

MYSORE HIGH COURT

Sundara Adapa

Vs

Girija

Appeal No. 36 of 1961, South Kanara, in R.I.A. No.2138 of 1956

(H. Hombe Gowda, K.S. Hegde and B.M. Kalagate, JJ.)

17.11.1961

JUDGMENT

H. Hombe Gowda, J.

1. The first defendant had claimed in his written statement, the partition of his own share; he was granted a 75/360th share in the preliminary decree. Under a will dated 19-6-1956 he left to his wife and children all his rights in the properties due to him on account of his share. The genuineness of this will was not disputed. The first defendant died on 25-7-1956; by then, the Hindu Succession Act, 1956 had already come into force; (it came into force on 17-6-1956). The claim of the children and the wife of the first defendant, that by virtue of the will they became entitled to the first defendant's share, was not accepted by the Subordinate Judge. He rejected their contention that by virtue of Section 30 of the Hindu Succession Act, 1956, it was competent for the first defendant to have disposed of his rights by will. In the order dated 29-1-58, he took the view that the first defendant had only a life interest and that the same could not be disposed of by will. Against this finding by the Subordinate Judge Regular Appeal No.36 of 1961 has been preferred by the children of the deceased 1st defendant. The first defendant was a nissanthathi kavaru and the defendants 5 and 7 to 11 were a santhathi kavaru. Questions of importance pertaining to the effect of the Explanation to sub-section (1) of Section 30 of the Hindu Succession Act, 1956, on certain provisions of the Madras Aliyasanthana Act (IX of 1949) had been raised in this appeal. The Division Bench consisting of the Hon'ble M. Sadasivayya and B.M. Kalagate, JJ. considered that the questions of law raised in the appeal were of great importance and any decision of the same might seriously affect the rights of the persons governed by the Madras Aliyasanthana Act, 1949. As the questions raised were of sufficient importance as to merit consideration by a Full Bench, they referred for decision by a Full Bench the following questions :-

1. Whether, by virtue of the Explanation to sub-section (1) of Section 30 of the Hindu Succession Act, 1956 the interest of the first defendant in the share taken by him as the sole member of a nissanthathi kavaru, became capable of being disposed of by will?
and

2. Whether sub-sections (3),(4)and(5) of Section 36 of the Aliyasanthana Act are inconsistent with the Explanation to sub-section (1) off Section 30 of the Hindu Succession Act 1956; and do they, by the operation of sub-section(1)(b) of Section 4 of the Hindu Succession Act, cease to apply?

OPINION OF THE FULL BENCH

The opinion of the Full Bench was delivered by-
Hegde, J.:

The questions of law referred for the decision of the Full Bench are:-

"1. Whether, by virtue of the Explanation to sub-sec(1) of Section 30 of the Hindu Succession Act, 1956, the interest of the first defendant in the share taken by him as the sole member of a nissanthathi kavaru, became capable of being disposed of by will?

AND

2. Whether sub-sections(3),(4)and(5) of Section 36 of the Aliyasanthana Act are inconsistent with the Explanation to sub-section(1) of Section 30 of the Hindu Succession Act,1956 and, do they, by the operation of sub-section(1)(b) of Section 4 of the Hindu Succession Act, cease to apply?"

2. The material facts are not in dispute and they are fully set out in the order of reference. As per the preliminary decree dated 26-8-1952, the deceased first defendant had been allotted a 75/360th share in the family properties. He died on 25-7-1956. He had left behind him a will executed on 19-6-1956 bequeathing the properties allotted to his share as per the preliminary decree, to his wife and children who are the appellants in this case. As per Section 36(3) of the Madras Aliyasanthana Act (to be referred to as the "Aliyasanthana Act" hereinafter) he got only a life interest in the share allotted to him. This was admittedly the position on the date of the preliminary decree. But, it is contended that the life interest so secured got itself enlarged because of the Explanation to Section 30 (1) of the Hindu Succession Act (to be referred to as the "Act" hereinafter). In the alternative, it is urged that the scheme of Section 36 of the Aliyasanthana Act being repugnant to the provisions contained in Section 7 (2) and Explanation to Section 30 (1) (Section 7 is not referred to in the order of reference) of the "Act" the same is void under Article 254 of the Constitution; further it was argued that the provision, contained in Section 36 impliedly stand repealed by virtue of Section 4 (1)(b) of the "Act".

