

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.07.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

S.A.NO.979 OF 2012

AND

M.P.NO.1 OF 2012

(THROUGH VIDEO CONFERENCING)

A.Ashraffa ...Appellant / 4th Defendant

Vs.

1.Saraswathi ...1st Respondent / Plaintiff

2.S.Sivaraj

3.S.Gunaseelan

4.Deepa ...Respondents 2 to 4 / Defendants 1 to 3

Second Appeal filed under Section 100 of Civil Procedure Code, 1908 against the Judgment and Decree dated 01.03.2012 passed by the Principal District Court, Erode in A.S.No.68 of 2011 confirming the Judgment and Decree dated 11.08.2010 passed by I Additional Subordinate Court, Erode in O.S.No.18 of 2006.

For Appellant : Mr.M.Krishnamurthy

For R1 : Mr.N.Manokaran

For R2 to R4 : No appearance

J U D G M E N T

The appellant is aggrieved by the impugned Judgment and Decree dated 01.03.2012 passed by the Principal District Judges Court, Erode (hereinafter referred to as Appellate Court) in A.S.No.68 of 2011. The fourth defendant in O.S.No.18 of 2006 is the appellant in this Second Appeal.

2. Earlier, O.S.No.18 of 2006 was filed by the first respondent/plaintiff before First Additional Subordinate Judges Court, Erode (hereinafter referred to as Trial Court) for the following relief:-

- i. dividing the suit properties into two equal shares by metes and bounds with reference to good and bad soil;
- ii. allotting one such share to the plaintiff* and put her in possession of the same;
- iii. appointing a commissioner to divide the suit property in the aforesaid manner; and
- iv. granting a permanent injunction to restrain the fourth defendant** from trespassing into the suit properties to take possession forcibly or interfering in any manner with the plaintiff's* peaceful possession and enjoyment of the same till a permanent portion worked out between the plaintiff and the defendants 1 to 4.

(* first respondent; ** appellant)

3. O.S.No.18 of 2006 filed by the first respondent/plaintiff was dismissed by the Trial Court by its Judgment and Decree dated 11.08.2010.

4. On further appeal by first respondent/plaintiff, the Appellate Court by the impugned Judgment and Decree dated 01.03.2012 in A.S.No.68 of 2011 partly reversed the Judgment and Decree dated 11.08.2010 passed by the Trial Court in O.S.No.18 of 2006 dismissing the aforesaid suit. Operative portion of the impugned Judgment and Decree of the Appellate Court reads as under:-

29. In the result, the appeal suit is partly allowed. The judgment and decree passed in O.S.No.18 of 2006 on the file of the First Additional Subordinate Judge, Erode dated 11.08.2010 are set aside. The suit in O.S.No.18 of 2006 is partly allowed and a preliminary decree is passed for partition of the suit properties into equal shares and allotment of one such share to the appellant/plaintiff. The suit, in so far as the permanent injunction is concerned, is dismissed. The parties are directed to bear their own costs throughout.

5. The appellant/fourth defendant purchased the suit schedule property from the third respondent/second defendant vide Ex.A2 Sale Deed dated 28.12.2005. The property is an ancestral property. The first and the second respondents/plaintiff and first defendant are the siblings born to one Seethappa Gounder who died on 28.09.1993. The first respondent got married on 26.06.1978. The dispute over the suit schedule property arises on account of Section 29-A and Section 6 of the Hindu Succession Act, 1956.

6. Section 29-A was inserted to the Hindu Succession Act, 1956 with effect from 25.03.1989. By a legal fiction, unmarried daughters were given the same rights as that of male coparcener over the coparcenary property.

7. Since the first respondent/plaintiff was married to one Nachimuthu on 26.06.1978, no claim for right over the property was made by the first respondent/plaintiff at the time when the Chapter II-A of the Hindu Succession Act, 1956 was made applicable in Tamil Nadu. Meanwhile, these ancestral properties had been mortgaged and there were certain debts which were discharged by the second respondent/first defendant.

8. In the year 2005, Section 6(1) of the Hindu Succession Act, 1956 was amended by the Parliament with effect from 09.09.2005 which gave the rights even to the married daughters on par with sons albeit male coparceners.

