

BOMBAY HIGH COURT

Sushilabai

Vs.

Narayanrao

A.F.O.D. No. 59 of 1968

(Kantawala, C.J., Tulzapurkar and Dharmadhikari, JJ.)

22.08.1974

JUDGEMENT

Kantawala, C.J.

1. The Division Bench of this Court has referred to the Full Bench the following two questions for determination :

(1) Is the scope of the fiction in the Explanation of Section 6 of the Hindu Succession Act, 1956 as wide as was held in *Rangubai v. Laxman*¹, and whether the view taken in Rangubai's case that as a result of the notional partition contemplated by the proviso to Section 6 of the Hindu Succession Act, the shares of persons other than the deceased coparcener also become fixed as if a partition had taken place during the lifetime of the deceased coparcener is correct ?

(2) On the facts found in this case to what share is the plaintiff entitled in the suit property ?

2. The plaintiff filed a suit for partition and separate possession of her share in movable and immovable property referred to in the plaint. Plaintiff Sushilabai is the daughter of one Narayanrao. Narayanrao had a wife by name Laxmibai, Narayanrao adopted a son by name Shridhar. Shridhar died on December 29, 1956, leaving him surviving his adoptive father Narayan, adoptive mother Laxmibai and his widow Shantabai, Laxmibai died on April 13, 1957. The suit was instituted on April 3, 1961. During the pendency of the suit Narayanrao died on March 11, 1965, making a will whereby he disposed of his interest in the family property in favor of Samarth Charitable Society, a Society registered under the Societies Registration Act.

3. The trial Court partially decreed the suit giving the plaintiff 1/8th share in the estate belonging to the family. This quantum of share was determined on the footing that Shridhar the adopted son

had 1/2 share in the family property and the adoptive father Narayanrao had the remaining half share therein. On Shridhar's death his interest in the family property was divided equally between his widow Shantabai and his adoptive mother Laxmibai. Thus, according to the trial Court, upon Shridhar's death, Shantabai became entitled to 1/4th share in the family property i.e., half share in Shridhar's property

¹1966 Mah LJ 240

and Laxmibai became equally entitled to 1/4th share in the family property. On Laxmibai's death in the year 1957 her interest in the family property was divided equally between the plaintiff, her daughter and her husband Narayan. Thus upon the finding of the trial Court the plaintiff became entitled to 1/8th interest in the family property and passed a decree accordingly. Aggrieved by the decision of the trial Court the plaintiff preferred an appeal.

4. The contention on behalf of the plaintiff was that when Shridhar died, his share should be considered to be 1/3rd in the joint family property and from the remaining 2/3rd, 1/3rd would be the share of his adoptive father Narayan and the remaining 1/3rd would be the share of adoptive mother Laxmibai, that on the death of Shridhar 1/3rd share that would have been allotted to him in the joint family property would on his death be inherited equally by his mother Laxmibai and by his widow Shantabai as both of them are the female heirs specified in Class I to the Hindu Succession Act, hereinafter referred to as 'the Act'. Thus, the submission was that on the death of Shridhar, Laxmibai's share would come to 1/3rd plus 1/6th i.e., 1/2 share in the family property and that on the death of Laxmibai, the plaintiff as the daughter became entitled to 1/2 share in Laxmibai's estate. Thus she became entitled to 1/4th share in the whole of the joint family property. On the other hand, on behalf of the contesting defendants, the contention was that in a notional partition as provided under Section 6 of the Act Laxmibai will not be entitled to any share on the footing of a partition but under the proviso to Section 6 she will be entitled to 1/2 share in the 1/3rd share which will be allotted to Shridhar immediately before his death. Thus, according to the contesting defendants, Laxmibai will be entitled to only 1/6th share in the entire family property and upon her death the plaintiff would be entitled to 1/12th share therein. As there was no appeal on behalf of the defendants, the decree passed by the trial Court giving the plaintiff 1/8th share in the family property was not sought to be disturbed.

5. When this appeal came up for hearing before the Division Bench several decisions were cited before the Court which showed that there was a conflict of legal opinion between the view taken by this Court in *Rangubai Lalji v. Laxman Lalji*², and the view taken by the other High Courts and the Division Bench considered it necessary to refer the above two questions for determination by the Full Bench. On interpretation of Section 6 of the Act there is a possibility of difference of opinion on the question whether upon partition of the share of the deceased coparcener the remaining coparceners continue to be joint or become separate. So far as that question is concerned, it will be relevant to decide only when the coparcenary consists of more than two members and one of the members of the coparcenary dies. We do not propose to decide that larger question as in this case the coparcenary consists of only two male members, namely

Narayanrao the adoptive father and his adopted son Shridhar and we propose to confine ourselves only to the facts of the present case and do not express any opinion on the larger question that may possibly arise upon the interpretation of Section 6 of the Act.

6. Mr. Bobde on behalf of the plaintiff contended that when one of the coparceners dies, his share in the coparcenary property goes by survivorship to the remaining surviving coparceners under the Hindu Law, that when coparcenary subsists and no partition is claimed, no coparcener can predicate that he has definite share in the coparcenary