3. To appreciate the contentions advanced before us, it is necessary to have a brief survey of the customary Aliyasantana law in the matter of composition of joint families (otherwise known as 'kutumbas'), the partition of kutumba properties, shares to be obtained at a partition and the devolution of those shares, Under the customary Aliyasantana law, a "kutumba" was a family corporation and every member of a kutumba has equal rights in the property by reason of his or her birth in the kutumba; on the death of any member, his or her interest in the kutumba property devolved on the members of the kutumba by survivorship; as both male and female members

have equal rights in the kutumba property, the limited estate of a Hindu woman so familiar in Mitakshara law is unknown to the Aliyasantana system. Further under that customary law, as interpreted by judicial decisions one or more members of a kutumba could not enforce a partition of the kutumba properties; partition could have been effected only with the consent or concurrence of all the adult members thereof. Aliyasantana kutumbas like the Marumakkattayam Tarwads are governed by a matriarchal system, the devolution being through the female line. In other words, while the children of the female members in the family are coparceners in the kutumba, the wife and children of the male members are not the members of that kutumba. As noticed earlier, the members of a kutumba under the customary law could not have enforced partition through Courts. But under certain circumstances they were entitled to claim separate maintenance which expression includes not merely food and raiment, but also medical expenses, expenses for schooling, etc. This was the state of law till the passing of the Aliyasantana Act (Madras Act 9 of 1949) (See Appendix III of Mayne on Hindu Law and Usage, Eleventh Edition). The Aliyasantana Act defined and amended in certain respects the law, relating to marriage, maintenance, guardianship, intestate succession and partition, applicable to persons governed by the customary Aliyasantana law. In other words that Act did not purport to codify or consolidate the entire law governing the parties. This is made clear by Section 39 of that Act which says:-

"Nothing contained in this Act shall be deemed to affect any rule of Aliyasantana law, custom or usage, except to the extent expressly laid down in this Act."

4. In the instant case we are concerned with partition and succession. Hence Chapters II to V of the Aliyasantana Act are not relevant for our purpose. Primarily we are concerned with Chapter VI. This Chapter contains two sections i.e., Sections 35 and 36. Section 35 says:-

"(1) Any kavaru represented by the majority of its major members may claim to take its share of all the properties of kutumba over which the kutumba has power of disposal and separate from the kutumba; Provided that-

(i) where a kavaru consists of only two persons, such a claim may be made by either of them;

(ii) no kavaru shall make such a claim during the life-time of any ancestress common to such kavaru and to any other kavaru or kavarus of the kutumba, who has not completed fifty years of age, unless

(a) she has signified her consent in writing, or

(b) two thirds of the major members of the kavaru join in making the claim for partition;

(iii) the common ancestress may on her own volition claim a partition.

(2) The share obtained by the kavaru shall be taken by it with all the incidents of kutumba property."

Hence what is allowed is only a "kavaru" partition. Kavaru is defined in Section 3(b)(i) and (ii) "Kavaru" used in relation to a female, means the group of persons consisting of that female, her children and all her descendants in the female line; "Kavaru" used in relation to a male, means the kavaru of the mother of that male. "Kutumba" is defined in Section 3(c) as :-

"Kutumba' means the group of persons forming a joint family with community of property governed by the Aliyasantana Law of inheritance." But then we have the Explanation to Section 35 which says :-

For the purpose of this Chapter-

(Chapter VI)-

(a) a male member of a kutumba, or a female member thereof who has no living descendant in the female line, shall be deemed to be a kavaru if he or she has no living female ascendant who is a member of the kutumba;

(b) such male member, or such female member if she has completed the age of fifty years, shall be deemed to be a nissanthathi kavaru." "Nissanthathi Kavaru" is defined in Section 3(f) as follows:-

"Nissanthathi Kavaru' means a kavaru which is not a santhathi kavaru;'

"Santhathi kavaru" is defined in Section 3 (h) thus:-

"Santhathi kavaru" means a kavaru of which at least one member is a female who has not completed the age of fifty years;"

The definition of "Kavaru" under Section 3(b)(i) and(ii) is in accordance with the customary law, (see *Sreedevi Nethiar v. Peruvunni Nair*¹), whereas the deemed kavaru mentioned in the Explanation to Section 35 is statutorily created kavaru and that only for "the purpose" of Chapter VI of the Aliyasantana Act.