9. As per proviso to Sub-Section (1) to Section 6, the amendment would not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20.12.2004. In the background of the above amendment, the first respondent/plaintiff filed O.S.No.18 of 2006 for partition of the suit schedule property.

10. During the interregnum, the third respondent/second defendant, executed a sale deed and sold the entire extent of 4.13 Acres of land for a total sale consideration of Rs.7,85,700/- in favour of the appellant/fourth defendant vide Ex.A2 Sale Deed dated 28.12.2005.

11. This Ex.A2 Sale Deed dated 28.12.2005 precedes Ex.A1 Partition Deed dated 20.05.2005 between the second to fourth respondents/first to third defendants.

12. In the said suit, the Trial Court had framed the following issues:-

- i. Whether the plaintiff is entitled for $\frac{1}{2}$ share in the suit properties and for separate possession?
- ii. Whether the plaintiff is entitled for the relief of permanent injunction against the fourth defendant?
- iii. Whether it is true that after two weeks from the date of death of Seethappa Gounder on 28.09.1993, the plaintiff after receiving Rs.10,000/- had originally relinquished her

right of share in the suit properties in favour of defendants 1 to 3?

- iv. Whether it is true that the first defendant mortgaged the suit properties with Elavamalai Primary Agricultural Co-operative Band and obtained a loan and when the properties were brought for sale for nonpayment of the loan, the defendants 2 & 3 filed the suit for partition in O.S.No.128/05 and second defendant settled the loan and on 20.5.05 the registered partition took place?
- v. Whether it is correct to say that the plaintiff has to pay court fees u/s. 37(1) of the Tamil Nadu Fees and Suits Valuation Act since she is not in joint possession?
- vi. Whether it is true that the fourth defendant purchased the share of second defendant by sale deed dated 28.12.2005 and in possession of the same co-owner and so permanent injunction could not be claimed against him?
- vii. To what other reliefs plaintiff is entitled?

13. The Trial Court has answered the issue against the first respondent/plaintiff vide Judgment and Decree dated 11.08.2010.

14. The appellant/fourth defendant has filed this Second Appeal primarily on the ground that the appellant/fourth defendant was a bona fide purchaser of the suit schedule property and therefore the appellant/fourth defendant was entitled for protection of the sale effected by the third respondent/second defendant vide Ex.A2 Sale Deed dated 28.12.2005.

15. Appearing on behalf of the appellant/fourth defendant, the learned counsel submits that the Appellate Court committed a grave error in allowing the appeal and thereby, decreeing the suit as prayed for by the first respondent/plaintiff.

16. It is submitted that the appellant/fourth defendant had no knowledge of the alleged dispute between the respondents/plaintiff and first to third defendants and therefore, he prays for setting aside the impugned Judgment and Decree of the Appellate Court and restoring the Judgment and Decree passed by the Trial Court.

17. The learned counsel for the first respondent/plaintiff submits that as per the decision of the Hon'ble Supreme Court in Rohit Chauhan Vs. Surinder Singh and Others, 2013 (9) SCC 419, the alleged partition in Ex.A1 dated 20.05.2005 between the second to fourth respondents/first to third defendants and the

subsequent sale in favour of the appellant/fourth defendant by the third respondent/second defendant vide Ex.A2 Sale Deed dated 28.12.2005 were to be declared as null and void as the third respondent/second defendant was not a party to the alleged partition in Ex.A1 dated 20.05.2005.

18. It is further submitted that these documents are not binding on the first respondent/plaintiff who has been given a statutory protection under Section 6(1) of the Hindu Succession Act, 1956 which came into force on 09.09.2005.

