



S.A.No.623 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.03.2022

Pronounced on : **05.06.2023**

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

S.A.No.623 of 2017

1.V.Vandhana

2.V.Vasanthakumar

... Appellants

Vs.

1.Vijayasekaran

2.Palanisamy

3.Rajalakshmi

4.M/s.Sri Lakshmi Textiles

Represented by its Partner,

B.Rajendran

D.No.130/2E, Sencheri Road,

Pethappampatti, Somavarapatti,

Udumalpet.

5.M/s.Indian Overseas Bank Limited,

by its Branch Manager,

having its business office at

“Shri Shanmugapriya Complex”

Vidyasagar Road, Udumalpet.

6.P.Prathap

7.Devi Prabha

... Respondents



S.A.No.623 of 2017

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree in A.S.No.36 of 2016 on the file of III Additional District and Sessions Court, Dharapuram, Thiruppur District, dated 24.04.2017, confirming the judgment and decree in O.S.No.106 of 2014 on the file of Subordinate Court, Udumalpet, dated 28.04.2016.

For Appellants : Mr.V.Raghavachari

For R4 : Mr.ARL.Sundaresan
Senior Counsel
for M/s.AL.Gandhimathi

For R2, R6 & R7 : Mr.P.Valliyappan

For R1, R3 & R5 : No appearance

J U D G M E N T

The plaintiffs in the suit in O.S.No.106 of 2014 on the file of the Subordinate Court, Udumalpet, are the appellants in the above Second Appeal.

2.The appellants filed the suit in O.S.No.106 of 2014 on the file of the Subordinate Court, Udumalpet, for partition of 2/6 share in suit A-Schedule and 8/27 share in the suit B-Schedule and for consequential reliefs.



S.A.No.623 of 2017

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3.The case of the plaintiffs/appellants in the plaint is as follows :

3.1.The suit properties originally belonged to one Ayyappa Naicker who was holding the same as ancestral. Ayyappa Naicker and his only son by name Duraisamy Naidu divided the suit properties among the family members who are coparceners by virtue of a partition deed, dated 11.05.1967, which is registered as Doc.No.2345/1967 on the file of Sub-Registrar's Office, Udumalpet. As per the said partition deed, A-Schedule to the deed was allotted to the share of Ayyappa Naicker for life and defendants 1 and 2, who are the sons of Duraisamy Naidu, were given vested interest. The properties given to Ayyappa Naicker and defendants 1 and 2 are the suit A-Schedule properties. The properties which are described as B-Schedule in the partition deed were allotted to the share of Duraisamy Naidu. Defendants 1 to 3 are the sons and daughter of Duraisamy Naidu. Plaintiffs are the daughter and son of 1st defendant.

3.2.After the demise of Ayyappa Naicker, defendants 1 and 2 derived absolute right over the suit A-Schedule properties as per the partition deed. The property that was allotted to Duraisamy Naidu is the ancestral property of defendants 1 and 2 who are entitled to equal right along with Duraisamy Naidu. In the suit B-Schedule property, defendants 1 and 2 have



S.A.No.623 of 2017

equal right along with Duraisamy Naidu. Since Duraisamy Naidu died intestate on 10.06.1993 leaving behind his wife namely Rukmani, who also died on 28.11.2005 leaving behind defendants 1 to 3 as her legal heirs, defendants 1 and 2 are entitled to 4/9 share in the suit property each and 3rd defendant is entitled to 1/9 share.

3.3.The plaintiffs became major in the year 2010 and 2012 respectively and they are struggling for their livelihood, as the 1st defendant is not taking care of the plaintiffs. Therefore, the plaintiffs approached the defendants 1 and 2 who informed them that the properties had already been sold. It was only later, plaintiff came to know that an extent of 6.09 Acres of land have been transferred in favour of 4th defendant by defendants 1 to 3 under a document of sale dated 02.02.2006 for a price of Rs.3,24,000/-. Defendants 1 to 3 have not even disclosed the right of plaintiffs as coparceners. The sale is neither for the benefit of plaintiffs nor for the benefit of family. The plaintiffs are not parties to the sale deed and therefore, the sale deed in favour of 4th defendant is void and not binding on the plaintiffs. Hence, the plaintiffs are ignoring the sale deed.

3.4.Remaining part of the suit properties were settled in favour of 3rd defendant by virtue of settlement deed dated 14.02.2011 registered as Doc.No.1430 of 2011 before the Sub-Registrar's Office, Udumalpet, which is



S.A.No.623 of 2017

nothing but sham and nominal document.

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3.5.The sale deed as well as the settlement deeds are created for the purpose of defeating the rights of plaintiffs who were minors then. The 4th defendant constructed a building in the suit property and has also created a mortgage. Neither the mortgage nor the sale can deprive the share of plaintiff in the suit property.

3.6.The plaintiffs got equal share in the share of 1st defendant and the plaintiffs are in constructive possession of the suit properties. The suit properties, being ancestral in character, defendants 1 and 2 have no exclusive right either to deal with the property or to be in possession of the same excluding the plaintiffs.

4.The suit was mainly resisted by the defendants 2 and 4. It is contended by the 2nd defendant that Ayyappa Naicker and his only son Duraisamy Naicker divided the properties under the registered partition deed dated 11.05.1967 and that the 2nd defendant alone was managing the entire family and the family business under the name and style of “Kumaran Textiles”. It is contended that, since M/s.Kumaran Textiles was the only family business, defendants 1 and 2 were depending upon the Mill for their livelihood and the family expenses and educational expenses of defendants 1



S.A.No.623 of 2017

and 2 and their family were met out of the income earned from M/s.Kumaran

Textiles. Stating that defendants 1 and 2 were not having any other source of income, it is contended that defendants 1 and 2 borrowed loan from Indian Bank, Udumalpet Branch, as partners of M/s.Kumaran Textiles, as the Mill was running in loss. Even after borrowal of money for the business, it is contended by the 2nd defendant that the Mill was continuously running in loss and the Bank loan due to Indian Bank was outstanding and the loan account became 'Non-Performing Account'. Since Indian Bank, Udumalpet, was pressurising defendants 1 and 2 to settle the loan amount and threatening to initiate legal proceedings to bring the suit properties for Court auction, defendants 1 to 3 decided to sell a part of the suit property to the 4th defendant to save the family business and for the benefit and necessity of the family. The 2nd defendant reiterated that the suit property was sold to the 4th defendant and the consideration received from the 4th defendant was directly paid to the Indian Bank, Udumalpet. It is the specific case of 2nd defendant that the suit property was sold only to save the family business, namely, M/s.Kumaran Textiles.

5.The 2nd defendant also stated that, since defendants 1 to 3 are the only Class-1 legal heirs of Duraisamy Naicker, they inherited the property



S.A.No.623 of 2017

from Duraisamy Naicker by virtue of Section 8 of Hindu Succession Act, 1956 and it is contended that defendants 1 to 3 have every right to sell suit B-Schedule property that was allotted to Duraisamy Naicker in the earlier partition. Since suit A-Schedule properties were gifted by their grandfather Ayyappa Naicker, it was contended by defendants 1 to 3 that suit A-Schedule properties are the separate and absolute properties of defendants 1 and 2 and that the plaintiffs are entitled to equal share along with their father 1st defendant.

