

IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	15.04.2019
Pronounced On	18.06.2019

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S.Nos.587 of 2011 & 135 of 2012
and
M.P.Nos.1 & 1 of 2012
and
M.P.Nos.1, 2 & 3 of 2015
and
C.M.P.Nos.7561, 7562 & 7564 of 2019

A.S.No.587 of 2011:

1.R.Nallusamy ..1st Appellant/2nd Defendant
2.S.Nallusamy (died) ..2nd Appellant/3rd Defendant
3.N.Muthulakshmi
4.R.Kavitha
5.S.Anitha
6.Senthil Kumar
(A3 to A6 are brought on record as LR's of deceased
A2 vide Court order and memo dated 28.02.2019)

VS

1.S.Chitra Devi ..1st Respondent/1st Plaintiff
2.Minor.S.Rithika repd by her mother
and natural Guardian S.Chitra Devi ..2nd Respondent/2nd Plaintiff
3.V.R.Shivakumar ..3rd Respondent/1st Defendant

Prayer: Appeal Suit is filed under Section 96 of CPC r/w Order 41 Rule 1 & 2 of CPC, against the judgment and decree of the Court of the Fast Track Court No.III Dharapuram in O.S.No.14 of 2007 dated 30.08.2011.

For Appellants : Mr.V.Raghavachari

For R1 : Mr.Parthasarathy senior counsel
for Mr.M.Guruprasad

For R2 : No appearance
For R3 : Mr.N.Manokaran

A.S.No.135 of 2012

V.R.Shivakumar ... Appellant/1st Defendant

vs

1.S.Chithra Devi ...1st Respondent/1st Plaintiff
2.Minor. S.Rithika rep by her mother S.Chithra Devi ...2nd Respondent/2nd Plaintiff
3.R.Nallusamy ...3rd Respondent/2nd Defendant
4.S.Nallusamy (deceased)
5.N.Muthulakshmi
6.R.Kavitha
7.S.Anitha
8.Senthil Kumar ...Respondents 4 to 8/Legal Heirs of 3rd Defendant

(R5 to R8 are brought on record as LR's of deceased R4 vide Court order dated 28.02.2019 in A.S.No.587 of 2011 and memo dated 28.02.2019)

Prayer: Appeal Suit is filed under Order 41 Rule 1 r/w Section 96 of CPC, against the Judgment and decree dated 30.08.2011 made in O.S.No.14 of 2007 on the file of the Additional District and Sessions Court/Fast Track Court No.III, Dharapuram.

For Appellant : Mr.N.Manokaran
For R1 : Mr.Parthasarathy senior counsel
for Mr.M.Guruprasad
For R2 : No appearance
For R3 to R8 : Mr.V.Raghavachari

COMMON JUDGMENT
C.SARAVANAN, J.

By this common order, we are disposing the following two appeals:-

- i. A.S.No.135 of 2012 filed by the 1st defendant
- ii.A.S.No.587 of 2011 filed by the 2nd and the 3rd defendants.

2. For the sake of convenience and narration of facts, we are referring to the ranks of the parties in the suit since both the Appeal Suits arise out of the same judgment and decree dated 30.08.2011 passed by the Fast Track Court No III, Dharapuram in O.S.No 14 of 2007.

3.Both the plaintiffs are the 1st and the 2nd respondents in the respective appeals. Respective appellants are the other respondents in the respective appeals.

4.The Plaintiffs are the estranged wife and daughter of the 1st defendant. Originally the above suit was filed before the Principal District Judge, Erode for partition of the suit schedule property against the 1st defendant as the sole defendant. It was numbered as O.S.No.167 of 2006.

5.Later, the suit was transferred to the Fast Track Court No.III, Dharapuram and has been renumbered as O.S.No.14 of 2007.

6.The above suit was filed for the partition of the suit schedule properties to divide and allot one share each to the 2nd plaintiff viz., and the 1st defendant. The 2nd plaintiff was aged about nine years at the time of institution of the suit.

7.At the time of institution of the above suit, the 2nd plaintiff (2nd respondent herein) was a minor and was represented by the 1st plaintiff (1st respondent herein) as her next friend and mother.

8.The above suit was laid on the strength of Exhibit A.2 dated 30.09.1970 which is a partition deed executed between the father of the 1st defendant and 1st defendant who was then a minor. Suit is based on premises that the suit schedule property was an ancestral property therefore the 2nd plaintiff was entitled to an equal share.

