Madras High Court
K.M.Thangavel vs R.C.Diocese Of Madurai And Others ... on 28 February, 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.02.2014

Coram:
THE HON'BLE MR. JUSTICE P.R.SHIVAKUMAR

S.A. No.495 of 2012
and
M.P.Nos.1/2012, 1/2013 and 2/2013

1.K.M.Thangavel
2.M.Latha
3.Mallika ... Appellants
1.K.T.Udayakumar
2.Geetha ... Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment

For Appellants ... Mr.P.Valliappan
For Respondents ... Mr.N.Manokaran

J U D G M E N T

The defendants 1, 3 and 4 in the Original Suit are the appellants in the second appeal. The plaintiff in the original suit is the first respondent and the 5th defendant in the original suit is the second respondent in the second appeal. The suit O.S.No.97/2004 was filed by the first respondent herein against the appellants 1 and 2 herein and one Jayalakshmi (since deceased), for the relief of partition and separate possession, claiming = share in the suit property and for a permanent injunction. Subsequently, Jayalalkshmi, the mother of the plaintiff died and her two other daughters, namely the 3rd appellant and the 2nd respondent herein were impleaded as defendants 4 and 5.

2. After trial, the learned trial judge, by judgment dated 14.06.2010, decreed the suit in part and granted a preliminary decree for partition holding the first respondent herein/plaintiff to be entitled to 1/5th share alone and directing division of the same from the rest and also granting a permanent injunction not to cause any alienation or encumbrance binding the said share of the first respondent/plaintiff.

3. On appeal in A.S.No.97/2010, the learned lower appellate judge, namely the Principal District Judge, Erode, reversed the judgment of the trial court and decreed the suit as prayed for granting a preliminary decree for the division of the suit property in to two equal shares and allotment of one such share to the plaintiff and also enlarging the decree of injunction so as to cover the said share of the plaintiff as found in the appeal. The said judgment was pronounced by the lower appellate judge on 08.12.2011. As against the said judgment and decree of the lower appellate court dated 08.12.2011, the present second appeal has been filed by the appellants, who were defendants 1, 3 and 4 in the suit, on various grounds set out in the Memorandum of Grounds of Second Appeal.

4. For the sake of convenience and to avoid confusion, the parties are referred to in this judgment in accordance with their ranks in the suit.

5. The plaintiff Udayakumar is the son of the first defendant K.M.Thangavel. Deceased Jayalakshmi (2nd defendant) was the mother of the plaintiff. Defendants 3 to 5 are the sisters of the plaintiff. The suit property was purchased by the paternal grandfather of the plaintiff by name Mariappa Asari, under a registered sale deed dated 24.04.1940. The first defendant Thangavel is the only son of Mariappa Asari, who died intestate on 27.02.1945. The plaintiff was born on 23.05.1957, long after the death of Mariappa Asari and after the Hindu Succession Act, 1956 came into force. The above said facts are not disputed.

6. The case of the plaintiff is that the suit property being an ancestral property in the hands of the first defendant, the plaintiff and the first defendant constituted a coparcenary in respect of the same and the plaintiff and the first defendant were entitled to half share each as coparceners and that hence, he was entitled to claim partition of the suit property into two equal shares and allotment of one such share to him. Out of the properties left by Mariappa Asari and inherited by his son, namely the first defendant, a small portion was settled on Mallika (4th defendant) by the first defendant under a Deed of Settlement dated 05.06.1985. Subsequently, before the filing of the suit, the first defendant executed a Settlement Deed dated 16.02.2004 in favour of defendants 3 to 5. According to the plaintiff, the said Settlement Deed dated 16.02.2004 was not valid and would not be binding the share of the plaintiff. Hence he had prayed for partition of the suit property into two equal shares and allotment of one such share to the plaintiff and also for a permanent injunction as indicated supra.

7. The 5th defendant remained ex-parte and the suit was contested by other defendants, namely defendants 1 to 4. It is the contention of the defendants 1, 3, 4 and the deceased defendant No.2 that the suit property was originally purchased by Mariappa Asari on 24.09.1940 and he died intestate leaving behind him his son, namely the first defendant and two daughters by name Jayalakshmi and Pushpavalli as his legal heirs; that the first defendant and his two sisters became entitled to 1/3 share each and that by virtue of a Release Deed dated 24.12.1957 executed by the sisters of the first defendant in his favour, the first defendant became the absolute owner of the entire property. It is their further contention that the plaintiff was entitled to 1/6th share alone which was also released by him after receiving a sum of Rs.2.00 Lakhs as consideration for such release at the time of his marriage 20 years prior to the filing of the suit. The further contention of the contesting defendants is that even after such release, the plaintiff was permitted to reside in one portion in the upstairs for

his life time and his possession of the same was purely permissive; that in the absence of love and affection on the part of the plaintiff, the defendants 3 to 5 showed affection towards their parents and the same made the first defendant execute a registered Settlement Deed in their favour and that thus the suit property now absolutely belongs to defendants 3 to 5. Based on the above said averments, the contesting defendants pleaded for dismissal of the suit. In addition, the contesting defendants had also stated in their written statement that the plaintiff, who was earning not less than Rs.15,000/- per month, failed to maintain his parents, namely defendants 1 and 2.

8. Based on the above said pleadings, the learned trial judge framed seven issues, which are as follows:

1) Whether the plaintiff released his share on receiving proper consideration?

2) Whether the first defendant has executed a settlement in favour of his daughters?

3) Whether the Settlement Deed executed by the first defendant in favour of his daughters is valid and binding upon the plaintiff?

4) Whether the plaintiff is entitled to a preliminary decree for partition and separate possession of his = share in the suit properties?

5) Whether the plaintiff is entitled to a final decree as prayed for?

6) Whether the plaintiff is entitled to a permanent injunction against the defendants not to alienate or encumber the suit property? and

7) To what relief?

9. Based on the same, the parties went for trial. In the trial, four witnesses were examined as PWs.1 to 4 and nine documents were marked as Exs.A1 to A9 on the side of the plaintiff. Three witnesses were examined as DWs.1 to 3 and 12 documents were marked as Exs.D1 to D12 on the side of the contesting defendants.

10. At the conclusion of trial, accepting the contentions of the contesting defendants, the learned trial judge held that only 1/3rd of the suit properties was the ancestral property in the hands of the first defendant and in that 1/3rd, the plaintiff and defendants 1 and 3 to 5 became entitled to equal shares. Thus the trial court held that the plaintiff was entitled to 1/15th share; that the defendants 3 to 5 were entitled to 1/15th share each and the first defendant was entitled to 11/15th share in addition to 2/3 share, he got from his sisters by way of release. Thus, the trial court has held the first defendant to be entitled to 11/15th share to the exclusion of others. Though the trial court came to a conclusion that the plaintiff, defendants 1 and 3 to 5 were entitled to equal shares in the 1/3rd portion of the suit property, it has not clarified as to how and on what basis, such a decision was made. The trial court has not even made any reference to the amendment introduced by the Tamil Nadu Act 1 of 1990 or the amendment introduced by the Central Act, namely Hindu Succession

(Amendment) Act, 2005. However, it can be inferred that the learned trial judge was of the view that the daughters of first defendant had also become coparceners in respect of the coparcenary property, which according to the trial court was the 1/3rd portion of the suit property. Based on the above said findings, the learned trial judge granted a preliminary decree for partition holding the plaintiff to be entitled to 1/15th share as against his claim of = share and directing separation of the said share from the rest. The learned trial judge also granted a decree for permanent injunction restraining the defendants from making any alienation or encumbrance so as to bind the plaintiff s share also.