²(1966) 68 Bom LR 74

property and that when the coparceners have separated, their property goes by succession to others. His submission was that upon proper interpretation of Section 6 of the Act, a moment before the death of Shridhar a notional partition took place as a result of which Narayanrao, Laxmibai and Shridhar each became entitled to 1/3rd share in the joint family property, that upon the death of Shridhar his 1/3rd share in the joint family property devolved upon Laxmibai his mother and Shantabai his widow equally. He submitted that it is not necessary for us to go into the larger question that upon proper construction of the provisions of Section 6 of the Act upon the death of a coparcener leaving 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, when the interest of the deceased in the Mitakshara coparcenary becomes separate, the other surviving coparceners become separate inter se. He only confined his submission to the facts of this case when the coparcenary consisted of father and son and the question arises as to what is the share of the mother upon the death of her son having regard to the provisions of Section 6. On behalf of the contesting defendants Mr. Palshikar has contended that the provisions of Section 6 of the Act do not effect severance of joint status at all, that the Section primarily recognises the rule of survivorship in respect of coparcenary property upon the death of a coparcener, that the proviso to that section merely provides for an exception when the deceased coparcener has left 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, that when such is the case special provision is enacted to the proviso read with Explanation 1 with regard to law of succession and no alteration is made to the normal rule of partition which should prevail and govern in accordance with the normal Hindu Law. In enacting this Act, according to Mr. Palshikar, the intention of the Legislature was only to codify the law relating to intestate succession among Hindus *qua* the deceased coparcener and not the law relating to partition. He submitted that neither under the proviso nor under Explanation 1 to the section there is severance of joint status between deceased Shridhar and his father Narayanrao. Only the interest of Shridhar in the coparcenary property goes by testamentary or intestate succession. In view of the fact that he died without leaving a will, his interest in the coparcenary property, which would have been allotted to him as if on a partition immediately before his death, has to be determined but there is nothing in the statute to show that a partition or severance in status came into effect upon or prior to the death of Shridhar.

7. The Act was enacted with a view to amend and codify the law relating to intestate succession among Hindus. It came into force on June 17, 1956. Section 6 of the Act provides for devolution of interest in coparcenary property and its provisions are as under :-

"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 purpose 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."

8. Prior to enactment of this Act a coparcener having undivided interest in the coparcenary property had no right to make testamentary disposition in respect thereof but by Section 30 of the Act such right was, for the first time, conferred upon a coparcener even though there was no partition prior to the date of his death. The main part of Section 6 of the Act normally recognises and reiterates the rule of survivorship in respect of devolution of interest by survivorship upon the death of a coparcener in favor of surviving members of the coparcenary. Even under the proviso when there are no female or other heirs of the class specified therein, the rule as to survivorship has to prevail but if the deceased coparcener dies leaving 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 such deceased coparcener in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. Shridhar left him surviving his adoptive mother Laxmibai and his widow Shantabai. Thus in view of the proviso his interest in the coparcenary property is not to devolve in accordance with the rule of survivorship but his interest in that coparcenary property is to devolve by intestate succession as he died without leaving a Will. It was urged by Mr. Bobde that it is implicit in the very language of the proviso to Section 6 that when devolution is by testamentary or intestate succession *qua* that deceased coparcener there is severance of status in the coparcenary property. On the other hand, the argument of Mr. Palshikar is that this is only a departure *qua* the rule of devolution of interest. Ordinarily upon the death of a coparcener

his interest in the joint family property will go by survivorship to the remaining coparceners, while in the present case as there was a female heir, the rule of survivorship was not attracted but the property was to devolve by testamentary or intestate succession. Such is the rule of succession but it has no effect of effecting severance in the joint family status.

9. Ordinarily under Shastric Hindu Law the interest of a coparcener in the Mitakshara coparcenary is undivided. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he as a member has a definite share e.g., one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by death of any coparcener in the family. Thus, it is only on a partition that he becomes entitled to a definite share. When there is a female heir or a male heir of the nature specified in the proviso, the language of the proviso lays down that the interest of the deceased coparcener would devolve by testamentary or intestate succession under the law. The very devolution of interest of the deceased coparcener by testamentary or intestate succession presupposes that at the moment of his death the share or interest of such a coparcener in the coparcenary property is either determined or is defined or is specific. If the share is defined or specific, then it cannot be a fluctuating type of interest which an undivided coparcener is normally possessing in the Hindu undivided family. How effect is to be given to this rule of devolution by testamentary or intestate succession is made explicit in Explanation 1 to the section. Under the Explanation for the purposes of the 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. It cannot be disputed that partition in accordance with law consists of numerical division of the property. In other words, it consists in defining the shares of the coparceners in the joint family property. The Explanation undoubtedly lays down a legal fiction and as regards effect to be given to the legal fiction two views are possible. One view as laid down by T. L. Venkataraman Aiyer, J., in *Commr. of Income-tax Delhi v. S. Teja Singh*³, is that it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. This view is based upon the observations of Lord Asquith in *East End Dwelling Co. Ltd. v. Finsbury Borough Council*⁴, Those observations are to the following effect :-

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

If the legal fiction contained in Explanation 1 is to be extended as laid down in this principle, then it is possible to urge that upon a coparcener dying leaving a female heir or other heirs as specified under proviso to Section 6 not only the share of the deceased coparcener is separated a moment before his death but, there is also a partition amongst the surviving coparceners as in a partition under Hindu Law. The other view as regards legal fiction is that the legal fiction cannot be stretched off beyond the purpose for which it was enacted. This view is based upon the decisions of the Supreme Court in *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*⁵, and *Bengal Immunity Co. Ltd. v. State of Bihar*⁶. For the purpose of the present case we do not propose to decide whether the legal fiction created by Explanation 1 has to be given full effect as stated in the earlier view and we are prepared to proceed on the assumption that it should not be stretched beyond the purpose for which it was enacted.

10. The effect of the proviso read with Explanation 1 thereto is that when there is an heir of the nature specified in the proviso, the share of the deceased coparcener has to be determined on the assumption and deemed fiction that a partition of the property has taken place immediately before his death as the Explanation points out that such legal fiction has to be given effect to irrespective of the fact whether the deceased coparcener is entitled to claim partition or not. It is well settled that there is no presumption that when

³ AIR 1959 SC 352

⁵1954 SCR 53 at p. 81-82

⁴1952 AC 109

⁶(1955) 2 SCR 603 at p. 646

one person separates from the other coparceners that the latter remain united. An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact. It is open to non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose but the intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them or it may be inferred from other conduct indicating such an intention. These principles are stated in brief in more than one decision of the Supreme Court. In *A. Raghavamma v. A. Chenchamma*⁷, the Supreme Court has laid down the principle as shown by the head-note (f) in that case :

"The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden is certainly on the person who sets up partition to prove the said fact."

