppan Chettiar* reported in AIR 1979 Madras (1) a Full Bench of this Court after revisiting the law as well as the effect of Section-4, concluded that the property allotted to a Hindu male in a partition between him and his father or the property that devolves on him, as coparcener under Section-6 will be treated as ancestral property vis a vis his son. In so far as the property i.e. inherited by a male Hindu under Section-8, will be held by him as an absolute owner and that his son or sons will not get a right by birth over the same. In effect, the Full Bench, noticed the difference between a devolution of ancestral property under Section-6 and inheritance under Section-8.

14. In *Commissioner of Wealth Tax vs. Chander Sen etc.* reported in AIR 1986 SC 1753 the Hon'ble Supreme Court after referring to the Full Bench Judgement of this Court agreed with the same, and observed as follows:

"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 pre-deceased son; daughter of a predeceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son."

"11. The heirs mentioned in class I of the Schedule are son, daughter etc. including the son of a

pre-deceased 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?"

16. 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 Commissioner of Income-tax, Madras v. P.L. Karappan Chettiar*, 114 I.T.R. 523, this question arose. There, on a partition effected on March 22, 1954, in the Hindu undivided family consisting of P, his wife, their sons, K and their daughter-in-law, P was allotted certain properties as and for this share and got separated. The partition was accepted by the revenue under section 25A 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."

15. Finally the Hon'ble Supreme Court had approved the views of the Full Bench of this Court. The said position of law was again reiterated by the Hon'ble Supreme Court in Yudhishter v. Ashok Kumar reported in 100 LW 356. Thus it could be seen that this Court as well as Hon'ble Supreme Court had recognized the two kinds of properties that would come in the hands of a male Hindu, who belongs to Mitakshara coparcenary joint family possessed of joint family properties. The first kind being one that devolves on him under Section-6 by virtue of being a coparcenar and the second kind being the one inherited by him under Section-8 as a son of his father. (Emphasis supplied)

16. This is the precise reason, why the Full Bench of this Court in Additional Commissioner of Income vs. P.L. Karuppan Chettiar reported in AIR 1979 Madras (1) held that the income received from the properties that were allotted to Palaniappa Chettiar in the partition between Palaniappa Chettiar and his son Karuppan Chettiar in the year 1954 and inherited by Karuppan Chettiar after the death of his father Palaniappa Chettiar after 1956, will be the separate property of Karuppan Chettiar, and the same cannot be treated as ancestral property and the income therefrom cannot be clubbed with that of the Hindu undivided family of which, Karuppan, his wife and his son were the members. The said dictum of this Court was also approved by the Hon'ble Supreme Court in Commissioner of Wealth Tax vs. Chander Sen etc. reported in AIR 1986 SC 1753. A combined effect

of the above three judgements quoted above can be summarized as follows:

1. The property that is allotted to a male Hindu at a partition, in his capacity as a coparcener will be held by him with all incidents of coparcenery. Once a son is born, he will acquire the right by birth in the said property. Needless to say till such time, a son is born, the male Hindu to whom the property allotted will hold it absolutely as a sole surviving coparcener.

2. The property that is inherited by a male Hindu on the death of his father under Section-8 as class-1 heir will be his absolute property and neither his son nor his daughter would claim any right by birth.

17. The question that arises in this appeal is as to whether a son born after 1956 would be entitled to seek partition as a coparcener of the property allotted to his father at a partition between his father and brothers, or his father or his grand father and others? To put it in otherwise, whether a son born after 1956 would be entitled to file a suit for partition of the property that devolved on his father under Section-6, even during the life time of his father? The difference between the properties that devolves on the coparcener under Section-6 and the properties that is inherited by a coparcener under Section-8 has already been noticed.

18. In *Sheela Devi and Ors. vs. Lal Chand and Anr.* reported in (2006) 8 SCC 581 a two judge Bench of the Hon'ble Supreme Court held that since one of the sons of the ancestor, Baburam was born in 1956 and it was not known as to whether, he was born prior to the Act, Baburam and his elder son Lal Chand, who was admittedly born in 1938 would take the half share each and the second son sohan Lal who was born in 1956 i.e. after coming into force of the Hindu Succession Act 1956 would succeed as a heir to the half share to which Baburam was entitled to. This is on the premise that proviso to Section-6, in effect abolishes devolution, by survivorship contemplated in main Section-6 as it stood prior to the amendment. This judgement of the Hon'ble Supreme Court was followed by the case in *Bhanwar Singh vs. Puran and Ors.* reported in 2008 3 SCC 87, wherein, again after referring to the facts, the Hon'ble Supreme Court held that a son born after 1956 will not become a coparcener along with his father. The same position was reiterated in *M.Yogendra and Ors. v. Leelamma N. and Ors.* reported in 2009 15 SCC 184.