11. As against the said judgment and decree of the trial court dated 14.06.2010, the plaintiff filed an appeal in A.S.No.97 of 2010 on the file of the District Court, Erode. In the said appeal, the plaintiff and the contesting defendants filed separate applications under Order 41 Rule 27 CPC seeking the leave of the court to produce additional documentary evidence and the applications were numbered as I.A.Nos.113/2011 and 435/2011 respectively. The learned Principal District Judge, Erode (lower appellate judge), by a common order and judgment allowed the said applications, received the documents produced on both sides, marked them as Exs.A10 and A11 and Exs.B13 and B14 respectively and allowed the appeal setting aside the finding of the trial court that the plaintiff was entitled to 1/15th share alone and declared that the plaintiff was entitled to half share in the suit property. Accordingly the preliminary decree for partition granted by the trial court was modified by directing division of the suit property into two equal shares and allotment of one such share to the plaintiff and also by enlarging the scope of permanent injunction to cover that half share of the plaintiff. For arriving at such a conclusion, the learned lower appellate judge held that the daughters of the first defendant (sisters of the plaintiff) were not entitled to the benefit of the amendment made by the Central Act (Act 39 of 2005) as they had got married even prior to the date on which the State Amendment was brought into force.

12. Questioning the correctness of the said judgment and decree of the lower appellate court dated 08.12.2011, the defendants 1, 3 and 4 have come forward with the present second appeal on various grounds set out in the Memorandum of Grounds of Second Appeal.

13. Notice before admission was issued to the respondents and on their appearance, the matter was referred for mediation in the hope that the matter would be settled. As mediation failed, the matter was again listed for hearing. Though the formal procedure of admitting the second appeal by identifying substantial questions of law was not followed, at the time of hearing, the learned counsel appearing for the contesting parties submitted that, since the records had been sent for and were available for reference in the second appeal, the substantial questions of law in the second appeal could be identified and arguments on both sides on such substantial questions would be heard and a disposal could be made. Accordingly, the following questions were identified as substantial questions of law:

1. Whether the lower appellate court has misconstrued the law of inheritance prior to the coming into force of Hindu Succession Act, 1956 and erroneously held that the daughters of Mariappa Asari were not entitled to any share in the property left by Mariappa Asari to be validly released in favour of the first defendant under Ex.B1-Release Deed dated 24.12.1957?

2. Whether the suit is bad for non-joinder of necessary parties, in so far as the sisters of the first defendant were not made parties to the suit?

3. Whether the lower appellate court committed an error in allowing the production of additional documents at the appellate stage?

4. Whether the judgment of the lower appellate court is not in conformity with Order 41 Rule 31 CPC?

5. Whether the lower appellate court has committed an error in holding that the defendants 3 to 5 are not entitled to the benefit of the amendment to section 6 brought by Act 39 of 2005 and erroneously held that the plaintiff is entitled to = share in the suit property on such misconception of law?

14. After the said questions were identified to be the substantial questions of law, the learned counsel appearing on both sides submitted their arguments. The arguments advanced by Mr.P.Valliappan, learned counsel for the defendants 1, 3 and 4 (appellants) and by Mr.N.Manokaran, learned counsel for the plaintiff (first respondent) were heard. The materials available on record were also perused. This court paid its anxious consideration to the same.

15. The appellants in their grounds of appeal have raised the plea of non-compliance with the requirements made under Order 41 Rule 31 in preparing the judgment of the appellate court in so far as the learned lower appellate judge has not chosen to frame necessary points for determination. The same has been projected as a substantial question of law in the grounds of second appeal. The learned lower appellate judge narrated the points for consideration in the appeal before him in the following language:

" 1) Whether the judgment and decree passed by the lower court is not sustainable and the appellant is entitled to the relief as claimed in the plaint?

2) To what relief the appellant is entitled?"

16. As rightly pointed out on behalf of the defendants 1, 3 and 4, who are the appellants in the second appeal, the above said questions framed by the lower appellate court are generic and the lower appellate court has not framed the correct points in precise terms for consideration in the appeal. It can be said that the framing of such general questions as points for consideration will not be sufficient compliance of the requirement of Order 41 Rule 31 CPC. Even then, it shall not be the sole ground on which the decree of the appellate court shall be reversed and it shall not be the sole ground on which the case shall be remanded back to the lower appellate court. If the lower appellate court has discussed the pleading and evidence and rendered decisions on all questions that have arisen for consideration in the appeal, the non-framing of the exact points for consideration, as contemplated under Order 41 Rule 31 CPC, shall not be a vital flaw and such irregularity can be condoned. This has been held so by the Apex Court in G.Amalorpavam and others vs. R.C.Diocese of Madurai and others reported in (2006) 3 SCC 224.

17. In this case also, though the learned lower appellate judge has not framed the exact points for consideration, a reading of the judgment of the lower appellate court shows that the learned lower appellate judge dealt with every aspect and every question that ought to have been made a point for determination in the appeal and decided the same with reference to the pleadings and the evidence adduced by the parties. The learned lower appellate judge, on a re-appraisal of evidence, decided the issues as to whether the suit property in its entirety was the coparcenary property in the hands of the first defendant and whether the plaintiff was entitled to half share as claimed by him. Learned lower appellate judge has also dealt with the question whether the benefit of amendment brought to the Hindu Succession Act by Act 39 of 2005 shall be available to the defendants 3 to 5. The learned lower appellate judge has also dealt with the question of the validity and binding effect of the settlement deed dated 16.02.2004 executed by the first defendant in favour of his daughters, namely defendants 3 to 5. Only after considering the above said aspects in the light of the evidence and in the light of the legal principles, the learned lower appellate judge has pronounced a judgment incorporating the said discussions and findings. Therefore, this court finds that though compliance with Order 41 Rule 31 has not been made in its letter and spirit, substantial compliance has been made and the irregularity caused by the lower appellate court in not framing the exact points for consideration is condonable.

18. The learned counsel appearing for both parties have also submitted in their arguments that since the lower appellate court has decided all necessary points, of course without specifically citing those points as points for consideration, the omission to frame the same as points for consideration can be condoned and that hence there is no need for setting aside the judgment and decree of the lower appellate court on the ground that the lower appellate court has not strictly adhered to the requirements of Order 41 Rule 31 CPC. Hence this court comes to the conclusion that though there is absence of strict compliance with Order 41 Rule 31 CPC, the learned lower appellate judge has substantially complied with the said provision and the same shall be enough and that therefore the same shall not be the ground on which this court shall interfere with the judgment and decree of the lower appellate court. The 4th Substantial question of law is answered accordingly.

19. The plaintiff chose to file the suit against his father, mother and one of his sisters alone, who were arrayed as Defendants 1 to 3. Though the other two sisters, namely defendants 4 and 5 had been left out, subsequently, they were also made party-defendants and arrayed as defendant Nos.4 and 5. Therefore, the defect of non-joinder of necessary parties to the suit stands rectified. However, the contesting defendants had taken a plea that the suit property originally belonged to one Mariappa Asari; that on his death, his son, namely the first defendant and daughters, namely Jayalakshmi and Pushpavalli, as his legal heirs became entitled to 1/3 share each; that the said Jayalakshmi and Pushpavalli subsequently released their 2/3 share in favour of their brother (first defendant); that thus the first defendant became entitled to the entire property left by Mariappa Asari and that under the circumstances, the said Jayalakshmi and Pushpavalli, ought to have been made parties to the suit and the failure to do so, would make the suit bad for non-joinder of necessary parties.