9.From the facts it is noticed that several properties have been sold over a period of time when the plaintiffs and the 1st defendants were together along with the 1st defendant's father.

10.During the pendency of the above suit, the 2nd defendant purchased an extent of 1.64 acres of land in Survey No.392/4 at Chellaikoil for a valuable consideration of Rs.1,64,000/- out of suit schedule property pending suit vide Exhibit B.11 dated 23.07.2007.

11.The 3rd defendant also purchased an extent of 36 cents in Survey No.391/3 for a valuable consideration of Rs.7,00,000/- on 30.10.2007 vide Exhibit B.12 dated 30.10.2007.

12.They were impleaded as defendants on 18.03.2009 pursuant to an order in I.A.No.23 of 2009 and I.A.No.66 of 2008. Thereafter, the plaint was also amended on 06.04.2009.

13.The above partition suit was resisted by the respective defendants namely to the appellant in the respective appeal. The 1st defendant filed a written statement on 29.01.2007 before the Principal District Judge, Erode. Thereafter, on 22.07.2009, the 1st defendant filed an additional written statement. The 2nd defendant filed his written statement on 03.11.2009. The 3rd defendant adopted the written statement filed by the 2nd defendant.

14.The Trial Court has framed the following issues and additional issues:-

Issues :

- i. Whether the description of the property is correct?
- ii. Whether the Court fee paid is correct?
- iii. Whether the first plaintiff is entitled to the relief of maintenance?
- iv. Whether the 2nd plaintiff is entitled to the relief of partition and separate possession?
- v. Whether the plaintiff is entitled for a decree as prayed for?
- vi. To what relief?

Additional Issues:

- i. Whether the sale agreement in favour of Muthusamy is binding on the plaintiffs?
- ii. Whether the sale infavour of defendants 2 and 3 affects the right of the plaintiffs?

15.On Behalf of the plaintiffs(1st and the 2nd respondents herein in the respective appeals) 3 exhibits were marked as Ex.A1 to A3. The 1st plaintiff/1st respondent herein deposed evidence as PW1 and one M.S.Myilasamy and Thiruvenkadam were examined as P.W.2 and P.W.3.

16.On behalf of the defendants No.1 to 3, 17 exhibits were marked as Exs.B1 to B.17. The 1stdefendant was examined as DW1. One Ramasamy and 3rddefendant/ were examined as D.W.2 and D.W.3.

17. By the impugned judgment and decree dated 30.08.2009, the Fast Track Court No III, Dharapuram in O.S.No.14 of 2007 has passed a preliminary decree and has held that both the 2nd plaintiff and the 1st defendant have an equal share in the suit schedule property.

18. The suit for partition for item No.4 was dismissed as it was sold by the 1st defendant even before his marriage with the 1st plaintiff. The court has also created a charge over half share of the 1st defendants' share towards future maintenance payable to the 1st plaintiff at Rs.8000/- per month.

19. Challenging the above decision, the 2nd and 3rd defendants have filed A.S.No.587 of 2011 while the 1st defendant has filed A.S.No.135 of 2012.

20. Heard Mr.V.Raghavachari, the learned counsel for the appellants in A.S.No.587 of 2011 (the 3rd and 4th respondent in A.S.No.135 of 2012/ 2nd and 3rd defendant).

21. Heard Mr.N.Manokaran, the learned counsel for the appellant in A.S.No.135 of 2012 (the 3rd respondent in A.S.No.587 of 2011/ 1st defendant).

22. Heard Mr.Parthasarthy, the learned Senior counsel for the 1st and the 2nd respondents in the respective appeals (plaintiffs).

23. The point for determination in the present appeal is whether the property in the hands of the 1st defendant (the father of the 2nd plaintiff) was ancestral in nature and therefore a coparcenary property and/or whether the 2nd plaintiff daughter born to the 1st defendant and the 1st plaintiff was entitled to right to partition of the aforesaid property from her father (1st defendant) who himself got the property through Ex.A2 Partition Deed dated 30.09.1970.

24. The impugned judgment and decree of the Trial Court has been sought to be contested on the ground that the suit schedule properties were not ancestral properties and therefore there was no basis to pass a preliminary decree in respect of item No.1, 2 and 3 of the suit schedule.

25. In A.S.No.587 of 2011, it was submitted that though the sale to the appellants (2nd and 3rd defendant) was subsequent to the filing of the suit, nevertheless the purchase by them was bona fide.

26.It was further submitted that even the plaintiffs were aware of the purchase and therefore the impugned judgment and decree has been passed without any legal basis.