5. Now we proceed to Section 36. Section 36 (1) and (2) lay down the mode of ascertainment of shares at a partition. For our present purpose, there is no need to make references to the provisions contained therein excepting to Section 36 (2)(h), according to which "the share of a kavaru at a partition shall be ascertained as on the date on which it makes a claim for partition," which in other words means that a division of status takes place on the date a claim for partition is made. The conception of division of status is not something peculiar to Mitakshara law; it is also applicable to families governed by Malabar Law which includes Aliyasantana Law. See *Kunhikannan Nambiar v. Cheriah Cheeru*², This position is further amplified by the Explanation to Section 36(2) which says:-

"For the purposes of this sub-section, the date on which a partition is claimed shall be-

(a) where the claim is made by a suit for partition, the date of the institution of the suit (whether the suit is prosecuted or not); and

(b) where the claim is made otherwise than by a suit, the date on which such

¹ AIR 1935 Mad 71

² AIR 1951 Mad 383

claim is made." From the above provisions it follows that when a claim for partition is made by a defendant, in his written statement, the date on which the division of status takes place, so far as he is concerned, is the date on which the written statement

is filed. Sub-section (3) of Section 36 is important for our purpose. It reads:-

"If at the time of the partition, any kavaru taking a share is a nissanthathi kavaru, it shall have only a life interest in the properties allotted to it, if the kutumba from which it separates has at least one female member who has not completed the age of fifty years, or where the kutumba breaks up into a number of kavarus at the partition, if at least one of such kavarus is a santhathi kavaru and if there is no such female member or santhathi kavaru, the kavaru shall have an absolute interest in the properties allotted to it" As, per sub-section(4) of Section 36:-

"In the case referred to in sub-section (3), the life interest of the nissanthathi kavaru in the properties allotted to it at the partition shall become absolute, if the kutumba concerned ceases to have among its members a female who has not completed the age of fifty years or if all the kavarus into which the kutumba broke up, whether at the same or at a subsequent partition, become nissanthathi kavarus." Sub-section (5) says:-

"The properties allotted to a nissanthathi kavani at a partition and in which it had only a life interest at the time of the death of the last of its members, shall devolve upon the kutumba, or where the kutumba has broken up, at the same or at a subsequent partition, into a number of kavarus, upon the nearest santhathi kavaru or kavarus."

Admittedly, the first defendant was a nissanthathi ' kavaru' on the date of the suit. Therefore, as seen above, he could take only a life interest in the properties that might have been allotted to him in pursuance of the preliminary decree, as at the time of his death the kutumba from which he had separated had female members below the age of 50 years. No property as such had been allotted to him as division by metes and bounds had not taken place by the time he died. Hence sub-section (5) of Section 36 has no direct application to the facts of this, case. It is not disputed that the expression, "partition" found in Section 36 includes within its meaning both division of status as well as division by metes and bounds. From the foregoing it follows that in the share determined by the preliminary decree, the first defendant had only a life interest. Thus far there is no dispute.

6. Now we come to the controversies in this case. The first contention of the appellants is than as a result of the Explanation to Section 30 (1) of the "Act", the rights of the first defendant became absolute; though he got only a life interest under the preliminary decree. Before considering the correctness of this contention, it is necessary to note that the "Act" did not repeal the Aliyasantana Act; the customary Aliyasantana Law as amended by the Aliyasantana Act was only further amended by the "Act". This position is made clear by Section 4(1) of the "Act", which says:-

"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;

(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." In particular the Act did not provide either for the management of kutumba properties or for partition of the same. Those fields were not occupied by the "Act". We shall presently see to what extent the "Act" has amended the law relating to the devolution of the estate of a co-parcener, divided as well as undivided. We have earlier noticed that under the customary law, the interest of an undivided member of an Aliyasantana family went by survivorship to the remaining members of the family. Under the Aliyasantana Act the share allotted to a nissanthathi kavaru devolved on the santhathi kavaru or kavarus, who are nearest to the holder at the time of his or her death. Now, we may consider the effect of Section 30 of the "Act". Section 30(1) says that:-

"Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him 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." (Underlining (here in ' ') is ours).