20. Admittedly, Mariappa Asari died intestate. As per the admitted facts he died on 27.02.1945. As per the then prevailing Hindu Law regarding succession, in the presence of son, daughters were not

the legal heirs. Only on the advent of the Hindu Succession Act, 1956, daughters became class I heirs entitled to share the property of the father on equal footing with the son by virtue of the Rule of succession provided in Section 8 of the Hindu Succession Act, 1956. This was not the position prior to the Hindu Succession Act, 1956 even regarding the separate properties of a male Hindu. As such, Jayalakshmi and Pushpavalli, the sisters of the first defendant, would not have got any share in the property left by their father Mariappa Asari. Even if it is assumed that they had got a share in the property of their father, admittedly, they had executed a registered Release Deed dated 24.12.1957 releasing the shares claimed by them in respect of the property of their father in favour of their brother, namely the first defendant. The said Release Deed has been marked as Ex.B1. Since the transferee under the Release deed is there on record as successor-in-interest of Jayalakshmi and Pushpavalli, they are not necessary parties. Hence the failure to make Jayalakshmi and Pushpavalli as parties to the suit shall not make the suit bad for non-joinder of necessary parties. The lower appellate court correctly held that the suit was not bad for non-joinder of necessary parties. The 2nd Substantial question of law is answered accordingly holding that the finding of the lower appellate court that the suit is not bad for non-joinder of necessary parties is bound to be confirmed.

21. In the appeal before the lower appellate court, the plaintiff (appellant before the lower appellate court) and the contesting defendants, namely respondents 1, 3 and 4 (respondents 1, 3 and 4 before the lower appellate court) filed separate applications seeking permission to produce documents as additional evidence in the appeal. The application filed by the plaintiff was taken on file as I.A.No.113/2011. He wanted to produce his school transfer certificate and the marriage invitation of the third defendant as additional documents on his side. So far as the first document is concerned, it was contended on behalf of the contesting defendants that the reason assigned by the plaintiff for non-production of the same during trial in the trial court, could not be sustained. So far as the second document is concerned, the contesting defendants contended that the same was created for the purpose of the case and that even though the date of marriage of the third defendant found in the said document was correct, the venue of marriage found in the said invitation was not correct.

22. Similarly, the application filed by the contesting defendants under Order 41 Rule 27 was taken on file by the lower appellate court as I.A.No.435/2011. A copy of the plaint filed by the plaintiff in O.S.No.35/2011 on the file of the District Munsif, Bhavani and the copy of the written statement filed by the first defendant Thangaval in the said suit were the two documents sought to be produced as additional documents on the side of the contesting defendants. The documents sought to be produced on the side of the defendants came into existence only after the disposal of the suit and during the pendency of the appeal before the lower appellate court. Hence the defendants could not have produced those documents in trial before the trial court. Those two documents were sought to be produced as additional documents in order to show that the plaintiff in the suit concerned in this second appeal, had omitted the property covered by the Release Deed dated 05.06.1985 executed by the first defendant in favour of the third defendant, which has been marked as Ex.B11 and that having omitted to do so and having confined his relief to the remaining portion of the properties left by Mariappa Asari, the plaintiff had chosen to file another suit for the cancellation of the said Release Deed only in order to get over the possible plea of the suit being bad for partial partition.

23. Similarly, the school transfer certificate of the plaintiff and the marriage invitation of the third defendant were sought to be produced as additional documentary evidence by the plaintiff in order to show that the defendants 3 to 5 would not be entitled to the benefit of the Amending Act (Act 39 of 2005), since they had been given in marriage prior to 31.10.1990, the date from which the amendment introduced by Tamil Nadu Act 1 of 1990 was brought into force in Tamil Nadu, which came to be incorporated by the Central amendment by Act 39 of 2005. Though the reason assigned by the plaintiff for non-production of the transfer certificate in the trial court, was disputed in the counter affidavit, the contention of the plaintiff that the same had been misplaced by the advocate in another bundle, had not been successfully refuted. In addition, no serious objection was raised for the reception of the said document. So far as the marriage invitation of the third defendant is concerned, the same was sought to be produced to prove the date of marriage of the third defendant. The contesting defendants admitted that the date of marriage found in the said document was correct. Under such circumstances alone, the learned lower appellate judge chose to allow the application filed by the plaintiff and also the application filed by the contesting defendants. The decision of the lower appellate court to allow the parties to adduce additional evidence in the form of those documents in the appellate stage cannot be said to be either infirm or defective.

24. However, after taking a decision to allow those two applications, namely I.A.Nos.113/2011 and 435/2011, the learned lower appellate judge has not chosen to follow the procedure prescribed in the Civil Procedure Code for recording of additional evidence and the lower appellate judge simply marked those documents as Exs.A10 and A11 and B13 and B14 respectively and proceeded with the pronouncement of judgment. The said procedure adopted by the learned lower appellate judge is not in conformity with the scheme provided in the Code of Civil Procedure for recording of additional evidence in the appellate stage. While dealing with the application seeking permission to adduce additional evidence in the appellate stage, the appellate court has to hear the application along with the appeal. But it does not mean that no separate order can be passed or is desirable after such hearing. In case the appellate court comes to the conclusion that the application cannot be allowed and the same deserves to be dismissed, there would not be any impediment for incorporating the said order in the Judgment itself and proceed with the pronouncement of judgment. On the other hand, if the appellate court decides to allow the application seeking permission to adduce additional evidence, a separate order allowing the petition shall be passed and the order shall indicate the points regarding which the additional evidence is to be adduced. Such additional evidence can be taken either by the appellate court or the appellate court can direct the trial court or any court subordinate to it to record such evidence and transmit the same to the appellate court. The same shall be clear from the provisions found in Order 41 Rule 28, which reads as follows:

28. Mode of taking additional evidence Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

A reading of the same will show that, in case the appellate court comes to the conclusion that a party to the appeal should be permitted to adduce additional evidence, then there shall be a separate order

in the application, which should be followed by recording of evidence. Only thereafter the appellate court can proceed with the pronouncement or judgment in appeal, taking into account the entire evidence including the additional evidence adduced in the appellate stage.

25. The above said procedure is not without any exception. There is one exception for the proposition that in cases wherein the appellate court grants permission to a party to adduce additional evidence, there must be a separate order on the application filed under Order 41 Rule 27, which should be followed by recording of evidence. The exceptional case is where the parties to the appeal concede the prayer of the other side for adducing additional evidence and also give their consent for marking those documents as additional exhibits. Even in cases wherein the application under Order 41 Rule 27 would have been resisted initially, on the expression of the view of the court that such an application deserves to be allowed, if the opposite parties may give their consent for the marking of those documents, there would not be any need to adduce oral evidence for the proof of the documents. In such cases alone, the appellate court can incorporate an order allowing the application and also mark the documents by consent and proceed with the pronouncement of the judgment in the appeal.

26. In this case, the learned lower appellate judge has chosen to allow the applications filed by both the parties and proceed with the pronouncement of judgment assigning exhibit numbers for the documents produced by the parties in the appellate stage, without considering the necessity of taking additional evidence in proof of those documents. There is nothing in the judgment of the lower appellate court to show that the parties expressed their consent for marking those documents and that the same was the reason why those documents were marked and judgment was pronounced. Though the said procedure adopted by the lower appellate court has been found fault with by the defendants (appellants in the second appeal), as a result of which they have raised it as a substantial question of law, learned counsel appearing for both parties in the second appeal have submitted that the parties do not want to precipitate the matter and on the other hand, they concede that the documents received in the appellate stage and marked as Exs.A10 and A11 and Exs.B13 and B14 can be accepted as validly admitted evidence and that this court can proceed with the consideration of the second appeal on merits disregarding the irregularity in marking those documents and holding that the marking of those documents are ratified by the parties. In view of the same, even though the lower appellate judge has committed an irregularity in marking Exs.A10, A11, B13 and B14, the same has to be condoned since the parties now agree that those documents need no further proof and that the parties ratify the marking of those documents. Hence no interference can be made on the basis that the lower appellate court has not followed the procedure contemplated under Order 41 Rule 28 for taking additional evidence. The 3rd Substantial question of law is answered accordingly.

