IN THE HIGH COURT OF KARNATAKA AT BENGALURU R

DATED THIS THE 22ND DAY OF OCTOBER, 2024

PRESENT

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR JUSTICE UMESH M ADIGA

REGULAR FIRST APPEAL NO.1226 OF 2016 (PAR)

BETWEEN:

JAYASHREE JAYANTH W/O. JAYANTH BALAKRISHNA,
AGE. 61 YEARS, R/O.183 PRESTIGE NORTH WEST COUNTY
RAJANUKUNTE, OFF DODDABALLAPUR RD,
BANGALORE-560064.

- APPELLANT

(APPELLANT REPRESENTED BY GPA HOLDER
SRI. JAYANTH BALAKRISHNA, PARTY-IN-PERSON)

AND:

1. N. KRISHNASWAMY S/O. P.B. NANJIAH,
AGE. 89 YEARS, R/O. NO.21/67, MAIN ROAD,
METTYAPALAYAM-641301,
COIMBATORE DISTRICT, TAMIL NADU.

2. PREMALEELA KRISHNASWAMY W/O. N. KRISHNASWAMY,
AGE. 69 YEARS, R/O. 21/1/67, MAIN ROAD,
METTYAPALAYAM-641301, COIMBATORE DISTRICT,
TAMIL NADU. (DELETED AS PER ORDER DATED
26.08.2010)

3. MALLIKA MURALI BABU D/O. N. KRISHNASWAMY,
AGE. 56 YEARS, R/O. KRISHNALEELA,
59/E, MAIN ROAD, METTUPALAYAM-641 301,
COIMBATORE DISTRICT, TAMIL NADU.
REPRESENTED BY HER LRS

3.(A) PRETIKA MANOJ D/O LATE MALLIKA
AGED ABOUT 32 YEARS,

3.(B) AMITA MURALI BABU D/O LATE MALLIKA
AGED ABOUT 30 YEARS,

BOTH R/O. 'KRISHNALEELA' 59/E,

MAIN ROAD, METTUPALAYAM-641301
COIMBATORE DISTRICT, TAMIL NADU.

4. R. MURALI BABU (HUSBAND OF MALLIKA MURALI BABU),
S/O. H.A. RANGASAMY, AGE. 60 YEARS,
R/O. KRISHNALEELA, 59/E, MAIN ROAD,
METTUPALAYAM-641 301,
COIMBATORE DISTRICT, TAMIL NADU.

5. R. THIMMAMMAL W/O. N. RAMOO GOWDER,
AGE. 90 YEARS, R/O. 21/1/53, MAIN ROAD,
METTUPALYAM-641 301,
COIMBATORE DISTRICT, TAMIL NADU.

6. R. CHANDRASEKHAR S/O. N. RAMOO GOWDER,
AGE. 75 YEARS, R/O. 21/1/53, MAIN ROAD,
METTUPALAYAM-641 301,
COIMBATORE DISTRICT, TAMIL NADU.

7. USHA UMAPATHI W/O. R. UMAPATHI,
AGE. 65 YEARS, R/O. LASYA, 91/1,
KASTURI APARTMENTS, OFF: KASTURI RANGA ROAD,
ALWARPET, CHENNAI-600 018.

8. PREETHAM UMAPATHI S/O. R. UMAPATHI
AGE. 43 YEARS, R/O LASYA, 91/1,
KASTURI APARTMENTS, OFF: KASTURI RANGA ROAD,
ALWARPET, CHENNAI-600 018.

9. VIKRAM UMAPATHI S/O. R. UMAPATHI,
AGE. 39 YEARS, R/O LASYA, 91/1,
KASTURI APARTMENTS, OFF: KASTURI RANGA ROAD,
ALWARPET, CHENNAI-600 018.

10. PREETHI SHIVRAM D/O SHYMALA DEVARAJ,
AGE. 51 YEARS, R/O NO.41416, MISSION DRIVE,
PALMDALE, CALIFORNIA-93551, USA.

11. PRIYA DEVARAJ D/O SHYMALA DEVARAJA,
AGE. 48 YEARS, R/O NO.41416, MISSION DRIVE,
PALMDALE, CALIFORNIA-93551, USA.

12. VASANTHA PADMANABHA D/O N. RAMOO GOWDER,
AGE. 71 YEARS, R/O NO.41416, MISSION DRIVE,
PALMDALE, CALIFORNIA-93551, USA.