19. This Second Appeal was admitted on 23.11.2012 and the following questions were framed as substantial questions of law for consideration:-

- i. As per Hindu Succession Act, 1956 father, son and grandson had got each equal share in the ancestral properties and female members have no right. As per the Hindu Succession Amendment (Tamil Nadu) Act, 1990 unmarried daughters alone are entitled to equal share with that of the male members. In the above particular case the plaintiff got married on 26.06.1978 and left for her husband's house before the demise of her father Seethappa Gounder. Therefore, as per the above Acts of Hindu Succession the plaintiff has no right to entitle to get any share in the above suit properties. Moreover, the Hindu Succession Amendment Act, 2005 is not applicable in this above particular case and plaintiff has no right to claim her share with retrospective effect. In these circumstances decree and judgment passed by the lower Appellate Court for partition of the suit properties and allotting 1/6th share to the plaintiff in A.S.No.68 of 2011 is valid according to prevailing Hindu Succession law?
- ii. The plaintiff got married on 26.06.1978 and ousted from the father's family and became the member of the husband's family and she is not in possession and enjoyment of the suit properties before or after the demise of her father Seethappa Gounder who expired on 28.09.1993 and both the lower trial court and the lower Appellate Court also admitted the fact that the plaintiff had never been in possession of the suit properties. In these circumstances, how the normal Court fee for partition paid by the plaintiff in the above suit is admitted and is it valid according to the prevailing law?

iii. One Seethappa Gounder, the father of the plaintiff and the first defendant died intestate on 28.09.1993. Before that on 26.06.1978, the plaintiff got married and settled at her husband's house and she had never enjoyed separate or joint possession of the suit properties and she never cared about the maintenance of the suit properties and she knows nothing about the same and is not aware of the developments made in respect of the suit properties. In these circumstances, the plaintiff invoked the Hindu Succession Amendment Act, 2005 and filed a suit O.S.No.18 of 2006 for partition of half share of the suit properties with retrospective effect after 13 years from the date of demise of her father Seethappa Gounder on 28.09.1993. Is the suit barred by limitation?

20. Defending the impugned Judgment and Decree, the learned counsel for the first respondent/plaintiff submits that the issue is no longer res integra and is covered by the decision of the Hon'ble Supreme Court in Vineeta Sharma Vs. Rakesh Sharma and Others, 2020 (9) SCC 1. He specifically drew attention to the paragraph Nos.49, 60 and 81 to 84 which read as under:-

49. It is apparent that unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner. It is significant to note that under Section 6 by birth, right is given that is called unobstructed heritage. It is not the obstructed heritage depending upon the owner's death. Thus, coparcener father need not be alive on 9-9-2005, date of substitution of provisions of Section 6.

60. The amended provisions of Section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son". Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as

that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 9-9-2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20-12-2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

81. In *Mangammal v. T.B. Raju* [*Mangammal v. T.B. Raju*, (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300] , the Court considered the provisions made in the State of Tamil Nadu, the State Government enacted the Hindu Succession (Tamil Nadu Amendment) Act, 1989, made effective from 25-3-1989, adding Section 29-A in the Hindu Succession Act, 1956. Section 29-A was held to be valid regarding succession by survivorship. Section 29-A provided equal rights to daughters in coparcenary property. The provisions were more or less similar, except Section 29-A(iv) treated a married daughter differently. The provisions were not applicable to the daughters married before the date of commencement of the Amendment Act, 1989. Thus, married daughters were not entitled to equal rights. That too, has been taken care of in Section 6, as substituted by the 2005 Act, and no discrimination is made against married daughters. In the said case, *Mangammal* got married in 1981, and *Indira* got married in or about 1984 i.e. before the 1989 Amendment. Therefore, it was held that because of Section 29-A(iv) of the Amendment Act, the appellant could not institute a suit for partition and separate possession as they were not coparceners. The decisions in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] and *Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] were referred, and it was opined that *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] would still hold the value of precedent for right of a

daughter in ancestral property and only "living daughters of living coparceners" as on 9-9-2005 would be entitled to claim a share in the coparcenary property.

82. In Mangammal [Mangammal v. T.B. Raju, (2018) 15 SCC 662 : (2019) 1 SCC (Civ) 300] , the Court opined thus : (SCC pp. 667-68, paras 15-17)

"15. Moreover, under Section 29-A of the Act, the legislature has used the words "the daughter of a coparcener". Here, the implication of such wordings mean both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the amendment of 1989. The similar issue came up for consideration before this Court in Prakash v. Phulavati [Prakash v. Phulavati, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] , wherein this Court while dealing with the identical matter held at para 23 as under : (SCC p. 49)

'23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born.'