27. The plaintiff is the only son of the first defendant. Defendants 3 to 5 are the daughters of the first defendant. An extent of 3.389 acres of land comprised in S.No.339/D in Kaundapadi village, Bhavani Taluk, Kaundapadi Sub Registration District, previously Coimbatore Registration District now Gobichettipalayam Registration District, along with a terraced house, a tiled room and a thatched house occupying an extent of three cents was purchased by Mariappa Asari, the father of the first defendant (paternal grandfather of the plaintiff) under a sale deed dated 24.04.1940. The

original Sale Deed has been produced as Ex.B3 and a certified copy of the same has been produced as Ex.A1. Admittedly, the said property was the self-acquired property of Mariappa Asari and he died intestate on 27.02.1945. According to the plaintiff, as per the Hindu Law regarding succession which was prevailing on the date of death of Mariappa Asari, his daughters were not entitled to any share, as he was survived by a son, namely the first defendant Thangavel. It is the further case of the plaintiff that on the death of Mariappa Asari, his son Thangavel (the first defendant) inherited the entire property left by Mariappa Asari and the property that came into the hands of the first defendant as the legal heir of Mariappa Asari was an ancestral property in his hands, in which his son (the plaintiff) had got a right by birth. It is the further contention of the plaintiff that, regarding the said property left by Mariappa Asari, the first defendant Thangavel and his son Udayakumar (plaintiff) became coparceners entitled to equal shares. Based on the said contention alone, the plaintiff has prayed for the relief of partition claiming half share in the suit property as a coparcener.

28. The contesting defendants have taken a stand that each one of the daughters of Mariappa Asari also got an equal share along with the first defendant (son of Mariappa Asari) and that each one of them, namely the first defendant, his sisters Jayalakshmi and Pushpavalli were entitled to 1/3 share in the property left by Mariappa Asari by rule of succession. It is the further contention of the contesting defendants that those two sisters of the first defendant released their 2/3 share in favour of the first defendant by executing a registered Release Deed dated 24.12.1957. The said Release Deed has been produced and marked as Ex.B1. A reading of the said document will show that the parties to the document themselves admitted the fact that the property left by Mariappa Asari devolved upon the first defendant alone and the first defendant on whom the property devolved was in possession and enjoyment of the same. However, since it was apprehended that by the change in the law regarding succession by the advent of Hindu Succession Act, 1956 there was a possibility of the sisters of the first defendant staking a claim, the said document came to be executed. The recitals found in the said document itself will make it clear. The relevant part of the recital in the vernacular is extracted here under:-

" v';fSf;Fk; j';fSf;Fk; jfg;gdhd fhyk; brd;w khhpag;g Mrhhpf;F fPH;fhQqk; brhj;J 24-4-1940 njjpapy; fpiua ghj;jpag;gl;L mth; fhyk; brd;w gpd; ckf;F ghj;jpag;gl;L ckJ RthjPdj;jpypUe;J tUfpwJ ,Ug;gpDk; jw;fhy murpay; rl;lg;go v';fSf;F Vw;gl;oUf;Fk; ghj;jpaj;jpw;fhf ehsJ njjpapy; eh';fs; j';fsplk; U:/400-00 ehD}W U:gha; bgw;Wf;bfhz;L v';fSf;F Vw;gl;oUf;Fk; ghj;jpaj;ij ,jd;K:yk; tpLjiy bra;J bfhLj;jp[Uf;fpnwhk;/"

The same will go to show that the said Release Deed was obtained on the assumption that succession could be reopened on the passing of the Hindu Succession Act, 1956 and on such assumption alone, the said document came to be executed. However, as rightly contended by the learned counsel for the plaintiff, the Hindu Succession Act, 1956 does not divest the title, which had already vested under the customary Hindu Law prior to the Hindu Succession Act coming into force. The Hindu Succession Act, 1956 shall be applied only in cases, where the succession opened after the said act came into force. If the succession had opened prior to the date on which the Hindu Succession Act came into force, such vesting of the property by the customary rule, shall not be over-turned and the succession shall not be reopened.

29. In this case, admittedly the original owner of the property, namely Mariappa Asari died on 27.02.1945. It has also been conclusively proved by the production of the death register extract and the entry made therein, which have been marked as Exs.A8 and A9. Daughters became class 1 heirs along with the sons only after the introduction of the Hindu Succession Act, 1956. It has been proved and admitted that Mariappa Asari died 11 years prior to the date on which Hindu Succession Act, 1956 came into force and succession to the properties of Mariappa Asari opened on 27.02.1945 itself. As rightly contended by the plaintiff, the son of Mariappa Asari, namely the first defendant alone got it as his legal heir as per the then prevailing customary law of succession among Hindus. The title thus vested prior to the Hindu Succession Act does not get divested on the advent of the Hindu Succession Act. Only in case of the widows, provision has been made in Section 14 for enlargement of their limited estate into absolute property. Even in Ex.B1, the sisters of the first defendant have clearly admitted that as per the law prevailing when succession to the property of Mariappa Asari opened, the first defendant alone was entitled to succeed to his property and the sisters of the first defendant were not entitled to any share in it. Therefore, the contention of the plaintiff that on the death of Mariappa Asari, the property devolved upon the first defendant in its entirety; that the sisters of the first defendant did not have any right to share in the property and that the Release Deed executed by them shall be superfluous and the same will not have any effect on the character of the property inherited by the first defendant from his father Mariappa Asari has got to be countenanced. In this regard, the trial court was wrong in holding that the sisters of the first defendant became entitled to 2/3rd share in the property left by their father Mariappa Asari. The said mistake committed by the learned trial judge was rightly interfered with by the lower appellate court. The lower appellate court has rightly held that the sisters of the first defendant by names Jayalakshmi and Pushpavalli had no right in the property left by their father Mariappa Asari; that the first defendant became entitled to the entire property of his father on his death and that the entire property inherited by him from his father was ancestral property in his hands in which his son, namely the plaintiff acquired a right to a share by birth. The learned lower appellate judge has correctly applied the rule of inheritance, which was prevailing before the coming into force of the Hindu Succession Act, 1956.

30. It is also pertinent to note that besides taking a stand that the first defendant became the absolute owner of 2/3 of the property left by Mariappa Asari as per the Release Deed executed by the sisters of the first defendant, the contesting defendants have taken a stand that the plaintiff shall have a share along with his father regarding the remaining 1/3 part alone. The contesting defendants, by taking such a plea, have conceded that the plaintiff did have a right by birth in the property inherited by the first defendant from his father. However, they have chosen to project the Release Deed executed by the sisters of the first defendant as a document under which the first defendant acquired absolute title to 2/3 of the property left by Mariappa Asari. But the fact remains that no property was acquired by the first defendant under the said Release Deed and on the other hand, on the death of Mariappa Asari on 27.02.1945, the first defendant got the entire property left by Mariappa Asari as his legal heir as per the customary Hindu Law. The learned trial judge, on a misconception of law, held that 2/3 of the property left by Mariappa Asari belonged to the sisters of the first defendant and the remaining 1/3rd alone was the property inherited by him directly from his father; that the first defendant became the absolute owner of the 2/3 share of his sisters by virtue of the Release Deed produced as Ex.B1 and that only the remaining 1/3 was the ancestral property of

the first defendant.