A similar view has been reiterated by the Supreme Court in *Girijanandini Devi v. Bijendra Narain*⁸,

11. As Shridhar left him surviving his adoptive mother Laxmibai and his widow Shantabai, the quantum of the share which will devolve by intestate succession under the proviso to Section 6 has to be determined as provided in Explanation 1. This Explanation lays down that Shridhar shall be deemed to be entitled to a share in the family property that would have been allotted to him if a partition of the property had taken place immediately before his death. It is not disputed that if a partition had taken place immediately before the death of Shridhar, he would have been entitled to 1/3rd share in the property. The question, however, arises whether the remaining 2/3rd share is to remain with Narayanrao or is to be divided between Narayanrao and his wife Laxmibai equally. Under Shastric Hindu Law a wife cannot demand a partition but if a partition does take place between husband and his son, she is entitled to receive a share equal to that of his son and to hold and enjoy that share separately even from her husband. The question that arises in this case is whether this right to claim a share equal to that of a son upon a notional partition as contemplated by Explanation 1 is taken away or is to be given effect to. It cannot be disputed that devolution by testamentary or intestate succession of the property of the deceased coparcener in coparcenary property cannot take place unless his share therein is determined or specified. How that share is to be determined is laid down in the Explanation and that is on the footing that immediately before his death a partition has been effected and he has been allotted a share. Explanation 1 provides for machinery for determining the quantum of such shares in the joint family property but the severance is implicit in the language of the proviso itself. It cannot be disputed that so far

⁷ AIR 1964 SC 136

⁸ AIR 1967 SC 1124

as coparcenary in the present case is concerned it consists of only two coparceners viz., Narayanrao and his adopted son Shridhar. Now if a partition is deemed to have taken place immediately before Shridhar's death, then naturally that partition can only be effected between Narayanrao and Shridhar i.e., between father and son. If that is so, independently of the provisions of Section 6 under pure Hindu Law the mother is entitled to receive a share equally to that of a son i.e., upon such severance of the share of Shridhar, not only Shridhar is entitled to 1/3rd share but the mother is equally entitled to one third share on the footing that there is a partition between Narayan on the one hand and Shridhar on the other. Thus the right conferred upon a mother under Hindu Law is not affected by any of the provisions contained in the Act, as partition is provided in Section 6 for determining the interest of the deceased coparcener.

12. Laxmibai is also one of the female heirs specified in Class I of the Schedule to the Act. If that is so, upon Shridhar's death his 1/3rd interest in the property is not to go by survivorship to his father Narayanrao but is to be governed by intestate succession in accordance with the Act because he did not die leaving a Will. The heirs who were entitled to inherit Shridhar's property upon his death are those who are specified in Class I to the Schedule of the Act. So far as the

present case is concerned, the widow and the mother are the two heirs so specified. Thus 1/3rd share which came to Shridhar upon partition will be equally divided between his widow Shantabai and his adoptive mother Laxmibai. Thus, Laxmibai in addition to 1/3rd share she gets on the partition, will also be entitled to 1/6th share in the family property as the heir of Shridhar.

13. That such is the correct position in law is recognised by a number of judicial decisions which gave effect to the right of a female person under Hindu Law. In *Parappa Ningappa v. Mallappa*⁹, the Full Bench of this Court has taken the view that under Hindu Law, in a suit by a son for partition and separate possession of his share after setting aside the alienation of joint family property made by his father, the mother, who is a party is entitled to a share, if the Court comes to the conclusion that the alienation is not for a purpose binding upon the family consisting of the father, mother and sons. Two approaches were presented to the Full Bench and the question arose which of the two approaches should be accepted in case of a widow. The one approach is the approach that an alienation, however unauthorized, is valid until it is challenged, that the right to challenge is restricted to the coparceners and it is only those who can challenge the alienation who can claim their shares in the joint family property as not having been affected by the alienation, the rest of the joint family property being validly alienated to the alienee. The other approach is that the wife has an interest in the joint family property, however inchoate that interest might be, and that interest must be protected as much in a suit for partition at the instance of her son as in a suit for partition whether at the instance of the alienee or at the instance of her own son which suit has been necessitated by unauthorised alienation by her husband. The Full Bench held that although the wife has no right to challenge the alienation as her right in the family property is inchoate and has not come into existence because there is no partition, because of the legal fiction her share in the joint family property cannot be alienated by her husband when the alienation is not supported by legal necessity. In other words, what the alienee gets is strictly the share of the alienor not augmented by the inchoate share of his wife. The alienee would have the right which the father would have to a partition and what would come to him upon the

⁹58 Bom LR 404 (FB)

partition being made. Therefore, notionally and fictionally such a partition should be effected and what share would come to the father on such a partition being made ought to be decided and that is the share that would pass to the alienee. Thus, in this case even before the partition was effected of the joint family property on a suit by a son to challenge the validity of alienation made by the father the right of the wife to share the property was recognized and it was held that her share in the property was to be determined at the date of the alienation.

14. A similar right under Hindu Law was recognised by the Full Bench of Allahabad High Court in *Bilaso v. Dina Nath*¹⁰, The Full Bench took the view that a Hindu widow, entitled by the Mitakshara law to a proportionate share with sons upon partition of the family estate, can claim such share, not only quoad the sons, but as against an auction purchaser at the sale in the execution of a decree of the right, title and interest of one of the sons in such estate before voluntary partition. At page 90 it is observed as under :-

"In an undivided family consisting of mother and sons, the mother is only entitled to maintenance so long as the family remains undivided in estate ; but in case a partition is made the law gives her a right to an assignment of a share in the property left by her husband equal to a son's share. The right the mother has is a right to participate in the property left by her husband, and it has been described as a latent and inchoate right of participation which becomes effective when separation takes place. Such being the right of the mother, and the son's obligation towards her in respect of the assignment of a specific share of the property on partition, we have to see what position the purchaser in execution of the right, title, and interest of a member of an undivided family takes."