27.It was also submitted that the cause of action for suit for maintenance and partition are different. They had submitted that these properties were sold to them by the 1st defendant to discharge the family debt incurred for the plaintiffs of which they were aware.

28.It was further submitted that even if the properties were ancestral in nature it was not sufficient. The property in Exhibit A2 - Partition Deed dated 30.09.1970 only show that they were joint family property of the 1st defendant and his father.

29.On behalf of the 2nd and the 3rd defendants (Appellants in A.S.No.587 of 2011 / 2nd and 3rd Respondents in A.S.No.135 of 2012) it was submitted that there was no injunction restraining the sale. Therefore, the 2nd and the 3rd defendants were not precluded from purchasing the 2 properties vide Exhibits B.11&12.

30.It was further submitted that the fact that the suit was decreed on an earlier occasion ex parte itself shows that it was a collusive proceeding initiated between the family members i.e. between the plaintiff and the 1st defendant.

31.It was also submitted that though there were several other properties which had been sold by the 1st defendant earlier, yet the suit was filed only to jeopardize the sale made to the 2nd and 3rd defendants.

32.The 1st defendant in A.S.No.135 of 2012 submitted that though the family owned ancestral properties, they are no longer ancestral in nature as the said partition took place when the 1st defendant was a minor bachelor on 30.09.1970 vide Exhibit A.2.

33.It was therefore submitted that though the suit schedule property was allotted to him, the 2nd plaintiff had no right over them. It was specifically argued that when a property is divided between the father and a son, the son takes the property in his individual capacity and therefore the son's daughter would have no right over the same.

34.It was further argued that even if the property in the hands of the grandfather was ancestral, nevertheless a granddaughter would not inherit any rights over the same.

35.Learned counsel for the 1st defendant further submitted that under Section 8 of the Hindu Succession Act, 1956, a son under the the Mitakshara Law gets a separate share and that the property cannot be termed as "joint family property" along with his progeny. In this case, his daughter was not entitled to a share.

36.Alternatively, it was further submitted that the 1st defendant was legally entitled to sell the property under Section 12 of the Hindu Minority and Guardianship Act, 1956 without the permission of the court. It was further submitted that the court erred in creating a charge in favour of the 1st plaintiff in the impugned judgment and decree.

37. Further, it was therefore submitted that debts were incurred by the 1st defendant and the amounts were spent to meet out the family necessity as the 1st plaintiff withdrew from the company of the 1st defendant and therefore the properties had to be liquidated to maintain the lavish lifestyle of the 1st plaintiff.

38.It was further submitted that there was incorrect description of the property. It was further submitted that since the plaintiff's had given incorrect particulars of the property contrary to the requirement under Order 7 Rule 3 of CPC., the Court ought to have rejected the plaint.

39.The learned counsel for the respective defendants (respective appellants) relied upon the following decision of this Court and Hon'ble Supreme court.

- i. Arunagiri vs Ayyar Muthuraja and others, 2011 (1) CTC 73
- ii. Uttam vs Saubhag Singh and Others (2016) 4 SCC 68
- iii. Order dated 31.10.2017 in A.S.No.582 of 2008.

40.The learned counsel for the plaintiffs (1st and 2nd respondents) relied on the decision of this court rendered in M Krishnamoorthy vs K. Pondpankar and others 2017 (3) CTC 170.

41.The plaintiffs have also filed C.M.P.No 7564 of 2019 in A.S.No. 135 of 2012 filed by the 1st defendant. They have filed the petition under Order 41 Rule 27 to mark a copy of a Partition Deed dated 9.6.1955 as Exhibit A 4 under Order 41 Rule 29 of CPC.

42.We have considered the rival submissions and the case laws filed on behalf of either side. The sale by the 1st defendant (the appellants A.S.No.135 of 2012) in favour of the 2nd and the 3rd defendant (the appellant is in A.S.No.587 of 2011)

