SUPREME COURT OF INDIA

Uttam

Vs.

Saubhag Singh & Ors.

C.A.No. 2360 of 2016

(Kurian Joseph and R.F.Nariman,JJ.)

02.03.2013

JUDGMENT

R.F.Nariman. J.

[SLP (Civil)No.6036 of 2014]

1. Leave granted.

2. The present appeal is by the plaintiff who filed a suit for partition, being Suit No.5A of 1999 before the Second Civil Judge, Class II Devas, Madhya Pradesh, dated 28.12.1998, in which the first four defendants happened to be his father (defendant No.3), and his father's three brothers i.e. defendant Nos. 1,2 and 4. He claimed a 1/8th share in the suit property on the footing that the suit property was ancestral property, and that, being a coparcener, he had a right by birth in the said property in accordance with the Mitakshara Law. A joint written statement was filed by all four brothers, including the plaintiff's father, claiming that the suit property was not ancestral property, and that an earlier partition had taken place by which the plaintiff's father had become separate. The trial court, by its order dated 20.12.2000 decreed the plaintiff's suit holding that it was admitted by DW.1 Mangilal that the property was indeed ancestral property, and that, on the evidence, there was no earlier partition of the said property, as pleaded by the defendants in their written statements.

3. The first Appellate Court, by its judgment dated 12.1.2005, confirmed the finding that the property was ancestral and that no earlier partition between the brothers had in fact taken place. However, it held that the plaintiff's grandfather, one Jagannath Singh having died in 1973, his widow Mainabai being alive at the time of his death, the said Jagannath Singh's share would have to be distributed in accordance with Section 8 of the Hindu Succession Act, 1956 as if the said Jagannath Singh had died intestate, and that being the case, once Section 8 steps in, the joint family property has to be divided in accordance with rules of intestacy and not survivorship. This being so, no joint family property remained to be divided when the suit for partition was filed by the plaintiff, and that since the plaintiff had no right while his father was alive, the father alone being a Class I heir (and consequently the plaintiff

not being a Class I heir), the plaintiff had no right to sue for partition, and therefore the suit was dismissed and consequently the first appeal was allowed.

4. Following the same line of reasoning and several judgments of this Court, the High Court in second Appeal dismissed the said appeal, holding:-

> "15. Thus in view of the provisions contained in Sections 4,6, 8 and Schedule of the Act as well as the law settled by the aforesaid judgments, it is clear that after coming into force of the Act grand-son has no birth right in the properties of grand-father and he cannot claim partition during lifetime of his father.
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> 16. In the present case, it is undisputed that Jagannath had died in the year 1973, leaving behind respondents No. 1 to 4 i.e. his four sons covered by Class I heirs of the schedule therefore, the properties had devolved upon them when succession had opened on the death of Jagannath. It has also been found proved that no partition had taken place between respondents No. 1 to 4. The appellant who is the grand son of Jagannath is not entitled to claim partition during the lifetime of his father Mohan Singh in the properties left behind by Jagannath since the appellant has no birth right in the suit properties.
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> 17. In view of the aforesaid, the substantial questions of law are answered against the appellant by holding that the first appellate court has committed no error in dismissing the suit for partition filed by the appellant referring to Section 8 of the Act and holding that during the lifetime of Mohan Singh, the appellant has no right to get the suit property partitioned."

5. It is this judgment that has been challenged before us in appeal.

6. Shri Sushil Kumar Jain, learned senior advocate appearing on behalf of the appellant, took us through various provisions of the Hindu Succession Act, and through several judgments of this Court, and contended that Section 6, prior to its amendment in 2005, would govern the facts of this case. He conceded that as Jagannath Singh's widow was alive in 1973 at the time of his death, the case would be governed by the proviso to Section 6, and that therefore the interest of the deceased in the Mitakshara coparcenary property would devolve by intestate succession under Section 8 of the said Act. However, he argued that it is only the interest of the deceased in such coparcenary property that would devolve by intestate succession, leaving the joint family property otherwise intact. This being the case, the plaintiff had every right to sue for partition while his father was still alive, inasmuch as, being a coparcener and having a right of partition in the joint family property, which continued to subsist as such after the death of Jagannath Singh, the plaintiff's right to sue had not been taken away. He went on to argue that Section 8 of the Act would not bar such a suit as it would apply only at the time of the death of Jagannath Singh i.e. the grandfather of the plaintiff in 1973 and not thereafter to non suit the plaintiff, who as a living coparcener of joint family property, was entitled to a partition before any other death in the joint family occurred. He also argued that the Hindu Succession Act only abrogated the Hindu Law to the extent indicated, and that

Sections 6 and 8 have to be read harmoniously, as a result of which the status of joint family property which is recognized under Section 6 cannot be said to be taken away upon the application of Section 8 on the death of the plaintiff's grandfather in 1973.