It was held that the auction purchaser was not entitled to the share which would have been allotted to a Hindu widow if a partition had taken place.

15. A similar view was taken by Ameer Ali, J., in *Amrita Lall Mitter v. Manick Lal Mullick*¹¹, A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. A purchaser from one of the sons has the same right and takes it subject to the same liabilities as those of the person from whom he purchased. Even in this case the right of a Hindu mother to share in the property was also recognized though no partition had taken place prior to the institution of the suit.

16. The right of a wife to a share on a partition between her husband and son was reaffirmed also by the Nagpur High Court in *Radhabai v. Pandharinath Bapu*¹², Under the Mitakshara laws a wife is entitled to a share on a partition between her husband and her sons, and she can sue for her share if she has not been assigned a share in the partition provided she has not assented to or acquiesced in the partition or waived her rights. This decision clearly recommends that a Hindu female who under Shastric Law will have a right of share upon a partition can assert that right if events have taken place which may jeopardise that right even prior to partition.

¹⁰(1880) 3 ILR All 88

¹²ILR 1942 Nag 534

¹¹(1900) ILR 27 Cal 551

17. The construction that we have placed upon the provisions of Section 6 is in conformity with the intention of the legislature if regard be had to the legislative history conferring larger rights upon female heirs than those conferred under pure Shastric Hindu Law. By the Hindu Law of Inheritance (Amendment) Act, 1929, female heirs like son's daughter, daughter's daughter and sister became entitled to share as heirs in all parts of India where Mitakshara law prevailed. Prior to this enactment, female heirs were recognised as heirs only in Bombay and Madras and not in other parts of the country. By Hindu Women's Rights to Property Act, upon the death of a Hindu his widow was entitled to a share either in the joint family property or separate property. She was also given a right to claim a partition though under the law the interest obtained by her as a result of partition was to be a limited interest which was available to a female. By the Hindu Adoptions and Maintenance Act, 1956 right to adopt as well as maintenance has been conferred upon a

Hindu female. Looking to the legislative history, *qua* the rights of a Hindu female, the provisions of the Act should be so construed as will further the intention of the legislature in enlarging the rights available to a female under Hindu Law. We are not putting in the present case strained construction upon the provisions of Section 6. As stated earlier, having regard to the language of the proviso itself when there is a female heir or other heirs of the type specified in the proviso, the share or interest of a deceased coparcener in the coparcenary becomes severed as it is to go or devolve by testamentary or intestate succession. How that share is to be computed is to be determined in the manner provided by Explanation 1. The Explanation 1 presupposes the legal fiction that immediately before his death the partition has taken place in the family and his interest in the joint family property has been ascertained and such share will thereafter go by testamentary or intestate succession as provided in the Act. Such being the scheme of the Act, if severance takes place upon the death of a coparcener leaving such female heirs or other heirs specified in the proviso, to ascertain his interest, the construction should not be put upon the language of the section so as to curtail the rights which a Hindu female may have under Shastric Hindu law. We are merely affirming the right which the mother has when partition takes place between father and son. Such right is conferred upon her by pure Hindu law and as the notional partition takes place upon the death of Shridhar a moment prior to his death. Laxmibai has to be given 1/3rd share as a result of that partition. In addition thereto she will be entitled to claim her share as an heir of adopted son Shridhar.

18. A large number of decisions have been cited before us where the provisions of Section 6 of the Act have come up for consideration. So far as this High Court is concerned, the provisions of Section 6 have been considered in three of the reported decisions to which our attention has been drawn. The first is the decision in the case of *Shirambai v. Kalgonda Bhimgonda*¹³, In this case the provisions of Section 6 as well as Section 4 of the Act came to be considered and upon interpretation thereof the Division Bench of this Court consisting of Patel and Chitale, JJ., took the view that the interest of a Hindu Mitakshara coparcener available for division under Section 6 of the Act will be such share in the property as would be allotted to him if a partition of the property had taken place immediately before his death amongst the coparceners according to the rules of Hindu Law with the qualification that the rule of Hindu Law providing a share to the mother and maintenance and marriage expenses of the daughters must be treated as abrogated in view of Section 4 of the Act. Section 4 (1) (b) of the Act provides that save

¹³ (1964) 66 Bom LR 351

as otherwise expressly provided in this Act, any other law in force immediately before the commencement of the Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act. The Division Bench accepted the contention urged that the rule of the Mitakshara Law that on a partition the mother is entitled to a share (a limited estate) and that daughter's maintenance and marriage expenses should be provided is for the reason, that they do not have any share in the family property as such nor are they entitled to succeed to the husband and father respectively. After the Hindu Succession Act came into force they are entitled to succeed to a share on the death of husband and father and under Section 4 that rule of partition

must be deemed to have been abrogated. The Division Bench rejected the contention urged on behalf of the appellant in that case that as the explanation to Section 6 defines the interest of the coparcener to be the share that the father would have got on a partition it amounts to an express saving of that rule of partition for the obvious reason that it does not enjoin actual partition and does not enable the mother to reduce her share into possession. The explanation, according to the Division Bench, is intended to be of general application and cannot be treated as saving the above said rule of partition. In the opinion of the Division Bench, to uphold the contention would produce most unjust results which could never have been intended by the Legislature.