16. It is pertinent to note here that recently, this Court in Danamma v. Amar [Danamma v. Amar, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] , dealt, inter alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet the court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of Danamma [Danamma v. Amar, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] , it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who was born prior to the 2005 Amendment would be entitled to claim a share in ancestral property or not? In such circumstances, in our view, Prakash [Prakash v. Phulavati, (2016) 2 SCC 36 :

(2016) 1 SCC (Civ) 549] , would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

17. Hence, without touching any other aspect in the present case, we are of the view that the appellants were not the coparceners in the Hindu joint family property in view of the 1989 Amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted."

(emphasis in original)

It is apparent that the question of living daughter of a living coparcener was not involved in the matter, once this Court held that the married daughters were not entitled to claim partition and separate possession as marriage had taken place prior to the enforcement of the 1989 Amendment, as observed in para 17 quoted above. However, this Court opined that the decision in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] , laying down that only living daughters of living coparceners would be entitled to claim a share in the ancestral property under Section 6 of the 1956 Act. The opinion expressed cannot be accepted for the reasons mentioned above. Moreover, it was not necessary to go into the aforesaid question.

83. In *Danamma* [*Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] , a Division Bench of this Court dealt with the interpretation of amended provisions of Section 6. The decision in *Anar Devi v. Parmeshwari Devi* [*Anar Devi v. Parmeshwari Devi*, (2006) 8 SCC 656] was relied upon. It was observed that the controversy concerning the interpretation of Section 6 now stands settled with authoritative

pronouncement in Prakash v. Phulavati [Prakash v. Phulavati, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] which affirmed the view [M. Prithviraj v. Leelamma N., 2007 SCC OnLine Kar 553] taken by the High Court as well as a Full Bench in Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari [Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari, 2014 SCC OnLine Bom 908 : AIR 2014 Bom 151] . In Danamma [Danamma v. Amar, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] , the Court further opined : (SCC pp. 356-57, paras 23 & 25-27)

"23. Section 6, as amended, stipulates that on and from the commencement of the Amendment Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognises the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property 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).

25. Hence, it is clear that the right to partition has not been abrogated. The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.

26. In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court [Danamma v. Amar, 2012 SCC OnLine Kar 9178] . This Court in Ganduri Koteshwaramma v. Chakiri Yanadi [Ganduri Koteshwaramma v. Chakiri Yanadi, (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880] , held that the rights of daughters in coparcenary property as per the amended Section 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

27. On facts, there is no dispute that the property which was the subject-matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5th share each in the said property. The plaintiff (Respondent 1) is son of Arun Kumar (Defendant 1). Since, Arun Kumar will have 1/5th share, it would be divided into five shares on partition i.e. between Defendant 1 Arun Kumar, his wife Defendant 2, his two daughters Defendants 3 and 4 and son/plaintiff (Respondent 1). In this manner, Respondent 1-plaintiff would be entitled to 1/25th share in the property."

84. In Danamma [Danamma v. Amar, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] , it is pertinent to mention that Gurulingappa, propositus of a Hindu joint family and the father of living daughter coparcener died in

2001, before the 2005 Amendment Act came into force, leaving behind two daughters, son and a widow. Daughters were given equal rights by this Court. We agree with certain observations made in paras 23 and 25 to 27 (supra) but find ourselves unable to agree with the earlier part approving the decision in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] and the discussion with respect to the effect of the statutory partition. As a matter of fact, in substance, there is a divergence of opinion in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] and *Danamma* [*Danamma v. Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385] with respect to the aspect of living daughter of a living coparcener. In the latter case, the proposition of the living daughter of a living coparcener was not dealt with specifically. However, the effect of reasons given in para 23 had been carried out to logical end by giving an equal share to the daughter.

21. I have considered the arguments advanced by the learned counsel for the appellant/fourth defendant and the learned counsel for the first respondent/plaintiff. I have perused the evidence on record.