31. Based on the said finding alone, the trial court came to the conclusion that the said 1/3 portion alone was the ancestral property in the hands of the first defendant; that by virtue of the amendment brought to the Hindu Succession Act making the daughters also coparceners, the plaintiff, first defendant and defendants 3 to 5 became entitled to equal shares as coparceners and that thus the plaintiff was entitled to 1/15 share alone. The said conclusion arrived at by the trial court was on an erroneous application of the principle of law. When succession had opened prior to the date on which the Hindu Succession Act, 1956 came into force and rights were conferred on the parties under the customary law, the same was not sought to be divested reopening the succession, except a provision for enlargement of the limited estate given to a widow into absolute estate. The said finding of the learned trial judge was rightly interfered with by the lower appellate court and the lower appellate judge, on proper re-appreciation of the facts and on proper application of the principle of law, came to a correct conclusion that the entire property left by Mariappa Asari, who died on 27.02.1945 (much prior to the date on which the Hindu Succession Act came into force), devolved upon the first defendant and the same in his hands was the ancestral property in respect of which his son, namely the plaintiff became a coparcener entitled to a right by birth, which is equal to that of the first defendant. In short, the learned appellate judge has held that the entire property left by Mariappa Asari came into the hands of the first defendant as his ancestral property and it was the coparcenary property in which the first defendant and the plaintiff had equal shares as per the then prevailing law. The erroneous finding rendered by the learned trial judge was rightly interfered with by the lower appellate court. The lower appellate court has rightly held that the sisters of the first defendant by names Jayalakshmi and Pushpavalli had no right in the property left by their father Mariappa Asari; that the first defendant became entitled to the entire property of his father on his death and that the entire property he inherited from his father was his ancestral property. The learned lower appellate judge has correctly applied the rule of inheritance which was prevailing before coming into force of the Hindu Succession Act, 1956. The first Substantial question of law is answered accordingly.

32. In the foregoing discussions, we have seen that on the death of Mariappa Asari on 27.02.1945 by the rule of inheritance, his son, namely the first defendant became entitled to the property of Mariappa Asari in its entirety, since Mariappa Asari died intestate. The next question that arises for consideration is what shall be the character of the said property in the hands of the first defendant. Admittedly, the same was not a self-acquisition of the first defendant. Having inherited the same from his father under the law of inheritance applicable prior to the advent of the Hindu Succession Act, 1956, it shall be his ancestral property in which his son in turn will get a right by birth to a share equivalent to that of the first defendant. It is also pertinent to note that even after the Hindu Succession Act, 1956 came into force, the position remained the same. Of course the plaintiff was born to the first and the second defendants only after the Hindu Succession Act, 1956 came into force. As per Ex.A10, he was born on 23.05.1957. Suppose the first defendant had alienated the property before the plaintiff was born, the plaintiff would be entitled to a right by birth only in the property left in the hands of the first defendant after such alienation. Fortunately, in this case, the first defendant did not alienate any portion of the property prior to the date of birth of the plaintiff. Therefore, the birth of the plaintiff on 23.05.1957 made the property in the hands of the first

defendant which had been inherited by him from his father Mariappa Asari, a property belonging to a Hindu Mitakshara coparcenary consisting of the first defendant and his son, namely the plaintiff as coparceners.

33. The position will be easy if there had been a partition between the plaintiff and the first defendant before any change was introduced to the law of succession. In this regard an amendment was introduced to the rule of succession regarding the properties belonging to Hindu Mitakshara coparcenery in Tamil Nady by introducing a new section 29-A by Act 1/1990. By the said Act, daughters were also made coparceners along with father, with a rider that daughters who had got married prior to 25.03.1989 would not become coparceners. The said provision had been interpreted to be applicable on proof of existence of two conditions. They are : 1) They should have remained unmarried on the crucial date, namely 25.03.1989 and 2) no partition should have taken place prior to the crucial date 25.03.1989. Sub clauses (iv) and (v) of Section 29-A introduced by the Hindu Succession (Tamil Nadu Amendment) Act, 1989 provide that the daughter of a coparcener, would, by birth, would become a coparcener in her own right in the same manner as a son. The same read as follows:

" (iv) nothing in this Chapter shall apply to a daughter married before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989;

(v) nothing in clause (ii) shall apply to a partition which had been effected before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989."

A consideration of the said clauses will make it clear that the daughter of a coparcener governed by Hindu Mitakshara Law, would have become a coparcener by birth, provided she was not married before the commencement of the amendment introduced by Tamil Nadu Act 1/1990. It has also been provided that any partition effected prior to the commencement of the said Amendment Act, would not be affected by the amendment introduced by Tamil Nadu Act 1/1990. It means that, in case such partition had occurred prior to the date of commencement of the amendment, the daughter, who remained unmarried on the crucial date, would have become a coparcener along with her father and the brothers, who remained in the coparcenary without separation, so far as the un-separated portion of the properties are concerned or the property allotted to the share of the father in the partition that took place prior to the cut off date.

34. Only in order to defeat the claim of the sisters of the plaintiff, who are defendants 3 to 5, the plaintiff has taken a stand that all his sisters were married prior to 25.03.1989 and that hence they did not become coparceners. Of course as per Ex.A11, the youngest among the daughters of the first defendant got married on 20.01.1988. The defendants have also admitted the date of marriage of the third defendant to be 20.01.1988. It is also an admitted fact that the other daughters of the first defendant, namely fourth and fifth defendants had been married prior to the marriage of the third defendant. Hence it is quite obvious that all the daughters of the first defendant (all the sisters of the plaintiff) got married prior to the amendment brought to Hindu Succession Act by Tamil Nadu Act 1/1990. The clause (iv) of the new section introduced by the said Act that was numbered as 29-A, made it clear that the said amendment would not apply to a daughter married before the date of

commencement of the Hindu Succession Act (Tamil Nadu Amendment) Act, 1989 (Act 1 of 1990). It came into force on 25.03.1989. Since it has been proved and it has been admitted that the daughters of the first defendant, including the third defendant, got married prior to the said date, none of them became coparceners entitled to a share equal to that of the plaintiff by virtue of the Hindu Sccussion (Tamil Nadu Amendment) Act, 1989 (Act 1 of 1990).

35. But, unfortunately for the plaintiff, the parliament itself amended Section 6 of the Hindu Succession Act, 1956 by enacting Hindu Succession (Amendment) Act 2005 (Act 39/2005). While making the daughter of a coparcener also a coparcener, the parliament thought it fit to fix the cut off date to preserve the validity of any disposition, alienation including partition made prior to the amendment. The cut off date thus fixed as per the proviso to sub clause (1) is 20.12.2004. Unlike the Tamil Nadu amendment, the Central amendment does not prescribe any condition that the daughter of a coparcener should have remained unmarried before the date of commencement of the amendment. On the other hand, the language used in the amended section is general, capable of encompassing all the daughters as coparceners without any distinction between the married and unmarried daughters. By the amendment, the rule of survivorship has been given a go by and all the daughters of a coparcener are made coparceners having a right to get a share equal to that of a son. A reading of the amended section will make it clear that the Amending Act has provided a death knell and a full stop to the continuation of the concept of coparcenary and it provides for the application of the rule of succession as provided in the Hindu Succession Act by testamentary or intestate succession, as the case may be, after the commencement of the amendment.