19. The correctness of the decision of the Division Bench in Shirambai Patil's case was doubted by Chandrachud, J., when the appeal in the case of *Rangubai Lalji Patil v. Laxman Lalji Patil* came up for hearing and he referred that appeal for decision by the Division Bench. As a result of the reference by Chandrachud, J., the matter came up for hearing before the Division Bench consisting of Patel and Bal, JJ., and the decision of the Division Bench is reported in *Rangubai Lalji Patil v. Laxman Lalji Patil*¹⁴, Patel, J., who delivered the judgment in the earlier case in Shirambai's case was a party to this decision and he declined to follow that decision and took a contrary view on the ground that in Shirambai's case the matter was not fully argued and the Division Bench was not in a position to consider all the pros and cons of the matter. In Rangubai's case a Hindu coparcenary consisted of the husband, his wife and his adopted son. The husband died after coming into force of the Hindu Succession Act and his widow filed a suit claiming a half share in the coparcenary property. The Division Bench took the view that on the interpretation of Section 6 of the Act on a partition during the lifetime of the husband the widow would have been entitled to one-third share and on succession to a further one-sixth share and therefore her share in the property would be one-half share. The scheme of Section 6 together with Explanation 1 was considered and the Division Bench took the view that for the purposes of Explanation 1 to the proviso of Section 6 of the Act, when the interest of the deceased coparcener is to be determined, the Court should first determine what is the property available for partition and then partition the coparcenary property setting aside the share of the widow in which she is entitled to her own right and divide the share of the deceased coparcener amongst the heirs. The decree must make proper provisions for the maintenance and marriage expenses of the daughters and award the widow her due share in the coparcenary property and divide the property of her husband amongst the heirs. At page 82 it is observed as under :

"Section 6 recognizes the Hindu Law of survivorship but by the proviso creates an exception and provides for devolution of the interest of the deceased coparcener if

¹⁴(1966) 68 Bom LR 74

he died intestate and left any of the female heirs specified in Clause 1 or a male relative specified therein claiming through such female relative. Probably, if the Explanation had not been there:

there would not have been any difficulty in accepting the interpretation suggested in Dinshaw Mulla's principle of Hindu Law and by other text writers. The difficulty has been

created by reason of the Explanation which defines the interest of such Hindu Mitakshara coparcener. According to the Explanation the interest is "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." The question is, what was intended by the Legislature when it enacted this Explanation. The intention of the Legislature is to be found from the words used giving them their ordinary meaning. The explanation enacts, in effect, that there shall be deemed to have been a partition before his death and such property as would have come to his share would be divisible amongst his heirs. It introduces a legal fiction of a partition before his death, since without such fictional partition his share cannot be possibly determined."

The Division Bench thereafter considered the provisions of Section 7 of the Act and further observed. "It would, therefore, appear from the scheme of Sections 6 and 7 that the Legislature intended that it shall be deemed that there was a partition in fact and substance and that such property as would be available to the deceased would be divisible among his heirs. Undoubtedly the latter part of the decision points out that the legal fiction of partition and separation of the share of the deceased coparcener at his death must be carried to its logical conclusion. On this aspect of the matter we do not propose to express any opinion and we have proceeded on the assumption that the object of the fiction was to quantify the share of the deceased coparcener and the point of time at which such quantification has to be made. Proceeding on that footing, partition has taken place a moment before the death when there are two coparceners viz., father and son and one of them dies. When such a partition takes place, even though notionally, a female, who under the Shastric Hindu Law is entitled to a share, will be entitled to claim such share not by reason of the provisions of the Act and under pure Hindu Law. There is nothing in the provisions of the Act which denies such a right to a Hindu female.

20. The provisions of Section 6 also came to be considered by a Single Judge of this Court in *Govindram Mithamal Sindhi v. Chetumal Villardas*¹⁵, It may be stated at the outset that while the question was considered by the single Judge his attention was not drawn either to the decision of the Division Bench in Rangubai's case or the earlier decision of the Division Bench in Shirambai's case. The scheme of Section 6 is considered by the learned Judge and he has taken the view that Section 6 is introduced in the Hindu Succession Act for the purpose of effecting a change in the normal mode in which the joint family property used to pass from one person to another in a joint Hindu family. In a joint Hindu family possessing joint family property the male members form a coparcenary. When a coparcener dies, his right, title and interest in the joint family property go by survivorship to the other coparceners. This normal mode in which the property passed from person to person in a joint Hindu family was sought to be changed by introducing a certain type of succession in the case of the interest of the coparceners in the joint Hindu property. Section 6 in the first instance speaks of Mitakshara coparcenary

¹⁵(1970) 72 Bom LR 653

possessing property. The opening substantive part of Section 6 provides that 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. The normal devolution by survivorship, which was a distinguishing feature of the Mitakshara coparcenary, is sought to be maintained even by the Hindu Succession Act. However, there is a proviso added to this section which carves out a case when the family consists of certain types of members. Then the learned Judge considered the language of the proviso read with Explanation 1 thereto and further observed that if the deceased had left behind him any female relative specified in that class in Class I of the Schedule or a male relative specified 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. This is provided by the proviso. How the interest of the deceased in the Mitakshara coparcenary property shall be determined for the purpose of devolution, whether testamentary or intestate contemplated by the proviso, is provided in Explanation 1. While discussing this case a further question arose before the learned Judge whether having regard to the provisions of Section 6 a full partition of the family property takes place or it is a piecemeal partition with respect to the interest of the deceased and what is the effect in either case on the entire family property or the interest and rights and liabilities *inter se* between the other coparceners in the family. That question, however, was not decided by the learned Judge and the learned Judge has merely chosen to confine his decision to the facts of the case which arose for consideration in that litigation and did not express any opinion as regards generalizations relating to the theory of partition. In this case the real question that arose for decision was whether the heirs who were entitled to inherit the joint family property by reason of the provision of the proviso were necessary parties to the suit upon the death of a coparcener whose interest in the property devolved upon them by testamentary or intestate succession and the learned Judge took the view that upon the death the interest of such a deceased coparcener ceased to have the character of joint family property and as such unless the heirs who inherited the property were brought on record their interest in the property was not represented and the frame of the suit was defective, if such heirs were necessary parties to the suit and the suit was liable to be dismissed if they were not brought on record.