22. Though this Court had reproduced the draft question appended along with the Memorandum of Appeal as substantial questions of law at the time of admission of this Appeal, the substantial questions of law that fall for consideration in this Second Appeal are as follows:-

- i. Whether the first respondent/plaintiff had no right to claim partition under Section 29-A of the Hindu Succession Act, 1956 as was made applicable in Tamil Nadu?
- ii. Whether the 2005 amendment to Section 6 of the Hindu Succession Act, 1956 conferred any fresh right on the first respondent/plaintiff?
- iii. Whether the unregistered partition deed in Ex.A1 dated 20.05.2005 and the registered sale vide Ex.A2 dated 28.12.2005 would put the first appellant/plaintiff to any advantage and thereby to the disadvantage to the appellant/fourth defendant?
- iv. Whether the First Appellate Court was correct in concluding that the first respondent/plaintiff was entitled to $1/6^{\text{th}}$ share in the suit schedule property?

23. A coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. "Coparcenary" is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and it enlarges by deaths and diminishes by births in the family. It is not static".

24. In *Gowli Buddanne Vs. CIT, Mysore, Bangalore*, AIR 1966 SC 1523, it was held that the concept of coparcenary was narrower body than a joint family thus:-

"6. A Hindu joint family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons, and great-grandsons of the holder of the joint property for the time being. Therefore there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners."

25. In *Rohit Chauhan Vs. Surinder Singh and Others*, 2013 (9) SCC 419, the Hon'ble Supreme Court held as under:-

11. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so

long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

14. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary 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 coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. 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 coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out their remedies in appropriate proceeding.

26. The Hon'ble Supreme Court recently in Vineeta Sharma Vs. Rakesh Sharma and Others, 2020 (9) SCC 1 has answered all the issue that arise for consideration on account of substantial questions of law Nos.1 to 3. The Hon'ble Supreme Court has held as follows:-

56. The daughter is treated as a coparcener in the same manner as a son by birth with the same rights in coparcenary property and liabilities. However, the proviso of sub-section (1) contains a non obstante clause providing that nothing contained in the sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before 20-12-2004.

57. It is apparent from the provisions of Section 6 that the discrimination with the daughter has been done away with, and they have been provided equal treatment in the matter of inheritance with Mitakshara coparcenary. In several States viz. Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra, the State Amendments in the 1956 Act were made to extend equal rights to daughters in Hindu Mitakshara coparcenary property. An amendment was made on 30-7-1994 by the insertion of Section 6-A by Karnataka Act 23 of 1994 in the 1956 Act. In the State of Andhra Pradesh, the amendment was made w.e.f. 5-9-1985, Tamil Nadu w.e.f. 25-3-1989 and Maharashtra w.e.f. 26-9-1994 by the addition of Section 29-A in the 1956 Act. In Kerala, the Act was enacted in 1975.

58. Before the amendment, Section 6 provided that on the death of a male Hindu, a coparcener's interest in Mitakshara coparcenary shall devolve by survivorship upon the surviving members of the coparcenary under the uncodified Hindu law and not in accordance with the mode of succession provided under the 1956 Act. It was provided by the proviso to Section 6, in case a male Hindu of Mitakshara coparcenary has left surviving a female relative of Class I heir or a male relative who claims through such female relative of Class I. The Schedule containing categories of Class I heirs is extracted hereunder:

"THE SCHEDULE
(See Section 8)

HEIRS IN CLASS I AND CLASS II

Class I

Son, daughter, widow; mother; son of a predeceased son; daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter; widow of a predeceased son, son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son; son of a predeceased daughter of a predeceased daughter, daughter of a predeceased daughter of a predeceased daughter, daughter of a predeceased son of a predeceased daughter, daughter of a predeceased daughter of a predeceased son."

59. In view of the provisions contained in Section 6 when a coparcener is survived by a female heir of Class I or male relative of such female, it was necessary to ascertain the share of the deceased, as such, a legal fiction was created. Explanation I provided legal fiction of partition as if it had taken place immediately before his death, notwithstanding whether he had the right to claim it or not. However, a separated Hindu could not claim an interest in the coparcenary based on intestacy in the interest left by the deceased.

60. The amended provisions of Section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son". Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 9-9-2005, the

provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20-12-2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act.

65. Section 6(2) provides that when the female Hindu shall hold the property to which she becomes entitled under Section 6(1), she will be bound to follow the rigours of coparcenary ownership, and can dispose of the property by testamentary mode.