13. MALATHI KRISHNASWAMY D/O N. RAMOO GOWDER,
AGE. 69 YEARS, R/O NO.10/B, KRUPA,
BORIAHGOWDER STREET, L.S.PURAM,
METTUPALAM-641 301,
COIMBATORE DISTRICT, TAMIL NADU.

14. SUJATHA CHANDAPPA W/O N. CHANDAPPA,
AGE. 83 YEARS, R/O NO.6/9, PRIMROSE ROAD,
GURAPPA AVENUE, BANGALORE-560 025.

15. NANJARAJ CHANDAPPA S/O N. CHANDAPPA,
AGE. 57 YEARS, R/O NO.6/9, PRIMROSE ROAD,
GURAPPA AVENUE, BANGALORE-560 025.

16. CHANDINI SURYA KUMAR S/O N. CHANDAPPA,
AGE. 64 YEARS, R/O NO.26, MARIANNAPALYA,
HEBBAL, BANGALORE-560 024.

17. NANDINI AMAR KUMAR D/O N. CHANDAPPA,
AGE. 61 YEARS, R/O NO.68, ASOKA PILLAR ROAD,
NEAR CANARA BANK, II BLOCK,
JAYANAGAR, BANGALORE-560 011.

18. K.KANTHARAJ REPRESENTED BY LRS,

18.(A) M V MALATHI W/O. LATE K KANTHARAJ,
AGED ABOUT 58 YEARS,

18.(B) K KESHAVARAJ S/O LATE K KANTHARAJ,
AGED ABOUT 40 YEARS,

BOTH R/O. NO.11/150, K K NAGAR,
COIMBATORE MAIN ROAD, MTTUPALAYAM-641301.

19. RENUKA LAKSHMANAN D/O KAMALA KRISHNARAJ,
AGE. 55 YEARS, R/O NO.11/150, K.K. NAGAR,
COIMBATORE MAIN ROAD, METTUPALAYAM-641 301.

\- RESPONDENTS

(BY SRI. KASHYAP N. NAIK, ADVOCATE
FOR CR R1,R2,R3 (A & B) TO R13;
V/O DATED 23.05.2023, R15 TO R17
SHALL BE TREATED AS LR'S OF R14;
SRI. DHANANJAYA JOSHI, SENIOR COUNSEL
FOR SRI. S.H. PRASHANTH & SRI. JAYAKUMAR N.D.,
ADVOCATES FOR R15, R16, C/R17 & R18 (A & B);
SRI. AKSHAY B.M., ADVOCATE FOR R19 AND PROPOSED R20)

THIS REGULAR FIRST APPEAL IS FILED UNDER ORDER XLI RULE 1 R/W SEC.96 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED 05.07.2016 PASSED IN OS NO.6285/2008 ON THE FILE OF THE XXXVII ADDL. CITY CIVIL SESSIONS JUDGE, (CCH-38), BENGALURU CITY, DISMISSING THE SUIT FOR PARTITION & ETC.

Date on which the appeal was reserved for judgment	20.08.2024
Date on which the judgment was pronounced	22.10.2024

THIS APPEAL, PERTAINING TO BENGALURU BENCH, HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT THIS DAY AT DHARWAD BENCH, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

HON'BLE MR JUSTICE UMESH M ADIGA

CAV JUDGMENT

(PER: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR)

This first appeal is directed against judgment dated 05.07.2016 in O.S.No.6285/2008 on the file of XXXVII Additional City Civil and Sessions Judge, Bengaluru (CCH-38), dismissing the suit as not maintainable.

2. The factual background in brief is as below:

2.1. One Bore Gowda of Pura Village, Hiresave Hobli, Channarayapatna Taluk, Hassan District was the propositus. He had two daughters, namely, Lakshmidevi and Devaramma, and a son by name P.B.Nanjiah. Thayammal was the first wife of P.B.Nanjiah. Through her he begot a son by name Devaiah Gowder. After the death of Thayammal, he married Lingammal through whom he begot three sons, namely, Ramoo Gowder, Chandappa and Krishnaswamy. Plaintiff is the daughter of Krishnaswamy, who is the first defendant in the suit. Second defendant was plaintiff's mother and she was deleted from the array of parties by order dated 26.08.2010. Defendant No.3 is the second daughter of the first defendant. Fourth defendant is the husband of third defendant. Defendant No.5 is the wife of Ramoo Gowder. Defendants No.6 to 13 belong to the branch of Ramoo Gowder. Defendants No.14 to 17 belong to the branch of

N.Chandappa and defendants No.18 and 19 belong to the branch of Devaiah Gowder.