21. Two other High Courts in this country have taken a view upon the construction of Section 6 which is similar to the one taken by the Division Bench of this Court in Rangubai's case. In *Ananda v. Haribandhu*¹⁶, the Division Bench of Orissa High Court took the view that Explanation 1 to Section 6 introduced a radical change. In that case one of the coparceners named Joydeb died and it is stated that though in fact Joydeb's interest in the coparcenary property had not been carved out, a legal fiction was introduced that the interest shall be deemed to be the share in the property which would have been allotted to him, if a partition of the property had taken place immediately before his death. It postulates that in order to fix the interest of Joydeb, a partition immediately before his death must be taken to have occurred. If that is the legal hypothesis, it follows as a logical corollary that plaintiff No. 2, who was the third

wife of the deceased, must be allotted a share in that partition amongst the father and the two sons. Though undoubtedly it was a case of more than two coparceners and the question arose upon the death of one, the view

¹⁶ AIR 1967 Oris 194

taken was that a female heir, who was entitled to a share upon a partition for separation of the interest of the deceased coparcener, was entitled to a share which Shastric law has conferred upon her.

22. A similar view has been taken by a Single Judge of Gujarat High Court in *Vidyaben v. Jagdishchandra Nandshankar Bhatt*¹⁷, The learned Single Judge who decided that case followed the decision of the Division Bench of this Court in Rangubai's case and that of the Orissa High Court above referred to. In the case before the Gujarat High Court the deceased coparcener was survived by wife, son and four daughters. Upon the death of the coparcener the property would be divided in three parts, 1/3rd going to the widow in her own right as she would have been entitled to a share equal to that of a son and husband had partition taken place immediately before the death of her husband; the son would get 1/3rd share and the remaining 1/3rd share i.e., the interest of the deceased in the property would be equally divided among all the six heirs. This was a case where there were only two coparceners as in the case of Rangubai where upon separation of the share of the deceased coparcener having regard to the provisions of the proviso to Section 6 the wife was allotted a share on such partition having regard to the provisions of pure Hindu Law.

23. Our attention has been invited to a large number of cases where there are some observations which go to indicate somewhat contrary view. It will be useful to refer to these cases and consider whether any of the said decisions is likely to be of any assistance in deciding the narrow issue to which we propose to confine our decision. In *Kanahaya Lal v. Smt. Jumna Devi*¹⁸, a question arising under Section 6 of the Act came up for discussion. It may be stated at the outset that the decision of the Division Bench of this Court in Rangubai's case was not cited before the Court. Upon analysis of the provisions of Section 6 the Division Bench of Delhi High Court took the view that the Mitakshara coparcenary property has been allowed to devolve by survivorship on the surviving members of the coparceners and not by way of succession under the Act, but an exception has been carved out of this rule of law by the proviso that if the deceased dies, leaving behind him a surviving female relative specified in Class I of the Schedule (the other part is not material) which would include a widow and the daughters, then the rule of law is that the interest of the deceased in the Mitakshara coparcenary shall devolve by succession (testamentary or intestate) under the provisions of the Act and not by survivorship. To work out the right, an explanation has been added which provides for a notional partition in the family at the time of the death of the deceased and then the share which would, upon a partition, have been allotted to the deceased just before his death, would constitute the property which would be inherited by the heirs in accordance with the provisions of Section 8 of the Act amongst the heirs specified in First Schedule. This was a case where there were more than two coparceners in the family and

one of the coparcener

24. In *Chandradatta v. Sanatkumar*¹⁹, a single Judge of Madhya Pradesh High Court had an occasion to consider the scheme of Section 6 of the Act. He has taken the view that the provisions contained in Section 6 merely incorporate the concept of a notional partition for the limited purpose of enabling succession and computation of the interest of the deceased coparcener which otherwise would have devolved by survivorship and also for

¹⁷AIR 1974 Guj 23 ¹⁹ AIR 1973 Mad Pra 169

¹⁸ AIR 1973 Del 160

the ascertainment of the share in that interest of the heirs specified in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener, the other incidents of the coparcenary are left undisturbed and the joint family continues without disruption. It is not correct to think that in a case where the proviso to Section 6 comes into play, the status of the joint family is disrupted on the death of a coparcener. The purpose of the legal fiction introduced by these provisions is limited. The observations in this case are obiter and for the purpose of deciding the issue before the learned Judge it was not necessary to consider this question. That was a case in which a decree passed against the father during his lifetime in a suit in respect of pre-partition debt came to be executed after his death against the shares obtained by the sons on partition and a question arose as regards the remedy of the decree-holder. The learned Judge took the view that his remedy was not by way of a separate suit. In such execution proceeding the son is at liberty to show that the property in his hands is not liable to pay the debts of his father. All these questions fall within the purview of Section 47. That was a case where the father died leaving more than one son.

25. Our attention is invited to the decisions of Andhra Pradesh High Court; one decision of the Full Bench in *P. Govinda Reddy v. Golla Obulamma*²⁰, and the other a decision of the single Judge in *Yethirajulu Neelaya v. Mudummuru Ramaswami*²¹, In both the cases the question that primarily arose for consideration was whether a suit that was instituted during the lifetime of a coparcener was liable to be continued in the absence of heirs of a coparcener who died during the pendency of the suit being brought on record. In the decision of the Full Bench in *P. Govinda Reddy's* case a mortgage was executed in favor of one Potalpati Nagi Reddy. Reddy the mortgagee died in 1960 leaving him surviving his widow, four sons and two married daughters. His eldest son Govinda Reddy thereafter brought a suit against the heirs of the deceased mortgagor, on the last day of limitation for enforcing the mortgage. A question arose in this case whether the female heirs who were entitled to inherit the property having regard to the provisions of the proviso to Section 6 of the Act were necessary parties to the suit and the Full Bench of Andhra Pradesh High Court took the view that it was so and in their absence the suit was liable to be dismissed. In that case within the period of limitation an application to bring the female heirs on record was not made and that was regarded as fatal to the suit. While considering this question the Court undoubtedly considered scheme of Section 6 of the Act. Even before the Full Bench the decision of the Division Bench of this Court either in *Rangubai's* case or in *Shirambai's* case was not cited. While considering the provisions of Section 6 the Full Bench pointed out that