6.The 2nd defendant also stated about financial position of the partnership firm M/s.Kumaran Textiles and the subsequent changes. It is contended by 2nd defendant that he retired from the partnership firm and 1st defendant's wife Satya joined as partner and later the firm was converted as a private limited company. It is stated that the wife of 1st defendant was having Rs.1,25,000/- equity share in the company after the Kumaran Textiles (firm) was converted as “Udumalpet Kumaran Spinning Mills Private Limited”. It is the further case of 2nd defendant that the wife of 1st defendant wanted to retire from the company and the property measuring an extent of 6.59 ½ Acres comprised in different Survey Numbers was settled in favour of 2nd defendant's wife to get the shares of wife of 1st defendant. Since the



S.A.No.623 of 2017

suit property was sold to save the textile business, it was contended that the sale in favour of 4th defendant should be treated as one for the benefit of family and to save the family business. The 2nd defendant also contended that the 2nd defendant saved several other properties including the family business. The 2nd defendant contended that he purchased several Acres of land on 17.02.2011 and therefore, pointed out that defendants are not living any wayward life as contended by plaintiffs. Stating that the 2nd defendant has sacrificed his life to save the Mill and other assets and to distribute proportionate share to all the Directors from the sale consideration received by selling the Mill to third parties, it is contended by the 2nd defendant that the suit has been instigated only by the 1st defendant.

7.The 4th defendant also filed a written statement which is almost identical to that of the 2nd defendant. Reiterating the contents of the written statement of the 2nd defendant, the 4th defendant also contended that the entire sale consideration paid by him for the property was utilised to discharge the mortgage loan obtained by defendants 1 and 2 borrowed from Indian Bank, Udumalpet. He also contested the suit on the ground that he is a *bona fide* purchaser without notice of encumbrance over the property. Since no part of sale consideration was utilised for any immoral purpose by defendants 1 to 3,



S.A.No.623 of 2017

4th defendant took a stand that 2nd defendant, who has acted as Manager of joint family is competent as Kartha or Manager of joint family, to deal with the property for the benefit of family and every such alienation to preserve the family business is valid and binding on all the members of the joint family. Since the sale deed was executed by the Manager of Hindu joint family consisting of minor and major members, it is contended by 4th defendant that the sale deed which was executed in good faith for the benefit of family is binding on the plaintiffs who are the children of 1st defendant. 4th defendant also submitted that the suit has been instigated by the 1st defendant.

8.The 4th defendant also contended that the suit is bad for not including all the properties of Duraisamy Naicker and the properties which were given to 1st defendant towards his wife's share from Udumalpet Kumaran Spinning Mills Private Limited. Since the suit properties were sold to clear the liability of Udumalpet Kumaran Spinning Mills Private Limited and to develop the business, it is contended by 4th defendant that the plaintiffs, in collusion with defendants 1 to 3, filed the suit and that the suit without even impleading the son and daughter of 2nd defendant is bad for non-joinder of necessary parties. It is also stated that the suit is bad for



S.A.No.623 of 2017

partial partition. Since defendants 1 to 3 are the sons and daughter of Duraisamy Naicker, it is contended by 4th defendant that defendants 1 to 3 have equal share in suit B-Schedule property as per Section 8 of Hindu Succession Act, and that the plaintiffs have no right over the suit A-Schedule property.

9.It is the specific case of 4th defendant that plaintiffs are under the care and custody of 1st defendant as they are living under the single roof. It is also stated that the 1st defendant has purchased several properties after selling portion of suit property to the 4th defendant and that the plaintiffs have not included those properties as their intention was to grab the property sold in favour of 4th defendant by defendants 1 to 3. Therefore, the 4th defendant repeatedly state that the suit is filed at the instigation of 1st defendant in collusion with defendants 2 and 3. Since substantial portion of suit property is sold in favour of 4th defendant long prior to the filing of the suit, the 4th defendant contended that the suit for partition by paying fixed Court fee under Section 37(2) of Tamil Nadu Court Fees and Suits Valuation Act, 1965, is not maintainable. Out of caution, the 4th defendant also pleaded that the 4th defendant may be allotted the properties purchased by him towards share of defendants 1 to 3 by applying the principles of equity. The



S.A.No.623 of 2017

4th defendant also admitted that the properties purchased by him is also mortgaged with the 5th defendant and that he has put up a Textile Mill on his own. He also pleaded that the suit is filed only to harass the 4th defendant and to blackmail and threaten the defendants to get a ransom from the 4th defendant.

10.The 5th defendant is the Bank and contested the suit almost in the same lines as found in the written statement filed by the 4th defendant.

11.The 3rd defendant also filed an independent written statement describing the suit as a false and frivolous suit. It is seen that the 3rd defendant also contended that, pursuant to the partition between Ayyappa Naicker and Duraisamy Naicker, the coparcenery ceased to exist and that there is no joint family between Ayyappa Naicker and his son Duraisamy Naicker. The 3rd defendant also contended that properties allotted to Duraisamy Naicker are his separate properties because his father Ayyappa Naicker and his sons defendants 1 and 2 were allotted separate shares in the partition. It is contended by the 3rd defendant that, after the death of Duraisamy Naicker and Rukmani (wife of Duraisamy Naicker), defendants 1 to 3 are entitled to succeed to the properties of Duraisamy Naicker under



S.A.No.623 of 2017

Section 8 of Hindu Succession Act. The 3rd defendant also contended that a share that was allotted to Ayyappa Naicker should be treated as his separate property and also contended that suit A-Schedule properties are allotted to Ayyappa Naicker and defendants 1 and 2 under the earlier partition and that the share that was allotted to Ayyappa Naicker has to be treated as his separate property because Duraisamy Naicker also was allotted separate share in the said partition. She also reiterated that the sale of suit A-Schedule in favour of 4th defendant was to clear the debts incurred while running the family business run by defendants 1 and 2 and that therefore, the sale deed executed by 1st defendant as a Manager of Hindu family is valid and binding on minors also, particularly when the entire consideration was paid towards discharge of mortgage loan.

12.The 1st defendant also filed a written statement and contended that the suit B-Schedule property was allotted to the share of Duraisamy Naicker and hence, defendants 1 to 3 alone have equal share in the suit B-Schedule property. However, he states that alienation in favour of 4th defendant was at the instigation of defendants 2 and 3 and that the 1st defendant had not received proportionate share of sale consideration for the sale effected in favour of 4th defendant. Similarly, he also stated that the



S.A.No.623 of 2017

settlement deed in favour of 3rd defendant was executed under the compulsion of defendants 2 and 3, as the 1st defendant was promised to be paid additional amount for the proportionate share of 1st defendant in the suit property. He also stated that the document was created by defendants 2 and 3 for their convenience. Finally, the 1st defendant contended that the plaintiffs are entitled to the share as mentioned in the plaint, however, he contended that suit A-Schedule properties are not ancestral properties, but are the absolute properties of defendants 1 and 2. The stand taken by 1st defendant would indicate that he has grievance against defendants 2 and 3 and he supports the case of plaintiffs to get a share in the properties sold in favour of 4th defendant.