2.2. Bore Gowda died on 15.10.1936 and his son P.B.Nanjiah predeceased him on 10.10.1936.

2.3. Plaintiff's suit is for partition and separate possession of her 1/8th share in the properties described in the plaint schedule. Schedule A consists of immovable landed properties, schedule B consists of Bank Accounts, plants and machinery and, assets and shares in some companies. Schedule 'C' consists of residential apartments at Coimbatore and two pieces of agricultural lands. According to the plaintiff items 1 to 3 of plaint 'A' schedule belong to the Hindu Undivided Family of Bore Gowda. These properties devolved on Devaiah Gowder, Ramoo Gowder, Chandappa and Krishnaswamy. The cousins of these four brothers claimed occupancy rights on these three lands under the provisions of Karnataka Land Reforms Act, but

their claim was rejected and therefore these items belonged to the joint family. In regard to other properties the plaintiff has given a long description of the way how they were acquired by the joint family, but it is not necessary to refer to all those details; it is enough if it is stated that according to the plaintiff the other properties also belong to the joint family.

2.4. The plaintiff refers to three partition deeds dated 04.03.1955, 26/27.04.1966 and 22.02.1994. It is stated in the plaint that by virtue of partition dated 04.03.1955, Ramoo Gowder and Devaiah Gowder were allotted separate shares and the shares of Chandappa and Krishnaswamy were kept jointly. Under partition deed of the year 1966, Krishnaswamy, the first defendant was allotted certain other properties. The partition deed dated 22.02.1994 refers to a share being given to third defendant. It is stated that the plaintiff's signature was taken on this

document as a witness. Plaintiff was denied share on an erroneous interpretation of law and therefore this partition did not bind her interest. The allegation of the plaintiff is that her father i.e., the first defendant has been hostile to her interest. The attitude of the first defendant towards the plaintiff resulted in depriving her of legitimate share in all the properties belonging to the joint family.

3. The first defendant filed a lengthy written statement, the gist of which is that:

3.1. P.Bore Gowda, the propositus died on 15.10.1936. His only son P.B.Nanjiah died on 10.10.1936. Items 1 to 3 of the plaint schedule no doubt belong to the ancestral joint family, but they were being cultivated by some others who claimed grant of occupancy rights under the provisions of Karnataka Land Reforms Act. The Land Tribunal granted occupancy rights in favour of one Kalaiah. The order of the Tribunal was

challenged by the first defendant and his brothers by preferring an appeal to the Land Reforms Appellate Authority at Hassan which allowed their appeal and thereby the order of the Land Tribunal was set aside. Kalaiah challenged the said order in the High Court of Karnataka by filing revision petition which was also dismissed. He then approached the Hon'ble Supreme Court by filing Special Leave Petition and it was also dismissed. The first defendant thereafter took possession of the lands on 12.11.2008. Thus there was no income from these three items of lands till 12.11.2008 to accept the plea of the plaintiff that the other items of the plaint schedule were acquired from the income of ancestral nucleus.

3.2. It is stated that P.B.Nanjiah left his native village at a very young age and settled at Mettupalayam in Tamil Nadu. He acquired the properties by dint of his hard labour without any aid from ancestral properties situated at Pura

village. Therefore the properties do not have traces of ancestral family nucleus. After the death of P.B.Nanjiah, there took place a partition on 04.03.1955. At that time the first defendant was unmarried. His marriage was held on 05.06.1958 and the plaintiff was born on 14.08.1962. By virtue of the partition deed dated 04.03.1955 all the sons of P.B.Nanjiah became separated. N.Devaiah Gowder, the step eldest brother of the first defendant severed from the joint family. Then on 27.04.1966, the first defendant and his two uterine brothers, namely, N.Ramoo Gowder and N.Chandappa divided the streedhana properties of their mother Lingammal. The properties that devolved on the first defendant by virtue of these two partitions became his exclusive properties and the plaintiff cannot claim any share even after the advent of Hindu Succession (Amendment) Act, 2005.