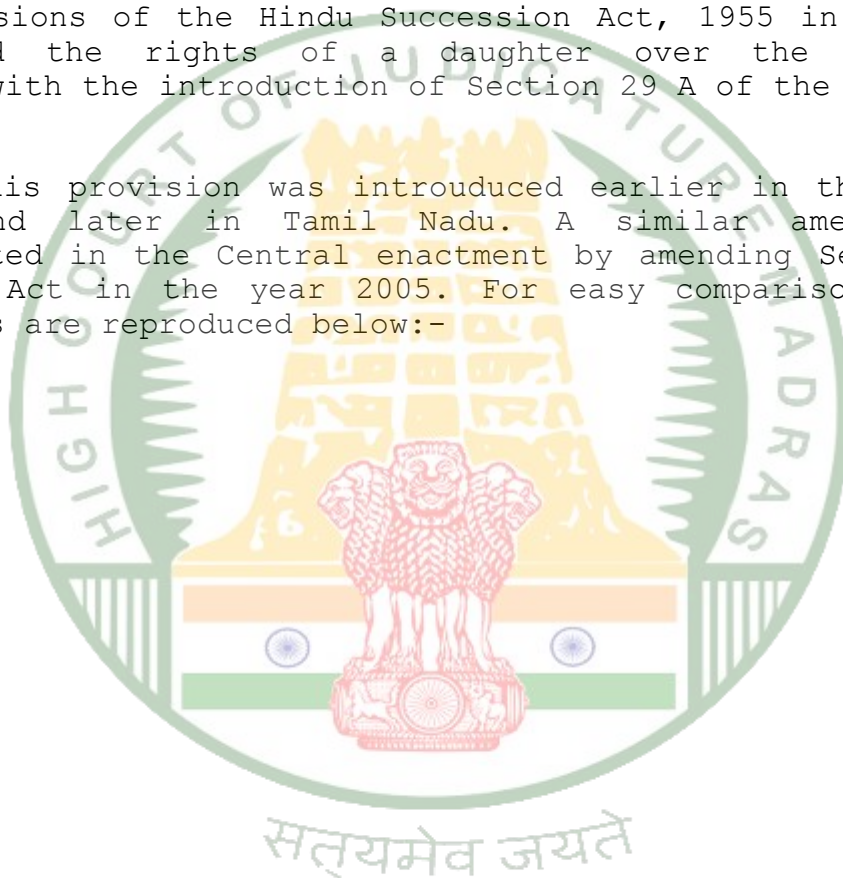
was pending suit. Therefore, the sale would be hit by the lis pendens doctrine under Section 52 of the Transfer of Property Act 1882

43. The law on the subject of devolution of coparcenary property has been subject matter of conflicting views of the Courts.

44. Therefore, before dealing with the merits of the case, it would be useful to refer to the law on the subject of coparcenary property.

45. It may be also apt to refer to progressive amendments to the provisions of the Hindu Succession Act, 1955 in 1989 which recognized the rights of a daughter over the coparcenary property with the introduction of Section 29 A of the Act.

46. This provision was introduced earlier in the State of Andhra and later in Tamil Nadu. A similar amendment was incorporated in the Central enactment by amending Section 6 of the said Act in the year 2005. For easy comparison both the provisions are reproduced below:-



WEB COPY

Section 29A of the Act as applicable in Tamil Nadu after 1989	Section 6 of the Act after 2005
"29-A. Equal rights to daughter in coparcenary property.—Notwithstanding anything contained in Section 6 of this Act— (i) in a Joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship: and shall be subject to the same liabilities and disabilities in respect thereto as the son: (ii) at a partition in such a Joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son; Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter: Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of	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

47. In Sheela Devi and Ors. vs Lal Chand and Anr. (2006) 8 SCC 581, although in para 12 and 16 , the Court held as follows:-

12. "...The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property and thus, would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten. {See C. Krishna Prasad v. C.I.T., Bangalore [1974] 97 ITR 493 (SC)} But once a son is born, it becomes a coparcenary property and he would acquire an interest therein."

"16. Although in 1927, Babu Ram had no son and the property at his hands became a separate property. But, in view of the well-settled principles of Hindu law, as soon as a son was born to him the concept of the property being a coparcenary property in terms of the Mitakshara school of Hindu law revived. The law in this behalf has succinctly been stated in Mayne's Hindu Law & Usage, 14th Edn., at pp. 627-28 and 641, in the following terms:

"Where ancestral property has been divided between several joint owners, there can be no doubt that if any of them have male issue living at the time of the partition, the share which falls to him will continue to be ancestral property in his hands, as regards his male issue, for their rights had already attached upon it, and the partition only cuts off the claims of the dividing members. The father and his male issue still remain joint. The same rule would apply even where the partition had been made before the birth of male issue or before a son is adopted, for the share which is taken at a partition, by one of the coparceners is taken by him as representing his branch. It was held by the Andhra Pradesh High Court that where a father divided the family property between him and his sons, the share obtained by him was his self-acquired property which he could bequeath to his wife..."