13.The trial Court framed the following issues :

- “1.தாவா ஏ அட்டவணைச் சொத்துக்களில் வாதிகளுக்கு 2/6 பாக உரிமை உள்ளதா ?
- 2.தாவா பி அட்டவணைச் சொத்துக்களில் வாதிகளுக்கு 8/27 பாகம் உள்ளதா ?
- 3.பகுதி பாகப்பிரிவினையால் வழக்கு பாதிக்கப்பட்டுள்ளதா ?
- 4.செலுத்தப்பட்டுள்ள நீதிமன்றக் கட்டணம் சரியானதா ?
- 5.வாதிகள் கோரும் பாகப்பிரிவினை வழங்கத்தக்கதா ?
- 6.வாதிகளுக்கு கிடைக்கும் வேறு பரிகாரங்கள் யாவை ?”



S.A.No.623 of 2017

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14. Before the trial Court, the 1st plaintiff examined herself as P.W.1 and marked Exs.A1 to A10. 2nd defendant examined himself as D.W.1 and examined one Rajendran, partner of 4th defendant, as D.W.2. On the side of defendants, Exs.B1 to B7 were marked.

15. The trial Court referred to the admission of P.W.1 that the plaintiffs are living jointly with their parents and that the Kumaran Mill run by defendants 1 and 2 incurred heavy debts apart from the loan borrowed from Indian Bank. Since A-Schedule was allotted exclusively to the share of Ayyappa Naicker with a rider that the property should devolve on the defendants 1 and 2 after his death, the trial Court held that suit A-Schedule property will be the separate property of defendants 1 and 2 and therefore, the plaintiffs are not entitled to seek partition in respect of suit A-Schedule property. As regards suit B-Schedule, the trial Court found that, after the death of Duraisamy Naicker, defendants 1 to 3 are entitled to the same and that they have right to sell the same. Since the property suit B-Schedule have been sold in favour of 4th defendant for discharging the loan borrowed by Kumaran Textiles (family business) and the consideration was also paid by way of Pay Order issued in favour of Bank as per the document, the trial



S.A.No.623 of 2017

Court held that the sale deed executed by defendants 1 to 3 in favour of 4th defendant is binding on plaintiffs, even assuming that suit B-Schedule is joint family property and that therefore, plaintiffs are not entitled to any share in the suit property. The trial Court also found that the plaintiffs are not in joint enjoyment and that therefore, the Court fee paid under Section 37(2) of Tamil Nadu Court Fees and Suits Valuation Act, 1965, is not proper. In view of the findings of trial Court against plaintiffs, the suit was dismissed in toto by the trial Court.

16. Aggrieved by the judgment and decree of the trial Court, the plaintiffs preferred an appeal in A.S.No.36 of 2016 before the III Additional District and Sessions Court, Dharapuram, Thiruppur District.

17. The Appellate Court also held that suit A-Schedule properties are the separate properties of defendants 1 and 2 as per the partition under Ex.A1 dated 11.05.1967. As regards suit B-Schedule, the Appellate Court found that the property, though was allotted to Duraisamy Naicker and he died intestate, in the light of the judgment of Hon'ble Supreme Court in the case of *Uttam v. Saubhag Singh and others* reported in (2016) 4 SCC 68, held that the plaintiffs are not entitled to seek partition, as the properties are



S.A.No.623 of 2017

the absolute properties of Duraisamy Naicker and that children of Duraisamy Naicker, namely defendants 1 to 3, alone are entitled to succeed to the estate of Duraisamy Naicker under Section 8 of Hindu Succession Act. Assuming that the suit B-Schedule property should be treated as joint family property, the Appellate Court found that, since the entire sale consideration for the sale under Ex.B3 in favour of 4th defendant had been utilised for discharging the Bank loan obtained in connection with the family business and the sale deed is for the benefit of family, the alienation by defendants 1 and 2 as Manager of joint family is binding on plaintiffs. As a result, the Appellate Court also confirmed the findings of trial Court and held that plaintiffs are not entitled to any share in the suit properties.

18. Aggrieved by the concurrent findings of the Courts below, the above Second Appeal is preferred by the plaintiffs by raising the following substantial questions of law :

- i. *“Whether the Courts below are right in not making a distinction between Section 6 and 8 of the Hindu Succession Act ?*
- ii. *Whether the coparcenary property on division will not continue its character as such to enable the coparceners born later in point of time to stake claim over the property ?*
- iii. *Whether the burden of proof does not lie upon the purchaser of*



S.A.No.623 of 2017

the coparcenary property and the alienating coparcener to prove the necessity for such sales ?

iv. Whether the Courts below are right in miscasting the burden of proof on the appellants when it is the duty of the defendants to establish the need and necessity for the sale of coparcenary property ?”

19.While admitting the Second Appeal, this Court framed the following substantial questions of law :

- i. Whether the alienations of the father is for legal necessity and binding on the plaintiffs ?*
- ii. Whether the debts incurred by the father or by the partnership firm run by the brothers are before 2005, and whether the heirs are liable under pious obligation in view of the legal implications of Section 6(4) as per amendment in 2005 by the Act 39 of 2005 ?*
- iii. Whether non-framing of issues vitiate the judgment and it requires this Court to remit the matter ?*

20.Mr.V.Raghavachari, learned counsel appearing for the appellants, submitted that the suit properties are ancestral in character as evident from the partition deed under Ex.A1 dated 11.05.1967. Since suit A-Schedule property was allotted to Ayyappa Naicker granting his life estate and the absolute right vested in defendants 1 and 2, Senior Counsel



S.A.No.623 of 2017

submitted that the suit A-Schedule properties should be treated as the coparcenary properties and that the plaintiffs are entitled to their share by birth. As regards suit B-Schedule properties, which are the properties given to Duraisamy Naicker in the partition between Ayyappa Naicker and Duraisamy Naicker, B-Schedule properties are also coparcenary properties to which plaintiffs are entitled to equal share as that of their father. Stating that the alienation in favour of 4th defendant is not for legal necessities, learned counsel contended that the Courts below have erroneously applied the principles of law ignoring the position that the devolution of interest will be under Section 6 of Hindu Succession Act and that the plaintiffs, who are coparceners, who get their right by birth, cannot be deprived of their legitimate share. The learned counsel submitted that the alienation of property by defendants 1 to 3 in favour of 4th defendant is not binding on the share of plaintiffs and that the suit ought to have been decreed as prayed for. Learned Senior Counsel pointed out that the lower Appellate Court has followed the judgment of Hon'ble Supreme Court in *Uttam's case (supra)* to hold that the plaintiffs who were born after 1956 are not entitled to claim right by birth as coparcener and they have no right to seek partition during the lifetime of 1st defendant who got the property under Section 8 of the Hindu Succession Act after the death of Duraisamy Naicker. Learned Senior



S.A.No.623 of 2017

Counsel then submitted that the burden of proof lies on the purchaser to prove the legal necessity and that there is no evidence to show that the alienation of property in favour of 4th defendant is for discharge of family debt or for legal necessity. Learned Senior Counsel also relied upon a few more judgments of Hon'ble Supreme Court taking a view contrary to the view expressed by the Hon'ble Supreme Court in *Uttam's* case.