Explanation 1 introduces out of necessity a legal fiction for ascertainment of interest of the deceased coparcener. His interest according to it will be deemed to be the share that would have been allotted to him if there was a partition immediately before he died irrespective of the fact whether he could claim such partition or not on that day. The need for the legal fiction arose out of impelling necessity for according to Mitakshara Law so long as there is no partition no coparcener can predicate that he has got a definite share in the coparcenary property. The legal fiction was designed for a limited purpose, namely for computation of the interest of the deceased coparcener for purposes of devolution of the same on his heirs so that there may be no difficulty in giving effect to the proviso. In the opinion of the Full Bench, Section 6 of the Act has nothing to do with the disruption of the joint family status. The coparcenary will

²⁰ AIR 1971 And Pra 363

²¹ AIR 1973 And Pra58

continue notwithstanding the death of a coparcener until partition is effected. Till then the Karta of the joint family will be in charge of the management of the coparcenary property and will be entitled to exercise all powers which he enjoys by virtue of his position. The effect of Section 6 in the coparcenary, if at all, is that in case the proviso applied to the devolution of the interest of the deceased that interest or specified share will be taken in pursuance of the legal fiction, out of the coparcenary property in so far as the heirs of the deceased are concerned and will be available for allotment to them. Otherwise the coparcenary will continue as ever. For the purpose of the case it was unnecessary to consider whether the remaining coparceners remained separate or became united. What was relevant to be considered was when the share or interest of a deceased coparcener in the coparcenary property devolved in the manner laid down in the proviso upon the heirs specified therein, whether such heirs were necessary parties to the suit and whether such heirs even though they were not the members of the coparcenary would have been represented by a Kartha. That question was answered by holding that such heirs were necessary parties in their own right and the Kartha could not represent them. Following this decision a similar view has also been taken by a Single Judge in *Yethirajulu Neelayya v. Mudumuru Ramaswami*²², It may however be pointed out in this case that even though the heirs of the deceased coparceners were not brought on record the continuance of the suit did not suffer from any infirmity by reason of absence of the heirs as it was a suit by at least some of the co-owners against the trespassers.

26. We may incidentally refer to a decision of the Calcutta High Court which has been referred with approval by the Full Bench of Andhra Pradesh in AIR 1971 Andhra Pradesh 363. In this case Mudumuru's family consisted of the father and his three minor sons. One of the minor sons died during the pendency of the litigation after the Act came into force leaving the mother as the only heir. As the mother was a female heir as specified in the proviso to Section 6 the provisions of the proviso were attracted and she inherited the property which would have been allotted to the minor son on a partition immediately before his death. The single Judge of the Calcutta High Court in *Narayan Prasad Ruia v. Mutuni Kohain*²², took the view that the mother was a necessary party to the suit and in her absence the suit suffered from infirmity. But there are certain observations in this judgment of Mr. Justice Bijayesh Mukherji which it would be useful

to refer. In para. 4 of the judgment he observed as under :-

"A karta of joint family property is quite an understandable concept. But a karta for a divided property, of property partitioned, notionally though, appears to be incomprehensible. So, old karta theory cannot help matters forward for the petitioner before me and Narayan Prasad Ruia as karta cannot represent his deceased son's mother and necessarily his wife upon whom devolves the share of the property after partition. The very nexus of the joint family property is gone."

(underlining is ours.)

Though there are no distinct observations on the question whether the remaining coparceners continued to be separate or joint, a *prima facie* observation is made that the nexus of the joint family property is gone. However, on the facts, as the mother of the deceased minor was necessary party continuance of the suit was regarded as suffering from infirmity. In *Karuppa Gounder v. Palaniammal*²³ the

²² AIR 1969 Cal 69

²³ AIR 1963 Mad 245

Division Bench of Madras High Court considered the effect of the proviso and Explanation 1 to Section 6. According to the Division Bench, the intendment of this provision is very clear. It is that persons entitled to succeed to the interest of a deceased coparcener under the Act shall not be subject to the hazard of the fluctuating fortunes of the family. The Act itself determines what the share of the heir shall be and it specifies it clearly to be that share on partitions, if partition had been effected immediately before the coparcener's death. Though factually no partition may have taken place, the quantum of the share of the female heir is effectively determined by this provision and no curtailment of that share is permissible on footing of the existence of the joint family or of the valid exercise of the power of the father to make a gift. Here also the question whether upon separation of the share of the deceased in order that it may devolve by testamentary or intestate succession under the proviso to Section 6 rendered the rest of the members of the coparcenary united or separate was not considered.