36. However, there arises a question whether a daughter of a deceased coparcener has been made a coparcener by the amendment. The language used in the amended Section 6 is to the effect that in a Hindu family governed by Mitakshara law, the daughter of a coparcener, shall, by birth become a coparcener in her own right in the same manner as the son and shall have the same rights in the coparcenary property, as she would have been a son and be subject to the same liability in respect of the said coparcenary property as that of a son. The problem is the amended section does not make it clear as to whether a daughter of a coparcener, who died prior to the amendment, would be deemed to have become a coparcener. In other words, whether the vested rights when succession opened prior to the date from which the amendment was brought into force shall stand divested? - shall be the question. If the answer to the question shall be in the affirmative, the same will have a devastating effect. If it should be given effect to retrospectively without taking into account the date of death of the father of such daughter, all settled positions will be unsettled. Vested rights will be divested, if such indiscriminate application of the amendment is made without any reference to the fact whether the father of the such daughter was alive on the crucial date. To say that a daughter of a coparcener has become a coparcener, her father should have been alive on the date on which the amendment came into force.

37. In this regard, reference to the judgments dealing with the effect of the amendment can be made. The learned counsel for the appellants has relied on the following judgments:

i) Ganduri Koteshwaramma and another vs. Chakiri Yanadi and Another reported in (2011) 9 SCC 788;

ii) Prema v. Nanje Gowda and Ors. reported in AIR 2011 SCC 2077.

The above said two judgments cited by the learned counsel for the appellants do not directly deal with the said question. The ratio decided in both the cases is that even though the suit for partition would have been filed and a preliminary decree for partition would have been passed, that would not be the final disposal of the suit for partition and the proceedings would get terminated only on the passing of a final decree allotting shares to the parties and that till then the changed effect due to the supervening effects like death of the parties or addition of parties by birth and changes brought by the legislature should also be taken into consideration and the preliminary decree passed earlier can be amended or modified suitably. Hence those two judgments shall not be helpful to decide the question, "whether a daughter of a coparcener who died before the amendment came into force would have become a coparcener?

38. In this regard, the learned counsel for the plaintiff relies on a judgment of this court made in Parameswari @ Gnanasakthi vs. Raja Rathinam and others reported in 2010 (5) CTC 51 (rendered by myself). An observation made in the said judgment was to the effect that daughters, who were not married on the date of commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 alone were made coparceners; that the similar provision introduced by the Central Act, namely Hindu Succession (Amendment) Act, 2005 replacing the said amendment was not given retrospective effect and that however, so far as Tamil Nadu was concerned, the amendment was given effect to from 25.03.1989. The said observation was sought to be projected by the learned counsel for the plaintiff as if the Hindu Succession (Amendment) Act, 2005 does not make daughters of a coparcener, who was alive on the date of coming into force of the Central amendment even though no partition or alienation had taken prior to 20.12.2004 as per the proviso to Sub-section 1 of Section 6, if such daughter had not become a coparcener as per the Tamil Nadu amendment made by Act 1 of 1990. The context in which the said judgment was pronounced seems to have been misconstrued by the learned counsel for the plaintiff. For better appreciation the relevant passage found in paragraph 28 of the said judgment is reproduced here under:

28. The amendment brought by Hindu Succession (Tamil Nadu Amendment) Act, 1989 made the daughters, who were not married on the date of commencment of the said amendment alone as coparceners and those who were married before the date of commencment of the amendment were not entitled to the benefit of the amendment. The said amendment has now been replaced by a similar provision by the central Act, namely Hindu Succession (Amendment) Act, 2005. The said amendment was not given retrospective effect. But, so far as Tamil Nadu is concerned, the said amendment was given effect to from 25.03.1989. In this case the plaintiff shall not be benefitted by the amendment, as admittedly she got married before the commencment of the Hindu Succession (Tamil Nadu amendment) Act, 1989. P.W.1 admits that his marriage with the plaintiff took place in 1975. As such Kalayanasabesa Deekshidhar and his son, namely the second defendant alone were the coparceners entitled to equal share in the suit 'A' schedule property and on the death of Kalayanasabesa Deekshidhar, his half share develoved upon his children, namely the plaintiff and the second defendant...."

As on 25.03.1989, the date from which the Tamil Nadu amendment was brought in to force, the plaintiff therein (daughter of Kalyanasabesa Deekshithar) was not unmarried as her marriage had taken place long back in 1975, she did not become a coparcener by virtue of the Tamil Nadu Amendment Act. Though the Central Act, namely Hindu Succession (Amendment) Act, 2005 does not impose such a condition that a daughter, to become a coparcener, should have remained unmarried on the date of the amendment Act coming into force or on the appointed date, the central amendment also was not held to be beneficial to the plaintiff therein, since the alienation of the share of her brother was made on 06.09.1999 itself. Such a transaction would not be nullified by the Amendment Act as per the amended provision. That was the reason why, this court held in that case that the amendment brought by the Central Act, namely Hindu Succession (Amendment) Act, 2005 would not enlarge the share of the plaintiff therein. Even in the said case, the father of the plaintiff, who claimed to have become a coparcener was alive as on the date of the Amendment Act (Central Act)coming into force and hence the question of applying the provisions of the Amending Act to a situation where the father had died before the commencement of the Amending Act did not arise. On the other hand, the claim of the plaintiff therein was negatived only on the ground that she had been married prior to the date of Tamil Nadu Amendment Act coming into force. Hence the question whether the benefit of the Hindu Succession (Amendment) Act, 2005 shall make a daughter of a coparcener, who died prior to the date on which the amendment came into force is a question not decided in that case.

39. Another learned single judge of this court, while applying the provisions of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 in Nachayal vs. Pongiannan, S/o.Palani Gounder and Others reported in 2007 (5) CTC 42 did not consider the effect of the Central amendment brought by Hindu Succession (Amendment) Act, 2005. Considering the scope of amendment introduced by the Tamil Nadu Amendment, the learned single judge held that in case a partition had been effected before the Amendment Act came into force, even if the daughter of a coparcener remained unmarried on the date on which the Amendment Act came into force, she would not have become a coparcener and that two conditions should be proved to exist for a daughter to have become a coparcener by Hindu Sucession (Tamil Nadu Amendment) Act (Act 1 of 1990): 1) the daughter should not have been married before the date of commencement of Hindu Succession (Tamil Nadu Amendment) Act, 1989; and 2) no partition should have been effected before the date of commencement of Hindu Succession (Tamil Nadu Amendment) Act, 1989. Apart from the above two conditions, a third condition by way of interpretation was noticed by the learned single judge in the said judgment. When the father had died prior to the date on which the Amending Act came into force, causing opening of the succession prior to the date of the amendment coming into force, the daughter would not be entitled to the benefit of the amendment.

40. In this regard, the Hon'ble Supreme Court had an occasion to consider this aspect in Sheela Devi and Others vs. Lal Chand and Another reported in (2007) 1 MLJ 797 (SC). It was held therein that since the succession had opened prior to the Hindu Succession (Amendment) Act, 2005, the provisions of the Amendment act would have no application. The relevant portion in the judgment reads as follows:

" 19.... We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005 would have no application. Sub-section (1) of Section of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only made descendants. But, proviso appended to sub-section (1) of Section of the Act creates an exception...."

41. Prior to amendment, Section 6 of the Hindu Succession Act, 1956 remained 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 spe cified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

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

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

42. A drastic change has been brought to the said provision by replacing the same with a new provision which reads as follows:

'6. Devolution of interest in coparcenary property.-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

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

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

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

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

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

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

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

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

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

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

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

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

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

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.- For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.'.

Sub clause (3) makes it clear that, where a Hindu dies after the commencement of the amendment, his interest in the property of joint Hindu family devolves by testamentary or intestate succession as the case may be and not by the rule of survivorship and the coparcenary property shall be deemed to have been divided as if partition had taken place.