21.Per contra, Mr.ARL.Sundaresan, learned Senior Counsel appearing for the 4th defendant, and Mr.P.Valliyappan, learned counsel appearing for respondents 2, 6 and 7, submitted that the suit A-Schedule property that devolved on defendants 1 and 2 has vested on them upon the death of Ayyappa Naicker as their separate properties and that therefore, the plaintiffs cannot seek partition of suit A-Schedule properties during the lifetime of 1st defendant. Both the learned counsels submitted that suit B-Schedule properties, though ancestral in the hands of defendants 1 and 2 and plaintiffs who are entitled to seek partition as coparceners, the sale deed executed by defendants 1 to 3 in favour of 4th defendant is for discharging the family debt which was incurred in connection with the family business as admitted by P.W.1 himself during the course of evidence. Referring to the recitals of the sale deed under Ex.A7 dated 02.02.2006 to show that the



S.A.No.623 of 2017

entire consideration received under Ex.A7 was paid to the Bank directly and that the said loan was in connection with the family business run under the name “Sri Kumaran Textiles”, the learned counsels appearing for the contesting respondents submitted that the sale deed under Ex.A7 is binding on the plaintiffs.

22.Mr.P.Valliyappan, learned counsel appearing for respondents 2, 6 and 7, relied upon several precedents for the proposition that the alienation made by Hindu father to discharge any debt incurred for legal or family necessity is binding on his sons. Learned counsel further submitted that the parties went to trial with full knowledge and understanding of the issues that arise for consideration before the trial Court as well as the lower Appellate Court and that the 1st plaintiff, who was examined as P.W.1, himself has admitted in unequivocal terms that the family was in financial trouble and that defendants 1 and 2 have no other business than running the Textile Mill. Since a huge loan was availed for running the Mill from Indian Bank, the admission of P.W.1 during cross-examination by 4th defendant was relied upon to show that defendants 1 and 2 had no bad habits and that the plaintiffs and 1st defendant are living together under the same roof without any issues. He relied on his evasive reply that he was not aware, whether the



S.A.No.623 of 2017

Textile Mill would have gone on public auction for the debts due by the Mill if the mortgage is not discharged out of sale proceeds of Ex.A7.

23.Learned counsels further submitted that the suit itself was at the instigation of 1st defendant by referring to the stand taken by the 1st defendant himself in the written statement filed by him. On the admitted facts, the learned counsels also raised several other issues by referring to the factual details and the oral evidence of P.W.1 in relation to the financial status of the family and regarding the existence of family debt. Considering the pleadings, evidence and the arguments of learned counsels appearing for the parties, this Court is inclined to deal with the character of suit 'A' and 'B' Schedule.

24.The first factual issue to be resolved is regarding the character of suit A and B Schedule properties. The suit A-Schedule property is admittedly the property that was allotted to Ayyappa Naicker in the partition deed under Ex.A1 dated 11.05.1967 to be enjoyed by him during his lifetime. Defendants 1 and 2 were given vested right after the lifetime of Ayyappa Naicker. Under Ex.A1, B-Schedule property was allotted to Duraisamy Naicker, son of Ayyappa Naicker. The partition between Ayyappa Naicker



S.A.No.623 of 2017

and Duraisamy Naicker would certainly indicate that the suit properties are the coparcenary properties of Ayyappa Naicker and Duraisamy Naicker.

When Duraisamy Naicker is also a party and the partition is between Duraisamy Naicker and his father, Duraisamy Naicker has taken the property as a coparcener representing his descendants upto three degrees including plaintiffs and defendants 1 and 2. However, the property allotted to Ayyappa Naicker is his absolute property. When a partition is between father and son and the property allotted to the son will be taken by the son along with his grandson and great grandson who form a Hindu Undivided Family. However, the property allotted to father will be his separate property. The Full Bench of this Court in the case of *The Additional Commissioner of Income Tax, Madras-I v. P.L.Karuppan Chettiar* reported in *AIR 1979 Mad Pg.1* held that the property of father obtained in a partition will be his separate property and that therefore, succession to the property after the lifetime of the father will be under Section 8 of the Hindu Succession Act.

25.No doubt, it is true that defendants 1 and 2 were given vested interest under the partition deed under Ex.A1 in 1967. Question as to whether defendants 1 and 2 got vested interest as coparceners has to be examined by applying the principles of Hindu Law. The coparceners are the



S.A.No.623 of 2017

first three generations of male descendants of the last owner in the direct male line. The term “coparcenary property” is relatable to unobstructed heritage. Since defendants 1 and 2 got the property at the wish of Ayyappa Naicker and his son after the lifetime of Ayyappa Naicker, the same cannot be treated as coparcenary property, as defendants 1 and 2 did not get suit A-Schedule property by birth but on the death of Ayyappa Naicker by transfer which is in the nature of gift or settlement in favour of grandsons who are also members of coparcenary. Therefore, the suit A-Schedule property is the separate property of defendants 1 and 2 after the lifetime of their grandfather Ayyappa Naicker.

26.The suit B-Schedule properties are admittedly the properties allotted to Duraisamy Naicker who takes the property not only for himself but also his male descendants upto three degrees. In other words, when a coparcenary property is partitioned and the property is allotted to a male member, he inherits the property from his ancestor not only for himself but along with his male descendants of three generations. In other words, sons, grandsons and great grandsons of Duraisamy Naicker become coparceners along with Duraisamy Naicker and they got their right by birth without any



S.A.No.623 of 2017

obstruction. Prior to commencement of Hindu Succession Act, 1956, the property of a male member on his death will go to his son, grandson and great grandson simultaneously irrespective of the fact whether the property is self-acquired or ancestral. In other words, the property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands along with his male descendants upto three degrees below him. However, the next issue is whether the property will remain as coparcenary property after the commencement of Hindu Succession Act, 1956. Though the learned Senior Counsel appearing for contesting respondents have no quarrel with the proposition that coparcenary character of properties remain unaffected by 1956 Act, learned counsel appearing for the appellant relied upon a few judgments of the Hon'ble Supreme Court.