It is well known that till the "Act" came into force, the interest of a coparcener in a Hindu joint family, be it a Mitakshara family or an Aliyasantana family, could not be disposed of by means of a testament, as by the time his will took effect his interest in the undivided family would have been taken by survivorship by the other coparceners. The Indian Succession Act did not make any inroad into that position, The relevant provisions of the Indian Succession Act are found in Part VI (Provisions relating to testamentary succession) read with the rules found in Schedule III. But they are also subject to the restrictions, and modifications specified in that schedule. Restriction No.1 in Schedule III says:-

"Nothing therein contained shall authorize a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which, but for the application of this section, he could not deprive them by will."

Now, we come to the Explanation to Section 30(1). It is as follows:-

"The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazi, illom, kutumba or kavaru in the property of the tarwad, tavazi, 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 sub-section."

Neither under the customary law nor under the Aliyasantana Act nor under the Indian Succession Act the interest of a coparcener in an Aliyasantana Kutumba could have been disposed of by testamentary disposition. In that regard a definite change in the law was made by means of the Explanation to Section 30 (1) of the "Act". There is no dispute that at present a member of an undivided Aliyasantana kutumba could dispose of his interest in the kutumba properties by means of a will. But we are unable to agree with Sri G.K. Govind Bhat when he says that Explanation to Section 30(1) enlarged the rights of a divided coparcener. The object of Section 30 is clear. That section neither directly nor by necessary implication deals with the devolution of

divided interest. As mentioned earlier, its purpose is limited. The language employed is plain and therefore no question of interpretation arises. It is not correct to contend, as done by Sri Bhat, that if the Explanation to Section 30(1) is understood in the manner the respondents want us to understand, a coparcener who dies undivided would leave a more valuable estate to his heirs than one who dies divided. In most cases, the share taken by nissanthathi kavaru though limited to the duration of the life of kavaru would be larger in extent than one unprovided under Section 7(2) of the "Act". In the case of a share under the Aliyasanthana Act the kavaru takes his share on the basis of half-per-capita, half-per-stirpes; under Section 7(2) the share is determined on per-capita basis. Quite clearly the object of bounty under Section 7(2) read with Section 30 is the donee under the will of a deceased coparcener. The fact that divided members also do not get corresponding benefits under the "Act" is no relevant test. If Parliament wanted to enlarge the interest of divided male members nothing would have been easier than to enact a provision on the lines of Section 14 (1) of the "Act", provided Parliament had competence to do so. Further, the Explanation to Section 30(1) speaks of:- "The interest of a Male Hindu" in his "kutumba" or "kavaru" property. The definite article "the" evidently refers to the interest specified or quantified in some other provision of the "Act"; it could not refer to the unascertained interest of a coparcener in a kutumba. Obviously, "the interest" referred to is the interest quantified under Section 7 of the "Act" to which reference will be made in greater detail at a later stage.

7. Quite clearly, on the date of his death, the first defendant was not a member of his kutumba or, kavaru. As noticed earlier, he was already divided from the family. Further, his will did not relate to his interest in the kutumba or kavaru property. The will purported to bequeath the property obtained by him as his share as per the preliminary, decree. Therefore, the contention that interest obtained by the first defendant under the preliminary decree stood enlarged as a result of Section 30(1) of the "Act" must fail.