3.3. In regard to the partition deed dated 22.02.1994, the first defendant stated that it was between him and his second daughter i.e., the third defendant, and no share was given to the plaintiff at that time because of Section 29A of Tamil Nadu Hindu Succession (Amendment) Act. To this partition the plaintiff was a witness and in fact before execution of this partition deed, she fully involved in the deliberations for preparing the partition deed. However the first defendant, realizing that the plaintiff had not been given any property, executed a registered will in her favour on 24.02.1994 bequeathing certain properties. Execution of this will was kept secret and he would not have executed the will if he did not have love and affection towards her. It is stated that the plaintiff is a puppet in her husband's hands. The suit has been instituted on the instigation of her husband. The cause of action is shown to have arisen on 02.09.2005, the day on

which Central amendment to the Hindu Succession Act was given into effect. This date did not give rise to cause of action for the suit. The plaintiff is not at all a coparcener to claim share in the properties because the first defendant succeeded to the self acquired properties of his father. Therefore suit is to be dismissed.

4. The other defendants filed their separate written statements and also adopted the averments made in the written statement filed by the first defendant.

5. The trial court having framed 8 issues, treated issues No.2 and 4 as preliminary issues. The trial court did not answer issue No.2 relating to applicability of Order II Rule 2 of CPC as it was not pressed. But it answered issue No.4 against the plaintiff and dismissed the suit as not maintainable and hence this appeal.

6. If the findings of the trial court are seen, it can be noticed that it has discussed the position

in regard to succession before and after coming into force of Hindu Succession Act, 1956. It is held that there are two modes of devolution of interest, namely survivorship and succession. The coparcenary interest would devolve upon other coparceners by survivorship and wherever coparcenary interest is not involved, the devolution is by succession and not by survivorship. Referring to the judgment of the Supreme Court in ***Eramma vs Virupana and Others [AIR 1966 SC 1879]***, it is held that section 8 of the Hindu Succession Act does not have retrospective effect and that the language of section 8 must be construed in the context of section 6 of the Act. Applying the effect of Hindu Succession Act, 1956 to the material facts pleaded by the parties in the plaint and the written statements, it is held by the trial court that Ramoo Gowder died on 08.02.1987 and Devaiah Gowder died on 21.10.1990. That means they both died

after coming into force of Hindu Succession Act, 1956. Then placing reliance on two Supreme Court judgments in ***Commissioner of Wealth Tax, Khanpur vs Chander Sen [AIR 1986 SC 1753]*** and ***Uttam vs Saubhag Singh and Others [AIR 2016 SC 1169]*** it is held by the trial court that once section 8 of the Hindu Succession Act is attracted, the joint family property is required to be divided by rules of intestate and not by survivorship and therefore this position of law goes against the plaintiff.

6.1. Referring to the factual position stated in the plaint, the conclusions drawn by the trial court are that Devaiah Gowder firstly separated from the joint family in a partition that took place on 04.03.1955, then Ramoo Gowder, N.Chandappa Gowder, defendant No.1 and their mother Lingammal again effected partition on 26/27.04.1966. Thereafter defendants No.1 and 3 became separated under a registered partition

deed dated 22.02.1994. The plaintiff is debarred from contending that these partitions do not bind her interest, especially when she was a witness to the partition deed dated 22.02.1994. It is also a fact that defendant No.3 sold her share to the plaintiff under a registered sale deed dated 16.06.1994. It is held that the partition deed dated 04.03.1955 disrupted the joint family status and when three brothers again divided the properties on 26/27.04.1966, the ancestral joint family properties did not exist at all and therefore there remained no joint family property on the day when suit was filed.

7. We have heard the arguments of Sri Jayanth Balakrishna, the husband and power of attorney holder of the plaintiff/appellant who appeared in person, Sri Kashyap N Naik, learned advocate for respondents 1, 2, 3 (A & B) to 13, Sri Dhananjaya Joshi, Senior Advocate for Sri S.H.Prashanth and Sri Jayakumar N D, advocates,

for respondents 15, 16, 17 and 18 (A & B) and Sri Akshay B M, advocate, for respondent 19 and proposed respondent 20.