27. A similar question came to be considered by Allahabad High Court in the matter arising under the Estate Duty Act in the case of *Controller of Estate Duty U.P. v. Smt. Anari Devi Halwasiya*²⁴, The deceased in that case was entitled to 1/4th share in the property if a partition was effected as contemplated in Explanation thereto. The Division Bench has, inter alia, observed that 1/4th interest of the coparcenary property representing the interest of the deceased coparcener was carved out for the purpose of intestate succession. The balance of the coparcenary property, representing 3./4th of the original property, continued to remain joint. That was also a case where there were more than two coparceners and reliance was placed in this case upon the decision of the Privy Council in *Pratapmull v. Dhanbeti Bibi*²⁵, The Privy Council held : that in a suit instituted by a son for the partition of joint family property impleading his mother and other members of the family as defendants the mother does not become owner of the share allotted to her by the preliminary decree until the preliminary decree is carried out and there is a

division by metes and bounds. It may be pointed out that the decision of the Privy Council was given at the time when the Hindu Succession Act was not in force and actually notwithstanding the decision of the Privy Council, in *Munnalal v. Rajkumar*²⁶. after referring to this decision the Supreme Court has pointed out that Section 14 of the Hindu Succession Act effected a change in law and once a preliminary decree was passed declaring the quantum of share of each of the persons entitled to the share on a partition and if thereafter a female person entitled to such share died, having regard to the provisions of Section 14 of the Act such interest was regarded as the property of the deceased Hindu female.

28. The last case to which our attention was drawn was the decision of Mysore High Court in *Commr. of Income-tax Mysore v. Smt. Nagarathanamma*²⁷, The Division Bench has taken the view that on the death of the karta of a Hindu undivided family after the coming into force of the Hindu Succession Act, 1956, his share in the income that accrued from firms in which he had been a partner as karta, devolves by succession on his own heirs, and is not assessable as income of the Hindu undivided family. For the purpose of computation or determination of the share of the male Hindu, Explanation 1 to Section 6 of the Hindu Succession Act assumes that a notional partition in the family had taken place immediately before his death. The joint family, notwithstanding the death of one of its male members, continues for the purpose of

²⁴ AIR 1972 All 179

²⁶ AIR 1962 SC 1493

²⁵ AIR 1936 PC 20

²⁷(1970) 76 ITR 352 (Mys)

Income-tax, but the share of that joint family is diminished to the extent of the share of the member dying. This was also a case where the coparcenary consisted of more than two members and continuance of the joint family property was considered on that footing.

29. In none of the cases where a view has been taken that notwithstanding separation of the share of the deceased coparcener having regard to the proviso to Section 6 of the Act, the remaining coparceners continued to be joint a question was considered relating to a coparcenary consisting of only two members. We are in the present case concerned with the simple case of that nature. The coparcenary consisted of the members viz., father Narayanrao and son Shridhar, Shridhar died after the coming into force of the Act leaving him surviving his heirs under the Act his mother Laxmibai and his widow Shantabai. Then undoubtedly in view of the provisions of Section 6 Shridhar's share has to be separated and it devolved by intestate succession as he did not leave any will. Such severance is effected by the language of the proviso to Section 6 itself and it is unnecessary for that purpose even to refer to the provisions of Explanation 1 thereto. If Shridhar's share is severed, then, automatically having regard to the provisions prevailing under Shastric Hindu law upon a partition taking place between father and son the mothers' right to claim a share equal to that of a son automatically springs up. That being the position, immediately before Shridhar's death a notional partition having taken place in view of the provisions of Section 6 Laxmibai, as a result of that partition, will be entitled to 1/3rd share in the joint family property. The remaining 2/3rd share will be divided as under : 1/3rd will go to Narayanrao and 1/3rd coming to the share of Shridhar will devolve by intestate succession as provided under the Act. Thus Laxmibai as a result of this partition gets 1/3rd share. She is also an heir of Shridhar and as an heir of Shridhar she is entitled to half the interest in the share of

Shridhar. So in addition to 1/3rd share obtained by her on a partition she will be entitled to 1/6th share as such heir of Shridhar. The total interest thus obtained by Laxmibai in view of the provisions of Section 6 and the provisions prevailing under pure Hindu Law will be 1/2. Upon the death of Laxmibai in 1957 half the interest in the share left by Laxmibai will go to her husband Narayanrao, and the remaining half will go to her daughter Sushilabai, the plaintiff. Thus, Laxmibai's half share in the joint family property will be divided as under : 1/4th of it will go to Narayanrao, her husband and the remaining will go to her daughter Sushilabai, the plaintiff. Thus, in our view, having regard to the facts and circumstances of the present case Shushilabai, the plaintiff is entitled to 1/4th share in the property and she is entitled to have a partition and separate possession thereof secured to her.

30. Question No. 1 referred to us is divided in two parts. The first part of question No. 1 relates to the scope of the fiction in the Explanation of Section 6 of the Act and the question requires us to answer whether the scope of the fiction is as wide as was held in *Rangubai v. Laxman*²⁸, As we have pointed out in our judgment, it is not necessary for the purpose of this case to express any opinion on this part of the legal fiction. The whole of our judgment is based upon assumption that the fiction should be carried to a narrow extent only with a view to implement the purpose for which it was introduced. Proceeding on that footing, having regard to the facts of this case as there were only two coparceners and one of them died, then if any person other than the coparceners is entitled to a share as a result of severance of the share of the deceased coparcener the share of such other person will become fixed. Thus, on the facts of this case, upon a partition taking place immediately before the death of Shridhar, Laxmibai became entitled to 1/3rd interest in

²⁸(1966) 68 Bom LR 74

the joint family property. So far as question No. 2 is concerned, Laxmibai has obtained 1/3rd share in the joint family property as a result of partition and she is also in addition thereto obtained 1/6th share in the joint family property as an heir of Shridhar. Thus she is entitled to 1/2 share in the joint family property and upon her death this 1/2 share is equally divided between her husband Narayanrao and her daughter, the plaintiff. Thus the plaintiff on the facts of the present case is entitled to 1/4th share in the suit property.

31. Having regard to the questions referred to us plaintiff Shushilabai is entitled to 1/4th share in the property in which she is entitled to claim a share. If there are other questions if any to be decided in this appeal, the same will be considered by the Division Bench in the light of the quantum of share of Shushilabai, the plaintiff, determined by us in this case and appropriate directions will be given and decree will be passed while disposing of the appeal.

32. The question of costs of hearing of this appeal will be dealt with by the Division Bench while disposing of the appeal.

Order accordingly.