Coparceners may hold property separately.—An examination into the property of the joint family would not be complete without pointing out what property may be held by the individual members as their separate property. All property which is not held in coparcenary is separate property and Hindu law recognises separate property of individual members of a coparcenary as well as of separated members. (1) Property which comes to a man as obstructed heritage (sapratibandhadaya) is his separate property. It is not self-acquired property within the meaning of Hindu law, though in their incidents, there may be no difference between the two species."

48. Yet in the above factual background, in para 21, the Court made the following observation :-

21. The Act indisputably would prevail over the old Hindu law. We may notice that Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted the Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of the Amendment Act, 2005 would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, the proviso appended to sub-section (1) of Section 6 of the Act creates an exception. First son of Babu Lal viz. Lal Chand, was, thus, a coparcener. Section 6 is an exception to the general rules. It was, therefore, obligatory on the part of the respondent-plaintiffs to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the second son, Sohan Lal is concerned, no evidence has been brought on record to show that he was born prior to coming into force of the Hindu Succession Act, 1956.

49. This conclusion in para has led to some confusion although the position of law as discussed in para 16 may not be consistent with the view expressed in para 21 of the above Judgment.

50. In the facts of the aforesaid case, the ancestral property had been previously divided between the 5 sons after the death of their father Tulsiram in 1889 equally. One of the sons Babu Ram had five children, i.e one son born before 1956 and another son after 1956 and had three daughters. Babu Ram died in 1989. Babu Ram's daughters claimed rights over the properties. His 2nd son Sohan Lal also claimed rights over the properties.

51. In paragraph No.22, the Court has held as follows:-

"22. Thus, it was the half-share in the property of Babu Ram, which would devolve upon all his heirs and legal representatives as at least one of his sons was born prior to coming into force of the Act."

52. First son of Babu Lal viz. Lal Chand alone was held to be a co-parcener. The Court held that Section 6 is an exception to the general rule and therefore, it was obligatory on the part of the 2nd son Sohan Lal to show that apart from Lal Chand, he would also derive the benefit thereof and since no evidence was brought on record to show that he was born prior to coming into force of the Hindu Succession Act, 1956, he was held not to be a "co-parcener".

53. A somewhat similar issue came up for consideration in Bhanwar Singh vs Puran and Ors. 2008 (3) SCC 87. There the ancestral properties were partitioned between the son Sant Ram and three daughters after the death of their father Bhima in 1972.

54. The mortgage and the subsequent sale on the properties in 1985 by Bhima to the respondent was challenged by the appellant, a son born to him in 1977 on the grounds that he was also a co-parcener and therefore entitled to a share in the property.

55. The Hon'ble Supreme Court while holding that the decision in Sheela Devi case referred to supra was not applicable to the facts, held that the brother and sisters upon partition became tenants-in-common by operation of Section 19 of the Act, thereby taking the properties devolved upon them per capita and not per stripes. This entitled each of them to alienate their share of the property particularly when different properties were allotted in their favor.

56. The Court held reiterated its earlier view that a succession as per Section 8 of the Act results in the breakage of the co-parcenary.

57. The Court there observed as follows in paragraph Nos.12, 13:-

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

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

58. In para 25, the Court further held as under :-

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

59. Both these decisions placed reliance on the view of the Hon'ble Court in Commissioner of Wealth Tax, Kanpur etc. vs. Chander Sen etc. AIR 1986 SC 1753, which upheld the primacy of Section 8 as follows:-

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

Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with Section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.

The express words of Section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which

excludes son's son but included son of a predeceased son cannot be ignored."

60. The reasoning of the above judgments have given an impression that the Hindu Succession Act, 1956 was enacted with a view to abolish the co-parcenary rights over the property through survivorship. However, this was not accepted uniformly. Conflicting views were expressed by coordinate benches of the Hon'ble Supreme Court in the following cases:-

- i. Dharma Shamrao Agalawe vs Pandurang Miragu Agalawe & Ors AIR 1988 SC 845;
- ii. Smt.Ass Kaur (Deceased) by LRs vs Kartar Singh (Dead) 2007 5 SCC 561;
- iii. Rohit Chauhan vs Surinder Singh and Ors. 2013 9 SCC 419; and
- iv. Prakash vs Phulavathi reported in 2016 (2) LW 865.

61. In these decisions, the Court held that once a son is born to a co-parcener, who had been allotted property through the partition of co-parcenary property, he can no longer treat the property as a separate property in his hands to the exclusion of the son born to him.