8. Sri Jayanth Balakrishna almost reiterated the plaint averments to emphasize the fact that items No.1 to 3 of the plaint schedule were ancestral and that the other properties of the plaint schedule were acquired from the income of ancestral properties. His line of argument was that in spite of partition having taken place in the year 1955 and 1966, there was no total disruption of the joint family in as much as item No.6 of the plaint schedule was purchased from the income of 'Reading Estate' which had been purchased by P.B.Nanjiah in the year 1926 in his capacity as a coparcener. After the death of Nanjiah in October 1936, Reading Estate continued to remain in the joint family hold, all the four sons of Nanjiah enjoyed the same along with their mother Lingammal. When division took place on

04.03.1955, the shares of Chandappa and Krishnaswamy, i.e., the first defendant were kept jointly and the other two coparceners namely Ramoo Gowder and Devaiah Gowder were allotted their respective shares. Even the property acquired by Lingammal was from joint family income and in this view the joint family continued to possess the properties which are available for partition. In so far as the partition of the year 1994 is concerned Sri Jayanth Balakrishna submitted that the signature of the plaintiff as a witness was deceptively obtained, and in spite of this partition she did not lose her interest to claim partition in the coparcenary properties by virtue of amendment brought to Hindu Succession Act in the year 2005. In a nutshell his argument is that since the plaintiff became a coparcener from the date of coming into force of 2005 Hindu Succession (Amendment) Act, she has every right to seek partition. The trial court should not have held that

the suit is not maintainable by erroneously applying section 8 of the Hindu Succession Act. He submitted that the judgments of the Supreme Court in ***Chander Sen*** and ***Uttam*** actually apply to succession under section 8 and they can not be applied where the coparcenary devolution is involved. In addition to placing reliance on many decided cases, he has referred to an article by Dr.Virendra Kumar, Professor of Law and Former Director of Chandigarh Judicial Academy.

9. We find it necessary to opine here that the plaint and the written statement of the first defendant have been drafted contrary to the Rules of Pleading envisaged in Order VI Rule 2 of CPC. Evidence to be placed before the court at the time of trial and legal aspects to be canvassed during argument are also mentioned in the pleadings and therefore they look like written arguments.

10. Sri Kashyap Naik and Sri D.V.Joshi raised the following issues :

(i) Section 4 of Hindu Succession Act, 1956 has a greater impact in the sense that any text, rule or custom or usage of Hindu Law that was in force before commencement of Hindu Succession Act will cease to have effect, and for any interpretation to be given, provisions made in Hindu Succession Act must only be considered.

(ii) The appellant cannot claim right on any of the properties invoking Hindu Succession Act. For the sake of arguments even if one were to assume that the property devolved on Krishnaswamy under the Act, since Devaiah Gowder, Ramoo Gowder, Chandappa and Krishnaswamy inherited items 1 to 3 of plaint schedule as sons of predeceased son of Bore Gowda, these properties never partook the character of coparcenary property at the hands of the appellant as more than three generations had not passed in the light of principle laid down by the Supreme Court in ***Chander Sen***, which has

been followed in subsequent judgments of the Supreme Court.

(iii) Items 10, 12, 13 and 14 were the properties of Lingammal, the second wife of Nanjiah, and these properties were subject matters of the partition effected in the year 1966. Section 14 of Hindu Succession Act could be applied here, and the inheritance of these properties by three sons of Lingammal was under section 15 of the Hindu Succession Act and in this view, the appellant cannot claim any share during the lifetime of her father.

(iv) For the purpose of assigning one's interest in the property it was not necessary that partition by metes and bounds must take place among the coparceners. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a

coparcenary property. The parties in such an event would not possess the property as 'joint tenants' but as tenants in common. The decision of this court in SBI case therefore is not applicable to the present case. Where a coparcener takes definite share in the property, he is the owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

(v) Even if a partition of ancestral property takes place, the share that a coparcener takes, becomes his separate property in accordance with ratio in ***Chander Sen*** and ***Uttam.*** It is a devolution under section 8 of the Hindu Succession Act and for this reason also, the appellant is debarred from claiming share as long as her father is alive.