43. A reading of the amended section will make it clear that devolution of interest by survivorship has been put to an end by the Amending Act. When a person having an interest in a property of joint family governed by Hindu Mitakshara Law had died before the commencement of the Amendment Act 2005, the succession to his interest would have opened on his death. On opening of such succession, the shares would have been vested on persons as per Explanation 1 and a partition should have been deemed to have taken place just prior to his death to find out the interest of such person for the purpose of deciding the shares of his legal heirs as per the proviso. The following categories of persons are class I female heirs as per the schedule. Widow, mother, widow of a pre-deceased son, widow of a pre-deceased son of pre-deceased son. If a male Hindu had died prior to the amendment, his interest in the coparcenary property as on the date of his death, would have devolved upon his legal heirs in the presence of any one of the above said persons. They would have got vested right to the respective shares. In case, the daughter of a coparcener, who died prior to the Amendment Act coming into force is given a share as equal to that of a father, then the share/shares of the above said person would get drastically diminished. Such unsettlement of settled position and divesting of vested rights was not the intention of the legislature. The very opening words of the amended Section 6(1) states that "the daughter of a coparcener" shall by birth become a coparcener in her own right. It does not say that a "sister of a coparcener" shall become a coparcener. On the other hand, since it says that a daughter of a coparcener by birth shall become a coparcener, it contemplates the father of such a woman to be alive on the date of coming into force of the amending Act. There would not be any difficulty in applying the amended provisions to the female children of the coparceners born after the amendment Act coming into force. Taking into account the fact that giving any other interpretation and applying the amendment to cases even where the succession had already opened prior to the amending Act coming into force will have drastic effect

by unsettling the settled position and divesting the vested rights, the Hon'ble Supreme Court in the said case made the ratio decidendi, which is as follows:

" If succession has opened prior to Hindu Succession (Amendment) Act, 2005, the provisions of Amendment Act would have no application."

44. In line with the above said judgment of the Hon'ble Supreme Court, this court also holds that there would not be any difficulty in coming to the conclusion that a daughter of the coparcener shall be eligible to the benefit of the Amendment and become a coparcener, only if the father was alive on the date of the Amendment Act coming into force, that too subject to a condition that the alienation made by registered instruments and a partition effected by a registered instrument or by a decree of the court would not be affected by such amendment.

45. In this case, such a difficulty in applying the provisions of the amending Act has not arisen, because the father was very much alive, both on the date on which the Tamil Nadu Amendment Act came into force and the date on which the Central amendment made by Hindu Succession (Amendment) Act, 2005 came into force. The father is also alive even as on today. Therefore, this court does have no hesitation in coming to the conclusion that the daughters of the first defendant, namely K.M.Thangavel have become coparceners by virtue of new Section 6 of the Hindu Succession Act introduced by the Hindu Succession (Amendment) Act, 2005 and they are entitled to equal shares as they would have had if they had been sons.

46. The other judgment of the Apex Court cited by the learned counsel for the respondent in Rohit Chauhan vs. Surinder Singh & Others reported in 2013(4) CTC 539, deals with the definition of coparcenary property and it clarifies that the property in the hands of a sole surviving coparcener, shall be equivalent to his separate property till the birth of a son/daughter, whose birth will cause the body of coparcenary enlarged, as he/she would get a share by birth. It also clarifies further that whatever alienation made by the sole surviving coparcener before the addition of a member to the coparcenary by the birth of son/daughter, the power of alienation by the surviving coparcener is restricted and such alienations made before the birth of son/daughter, cannot be questioned. Such a question does not arise here in the case on hand.

47. The issues that arise for consideration in this case are:

(1) Whether by the Tamil Nadu Amendment introduced by Act 1/1990, a daughter of a coparcener, who had died prior to the cut-off date mentioned in the said amending act became a coparcener even though she remained unmarried on the cut-off date?

(2) Whether a daughter whether married or unmarried as on the effective date prescribed in the Central Amendment by Act 39/2005, would have become a coparcener, if her father was not alive on the effective date? and (3) Whether a daughter of a pre-deceased coparcener, who died prior to the effective date under Act 39/2005 would have become a coparcener along with the sons of such deceased coparcener?

48. All these questions were considered by myself in another case in Kamalakannan & Others vs. Kasthuri & another reported in 2013-4-L.W.193. Therein, the position has been made clear that a daughter of a coparcener, who was alive on the cut-off date prescribed by Tamil Nadu Act 1/1990, would have become a coparcener, provided two conditions were fulfilled. They are: (1) she should not have been married before the cut-off date and (2) her father should have been alive on the cut-off date. In addition it was also pointed out that, in case a partition had already been effected, the daughter would be entitled to a share, which was allotted to her father, provided the father was alive as on the cut-off date as per Tamil Nadu Act 1/1990. It was also made clear in the said judgment that Central Act 39/2005 enlarged the scope by making daughters also as coparcener irrespective of the fact whether she was married or unmarried on the effective date as per the said amending Act. The relevant observations made in the judgment are extracted here under:

" 12. The plaintiffs have filed a suit claiming partition and separate possession of the second plaintiff share in the suit properties. Admittedly the first defendant had got ancestral properties and regarding the ancestral properties, the first defendant along with his son 2nd defendant constituted a coparcenary. On the advent of Tamil Nadu Act 1 of 1990, his daughters, who remained unmarried, namely defendants 3 to 5 also became coparceners. Only thereafter the second plaintiff was born. The birth of the second plaintiff had caused further enlargement of the coparcenary by the inclusion of the second plaintiff. Before the Hindu Succession Act was amended by the Central Act 39/2005, the first defendant, his son namely the 2nd defendant and the second plaintiff and the daughters of the first defendants, who remained unmarried on 31.03.1989 alone were the coparceners. Even as per the plaint averments, the 6th appellant Apeetha alone got married even before 31.03.1989 and all others got married subsequently. Hence the trial court rightly held that the second plaintiff and defendants 1 to 5 were entitled to equal shares (1/6th each) as coparceners. The judgment of the trial court was pronounced on 31.12.2002 much before the cut-off date prescribed in Act 39/2005. Hence the trial court was perfectly right in holding that the second plaintiff and defendants 1 to 5 were entitled to 1/6th share each in the joint family properties. However, the proceedings did not come to an end. An appeal was filed by defendants 1 to 5 before the lower appellate court in A.S.No.16/2003. During the pendency of the appeal, the first defendant, namely Rajagopal died. The date of death of Rajagopal is crucial regarding the applicability of the amendment brought to Section 6 of Hindu Succession Act by Act 39 of 2005. Suppose the first defendant had died subsequent to the cut-off date mentioned in Act 39/2005 (namely 20.12.2004), all his daughters would have become coparceners irrespective of the fact whether they got married or remained unmarried on the cut-off date. At the outset, the problem would appear to be a simple one. But, while applying the provisions of the amendment, we should also consider the intention of legislature in bringing about such amendment.

13. It is quite obvious that the amendment brought to the Hindu Succession Act by Act 39 of 2005 has not been expressly given retrospective effect. However, the provision does not recognise any partition alleged to have taken place before the cut-off date unless such partition had been effected by a registered instrument or by a decree of court. The amended section also provides that the amendment would not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property, which had taken place before the cut-off date. There is a marked difference between disposition and the recognition of partition. Proviso to Sub-section (1) of

Section (6) reads as follows:

"provided that nothing contained in this sub section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property, which had taken place before the 20th of December 2004."

Sub clause (5) of Section 6 reads as follows:

(5) Nothing contained in this section shall apply to a partition which has been effected before the 20th day of December 2004.

Explanation: For the purpose of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16/1908) or partition effected by the decree of a court.