7. Shri Niraj Sharma, learned counsel appearing on behalf of the respondents, countered these submissions, and also referred to various provisions of the Hindu Succession Act and various judgments of this Court to buttress his submission that once Section 8 gets applied by reason of the application of the proviso to Section 6, the joint family property ceases to be joint family property thereafter, and can only be succeeded to by application of either Section 30 or Section 8, Section 30 applying in case a will had been made and Section 8 applying in case a member of the joint family dies intestate. He, therefore, supported the judgment of the High Court and strongly relied upon two judgments in particular, namely *Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others*[1], *and Bhanwar Singh v. Puran*[2], to buttress his submission that once Section 8 is applied to the facts of a given case, the property thereafter ceases to be joint family property, and this being the case, no right to partition a property which is no longer joint family property continues to subsist in any member of the coparcenary.

8. Having heard learned counsel for the parties, it is necessary to set out the relevant provisions of the Hindu Succession Act, 1956. The Act, as its long title states, is an Act to amend and codify the law relating to intestate succession among Hindus. Section 4 overrides the Hindu Law in force immediately before the commencement of this Act insofar as it refers to any matter for which provision is made by the Act. Section 4 reads as follows:

> "4. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—
>
> (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;
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> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Section 6 prior to its amendment in 2005 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 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 had 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."

It is common ground between the parties that since the present suit was filed only in 1998 and the decree in the said suit was passed on 20.12.2000, that the amendment to Section 6, made in 2005, would not govern the rights of the parties in the present case. This becomes clear from a reading of the proviso (i) to Section 6 of the amended provision which states 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 day of December, 2004."

The explanation to this Section also states thus:

"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."

From a reading of the aforesaid provision it becomes clear that a partition having been effected by a court decree of 20.12.2000, which is prior to 9th September, 2005, (which is the date of commencement of the Amending Act), would not be affected.

9. The next important Section from our point of view is Section 8, which reads as follows:-

"8. General rules of succession in the case of males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter —

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased."

THE SCHEDULE

Class I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son, son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son."

10. Also of some importance are Sections 19 and 30 of the said Act which read as follows:-

"19. Mode of succession of two or more heirs.— If two or more heirs succeed together to the property of an intestate, they shall take the property,

(a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and

(b) as tenants-in-common and not as joint tenants.

30. **Testamentary succession.—** Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

Explanation.—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act, or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

11. Before analysing the provisions of the Act, it is necessary to refer to some of the judgments of this Court which have dealt, in particular, with Section 6 before its amendment in 2005, and with Section 8. In *G.K. Magdum v. H.K. Magdum*[3], the effect of the old Section 6 was gone into in some detail by this Court. A Hindu widow claimed partition and separate possession of a 7/24th share in joint mfamily property which consisted of her husband, her self and their two sons. If a partition were to take place during her husband's lifetime between himself and his two sons, the widow would have got a 1/4th share in such joint family property. The deceased husband's 1/4th share would then devolve, upon his death, on six sharers, the plaintiff and her five children, each having a 1/24th share therein. Adding

1/4th and 1/24th, the plaintiff claimed a 7/24th share in the joint family property. This Court held:-

> "The Hindu Succession Act came into force on June 17, 1956. Khandappa having died after the commencement of that Act, to wit in 1960, and since he had at the time of his death an interest in Mitakshara coparcenary property, the pre-conditions of Section 6 are satisfied and that section is squarely attracted. By the application of the normal rule prescribed by that section, Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. But, since the widow and daughter are amongst the female relatives specified in class I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to Section 6 comes into play and the normal rule is excluded. Khandappa's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship. Testamentary succession is out of question as the deceased had not made a testamentary disposition though, under the explanation to Section 30 of the Act, the interest of a male Hindu in Mitakshara coparcenary property is capable of being disposed of by a will or other testamentary disposition. There is thus no dispute that the normal rule provided for by Section 6 does not apply, that the proviso to that section is attracted and that the decision of the appeal must turn on the meaning to be given to Explanation 1 of Section 6. The interpretation of that Explanation is the subject-matter of acute controversy between the parties."