66. With respect to a Hindu who dies after the commencement of the 2005 Amendment Act, as provided in Section 6(3) his interest shall pass by testamentary or intestate succession and not by survivorship, and there is a deemed partition of the coparcenary property in order to ascertain the shares which would have been allotted to his heirs had there been a partition. The daughter is to be allotted the same share as a son; even surviving child of predeceased daughter or son are given a share in case the child has also died then the surviving child of such predeceased child of a predeceased son or predeceased daughter would be allotted the same share, had they been alive at the time

of deemed partition. Thus, there is a sea-change in substituted Section 6. In case of death of coparcener after 9-9-2005, succession is not by survivorship but in accordance with Section 6(3). The Explanation to Section 6(3) is the same as Explanation I to Section 6 as originally enacted. Section 6(4) makes a daughter liable in the same manner as that of a son. The daughter, granddaughter, or great-granddaughter, as the case may be, is equally bound to follow the pious obligation under the Hindu law to discharge any such debt. The proviso saves the right of the creditor with respect to the debt contracted before the commencement of the 2005 Amendment Act. The provisions contained in Section 6(4) also make it clear that provisions of Section 6 are not retrospective as the rights and liabilities are both from the commencement of the Amendment Act.

67. The proviso to Section 6(1) and Section 6(5) saves any partition effected before 20-12-2004. However, Explanation to Section 6(5) recognises partition effected by execution of a deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. Other forms of partition have not been recognised under the definition of "partition" in the Explanation.

69. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 9-9-2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 9-9-2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted Section 6(3).
In re : Effect of enlargement of daughter's rights

70. Under the proviso to Section 6 before the amendment made in the year 2005 in case a coparcener died leaving behind female relative of Class I heir or a male descendant claiming through such Class I female heir, the daughter was one of them. Section 6, as substituted, presupposes the existence of coparcenary. It is only the case of the enlargement of the rights of the daughters. The rights of other relatives remain unaffected as prevailed in the proviso to Section 6 as it stood before amendment.

74. The argument raised that if the father or any other coparcener died before the 2005 Amendment Act, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and there was no coparcener alive from whom the daughter would succeed. We are unable to accept the submission because it is not by the death of the father or other coparcener that rights accrue. It is by the factum of birth. It is only when a female of Class I heir is left, or in case of her death, male relative is left, the share of the deceased coparcener is fixed to be distributed by a deemed partition, in the event of an actual partition, as and when it takes place as per the proviso to unamended Section 6. The share of the surviving coparcener may undergo change till the actual partition is made. The proviso to Section 6 does not come in the way of formation of a coparcenary, and who can be a coparcener. The proviso to Section 6 as originally stood, contained an exception to the survivorship right. The right conferred under substituted Section 6(1) is not by survivorship but by birth. The death of every coparcener is inevitable. How the property passes on death is not relevant for interpreting the provisions of Section 6(1). Significant is how right of a coparcener is acquired under Mitakshara coparcenary. It cannot be inferred that the daughter is conferred with the right only on the death of a living coparcener, by declaration contained in Section 6, she has been made a coparcener. The precise declaration made in Section 6(1) has to be taken to its logical end; otherwise, it would amount to a denial of the very right to a daughter expressly conferred by the legislature. Survivorship as a mode of

succession of property of a Mitakshara coparcener, has been abrogated with effect from 9-9-2005 by Section 6(3).

76. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to Section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20-12-2004. A daughter can assert the right on and from 9-9-2005, and the proviso saves from invalidation the above transactions.

80. A finding has been recorded in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] that the rights under the substituted Section 6 accrue to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. Hence, we respectfully find ourselves unable to agree with the concept of "living coparcener", as laid down in *Prakash v. Phulavati* [*Prakash v. Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549]. In our opinion, the daughters should be living on 9-9-2005. In substituted Section 6, the expression "daughter of a living coparcener" has not been used. Right is given under Section 6(1) (a) to the daughter by birth. Declaration of right based on the past event was made on 9-9-2005 and as provided in Section 6(1)(b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in Section 6(1)(c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The

provisions of Section 6(1) leave no room to entertain the proposition that coparcener should be living on 9-9-2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part.