A comparison of the proviso to sub section (2) and the explanation to sub section (5) will make it clear that the testamentary dispositions made by a person, which had taken effect on his death before the cut-off date has been left untouched by the amendment irrespective of the fact whether such an instrument effecting testamentary disposition was registered or not. On the other hand, explanation to sub section (5) refused to recognise a partition, if such partition had not been effected by a registered deed or by a decree of the court.

14. In this case, though the decree of the trial court was passed before 20.12.2004, it is only a preliminary decree and the suit has not resulted in a final decree for partition. Hence we cannot come to a conclusion that there was a partition by a decree of court, which stands protected by sub section (5) of section 6 of the Hindu Succession Act. Even then the question that remains to be considered is whether the 6th appellant Apeetha would have become a coparcener by virtue of the amendment brought to the Hindu Succession Act by Act 39 of 2005. The amended provision has made a daughter a coparcener in the Hindu undivided family governed by Mitakshara law, in which her father is a coparcener. It does not make a sister of a coparcener as a coparcener along with her brother when the father had died before the cut-off date. While interpreting the State amendments, it was held therein that, if a coparcener (father) had died prior to the date of the amendment coming into force, succession to his interest in the coparcenary property had already opened and hence his daughter would not have become a coparcener along with his sons (her brothers) and that in such cases, she would be entitled to get a share in the share of the father along with other class 1 legal heirs as per the rule of succession provided in the Act. Any other interpretation will have the effect of opening a Pandora's box, since rights vested on others on the death of a coparcener before the amendment would be divested leading to numerous litigations reopening the closed matters. The parliament, in its wisdom, definitely did not intend to do it. Hence the only possible and plausible interpretation shall be that the amendment does not make a daughter of coparcener who died prior to the cut off date, as a coparcener and the amendment does not reopen the succession, that had already opened regarding the interest of a coparcener, who died prior to 20.12.2004.

However, it was clarified that the Amendment Act did not cause reopening of the succession, which had already arisen before the effective date by the death of the father before the effective date. The said proposition needs further elaboration for making it more clear and unambiguous.

49. A proper interpretation of section 6 of the Hindu Succession Act, 1956 as amended by the Hindu Succession (Amendment) Act, 2005 (Central Act) in conjunction with the amendment introduced by the Tamil Nadu Amendment Act, 1989 (Act 1 of 1990) will result in the identification of the legal position so far as Tamil Nadu is concerned, as follows:

a) In case the father of the female, who claims to have become a coparcener by virtue of the amendment had died prior to 25.03.1989, the date on which the Tamil Nadu Amendment Act came into force, she will not be entitled to the benefit of either Tamil Nadu Amendemnt Act or the amendment to Section 6 made by the Hindu Succession (Amendment) Act, 2005.

b) In case the father was alive on 25.03.1989 and his daughter was unmarried on that date, by virtue of Tamil Nadu Amendment Act, she would have become a coparcener in respect of the coparcenary property, which remained undivided.

c) In the case referred in clause (b) above, if a partition had been effected prior to the effective date and her father had been allotted a share, she would have become a coparcener with the father only in respect of the property allotted to his share in the partition that took place prior to the crucial date, namely 25.03.1989.

d) The death of the father (coparcener) after the Tamil Nadu Amendment and before the commencement of the Central Amendment made by Hindu Succession (Amendment) Act, 2005 shall not deprive a daughter, who remained unmarried on 25.03.1989 and had become a coparcener by virtue of the Tamil Nadu Amendment of her right by birth as coparcener.

e) Irrespective of the fact whether the daughter of a coparcener was married or unmarried as on the date of commencement of the Hindu Succession (Amendment) Act, 2005, she would have become a coparcener by birth in respect of the coparcenary property along with her father, provided her father was alive on the date of commencement of the Hindu Succession (Amendment) Act, 2005, with an exception that any disposition or alienation including any partition or testamentary disposition, which had taken place prior to 20.12.2004, would not be affected and invalidated.(The partition referred to above should have been effected by means of a duly registered partition deed or effected by a decree of a court).

f) The death of a coparcener after 25.03.1989 and before the commencement of the Central Amendment Act made under the Hindu Succession (Amendment) Act, 2005 will not make the daughters, who got married prior to 25.03.1989 as coparceners.

50. The result of the above said discussions shall be that the plaintiff and defendants 1 and 3 to 5 shall be the coparceners and all of them shall be entitled to equal shares in the suit property. Each one of them shall be entitled to 1/5th share.

51. The contention of the contesting defendants that since the plaintiff had already relinquished his share by receiving a sum of Rs.2.00 Lakhs at the time of his marriage he is debarred from making any further claim, has been rejected by the courts below. On proper appreciation of evidence the courts below have arrived at a concurrent finding that the said contention of the contesting defendants has not been proved by reliable evidence. Both the courts below have rightly held that claim of the defendants in this regard has not been proved. The said concurrent finding of the courts below is neither defective nor infirm and the same does not deserve any interference. However, in view of the above finding that the daughters of first defendant have become coparceners along with their father and brother and that each one of them has become entitled to 1/15th share, this court holds that the lower appellate court has committed an error in coming to the conclusion that the benefit of amendment shall not be available to the daughters and that hence the son alone will be a coparcener, is bound to be interfered with and reversed. Since the plaintiff, first defendant and his daughters, namely defendants 3 to 5 have become coparceners and each one of them has become entitled to 1/5th share, the learned lower appellate judge committed an error in not considering the effect of the amendment made by the Central Act, namely the Hindu Succession (Amendment) Act, 2005 and the same was the reason why the learned lower appellate judge gave an erroneous finding that the plaintiff and the first defendant alone were the coparceners and they were entitled to = share each. A proper application of the amended provision will make it clear that all the daughters of the first defendant had become coparceners on the commencement of the Hindu Succession (Amendment) Act, 2005 and each one of them has also become entitled to a share equal to that of the plaintiff and that of the first defendant. While holding that the learned lower appellate judge has committed an error in not applying the provisions of the amended Hindu Succession Act as amended by Hindu Succession (Amendment) Act, 2005 and resulted in holding the daughters of the first defendant not entitled to share as coparceners, this court notices the error committed by the trial court also in holding that only a 1/3rd of the suit properties was the coparcenary property, in which the plaintiff, defendants 1, 3 to 5 were entitled to equal share as coparceners. In view of the said finding, the decree of the lower appellate court deserves to be reversed and at the same time, the appeal filed by the plaintiff before the lower appellate court is bound to be allowed in part holding that the plaintiff is entitled to 1/5th share as against the finding of the trial court that he was entitled to 1/15th share only.

In the result, the second appeal is allowed. The decree of the learned Principal District Judge, Erode dated 08.12.2011 made in A.S.No.97 of 2010 Erode modifying the judgment and decree of the learned Subordinate Judge, Bhavani dated 14.06.2010 made in O.S.No.97 of 2004 is set aside. The preliminary decree for partition passed by the learned Subordinate Judge, Bhavani dated 14.06.2010 made in O.S.No.97 of 2004 is modified by declaring the share of the plaintiff to be 1/5 and directing division of the same from the rest. In respect of the relief of injunction, the decree passed by the trial court shall get enlarged to cover the above said 1/5th share of the plaintiff. Considering the facts and circumstances of the case, there shall be no order as to cost. Consequently, all the connected miscellaneous petitions are closed.

28.02.2014 Index : Yes Internet : Yes asr To

1. The Principal District Judge, Erode

2.The Subordinate Judge, Bhavani P.R.SHIVAKUMAR J., (asr) Judgment in S.A. No.495 of 2012 and M.P.Nos.1/2012, 1 & 2/2013 28.02.2014