(vi) Contention of the appellant that despite a registered partition deed, the property continued to be coparcenary property as it was not divided

by metes and bounds is an illogical contention, and inadmissible in law. Sri P.V.Kane in his History of Dharma Shastra, writes, "Even in the absence of joint family property, severance of interest takes place by mere declaration in the form 'I am separate from thee', for severance is merely a particular mode (or state) of mind and this declaration merely manifests that state or mode of mind". This aspect of Mithakshara Law has been applied and recognized in the cases of Banraj Alakdhari Pathak, P.Chandrappa Pai, Kallomal Topeshwari Prasad and Kashi Bai.

(vii) A careful reading of the unamended (or Old) section 6, amended section 6 and section 8 of the Act would show the manner of conferment of right on a female Hindu and her limitations thereof. Proviso to unamended section 6 stated, "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".

(viii) On the amendment to section 6 of the Act, section 6 (3) reiterated the earlier principle carved out in proviso to unamended section 6, albeit in different words. The essence of section 6 (3) and proviso to old section 6 were one and the same. The devolution of property by survivorship was specifically excluded in the 2005 amendment.

(ix) Also, the court would be concerned about the appellant's right over the alleged coparcenary property and not her father's so as to decide her share. As she was born in the year 1962, her right, if any, would have to be ascertained under the Act of 1956 and not under the uncodified Hindu

Law. Therefore, the law as encapsulated under the Dharmashastra becomes inapplicable to the case at hand.

(x) Any partition deed that makes a division and severance of interest in respect of joint family / coparcenary properties, disrupts the coparcenary and even if the partition is partial, the cosharers of the property continue to hold the undivided properties as tenants-in-common and not as joint tenants. In respect of the partitioned properties and where the properties are held as tenants-in-common, the sharer under a registered partition takes the share in his individual capacity and if a son is born to him subsequent to partition, such a son does not get entitlement to such properties as a coparcener as there exists no coparcenary. This principle is laid down vide, (1) P.Cheradappa Pai Vs. Agricultural Income Tax Officer, Puttur, reported in (1970) 77 ITR 313 – Paras 5 & 6; (2)

M.N.Aryamurthy & Anr Vs.M.D.Subbaraya Setty & Ors, reported in (1972) 4 SCC 1 –para 20; (3) Kalloomal Tapeswari Prasad Vs. CIT, Kanpur, reported in (1982) 1 SCC 447-Paras 16 & 17; (4) Kashibai & Ors Vs. Putalabai & Anr, reported in AIR 1987 Kar 156-Para 9-{Karnataka HC-DB judgment}; (5) Bhanwar Singh Vs. Puran & Ors, reported in (2008) 3 SCC 87-Paras 12 to 20; (6) Uttam Vs. Saubhag Singh & Others, reported in (2016) 4 SCC 68-Paras 18 and 19. (These judgments are cited by learned Senior Counsel Sri. Dhananjaya Joshi. Some of these judgments are cited by Sri Kashyap Naik and only those which are relevant to the discussion are referred here).

(xi) As Sri Dhananjaya Joshi argued, the judgment of the coordinate Bench of this court in ***Pushpalatha N.V vs V.Padma [ILR 2019 Kar 3205]*** is a decision *per incuriam* in as much as decision of the Supreme Court in ***Uttam*** was not cited.

11. Before answering legal issues, it is necessary to opine here regarding some interlocutory applications filed by the appellant under Section 340 of Cr.P.C. and Order 41 Rule 27 CPC. All these applications are out of scope of the appeal. The trial court dismissed the suit as not maintainable. Even though issues were framed, no oral evidence was recorded and no document was marked. As the trial court did not venture into receiving evidence, production of additional evidence in the appeal does not arise. For the same reason application under section 340 Cr.P.C cannot be entertained. All these applications are filed by the appellant's power of attorney without comprehending the scope of the provisions of law under which they are filed. We also do not hesitate to state that all the decisions cited by Shri Jayanth Balakrishna are not necessary for discussing the legal issue involved in this appeal, hence they are not referred here.

12. Now the context requires to trace the law relating to coparcenary before and after the Hindu Succession Act, 1956 came into force.

13. Sri P.V.Kane, in his work, History of Dharmashastra (Volume III page 591) writes, "Coparcenary is purely a creation of law; it cannot be created by act of parties, except by adoption. In order to be able to claim a partition, it does not matter how remote from the common ancestor a person may be, provided he is not more than four degrees removed from the last male owner who has himself taken an interest by birth".