62. In Rohit Chauhan vs Surinder Singh and Ors. 2013 9 SCC 419 the Court has summarized the position as follows:-

"A person, who for the time being is the sole surviving co-parcener as in the present case Gulab Singh was, before the birth of the Plaintiff, was entitled to dispose of the co-parcenary property as if it were his separate property. Gulab Singh, till the birth of Plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of Plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the Plaintiff he was the sole surviving co-parcener but the moment Plaintiff was born, he got a share in the father's property and became a co-parcener. As

observed earlier, in view of the settled legal position, the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the Plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire co-parcenary property are illegal, null and void."

63. In *M. Yogendra and Ors. vs Leelamma N. and Ors.* V 2009 (15) SCC 184, it was held as under:

"It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him."

64. It may be also useful to refer to the decision of the Full Bench of this High Court in *Commissioner of Income Tax vs P.L.Karruppan Chettiar* AIR 1979 Madras 1. The court there held that income received from the properties that were allotted pursuant to partition between the father and the son and inherited by the son later after the death of his father will be a separate property and same cannot be treated as ancestral property and therefore income therefrom cannot be clubbed with that of Hindu undivided family of which the son, his wife and his son were members.

65. It 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. The Full Bench brought out the difference between a devolution of ancestral property under Section-6 and inheritance under Section-8.

66. In fact, in the light of seemingly conflicting views, the Hon'ble Supreme Court in *Balhar Singh vs Sarwan Singh and Ors* 2015 (2) RCR (Civil) 1012 had earlier referred the question

to a larger Bench. However, the Civil Appeal No. 3022 of 2006, which was the original case referred to the Larger Bench was however dismissed as withdrawn on 12.1.2017 and therefore reference was not answered either way.

67. In *Prakash v. Phulavati* [(2016) 2 SCC 36], it was held that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.

68. In *Uttam vs Saubhag Singh & Ors.* (2016) 4 SCC 68, the Hon'ble Supreme Court summarized the legal position of law prior to the 2005 amendments 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.

69. In *Mangammal and others vs T.B. Raju and others* (2018) 15 SCC 662, the court while dealing with the situation where the daughter was married prior to 1989 and had later sought for partition of the coparcenary property answered the case against the daughter due to her marriage prior to the introduction of Section 29A of the Act in Tamilnadu. At the same time the Court in principle recognized the rights of a daughter under the aforesaid provision.

70. There, a suit came to be filed in the year 2003 wherein the daughter claimed rights over the property as a coparcener. The court observed that any property inherited up to 4th generation of male lineage from the father, father's father or father's father's father that is father, grandfather etc. is termed as ancestral property.

71. In other words, property inherited from mother, grandmother, uncle or even brother was not to be considered as ancestral property. In ancestral property, the right of property accrues to the capacitor on birth. Referring to Section 29 A of the act the court held that a daughter of the coparcener was not entitled to claim rights over joint family property if she was already married prior to 1989.

72. The Court held that coparcenary property between the father and the son got divided and each of the half share would be a separate property in the hands of the capacitor. On the death of the father, devolution of the property would be

Governed by Section 8, 9 and 10 of the Hindu Succession Act, 1956.

73. In *Danamma vs Amar*, (2018) 3 SCC 343 it was held that "the amended provision now statutorily recognises the rights of coparceners of daughters as well since birth. The section 6 uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and is well recognised. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-sections (1)(a) and (b)."

74. In 2018, once again a three-judge Bench of the Supreme Court comprising Hon'ble Mr. Justices AK Sikri, Hon'ble Mr. Justices Ashok Bhushan and Hon'ble Mr. Justices MR Shah was constituted by reference from a Lower Bench.

75. It was to reconsider the law relating to Daughter's Coparcenary rights after the 2005 Amendment to Hindu Succession Act. The Court was to go into the correctness of the conflicting decisions of the Supreme Court in the cases of *Prakash vs Phulavati* [(2016) 2 SCC 36], *Danamma @ Suman Surpur vs Amar* [(2018) 3 SCC 343] and *Mangammal vs T.B. Raju* [(2018) SCC online SC 422].

76. However, by an order passed on 05.12.2018 in Civil Appeal Diary Mps. 32601/2018, the pending cases were to be referred to the Hon'ble Chief Justice of India in terms of Order VI Rule 2 of the Supreme Court Rules, 2013. As of the date, the issue is still pending before the Hon'ble Chief Justice to constitute a larger bench.