27.The question whether the property will remain as coparcenary property even after the commencement of Hindu Succession Act, 1956, was an issue considered and decided in different contexts. It is true that the Hon'ble Supreme Court, in a few cases, has observed that the son born after 1956 will not get a right by birth in respect of the properties which are ancestral in the hands of their father. In *Uttam's* case, a two member Bench of Hon'ble Supreme Court considered the effect of Sections 4, 8 and 19 of



S.A.No.623 of 2017

Hindu Succession Act, 1956, and summarized the position insofar it applies to joint family property covered by Mitakshara School prior to the amendment in 2005. It is relevant to know the facts of the case. The plaintiff in the suit for partition is the appellant before Hon'ble Supreme Court. The suit was against the plaintiff's father and his father's three brothers who were defendants 1 to 4. Plaintiff being the only son of 3rd defendant claimed 1/8 share in suit property as coparcener. The suit was contested by stating that the suit property was not ancestral. The trial Court found that there was no earlier partition and that the suit property is ancestral. Though the appellate Court confirmed the finding that the suit property was ancestral, held that the plaintiff had no right while his father was alive as plaintiff's grandfather died leaving his widow Mainabai alive. The High Court also dismissed the Second Appeal filed by plaintiff holding that the grandson has no birth right in the properties of grandfather. Surprisingly, the Hon'ble Supreme Court dismissed the Appeal after summarising the legal position in the following lines :

“20. Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there



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is a sole surviving coparcener. Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe (1988) 2 SCC 126, Sheela Devi v. Lal Chand, (2006) 8 SCC 581, and Rohit Chauhan v. Surinder Singh (2013) 9 SCC 419, were cited for this purpose. None of these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized 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



S.A.No.623 of 2017

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.”

Similar view was also expressed by Hon'ble Supreme Court in the cases of ***Sheela Devi and others v. Lal Chand and others*** reported in (2006) 8 SCC 581, ***Bhanwar Singh v. Puran and others*** reported in (2008) 3 SCC 87, and ***M.Yogendra and others v. Leelamma N. and others*** reported in (2009) 15



S.A.No.623 of 2017

WEB COPY

28.However, a two member Bench of Hon'ble Supreme Court in the case of *Arshnoor Singh v. Harpal Kaur and others* reported in (2020) **14 SCC 436** considered several judgments of Hon'ble Supreme Court earlier and distinguished the judgment in *Uttam's case (supra)*. The principles of Hindu Law as has been considered by the Hon'ble Supreme Court would explain the position to some extent by reading Para Nos.7.1 to 7.12, which are extracted below :

“7.1.Mulla in his commentary on Hindu Law (22 nd Edition) has stated the position with respect to succession under Mitakshara law as follows:

Page 129

“A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.”

Page 327

“All property inherited by a male Hindu from his father, father’s father or father’s father’s father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.



S.A.No.623 of 2017

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.

(emphasis supplied)

7.2. In Shyam Narayan Prasad v. Krishna Prasad & Ors., (2018 7 SCC 646), this Court has recently held that :

“12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.”

(emphasis supplied)

7.3. Under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him, would get an equal right as coparceners in that property.

7.4. In Yudhishter v. Ashok Kumar (1987) 1 SCC 204, this



WEB COPY



S.A.No.623 of 2017

Court held that :

“11.This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors. [1986] 161 ITR 370 (SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.”

(emphasis supplied)

7.5.After the Hindu Succession Act, 1956 came into force, this position has undergone a change. Post 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self- acquired property, and does not remain coparcenary property.

7.6.If succession opened under the old Hindu law, i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor



shall be coparcenary property in his hands vis-à-vis his male descendants upto three degrees below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act, 1956.

7.7. In the present case, the succession opened in 1951 on the death of Lal Singh. The nature of the property inherited by his son Inder Singh was coparcenary in nature. Even though Inder Singh had effected a partition of the coparcenary property amongst his sons in 1964, the nature of the property inherited by Inder Singh's sons would remain as coparcenary property qua their male descendants upto three degrees below them.

7.8. The judgment in Uttam v. Saubhag Singh (supra) relied upon by the Respondents is not applicable to the facts of the present case. In Uttam, the appellant therein was claiming a share in the coparcenary property of his grandfather, who had died in 1973 before the appellant was born. The succession opened in 1973 after the Hindu Succession Act, 1956 came into force. The Court was concerned with the share of the appellant's grandfather in the ancestral property, and the impact of Section 8 of the Hindu Succession Act, 1956. In light of these facts, this Court held that after property is distributed in accordance with Section 8 of the Hindu Succession Act, 1956, such property ceases to be joint family property in the hands of the various persons who have succeeded to it. It was therefore held that the appellant was not a coparcener vis-à-



vis the share of his grandfather.

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7.9. In the present case, the entire property of Lal Singh was inherited by his son Inder Singh as coparcenary property prior to 1956. This coparcenary property was partitioned between the three sons of Inder Singh by the court vide a decree of partition dated 04.11.1964. The shares allotted in partition to the coparceners, continued to remain coparcenary property in their hands qua their male descendants. As a consequence, the property allotted to Dharam Singh in partition continued to remain coparcenary property qua the Appellant.

7.10. With respect to the devolution of a share acquired on partition, Mulla on Hindu Law (22nd Edition) states the following:

“339. Devolution of share acquired on partition. – The effect of a partition is to dissolve the coparcenary, with the result, that the separating members thenceforth hold their respective shares as their separate property, and the share of each member will pass on his death to his heirs. However, if a member while separating from his other coparceners continues joint with his own male issue, the share allotted to him on partition, will in his hands, retain the character of a coparcenary property as regards the male issue [Section 221, sub-section (4)].”

(emphasis supplied)

7.11. This Court in Valliammai Achi v. Nagappa Chettiar and Ors. [AIR 1967 SC 1153] held that:



S.A.No.623 of 2017

“10. ... It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently: [see Hindu Law by Mulla, Thirteenth Edition p. 249, para 223 (2)(4)]. If that is so and the character of the ancestral property does not change so far as sons are concerned even after partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family property (after making certain bequests) to the son.”

(emphasis supplied)

7.12. The suit property which came to the share of late Dharam Singh through partition, remained coparcenary property qua his son – the Appellant herein, who became a coparcener in the suit property on his birth i.e. On 22.08.1985. Dharam Singh purportedly executed the two Sale Deeds on 01.09.1999 in favour of Respondent No. 1 after the Appellant became a coparcener in the suit property.”

29. However, the position dealt with by Hon'ble Supreme Court in *Arshnoor Singh's* case as seen from Para No.7 gives an impression that the Hon'ble Supreme Court has considered only the position where succession opened prior to commencement of 1956 Act. Having dealt with the issue, the Hon'ble Supreme Court ought to have held that the judgment of Hon'ble Supreme Court in *Uttam's* case is not in tune with law settled by Hon'ble



S.A.No.623 of 2017

Supreme Court. This Court with great caution prompted to consider one more aspect, while examining the scope of Section 6 of Hindu Succession Act, 1956. The Hindu Succession Act, 1956, does not deal with coparcenary property or joint family property as such. Section 6 of Hindu Succession Act, 1956, deals with succession in respect of an undivided share of a male coparcener in a coparcenary property on his death after 1956. It does not affect or abrogate the right of every coparcener who had already acquired right by birth. According to Mitakshara Law, before 1956 Act, sons, grandsons and great grandsons of a male acquires an interest by birth upon his death irrespective of whether the property is his self-acquired or ancestral and a person inheriting property from his three immediate paternal ancestors holds it, in coparcenary with his sons, grandsons and great grandsons. Hence, the use of expression “opening of succession” should be understood in the light of all the legal incidents of coparcenary. It should be kept in mind that the term “coparcenary” refers to male members of three degrees in the line of descendants. It is hopefully better to understand what is “coparcenary”, by applying some of the essential the features of coparcenary property. Since Section 4 saves the law prior to 1956 as regards the coparcenary character of a joint family property, all the incidents of coparcenary as it had been applied according to Mitakshara Law, have to be



S.A.No.623 of 2017

kept in mind. It is well settled that in coparcenary, a person inheriting property from his three immediate paternal ancestors holds it in coparcenary with his sons and great grandsons.