19. Recently another two judge Bench of the Hon'ble Supreme Court in *Uttam vs. Saubhag Singh & Ors.* reported in 2016 4 LW

309, after having made certain observations regarding the effect of the proviso to Section-6, had finally summarized the legal position as follows:

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

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

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

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

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

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

20. The Division Bench had made it very clear that only the property which is inherited by application of Section-8 or by application of proviso to Section-6 would devolve by intestate succession and not by survivorship. It should also be pointed out that atleast four two judge Benches of the Hon'ble Supreme Court in 1) Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors 1988 SCC (2) 126; 2) Rohit Chauhan v. Surinder Singh

reported in (2013) 9 SCC 419 and Anar Devi vs. Parmeshwari Devi reported in (2006) 8 SCC 656 and Prakash vs. Phulavathi 2016 (2) LW 865 have held that irrespective of date of birth, a son of a male Hindu who is possessed of a joint family property, which had been allotted to him either in a partition or which had devolved on him at a notional partition, assumed as per the explanation to Section-6, would acquire rights by birth in the said property. After the amendment of Section-6 by Act 39 of 2005, there was a raging controversy regarding the applicability of the Act. Questions were posed as to whether the Act is prospective or retrospective.

21. There were also several judgements of various High Courts, including this Court, wherein, the retrospectivity of the provisions of the respective State amendments were considered. The Division Bench of Bombay High Court took a view that only the daughters who were born after coming into force of the Hindu Succession amendment Act 39 of 2005, would become the coparcenars. The Division Bench of Bombay High Court in AIR 2012 Bombay 101 Vaishali S. Ganarkar v. Satish Keshavrao Ganorkar and others held that the amending Act would apply only if the daughter is born after 2005. However a larger Bench of the same High Court in AIR 2014 Bombay 151 Badrinarayan Shankar Bhandari vs. Omprakash Shankar Bhandari took a different view. After referring almost all the cases on that point including Sheela Devi and Ors. vs. Lal Chand and Anr. reported in 2006 (8) SCC 581, Banwar Singh vs. Puran & Ors. reported in 2008 (3) SCC 87 as well as the earlier judgements of this Court and the Hon'ble Supreme Court a two judge Bench of the Hon'ble Supreme Court in Prakash vs. Phulavathi reported in 2016 (2) LW 865 held that the benefits conferred on a daughter by Hindu Succession (Amendment) Act 39 of 2005 would be available to a living daughter of a living coparcener irrespective of date of birth of the daughter. Therefore, while holding that the Act is essentially prospective, the only condition for applicability of the Act was held to be that both the daughter and the father must be alive on 9.9.2005, the date on which the Act came into force.

22. The Division Bench after taking note of the observation in Sheela Devi's case has held that a daughter born after 1956 would also become a coparcener by virtue of the provision of the Amended Section-6 of the Hindu Succession Act. It will be useful in reproducing the following observation of the Hon'ble Supreme Court:

"23. Accordingly, we hold that 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. ."

23. From the above, it could be seen that there is a conflict of opinion between Co-equal Benches of the Hon'ble

Supreme Court. While the three decisions namely

- 1) Sheela Devi vs. Lal Chand 2006 (8) SCC 581;
- 2) Banwar Singh vs. Puran & others 2008 (3) SCC 87 and
- 3) Mr.Yogendra vs. Leelamma & others 2009 (15) SCC 184

take the view that a son who born after coming into force of Hindu Succession Act 1956 would not become a coparcener, the other four two judge Bench decisions namely:

- 1) Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors 1988 (2) SCC 126;
- 2) Ass Kaur (deceased) by Lrs vs. Kartar Singh (dead) by LRs 2007 (5) SCC 561;
- 3) Rohit Chauhan vs. Surinder Singh and Ors. reported in 2013 9 SCC 419
- 4) Prakash vs. Phulavathi 2016 (2) LW 865;

have held that even children born after 1956 would become comparceners along with their father under certain circumstances. In fact it should be pointed out that in Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors 1988 (2) SCC 126 a son who was adopted in the year 1972 was treated as a coparcener. Noticing the conflict in the judicial opinion between Co-equal Benches, a Division Bench consisting two judges of the Hon'ble Supreme Court, made a reference to a larger Bench in Balhar Singh vs. Sarwan Singh & Anr. Civil Appeal No.3022 of 2006, reported in 2015 (2) RCR (Civil) 1012. However, it is gathered that Civil Appeal No.3022/2006 was dismissed as withdrawn on 12.01.2017. Thus it appears, the reference was not answered either way.

24. Now it has to be seen as to what is the duty of the High Court, when it faced such a situation of direct conflict of opinion between the decisions of Co-equal Benches of the Hon'ble Supreme Court. This question was answered by the Full Bench of Patna High Court in Amar Singh Yadav and anr. vs. Shanti Devi and Ors. reported in 1987 Patna 191. The Full Bench had observed as follows:

"(24) to conclude on this aspect it has held that where there is a direct conflict between two decisions of the Hon'ble Supreme Court rendered by the Co-equal Benches, the High Court must follow up with the judgement which appears to it to suit the law more elaborately and accurately."