77. At this stage, we would also like to refer to a recent decision of this Court in *M Krishnamoorthy vs K. Pondeepankar*, 2017 (3) CTC 170. There after, discussing the apparent conflicting views of the Hon'ble Supreme Court while disposing

an appeal, the learned judge has succinctly summarized as follows which reads as under:-

" i. The property that is allotted to a male Hindu at a partition, in his capacity as a co-parcener will be held by him with all incidents of co-parcenary. 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 was allotted will hold it absolutely as a sole surviving co-parcener.

ii. 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."

78. As per Section 29-A introduced by the Tamil Nadu Amendments in 1989, a daughter became entitled to equal rights in coparcenary property on her birth subject to the exception provided therein. In States which did not have similar provisions, the rights were recognized in 2005.

79. As already discussed earlier, the Full Bench of This Court in PL Karuppan Chettiar AIR 1979 Mad 1 held that only the property which is inherited by application of Section-8 or by the application of proviso to Section-6 would devolve by intestate succession and not by survivorship. Various other judgments of the Hon'ble Supreme Court also have concluded the same.

80. The impression that the Hon'ble Supreme Court in Sheela Devi & Ors. v Lal Chand & Anr (2006) 8 SCC 581 has held that the co-parcenary system had come to an end in view of Section 8 of the Hindu Succession Act, 1956 is not supported by the proposition of law as laid down in Paras 12 and 16 of the said judgment.

81. In our view, there is no scope for confusion due to the decision of the Court in Sheela Devi and Ors. vs Lal Chand and Anr. (2006) 8 SCC 581. In para Nos. 12 and 16, the court has clearly explained the position of law that "if a son is subsequently born to him or adopted by a person who has got co-parcenary property by way of partition, the alienation whether

it is by way of sale, mortgage or gift, will nevertheless stand, for his son cannot object to such alienations so made by his father before he was born or begotten. But once a son is born, it becomes a coparcenary property and he would acquire an interest therein." However, having settled the above position, a slightly inconsistent view was arrived in para 21 in the facts of the case.

82. Therefore point for determination in the present appeal is whether the property in the hands of the 1st defendant (the father of the 2nd plaintiff) was ancestral in nature and therefore a co-parcenary property and/or whether the 2nd plaintiff daughter born to the 1st defendant and the 1st plaintiff was entitled to right to partition of the aforesaid property from her father (1st defendant) who himself got the property through Ex.A2 Partition Deed dated 30.09.1970.

83. In the present cases none of the eventualities discussed in Sheela Devi and Ors. vs Lal Chand and Anr. (2006) 8 SCC 581 and Bhanwar Singh vs Pura & Ors. 2008 3 SCC 87 are attracted as the 2nd plaintiff was born only in the year 1997.

84. Almost all the cases discussed above indicate that the property which devolves on son as a coparcener would continue to retain character of co-parcenary property if a son is born. Only after further partition, the partitioned property would become a separate property in the hands of the respective co-parcener and its character will change once a son or daughter is born as held in Dannamma vs Amar (2018) 3 SCC 343.

85. Various State legislations have enacted section 29 A to the Hindu Succession Act 1956. Andhra Pradesh led the way in 1986. It was followed by Tamil Nadu through Act 1 of 1990 which had limited retrospective effect from 25.03.1989. Several states followed the same. The 2005 Amendments to the Hindu Succession Act, amended Section 6 and has conferred equal coparcenary rights on the daughters on par with the son.

86. The fact that the property was partitioned earlier between the family members of the 1st defendant's father vide Exhibit A2 itself shows that the suit schedule property was ancestral in nature. It was to be treated as his separate property till the birth of the 2^d plaintiff in 1997. After her birth, a new co-parcenary was established and the partitioned property lost its character of a separate property in the hands of the 1st defendant.

87. Following the birth of the 2nd plaintiff, the properties opened for devolution by survivorship in view of Section 29A of the Hindu Succession Act, 1956 read with Section 6 as amended with the effect from 2005. Therefore, to the extent the impugned judgment has recognized the 2nd plaintiff's rights over the suit scheduled property, is concerned we are not inclined to interfere with the impugned Judgment and decree of the Trial Court.

88. The 1st defendant could not have legitimately sold the property or transferred the same to the 2nd and the 3rd defendant particularly after the birth of the 2nd plaintiff and more so, after the partition suit came to be filed.

89. Having answered the issue as above, we therefore hold that the 2nd defendant and the 3rd defendant cannot perfect their title as the property has been bought during the pendency of the suit in respect of which the 2nd plaintiff has a right.