30.The position regarding unobstructed and obstructed heritage in Mitakshara coparcenary is considered by the Hon'ble Supreme Court in ***Vineeta Sharma v. Rakesh Sharma and others*** reported in (2020) 5 CTC 302 in the following manner :

“48.In Mitakshara coparcenary, there is unobstructed heritage, i.e., apratibandha daya and obstructed heritage i.e., sapratibandha daya. When right is created by birth is called unobstructed heritage. At the same time, the birthright is acquired in the property of the father, grandfather, or great grandfather. In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue is called obstructed heritage. It is obstructed because the accrual of right to it is obstructed by the owner's existence. It is only on his death that obstructed heritage takes place. Mulla on Hindu Law has discussed the concept thus:

“216. Obstructed and unobstructed heritage. – Mitakshara divides property into two classes, namely, apratibandha daya or unobstructed heritage, and



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S.A.No.623 of 2017

sapratibandha daya or obstructed heritage.

(1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner.

Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather, is unobstructed heritage as regards his own male issue, i.e., his son, grandson, and great-grandson. His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.

Property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue, is called obstructed heritage. It is called obstructed, because the accrual of right to it is obstructed by the existence of the owner. Thus, property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere spes successionis, or a bare chance of succession to the



S.A.No.623 of 2017

property, contingent upon their surviving the owner.

(2) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, some cases in which obstructed heritage is also passed by survivorship.”

44.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.”

31.Section 6 of the Hindu Succession Act, 1956, prior to amendment, reads as follows :

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

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara



S.A.No.623 of 2017

coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

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

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

Therefore, Section 6 of the Hindu Succession Act, 1956, before 2005 amendment does not deal with coparcenary property of a joint family, but devolution of interest of a male Hindu who dies after the commencement of 1956 Act in a Mitakshara coparcenary property.

32.In ***Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe and others*** reported in (1988) 2 SCC 126, the Hon'ble Supreme Court has considered whether the coparcenary ceases to exist when the property is inherited by a sole surviving coparcener, in the following lines :

“9. *We respectfully agree with the above*



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



S.A.No.623 of 2017

33. There are several other judgments of Hon'ble Supreme Court where the position in *Dharma Shamrao Agalawe's* case is reiterated. This Court also agrees with the view expressed by a learned Single Judge of this Court in the case of *M. Krishnamoorthy v. K. Pondeepankar and others* reported in **(2017) 3 CTC 170** pointing out the divergent views expressed by Hon'ble Supreme Court dealing with the scope of Sections 6 and 8 of Hindu Succession Act, 1956 and the difficulty in accepting the views of Hon'ble Supreme Court in *Uttam's* case. This Court would agree with the view expressed in *Dharma Shamrao Agalawe's* case and *Arshnoor Singh's* case **[(2020) 14 SCC 436]**. Having regard to the succession under Mitakshara Law as applicable to Hindus prior to 1956, the essential features and incidence of coparcenary according to Mitakshara Law and the fact that Section 6 deals with only undivided interest of a male member in a coparcenary property and does not abrogate the rights of every coparcener, who had acquired right by birth, this Court has no hesitation to hold that the nature and character of coparcenary property will remain as coparcenary even after commencement of Hindu Succession Act, 1956. Therefore, plaintiffs are entitled to get 2/9 share in the property allotted to Duraisamy Naicker in the partition under Ex.A1 by birth.



S.A.No.623 of 2017

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34.However, the next question is whether the alienation by defendants 1 to 3 will be binding on the plaintiffs or not. While extracting the pleadings, this Court has noticed that a specific plea has been taken by defendants 2 and 4 that the sale deed executed by defendants 1 to 3 under Ex.A7 is for discharging the debt borrowed by defendants 1 and 2 in connection with their family business from Indian Bank, Udumalpet Branch. From Ex.B3 sale deed, dated 02.02.2006, a certified copy of which is also marked as Ex.A7, the following recitals in the document are extracted to see how the sale consideration is paid :

“ஆக மேற்கண்ட விதமாய் எங்களுக்கு பாத்தியப்பட்டதும், எங்களின் கூட்டான அனுபவ சுவாதீனத்தில் இருந்து வருகிறதும், எங்கள் பெயரில் சிட்டா, பட்டா ஏற்பட்டு, பட்டா பாஸ்புத்தகம் வழங்கப்பட்டுள்ளதும் இதன்கீழ் விவரிக்கப்பட்டதுமான பூமி, கிணர், மோட்டார் பம்ப் செட் வகையராச் சொத்துக்களை நாங்கள் தங்களுக்கு ரூ.3,24,000/-க்கு சுத்தக்கிரையத்துக்கு கொடுத்து மேற்படி கிரையத் தொகை ரூபாய் மூன்று லட்சத்து இருபத்தி நான்காயிரமும் எங்களில் 1,2 லக்கமிட்டவர்கள் பங்குதாரர்களான உள்ள, உடுமலைப்பேட்டை வட்டம் தாராபுரம் ரோட்டில் அமைந்துள்ள ஸ்ரீ குமரன் டெக்ஸ்டைல்ஸ் நிறுவனத்திற்காக உடுமலைப்பேட்டை கிளை இந்தியன் வங்கியில் கடன் எண்.00071986180 நெம்பர்படி பெற்றுள்ள கடனுக்கு செலுத்தி தீர்க்கும்படி நாங்கள் தங்களைக் கேட்டுக் கொண்டதற்கிணங்க தாங்களும் அவ்விதமே சென்ற



S.A.No.623 of 2017

21.1.2006 தேதிய உருமலைப்பேட்டை கிளை கனரா வங்கியின் 463116 நெ.Payorder-ன்படி மேற்படி வங்கிக்கு செலுத்தி, கடன்கணக்கைத் தீர்த்துவிட்ட வகையில் ரூபாய் பூராவும் உங்களால் எங்களுக்கு செல்லாநபடியால், இன்றே இதன்கீழ் விவரிக்கப்பட்ட சொத்துக்களை இதன்மூலம் நாங்கள் மேற்படி ஸ்ரீ லட்சுமி டெக்ஸ்டைல்ஸ்க்காக தங்களுக்கு சுத்தக்கிரையப் பாத்தியப்படுத்திக் கொடுத்து மேற்படி சொத்துக்களையும் இன்றே நாங்கள் மேற்படி நிறுவனத்திற்காக தங்கள் வசம் சுவாதீனமும் ஒப்படைப்பும் செய்து கொடுத்து விட்டோம்.”

35.Both the Courts below have concurrently held that the defendants 1 to 3 have sold the property under Ex.A7 (equivalent to Ex.B3) only for the discharge of loan obtained in connection with the family business namely “Kumaran Textiles”. Both the Courts have concurrently held that the plaintiffs are not entitled to any share in the property sold in favour of 4th defendant, since the sale itself is for the discharge of family debt.