The Full Bench judgement of Patna High Court was followed by this Court in Neyveli Lignite Corporation Limited vs. Special Tahsildar (Land Acquisition) Lignite Projected reported in 1998 2 LW 79. The same view was reiterated by the Hon'ble Mr.Justice K.Sampath in Special Thasildhar (Land Acquisition), Vembakottai Reservoir Scheme, Srivilliputhur vs. Seenai Naicker & two others Manu/TN/1891/1998. Hon'ble Mr.Justice S.B.Sinha as a Judge of Patna High Court had also taken a same view in The Oriental Fire and General Insurance Company vs. Panapati Devi reported in

25. Now my task is to decide as to which of the two views of co-equal Benches of the Hon'ble Supreme Court should I follow? I had in the earlier portion of the judgement culled out the effect of devolution under Section 6 and the effect of inheritance under Section 8. I had also pointed out the overriding effect given in Section 4 is not an absolute one. If the legislature had intended that the coparcenary must cease to exist after 1956, Section-6 was not at all required. The very fact Section-6 was incorporated in order to provide for devolution of interest in the coparcenary property, as indicated in its heading itself would show the definite intention on the part of the legislature to provide two methods of succession. One with reference to coparcenary property and the other with reference to self acquired property. By proviso to Section 6, the effect devolution of interest in the coparcenary property on the coparcener is the same. What is distinct is the inheritance of interest of the male Hindu that remains, after the notional partition and not the entire coparcenary property. This difference has been highlighted by the Hon'ble Supreme Court in Eramma vs Verrupanna & Ors reported in AIR 1966 SC 1879 as well as in Gurpad Khandappa Magdum vs. Hirabai Khandappa Magdum and others reported in AIR 1978 SC 1239. The Hon'ble Supreme Court observed as follows:

"Consequence of a notional partition, which is to be assumed under explanation 1 to Section-6 as it stood then, observed as follows All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition."

26. In the light of the above categoric observations of the Supreme Court and in the light of the pronouncements of two

judge Bench of the Hon'ble Supreme Court in Uttam Vs. Saubhag Singh & Ors reported in 2016 4 L.W. 309 and Prakash vs. Phulavathi reported in 2016 (2) LW 865 wherein the judgement in Sheela Devi and Ors. vs. Lal Chand and another reported in 2006 8 SCC 581, was taken note of and the Hon'ble Supreme Court in Prakash vs. Phulavathi case went on to hold that daughters born after 1956 would become coparceners by virtue of Act 39 of 2005. The other two Judge Bench in Uttam Vs. Saubhag Singh & Ors reported in 2016 4 L.W. 309 held that the property would be treated as self acquisition of a male Hindu only if it is inherited either under Section 8 or under the proviso to Section 6, that is the interest of the male Hindu at the time of his death in Mitakshara coparcenary property worked out by assuming a partition, just prior to his death.

27. A reading clause-iv and v of the summary of the law enunciated in Uttam Vs. Saubhag Singh & Ors reported in 2016 4 L.W. 309 would undoubtedly show that irrespective of date of birth of the son, the property which devolves on him as a coparcener would continue to retain character of coparcenary property in his hands vis a vis his son/daughter (after 09/09/2005).

28. Yet another circumstance that would compel me to follow the judgements in Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors 1988 SCC (2) 126, Rohit Chauhan vs. Surinder Singh and Ors. reported in 2013 9 SCC 419, and Prakash vs. Phulavathi reported in 2016 2 LW 865 is the subsequent enactment of Act 39 of 2005 as well as the enactment of laws which confers equal rights on daughters by various states. In so far as the Tamil Nadu is concerned, Act 1 of 1990 was brought into force with limited retrospective effect from 25.03.1989. In and by such enactment, a daughter was conferred the status of coparcener along with her father. Exception for the rule was prescribed where a daughter married prior to 25.03.1989 was prohibited from claiming as a coparcener. If the law laid down by the Hon'ble Supreme Court in 1) 2006 (8) SCC 581, 2) 2006 (3) SCC 87 and 3) 2009 (15) SCC 184 is to be followed in its letter and spirit, no daughter born after 1956 would be entitled to the benefits of the subsequent enactments which came nearly 34 years thereafter. Parliament had also enacted Act 39 of 2005, which confers equal rights to the daughters. One exception that was made by the State legislature relating to the married daughters was conspicuously absent in the Central enactment, thereby enabling the daughter who was married even prior to 9.9.2005 or 25.03.1989 (In Tamil Nadu) to claim as coparcener. If it is to be held that the daughters born after 1956 would not become coparcener, the very purpose of the amending enactments would be defeated. It was Andrapradesh which led the move to make daughters as coparceners along with their fathers by enacting a law in 1986. The same was followed by the Tamilnadu in 1989 and

several other States followed suit. Ultimately the parliament has enacted the law in 2005. If the legislatures' intention, in the year 1956, was to put an end to coparcenary by saying that the son born after 1956 will not become a coparcener, there was no need for several State enactments and the Central enactment which intended to place daughters on a equal footing with the son. If the interpretation to the effect that the son/daughter born after 1956 would not become a coparcener, is accepted the provisions of the amending Acts, particularly Act 39 of 2005 would be rendered otiose.