8. In his concluding arguments Sri G.K. Govind Bhat pressed into service a new contention viz. the deceased first defendant as per Section 3(b)(ii) of the Aliyasantana Act belonged to the kavaru of his mother; he could not be a kavaru by himself; therefore, he must be deemed to have died as a member of his kavaru, which, in the instant case, is the same thing as a kutumba, as all the members of the suit kutumba descended from the mother of the first defendant; hence his clients are entitled to the benefit of Section 7(2) read with Section 30(1). This contention is something totally new. What the appellants have been contending in these proceedings is that the share allotted to the first defendant as per the preliminary decree has become his absolute property and they have got the same as per the will executed by him. But the present contention of Sri Bhat is that the will must be deemed to take effect only on the undivided interest of the first defendant in the kutumba property which has to be ascertained according to the provisions contained in Section 7 of the "Act." Assuming that this contention has any substance in it, then the appellants will have to enforce their right, by means of a separate suit. The relief claimed in the present proceedings is of an entirely different character. We are now considering as to what should happen to the share allotted to the first defendant under the preliminary decree. Even if we go to the substance of the matter, the nissanthathi kavaru of the first defendant which claimed its share, in the kutumba properties consisted of only one member i.e., the first defendant; that "kavaru", which in reality was the first defendant, became divided in status from the date the claim for a separate share was made i.e. the date of the written statement of the first defendant. Hence it follows that the first defendant was not a member of his "kutumba" on the date of his death. We are not aware of any legal fiction under which he could be considered to have died

undivided. A divided member does not get the benefit of either Section 7(2) or Section 30 (1) of the "Act".

9. Section 7(2) of the "Act" again, either specifically or by necessary implication, did not enlarge the share given to the first defendant. That Section specifically refers to "an undivided interest in the property of a kutumba or kavaru". What has been said while considering the nature of the interest referred to in Section 30 (1) applies with equal force in considering the contents of Section 7 (2) as well.

10. The next contention of Sri Bhat is that the provisions contained in Sections 36(3),(4)and(5) of the Aliyasantana Act being repugnant to the provisions contained in Section 7 and Section 30(1) of the "Act", the former provisions ceased to apply in view of Section 4 of the "Act", and void under Article 254 of the Constitution. Clearly, there is no direct conflict between the two sets on provisions. Section 36 (3),(4)and(5) of the Aliyasanthana Act relate to devolution of the shares allotted to divided members, whereas Section 7(2) and Section 30(1) of the "Act" relate to the undivided interest of the co-parceners in a family. But Sri Bhat says that the conflict lies in the different schemes of the two Acts, the conflicting purposes intended to be achieved by each of them and above all if Section 36 (3) and (5) of the Aliyasantana Act are allowed to stand unimpaired, then they would take away the efficacy of Section 7 (2) and Section 30 (1) of the "Act". In order to find out whether there is any substance in this grievance we must find out the scheme and purpose of Section 7 (2) (Section 30(1) as seen earlier is merely ancillary) and find out the purpose of that provision. Sections 6 and 7 are found in Chapter II which relates to intestate succession. Section 6 concerns itself with the devolution of interest of a male Hindu in a Mitakshara coparcenary property, while Section 7 provides for the devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom. Section 6 says:-

"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." (Underlining (here into ' ') is ours).

This provision read by itself merely codified the existing customary law. But the proviso is important. It says:-

"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." (Underlining (here in ' ') is ours).

This proviso made a definite and important change in the law. Further under the customary law, the interest of a coparcener was not quantified. With a view to quantify the interest that would devolve on the personal heirs of the deceased under the proviso to Section 6 two Explanations were added to that section. Explanation No.1 to Section 6 which is relevant for our purpose is as follows:-

"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"

Section 30 is complementary to Sections 6 and 7. That is clear from the contents of the proviso to Section 6 which says:-

"..... The interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be....."

In other words, while the interest of the deceased coparcener is quantified and provision is made for its intestate succession under Section 6, the same interest is made capable of testamentary disposition by Section 30 (1). To sum up, Section 6 read with Section 30 (1) conferred on a coparcener in a Mitakshara family or his heirs as the case may be the following rights:- (1) the coparcener's undivided interest as quantified by Section 6 would go by intestate succession to his personal heirs under the "Act"; and (2) the same interest could be disposed of by the coparceners by means of testamentary disposition under Section 30(1).

11. The rights given to a coparcener in a Mitakshara family under Sections 6 and 30 (1) were extended to a member of an Aliyasantana kutumba by means of Sections 7(2) and 30(1). Section 7(2)

"When a Hindu to whom the Aliyasantana law would have applied if this Act had not been passed dies after the commencement of this Act, 'having at the time of his or her death an undivided interest in the property of a kutumba or kavaru as the case may be, his or her interest in the property' shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the "Aliyasantana law."(Underlining (here into ' ') is ours).