36.Learned counsel appearing for the respondents 2, 6 and 7 relied upon several precedents to buttress their arguments that alienation made by Hindu father to discharge Avyavaharika debts incurred by father or for meeting family necessities are binding on the sons. In *Irukulapathi*



S.A.No.623 of 2017

Venkateswara Rao @ Kannaganti Venkateswara Rao v. Vemuri Ammayya

and others reported in (1939) *MWN Pg.326*, a Division Bench of this Court has held that the debts borrowed and utilised by a father for the discharge of antecedent debts, namely debts incurred by him in connection with the trade started by him, is binding on the sons under Doctrine of Pious Obligation and held further that the alienation for discharge of antecedent debts is binding on the share of sons. Again, a Division Bench of this Court in the case of ***Alapati Ananda Rao & others v. The President, Co-operative Credit Society, Pedatadepalli & others*** reported in (1940) *MWN Pg.774*, has held that the sons are bound to discharge the loan borrowed by the father even if it is found at the later stage that the father who had received money used them later for his own purposes. The Hon'ble Supreme Court, in the case of ***S.M.Jakati and another v. S.M.Borkar and others*** reported in *AIR 1959 SCC 282*, has held as follows :

“12.The effect of severance of status brought about the filing of the suit on January 25, 1943, made the basis of the argument that only the share of the father could be seized in execution of the payment order made against him. This would necessitate an examination into the rights and liabilities of Hindu sons in a Mitakshara coparcenary family where the father is the karta. In Hindu law there are two mutually destructive principles, one the principle of



independent coparceiary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenary property, and the other the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality, which lays open the whole estate to be seized for the payment of such debts. According to the Hindu law gives this pious duty to pay off the ancestors' debts and to relieve him of the death torments consequent on nonpayment was irrespective of their inheriting any property, but the courts rejected this liability arising irrespective of inheriting any property and gave to this religious duty a legal character. Masit Ullah v. Damodar Prasad (AIR 1926 P C 105). For the payment of his debts it is open to, the father to alienate the whole coparconary estate including the share of the sons and it is equally open to his creditors to proceed against it; but this is subject to the sons having a right to challenge the alienation or protest against a creditor proceeding against their shares on proof of illegal or immoral purpose of the debt. These propositions are well settled and are not within the realm of controversy.”

In the same judgment, it is also held that liability of sons is not even affected by partition because of the pious duty of the sons to pay the debt of the father unless the debt was incurred for an immoral or illegal purpose. The Hon'ble Supreme Court, again, in the case of **Kalwa Devadattam v. Union of India** reported in **AIR 1964 SC 880**, has held as follows :

“13.*We may now deal with the questions which fall*



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to be determined in Civil Appeal No. 642 of 1961-one of the questions being common in Appeals Nos. 641 and 642 of 1961. Suit No. 7 of 1944 was filed by the firm Kumaji Sare Mal for damages for breach of Contract. That suit was decreed by the High Court on March 5, 1947. Within nine days thereafter the deed of partition came into existence. The plaintiffs contended that the debts due by Nagappa to Kurmaji Sare Mal being immoral or avyavharika their share in the properties was not liable to be sold. In any event, they contended, the shares allotted to them under the deed of partition were not liable to be attached and sold in execution proceeding in enforcement of the decree against their father Nagappa, and the remedy of the creditor even if the debts were not avyavharika was to file a suit to enforce the pious obligation of the plaintiffs and not in execution of the decree obtained against Nagappa alone. The creditors contended that the deed of partition was a sham transaction and therefore they were entitled to proceed in execution. Alternatively, it was contended that even if the deed of partition did not evidence a sham transaction, it was open to them as holders of a decree obtained before the partition to enforce the pious obligation of the plaintiffs to discharge the debts of their father in execution of the decree, and it was not necessary for them to file a separate suit. On the question as to the proper procedure for enforcement of the liability of a Hindu son to discharge the debts of his father which are not avyavharika, where since the passing of the decree on the debt against the father there has been a partition between the father



and son, there has arisen difference of opinion. The Madras High Court in *Schwebo K.S.R.M. Firm v. Subbiah* (ILR 1945 Mad 138), held that the son's share in the property cannot be proceeded against in execution, as the division of status brought about by the partition will stand, notwithstanding the avoidance of the partition as a fraudulent transfer. This was reaffirmed in a Full Bench judgment of the Madras High Court in *Katragadda China Ramayya v. Chiruvella Venkunraju* (AIR 1954 Mad 864), where the Court held:-

"A son under the Hindu law is undoubtedly liable for the pre-partition debts of the father which are not immoral or illegal. If a decree, however, is obtained against the father alone and there is a partition of the family proper ties, in execution of such a decree, the son's share cannot be seized by the creditor as by reason of the partition the disposing power of the father possessed by him over the son's share under the pious obligation of the son to discharge the father's debts can no longer be exercised. With the partition, the power comes to an end. The liability thereafter can be enforced only in a suit. After partition, the son's share can no longer be treated as property over which the father had a disposing power within the meaning of S. 60 Civil P.C."

On the other hand the Bombay High Court has held in *Ganpatrao Vishwnathappa v. Bhimrao Sahibrao*, ILR (1950) Bom 114, that a decree obtained against the Hindu father may after partition be executed against the son's interest by impleading the son as a party to the executing proceeding against the father. There is no clear expression of opinion by this Court on this question, though in *S.M. Jakati v. S.M. Borkar* (1959 SCR 1384 : AIR 1959 SC 282), this Court has



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held that the liability of a Hindu son to discharge the debts of his father which are not tainted with immorality or illegality is founded in the pious obligation of the son which continues to exist in the life time and even after the death of the father and which does not come to an end as a result of partition of the joint family property: all that results from partition is that the right of the father to make an alienation comes to an end. In that case the property of the family was sold in execution of a money decree against the father and the sons sued to set aside the sale in so far as is affected their interest in the property and for a decree for possession of their share. The Court held that it was not proved that the liability which was incurred by the father was illegal or immoral and the sale of the joint family property including the share of the sons for satisfying the debts was valid notwithstanding the severance of the joint family status effected before the sale was held through Court. We do not think it necessary to express our opinion on the question whether the remedy of the creditor is to file a separate suit to enforce the pious obligation of a Hindu son to discharge the debts of his father, where since the decree against the father on a debt there has been a severance of the joint family status, or whether he can proceed to execute the decree against the son's interest in the property, after impleading him as a party to the execution proceeding, for we are definitely of the that partition was a sham transaction which was not intended to be operative.”