27. The view expressed in Prakash and Others Vs. Phulavati and Others, (2016) 2 SCC 36 holding that only living daughters of living coparceners would be entitled to claim a share in the ancestral property under Section 6 of the 1956 Act. The opinion expressed cannot be accepted for the reasons mentioned above. Moreover, it was not necessary to go into the aforesaid question.

28. The Hon'ble Supreme Court in Vineeta Sharma case referred to supra, has further held as follows:-

124. The intendment of amended Section 6 is to ensure that daughters are not deprived of their rights of obtaining share on becoming coparcener and claiming a partition of the coparcenary property by setting up the frivolous defence of oral partition and/or recorded in the unregistered memorandum of partition. The court has to keep in mind the possibility that a plea of oral partition may be set up, fraudulently or in collusion, or based on unregistered memorandum of partition which may also be created at any point of time. Such a partition is not recognised under Section 6(5).

133. The severance of status may take place from the date of filing of a suit; however, a decree is necessary for working out the results of the same, and there may be a change of rights during the pendency of the suit for allotting definite shares till final decree is passed. There are cases in which partition can be reopened on the ground of fraud or mistake, etc. or on certain other permissible grounds. In appropriate cases, it can be reopened at the instance of minor also.

134. The protection of rights of daughters as coparcener is envisaged in the substituted Section 6 of the 1956 Act recognises the partition brought about by a decree of a court or effected by a registered instrument. The partition so effected before 20-12-2004 is saved.

135. A special definition of partition has been carved out in the Explanation. The intendment of the provisions is not to jeopardise the interest of the daughter and to take care of sham or frivolous transaction set up in defence unjustly to deprive the daughter of her right as coparcener and prevent nullifying the benefit flowing from the provisions as substituted. The statutory provisions made in Section 6(5) change the entire complexion as to partition. However, under the law that prevailed earlier, an oral partition was recognised. In view of change of provisions of Section 6, the intendment of the legislature is clear and such a plea of oral partition is not to be readily accepted. The provisions of Section 6(5) are required to be interpreted to cast a heavy burden of proof upon proponent of oral partition before it is accepted such as separate occupation of portions, appropriation of the income, and consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence, may be accepted most reluctantly while exercising all safeguards. The intendment of Section 6 of the Act is only to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defence and only oral ipse dixit is to be rejected outrightly. The object of preventing, setting up of false or frivolous defence to set at naught the benefit emanating from amended provisions, has to be given full effect. Otherwise, it would become very easy to deprive the daughter of her rights as a coparcener. When such a defence is taken, the court has to be very extremely careful in accepting the same, and only if very cogent, impeccable, and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained, not otherwise. We reiterate that the plea of an oral partition or memorandum of partition, unregistered one can be manufactured at any point in time, without any contemporaneous public document needs rejection at all costs. We say so for exceptionally good cases where partition is proved conclusively and we caution

the courts that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigour of very heavy burden of proof which meets the intendment of Explanation to Section 6(5). It has to be remembered that the courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The exception is carved out by us as earlier execution of a registered document for partition was not necessary, and the court was rarely approached for the sake of family prestige. It was approached as a last resort when parties were not able to settle their family dispute amicably. We take note of the fact that even before 1956, partition in other modes than envisaged under Section 6(5) had taken place.

136. The expression used in the Explanation to Section 6(5) "partition effected by a decree of a court" would mean giving of final effect to actual partition by passing the final decree, only then it can be said that a decree of a court effects partition. A preliminary decree declares share but does not effect the actual partition, that is effected by passing of a final decree; thus, statutory provisions are to be given full effect, whether partition is actually carried out as per the intendment of the Act is to be found out by the court. Even if partition is supported by a registered document it is necessary to prove that it had been given effect to and acted upon and is not otherwise sham or invalid or carried out by a final decree of a court. In case partition, in fact, had been worked out finally in toto as if it would have been carried out in the same manner as if affected (sic effected) by a decree of a court, it can be recognised, not otherwise. A partition made by execution of deed duly registered under the Registration Act, 1908, also refers to completed event of partition not merely intendment to separate, is to be borne in mind while dealing with the special provisions of Section 6(5) conferring rights on a daughter. There is a clear legislative departure with respect to proof of partition which prevailed earlier; thus, the court may recognise the other mode of partition in exceptional cases based upon continuous evidence for a long time in the

shape of public document not mere stray entries then only it would not be in consonance with the spirit of the provisions of Section 6(5) and its Explanation.