90. Two sale deeds Vide Exhibit B.11-12 executed in favour of the 2nd and the 3rd defendants (appellants in A.S.No.587 of 2011) by the

1st defendant (appellant in A.S.No.135 of 2012) cannot be said to be a bona fide purchase.

91. These two sale deeds vide Exhibit B.11-12 do not confer a valid title in favour of the 2nd and the 3rd defendants (appellants in A.S.No.587 of 2011) by the 1st defendant (appellant in A.S.No.135 of 2012) as the suit schedule properties have been held to be ancestral properties.

92. Whether the sale was made to discharge a family debt or not in favour of the alleged creditor namely Muthuswamy has not been proved in the manner known to law.

93. There is also ample evidence on record to show that 2nd and 3rd defendant had prior knowledge of an interim injunction granted by the trial court restraining the 1st defendant from alienating or encumbering the suit property.

94. Though, plaintiffs have accused the sale vide Exs.B.11 & B.12 as a sham transaction to accommodate the interest of the 1st defendant by his friends namely the 2nd and the 3rd defendant, these 2 defendants have

inturn also accused the plaintiffs of colluding with the 1st defendant to deny them rights over the property.

95. We are not convinced with the said submission as the sales have taken place subsequent to the institution of the suit. In our view, the sale was made to defeat the rights of the plaintiff. They did not confer right to the 1st defendant to sell it to the 2nd and the 3rd defendant as has been held by the Trial Court.

96.The 1st defendant in his cross examination's has also admitted that the suit schedule properties were ancestral in nature. The 3rd defendant has also admitted during cross examination that he was aware that the plaintiffs had obtained an interim injunction prohibiting the 1st defendant from encumbering or alienating any of the suit schedule properties. These defendants have also admitted to have considered Exhibit A2 dated 30.09.1970 before purchase of the properties.

97.The undisputed facts of the case is that Exhibit A2 was preceded by another partition of the year 1955 dated 9.6.1955. This document has been sought to be marked as Exhibit A 4 dated vide CMP No. 7564 of 2019. Since there is no dispute as to the nature of property being ancestral in nature as we have held above, we are of the view, that same is not necessary to be marked. Consequently, C.M.P.No.7564 of 2019 is closed.

98.While upholding the impugned judgment and decree recognising the rights of the 2nd plaintiff we are of the view that the Trial Court has overstepped its jurisdiction by holding that the 1st plaintiff was entitled to have charge over balance property for maintenance. This aspect was to be necessarily decided in the dispute before a Family Court under the provisions of the Hindu Marriage Act, 1955 and under section 125 of the CRPC r/w Family Court Act, 1984 which have vested jurisdiction with such courts. Consequently, we are of the view that to the extent the Court has recognized the charge in favour of the 1st plaintiff is concerned, the same deserves to be set aside.

99.Therefore, that portion of the impugned Judgment and decree stands set aside. However, to mitigate the situation and

to balance interest of both the parties, we are of the view that the order recognizing such rights in favour of the 1st plaintiff in the impugned judgement and decree shall continue for a limited period of 90 days from date of receipt of a copy of this order. Within such time, the 1st plaintiff, if advised may approach the jurisdictional Court to get such rights extended.

100. In the light of the above discussions and the observations, we are inclined to pass the following orders:-

- i. A.S.No.135 of 2012 filed by the 1st defendant stands partly allowed to the extent it creates a charge over the property in favour of the 1st plaintiff;
- ii. A.S.No.135 of 2012 filed by the 1st defendant insofar as the relief granted in the impugned judgement and decree in favour of the 2nd plaintiff stands dismissed;
- iii. A.S.No.587 of 2011 filed by the 2nd and the 3rd defendants stands dismissed.
- iv. Connected all Miscellaneous Petitions are closed. No costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

jen
To

1.The Additional District and Sessions Judge
Fast Track Court No.III, Dharapuram.

2.The Section Officer, V.R. Section, High Court, Madras.

+1 CC to Mr.N. Manokaran, Advocate sr 49787

+1 CC to Mr.V. Raghavachari, Advocate sr 49217.

+1 CC to Mr.M.Guruprasad, Advocate sr 53598(20/12/2019)

A.S.Nos.587 of 2011 & 135 of 2012
and

M.P.Nos.1 & 1 of 2012
and

M.P.Nos.1, 2 & 3 of 2015
and

C.M.P.Nos.7561, 7562 & 7564 of 2019

CNR(CO)
SP(16/12/2019)

WEB COPY