S.A.No.623 of 2017

WEB COPY

37.A larger Bench of Hon'ble Supreme Court in the case of ***Virdhachalam Pillai v. Chaldean Syrian Bank Ltd., Trichur and another*** reported in ***AIR 1964 SC 1425*** has held to the effect that a father can, by incurring a debt even though the same be not for any purpose necessary or beneficial to the family so long as the family continues undivided and it is not for illegal or immoral purposes, lay the entire joint family property including the interests of his sons open to be taken in execution proceedings upon a decree for the payment of that debt. The position that the father is competent to alienate the joint family properties for satisfying his debts is co-extensive with the rights of the creditors to obtain satisfaction out of family property including the share of the sons in such property. The Doctrine of Pious Obligation and the binding nature of alienation by father as karta of joint family for the discharge of family debts or for family necessity has been followed in several precedents. The learned Single Judge of this Court in the case of ***L.Sundaram and another v. Lakshmanan (died) and others*** reported in ***(2003) 2 LW 163***, has held as follows :

“25.It is pointed out that there were debts in the family as could be seen from the evidence of the second defendant himself as D.W.1, D.W.3 and P.W.5 Govindasamy that only to discharge the said debts, the release was effected



S.A.No.623 of 2017

WEB COPY

in favour of the first defendant. As rightly pointed out by the lower Appellate Court, since Ex.B-1 was executed by Thotti Periasamy, Chinnababu and the second defendant representing each of the branches of the joint family, the heirs of the above said persons cannot question the validity of Ex.B-1. Though the second defendant might not have stated in Ex.B-1 that he was executing the document for himself and on behalf of his sons, the principle is well settled that where a father enters into any transaction affecting the family, he need not expressly state that he enters into it in his representative capacity. This capacity will ordinarily be presumed unless it can be shown that there is a conflict of interest between him and his sons. Thus, Ex.B-1 must be deemed to be binding on the plaintiffs and the third defendant as well, subject to the renunciation being for consideration representing the value of the share of the branch of the member renouncing. It can be considered as a partition of his branch including the interests of his sons in the joint family property.”

38.This Court is not inclined to elaborate further as the position was extensively dealt with and settled in some of the judgments referred to above to support the proposition that the Manager or father of a Hindu joint family has unfettered rights to deal with the property of joint family for consideration either for discharge of debt or for family necessity.



S.A.No.623 of 2017

39.The suit A and B Schedule properties are described separately in the plaint. From the document Ex.A7 (Ex.B3), it is seen that substantial portion of A-Schedule and a small portion of B-Schedule is also covered under the document. This Court has already seen that the plaintiffs are not entitled to share in A-Schedule property. As far as B-Schedule properties are concerned, the portion of it has been sold under Ex.A7 (Ex.B3). It is relevant to refer to some of the admissions of P.W.1. P.W.1, during the course of cross-examination by defendants 3 to 5, has admitted that he is residing with his parents and that his father has no bad habits. He said that he has challenged the alienation only because he is not a party to it and that he does not know whether the joint family property under Ex.A7 was alienated to save the family business. When a suggestion was put to P.W.1 by counsel for 4th defendant, P.W.1 admitted that he does not know whether the property under Ex.A7 was sold to save the family business run in the name and style of “Kumaran Textiles”. Even to the suggestion that the property was sold only for family necessity, P.W.1 has stated that he did not know. Therefore, as against the positive case pleaded by defendants 2 and 4 in their evidence, apart from recitals of sale deed, the plaintiff has only spoken about his ignorance. Therefore, this Court has no hesitation to hold that the defendants 1 to 3 have sold the property under Ex.A7 in favour of 4th



S.A.No.623 of 2017

defendant only to discharge the family debt which was incurred in connection with the family business and that therefore, the alienation was for legal and family necessity.

40.The specific case pleaded by the defendants 2, 3 and 5 that the suit has been engineered only by 1st defendant is probalised by the very stand taken by the 1st defendant in the independent written statement. The 1st defendant has filed the written statement pleading that he did not receive proportionate share in the sale proceeds of the sale effected under Ex.A7. As per the document, the entire money was paid only to discharge the family debt by mortgaging a valuable asset. Since the Courts below have given a specific finding with regard to the binding nature of alienation, the case of contesting defendants that the suit for partition filed by appellant was engineered by their own father 1st defendant, is more probable and hence accepted.

41.From the document Ex.A7, this Court is unable to see that the entire B-Schedule property is covered under the document Ex.A7. Admittedly, the 1st defendant has acquired a few more properties as evident from Exs.B4 and B6. The properties purchased by 1st defendant is not



S.A.No.623 of 2017

included in the suit. However, the 1st defendant has admitted that the remaining suit properties are also alienated. When it is admitted that the 1st defendant has no other business or avocation except the family business and no independent source of income is pleaded or proved, the property acquired in the name of 1st defendant can be treated as joint family property available for partition among the coparceners. The plaintiffs have not included those properties in the suit Schedule. This itself would show that the appellants/plaintiffs have not come to Court on their own against their father. However, though a defence is taken in the written statement about other properties purchased by 1st defendant, specific issue whether the suit is bad for partial partition is not framed nor considered by the Courts below. From the description of properties in the A and B-Schedules in the plaint and the allotment of shares under Ex.A1 partition deed dated 11.05.1967, this Court finds some discrepancies. When this Court examined the document Ex.B3 (Ex.A7) dated 02.02.2006, the properties sold in favour of 4th defendant includes a portion of property allotted to Ayyappa Naicker under Ex.A1 partition and a portion of property allotted to Duraisamy Naicker under Ex.A1 partition. Alienation or the sale deed executed by defendants 1 to 3 in favour of 4th defendant is held to be valid and binding by Courts below. This Court also having regard to the admitted facts agrees with the submissions of



S.A.No.623 of 2017

the learned counsel appearing for the respondents that the family was really in financial crunch and that the alienation under Ex.A7 is binding on the plaintiffs. However, except the property covered under Ex.A7, if the family is possessed of any portion in 'B' Schedule, the plaintiffs are entitled to 2/9 share. It is admitted that the 3rd defendant is the daughter of Duraisamy Naicker. By virtue of Hindu Succession (Amendment) Act, 2005, the daughter is entitled to equal share along with sons. In *Vineeta Sharma's case (supra)*, the larger Bench of Hon'ble Supreme Court has held that the Amendment will have retrospective effect and that a daughter is entitled to claim equal share in coparcenary property, even if her father is not alive when the amendment in 2005 came into force. Therefore, the plaintiffs are only entitled to 2/3 of 1/3 share.

42.As a result, this Second Appeal is partly allowed and the suit in O.S.No.106 of 2014 on the file of Subordinate Court, Udumalpet, is partly decreed by granting 2/9 share to the plaintiffs only in respect of the portion of the suit B-Schedule after excluding the entire portion of B-Schedule covered by Ex.A7 in favour of 4th defendant. The judgment and decree of the Courts below dismissing the prayer in respect of suit A-Schedule property is confirmed. Therefore, the suit in O.S.No.106 of 2014 is



S.A.No.623 of 2017

dismissed in respect of suit A-Schedule. Having regard to the relationship between the parties, there is no order as to costs.

05.06.2023

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Internet : Yes

Index : Yes / No

To

1.The III Additional District and Sessions Judge,
Dharapuram, Thiruppur District.

2.The Subordinate Judge,
Udumalpet.



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S.A.No.623 of 2017

S.S. SUNDAR, J.

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Judgment in
S.A.No.623 of 2017

05.06.2023