29. Admittedly, the alleged partition in Ex.A1 between the second to fourth respondents/first to third defendants took place on 20.05.2005. What is saved under the amended Act is the partition that took place before 20.12.2004. The law has recognised the rights of daughter under Act as a coparcener. In the explanation to Section 6 of the Hindu Succession Act, 1956, "partition" means partition effected by a decree of Court dividing the property. In this case, the partition in Ex.A1 dated 20.05.2005 is not recognized under the law. Division has to be by metes and bounds by a decree of the Court.

30. Therefore, the second, third and fourth respondents were not justified in entering into an unregistered partition deed dated 20.05.2005 in Ex.A1. Ex.A1 dated 20.05.2005 is not binding on the first respondent/plaintiff. Consequently, the subsequent sale in Ex.A2 dated 28.12.2005 between the third respondent/second defendant and the appellant/fourth respondent after 20.12.2004 cannot also bind on the first respondent/plaintiff.

31. Though the appellant claims to be a bona fide purchaser of the entire extent of property in Ex.A2 Sale Deed dated 28.12.2005, there are no documents to infer that the purchase was a bona fide. The sale was after the amendment which came into force w.e.f. 09.09.2005.

32. As the rights of the married daughter as a coparcener stands recognized under Section 6(1) of the Hindu Succession Act, 1956 with effect from 09.09.2005, no mistake can be found in the impugned Judgment and Decree of the Appellate Court.

33. If the appellant/fourth defendant had taken the trouble of getting a prior legal opinion before purchasing the property under Ex.A2 Sale Deed dated 28.12.2005, the appellant would have been perhaps advised to not to purchase the same, if a correct genuine legal opinion was given to the appellant/fourth defendant.

34. In this case, no attempt was made by the appellant/fourth defendant in that direction and therefore the appellant/fourth defendant cannot plead bona fide purchase. In this case, there are no records to substantiate that any attempt was made by the appellant/fourth defendant before purchasing the property vide Ex.A2 Sale Deed dated 28.12.2005.

35. Therefore, the decision of the Appellate Court to the extent of recognising the rights of the first respondent/plaintiff to the suit schedule property has to be upheld. Certain other observations in the impugned Judgment and Decree that properties have to be divided into three equal shares between the first respondent/plaintiff, the second respondent/first defendant and the third respondent/second defendant is liable to be set aside as incorrect.

36. It is noticed that the Appellate Court has wrongly allotted $1/6^{\text{th}}$ share in the suit scheduled properties to the first respondent/plaintiff. The property was to be divided in two equal shares. In view of the above, the both the appellant/fourth defendant and the first respondent / plaintiff are entitled to 50% share each in the suit schedule properties. Accordingly, the impugned Judgment and Decree of the Appellate Court is partly modified.

37. In the light of the above, the substantial questions of law raised in this appeal are answered against the appellant/fourth defendant and this appeal filed by the appellant / fourth defendant is liable to be dismissed.

38. Since the appellant/fourth defendant had paid the sale consideration for the sale of suit scheduled property to the third respondent/second defendant (the son of second respondent/first defendant), the appellant/fourth defendant is entitled to recover 50% of sale consideration from the third respondent/second defendant together with interest at 7.5% from the date of payment till the date of deposit in the manner known to law.

39. This Second Appeal is therefore dismissed with the above observations. No cost.

Sd/-
Assistant Registrar (CS-VII)

// True Copy //

Sub Assistant Registrar

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To

1.The Principal District Judge,
Erode.

2.The I Additional Subordinate Judge,
Erode.

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

+1cc to Mr.N.Manokaran, Advocate Sr.No.34862

S.A.No.979 of 2012
and M.P.No.1 of 2012

CA(CO)
RVM(26/07/2022)