29. In view of the above, I am compelled with great respect to the learned Judges, who decided *Sheela Devi and Ors. vs. Lal Chand* and another reported in 2006 8 SCC 581, in *Bhanwar Singh vs. Puran & Ors* reported in 2008 3 SCC 87 and *M.Yogendra and Ors. v. Leelamma N. and Ors.* reported in 2009 15 SCC 184 to conclude that I find the law is more clearly and elaborately stated in *Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe & Ors* 1988 SCC (2) 126, *Rohit Chauhan vs. Surinder Singh and Ors.* reported in 2013 9 SCC 419, *Uttam vs. Saubhag Singh & Ors* reported in 2016-4-L.W. 309 and *Prakash vs. Phulavathi* reported in 2016 2 LW 865. In view of the above conclusion, the point that is raised in this appeal is answered in the affirmative and the plaintiff is entitled to sue for partition of the properties, inasmuch as they were allotted to his father at a partition that took place in 1984 as a coparcener of a joint Hindu family and the plaintiff would essentially have a right by birth to seek partition.

30. On facts it is already seen that the Trial Court granted a decree only in respect of those properties that fell to the share of the father, the 3<sup>rd</sup> defendant in the partition and not to the other properties. Hence, I do not find any illegality or irregularity warranting interference by me.

31. In fine, the appeal is dismissed confirming the judgement and decree of the trial court. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

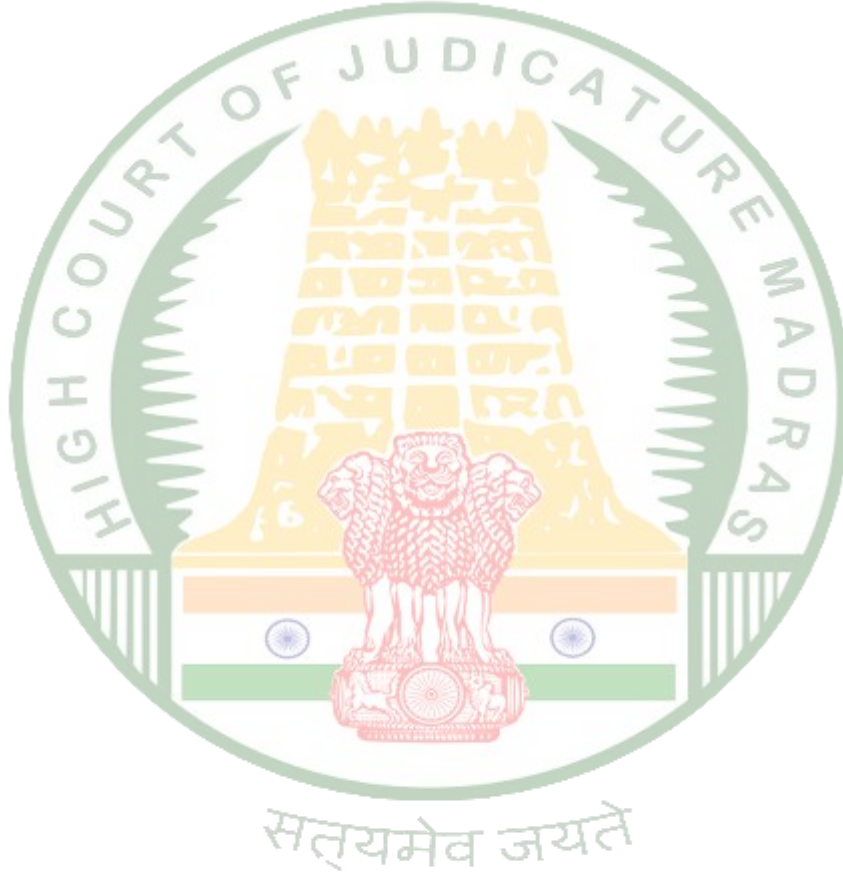
To

The Additional District Court-Fast Track Court No.4,  
Bhavani.

+1 CC to Mr.V. Rajesh Advocate sr 26147  
+2 Ccs to Mr.Naveenkumar Murthy, sr 26281

A.S.No.874 of 2008

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