12. Explanation to that sub-section quantifies, the interest referred to above. It says:-

"For the purposes of this sub-section, 'the interest of a Hindu in the property of a kutumba or kavaru' shall be deemed to be the share in the property of the kutumba or kavaru, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the kutumba or kavaru, as the case may be, then living, whether he or she was entitled to claim such partition or not under the Aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely." (Underlining (here into ' ') is ours).

"Aliyasantana law" has been defined in Section 3(b) as

"a system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act,1949 (Madras Act No.IX of 1949) or by the customary Aliyasantana law with respect to the matters for which provision is made in

this Act"

13. As noticed earlier, Section 36 of the Aliyasantana Act deals with partitions, quantifications of shares at a partition, and devolution of the properties allotted to the sharers.

14. Now, we have to see whether there is any conflict between the schemes of these two Acts, between the purposes to be achieved by the two sets of provisions noticed above or whether the provisions made in Aliyasantana Act do in any manner impair the efficacy of Section 7(2) or Section 30(1) of the "Act". As observed by Sulaiman, J. in *Shyamakant Lal v. Rambhajan Singh*³, at special page 83:-

"When the question is whether a Provincial legislation is repugnant to an existing Indian Law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favor of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further repugnancy must exist in fact, and not depend merely on a possibility."

15. There is no doubt that these two sets of provisions, referred to above, could co-exist; they can operate simultaneously without impinging on one another's field. But, as observed in the above decision-

"Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties; they may, for Instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it."

Hence the test of a possible obedience to both is not an absolute test though undoubtedly an important test. The law bearing on the question of repugnancy was exhaustively considered by a Bench of the Calcutta High Court in *G.P. Stewart v.*

³ AIR 1939 FC 74

*Brojendra Kishore Roy*⁴, The judgment of the Bench was delivered by Sir Benegal Narasinga Rau, J. The decision as summarised in the head-note (d) to that report is as follows:-

"It is too narrow a test to say that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't". There may well be cases of repugnancy where both laws say "don't" but in different ways. The true test is that if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law."

During the course of the discussion the learned Judge referred to various cases English, Canadian and Australian. Though in view of the decision of our Supreme Court on this point, to which reference will be made presently, there is no need to refer to the decisions rendered by foreign Courts, still with a view to bring out the precise scope of the doctrine of repugnancy, we shall refer to the relevant observations found in some of those decisions. In *Ex parte McLean*, (1930) 43 CLR 472 Dixon, J. observed that:-

"Inconsistency which is the same as repugnancy depends upon the intention of the paramount Legislature to express by its enactment completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

In *Clyde Engineering Co., Ltd. v. Cowburn*⁵, at special page 489, Issacs, J. observed:-

"If, however, a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency when another Legislature assumes to enter to any extent upon the same field."

In *Stock Motor Ploughs Ltd. v. Forsyth*⁶, at special page 147, Evatt, J. expressed his opinion on that point thus:-

"It is now established therefore, that State and Federal laws may be inconsistent, although obedience to both laws is possible. There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main been reached, by ascribing "'inconsistency' to a State Law, not because the Federal Law directly invalidates or conflicts with it, but because the Federal Law is said to 'cover the field'. This is a very ambiguous phrase, because subject-matters of legislation bear little resemblance to geographical areas. It is no more than a cliché for expressing the fact that, by reason of the subject matter dealt with,

⁴ AIR 1939 Cal 628

⁶(1932) 48 CLR 128

⁵(1926) 37 CLR 466

and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State Authority."