12. This Court, in dealing with the proviso and explanation 1 of Section 6, held that the fiction created by explanation 1 has to be given its full effect. That being the case, it was held:-

> "13. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that 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 that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is

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

13. In *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh and Ors.*[4], this Court distinguished the judgment in Magdum's case in answering a completely different question that was raised before it. The question raised before the Court in that case was as to whether a female Hindu, who inherits a share of the joint family property on the death of her husband, ceases to be a member of the family thereafter. This Court held that as there was a partition by operation of law on application of explanation 1 of Section 6, and as such partition was not a voluntary act by the female Hindu, the female Hindu does not cease to be a member of the joint family upon such partition being effected.

14. In *Shyama Devi (Smt) and Ors. v. Manju Shukla (Mrs) and Anr.*[5], this Court again considered the effect of the proviso and explanation 1 to Section 6, and followed the judgment of this Court in Magdum's case (supra). This Court went on to state that explanation 1 contains a formula for determining the share of the deceased on the date of his death by the law effecting a partition immediately before a male Hindu's death took place.

15. On application of the principles contained in the aforesaid decisions, it becomes clear that, on the death of Jagannath Singh in 1973, the proviso to Section 6 would apply inasmuch as Jagannath Singh had left behind his widow, who was a Class I female heir. Equally, upon the application of explanation 1 to the said Section, a partition must be said to have been effected by operation of law immediately before his death. This being the case, it is clear that the plaintiff would be entitled to a share on this partition taking place in 1973. We were informed, however, that the plaintiff was born only in 1977, and that, for this reason, (his birth being after his grandfather's death) obviously no such share could be allotted to him. Also, his case in the suit filed by him is not that he is entitled to this share but that he is entitled to a 1/8th share on dividing the joint family property between 8 co-sharers in 1998. What has therefore to be seen is whether the application of Section 8, in 1973, on the death of Jagannath Singh would make the joint family property in the hands of the father, uncles and the plaintiff no longer joint family property after the devolution of Jagannath Singh's share, by application of Section 8, among his Class I heirs. This question would have to be answered with reference to some of the judgments of this Court.

16.In *Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others*[6], a partial partition having taken place in 1961 between a father and his son, their business was divided and thereafter carried on by a partnership firm consisting of the two of them. The father died in 1965, leaving behind him his son and two grandsons, and a credit balance in the account of the firm. This Court had to answer as to whether credit balance left in the account of the firm could be said to be joint family property after the father's share had been distributed among his Class I heirs in accordance with Section 8 of the Act.

17 .This Court examined the legal position and ultimately approved of the view of 4 High Courts, namely, Allahabad, Madras, Madhya Pradesh and Andhra Pradesh, while stating that the Gujarat High Court's view contrary to these High Courts, would not be correct in law. After setting out the various views of the five High Courts mentioned, this Court held:

> "It is necessary to bear in mind the preamble to the Hindu Succession Act, 1956. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus. In view of the preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to he excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu Law, 15th Edn. dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as Mayne's on Hindu Law, 12th Edn., pp. 918-19. The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to "amend" the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored. In the aforesaid light the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court, and the Andhra Pradesh High Court, appear to us to be correct. With respect we are unable to agree with the views of the Gujarat High Court noted hereinbefore." [at paras 21-25]

18. In *Yudhishter v. Ashok Kumar,*[7] at page 210, this Court followed the law laid down in Chander Sen's case.

19. In *Bhanwar Singh v. Puran*[8], this Court followed Chander Sen's case and the various judgments following Chander Sen's case. This Court held:-

> "The Act brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non obstante provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants. Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record-of-rights. A partition had taken place amongst the heirs of Bhima. Although the learned first appellate court proceeded to consider the effect of Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants-in-common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue." (at paras 12-15)

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 is ma sole surviving coparcener. *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe*[9] *Sheela Devi v. Lal Chand*[10] *,and Rohit Chauhan v. Surinder Singh*[11] 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) m To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

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

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

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

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

21. Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable. The appeal is consequently dismissed with no order as to costs.

Judgment Referred.

[1]*(1986) 3 SCC 0567*
[2]*(2008) 3 SCC 0087*
[3]*(1978) 3 S.C.R. 0761*

[4]*(1985) 3 S.C.R. 0358*
[5]*(1994) 6 SCC 0342*
[6]*(1986) 3 SCC 0567*
[7]*(1987) 1 SCC 0204*
[8]*(2008) 3 SCC 0087*
[9]*(1988) 2 SCC 0126*
[10]*(2006) 8 SCC 0581*
[11]*(2013) 9 SCC 0419*