The Supreme Court considered the scope and extent of Article 254 in *Tika Ramji v. State of Uttar Pradesh*⁷, After referring to the decided cases it came to the conclusion that repugnancy falls to be considered when the law made by Parliament and the law made by the State Legislature occupy the same field because, if both these pieces of legislation deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise. Therefore, the question for consideration is whether Section 7 (2) and Explanation to Section 30(1) of the "Act"

cover the very field that is covered by Sections 35 and 36 of the Aliyasantana Act. As seen earlier, these two sets of provisions deal with different topics - one deals with the interest in a coparcenary property whereas the other deals with partition of the kutumba properties and devolution of the property allotted at a partition. To borrow the language in Tika Ramji's case, AIR 1956 SC 676 "both these pieces of legislation deal with separate and distinct matters though of a cognate and allied character". Hence the test of "occupied field" does not help the appellants. But still undaunted Sri Bhat contended that the possibility of the, State law impairing the benefits conferred by the law enacted by Parliament is a good ground to hold that the former is repugnant to the latter. In this connection he placed reliance on the observations of Evatt, J. In re: Stock Motor Ploughs Ltd.'s case, (1932) 48 CLR 128 as to what is meant by saying that a law "covers the field" - the learned Judge, as seen earlier, explained that expression as

"no more than, a cliché for expressing the fact that, by reason of the subject-matter dealt with, and the nature and multiplicity of regulations prescribed, the Federal Authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if in other words, the subject is either touched or trenched upon by the State authority."

16. Drawing inspiration from the above observation, it was argued that if the provisions contained in sub-sections (3) and (5) of Section 36 of the Aliyasantana Act are allowed to operate, then the benefits conferred under Sec.7 (2) on an undivided member of a kutumba can be defeated by the other coparceners claiming shares and thus compelling the member concerned to get himself divided from his kutumba in which case the member concerned would lose the benefit of Section 7 (2) of the "Act", In this connection, Sri Bhat gave the illustration of a kutumba, consisting of a brother, a sister and her children; the sister and children forming a kavaru could claim a share on behalf of their kavaru and thus compel the brother to get himself divided from the kutumba; the brother, despite his desire to continue as a member of the kutumba and get the benefit of Section 7 (2) of the "Act", can be deprived of that benefit. It is not necessary to consider in this case whether in the illustration given by Sri Bhat, the male member concerned can be said to have been reduced to a

⁷ AIR 1956 SC 676

nissanthathi kavaru. But, if Sri Bhat's contention is correct, then not merely sub-sections (3) and (5) of Section 36 conflict with Section 7(2) but Section 36 as a whole conflicts with it because anybody taking share may possibly affect the quantum of property available under Section 7(2). If Section 36 goes, Section 35 goes along, with it, which means the whole of Chapter VI of Aliyasantana Act falls to the ground and we go back to the old "kutumba" incapable of being divided without the consent of all adult members. Nothing so bad could have been intended by Parliament. The short answer for Sri Bhat's contention is the one given by Sulaiman, J. in Shyamkant Lal's case, AIR 1939 FC 74 "repugnancy must, exist in fact and not depend merely on a possibility" or as observed by Dixon, J. in Ex parte McLean's case, (1930) 43 CLR 472 "Inconsistency which is the same as repugnancy depends upon the intention of the paramount Legislature to express by its enactment completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed." The pith and substance of the matter is to find out whether the law made by Parliament and the law made by the State Legislature occupy the same field or not.

17. We are clearly of the opinion that there is no conflict, either direct or indirect, between the provisions contained in the "Act" and those contained in Chapter VI of the Aliyasantana Act.

18. Sri T. Krishna Rao the learned Counsel: for the respondents, arguing in support of the vires of Sections 35 and 36 of Aliyasantana Act contended that the estate given to a nissathathi 'kavaru' is similar to the life estate familiar to English law and has no resemblance to the woman's estate found in Hindu law; in that estate the nearest santhathi kavaru has a vested remainder and the same cannot be interfered with either by the State Legislature or by Parliament in view of Article 19(f) of the Constitution and its deprivation is not within the competence of the Legislatures, State or Central. We think it unnecessary to go into that controversy in view of our earlier findings.

19. In the course of his argument, Sri Bhat tried to assail the validity of the provisions contained in Section 36 of the Aliyasantana Act on the ground that the case is hit by Article 14 of the Constitution. We declined to hear him on that point as that was not one of the points referred to the Full Bench.

20. For the reasons mentioned above, both the questions referred to for our derision are answered in the negative, The papers wilt now be sent back to the concerned Bench, for disposal of the appeal, in the light of our above decision. The costs of this reference will be the costs in the appeal and provided for therein. Advocate's fee ₹ 250/-.

Answer accordingly.