14. In 'Hindu Law' by Mulla, (24th Edition, Chapter XII) §212, formation of coparcenary is stated thus below :

> ***"§212. Formation of coparcenary***
>
> *(1) The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal*

descendants in the male line within four degrees counting from, and inclusive of, such ancestor (or three degrees exclusive of the ancestor). No coparcenary can commence without a common male ancestor, though after his death, it may consist of collaterals, such as brothers, uncles, nephews, cousins, etc.

(2) A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof.

(3) No female can be a coparcener, although a female can be a member of a joint Hindu family (see §215). This was the position prior to the amendment of the Hindu Succession Act in 2005. By virtue of the amendment, the daughters of a coparcener are included as coparceners along with his sons and are recognized as coparceners in their own right."

15. Uncodified Hindu Law applicable to Mithakshara School, recognized only male members up to fourth generation in the line of descendants from the propositus or common

ancestor being entitled to claim partition as coparceners. The cordinal doctrine of Mithakshara is that property inherited by a Hindu from his father, father's father, or father's father's father is ancestral property, and his descendants up to 4th generation including him i.e., son, grandson and great grandson get a right to seek partition as they become coparceners by birth. Illustration (a) to $ 211 (Hindu Law by Mulla), extracted here gives a clear picture.

> *(a) Prior to the coming into force of The Hindu Succession Act, 1956, if A who had a son B, inherited property from his father, it became ancestral property in his hands, and B became a coparcener with his father. Though A as head of the family was entitled to hold and manage the property, B was entitled to an equal interest with his father A, and to enjoy it in common with him. B could, therefore, restrain his father from alienating it except in the special cases where such alienation was achieved by law, and he could enforce partition of it against his father. On his father's death, B took the*

property by right of survivorship and not by succession."

16. Hindu Succession Act, 1956 did not bring in any change in the meaning of 'coparcenary' till it saw amendments in the year 2005. Even in 1956 Act, coparcenary meant that common male ancestor and next three male descendants from him, (to be more explicit father->son-> grandson -> great grandson) constituted coparcenary. But amendment brought to Hindu Succession Act in the year 2005 conferred status of a coparcener to a daughter. This is the change in law.

17. Now the next question is "when does a property assume the character of ancestral or coparcenary?" This question is necessary to be raised because it is impossible to conceive of existence of a separate ancestral property as such from inception. One must earn or acquire a property and if that property is inherited by

successive generations in the same lineage, it partakes the character of coparcenary property. Genesis of coparcenary is explained by Mulla with an illustration to S 212 which is extracted here :

> ***"Genesis of Coparcenary:-*** *A coparcenary is created in the following manner: A Hindu male A, who has inherited no property at all from his father, grandfather, or great-grandfather, acquires property by his own exertions. A has a son B, B does not take any vested interest in the self-acquired property of A during A's lifetime, but on A's death, he inherits the self-acquired property of A. If B has a son C, C takes a vested interest in the property by reason of his birth, and the property inherited by B from his father A, becomes ancestral property in his (B's) hands, and B and C are coparceners as regards the property. If B and C continue joint, and a son D is born to C, he enters the coparcenary by the mere fact of his birth. Moreover, if a son E is subsequently born to D, he too becomes a coparcener."*

18. According to Shastric Hindu Law, if a son inherited the property of his father it was ancestral in his hands; if the son had a son (grandson) at the time of inheritance, the son's son got a right by birth to claim partition. But this position saw a change in the Hindu Succession Act, 1956, those changes can be understood with the help of sections 6 and 8 of Hindu Succession Act.

19. Section 6 of 1956 Act primarily deals with devolution by survivorship of Mithakshara coparcenary property. The requirement of this section is that death of a male Hindu must have occurred after commencement of 1956 Act and at the time of death, male Hindu should have possessed interest in Mithakshara coparcenary property and such kind of interest devolves on surviving members of coparcenary. Until amendment to section 6, members of coparcenary included only male members; 2005 amendment

brought in the effect of conferring coparcenary right on a daughter.

20. Section 8 is in relation to intestate succession of a male Hindu. Intestate succession obviously connotes a meaning that it must be in relation to a property which must absolutely belong to a male Hindu, he may acquire it by his own exertion or from anybody other than his male ancestor. In other words self acquired or separate property of a male Hindu becomes subject matter of intestate succession.

21. Section 6, whether before amendment or after amendment, also provides for testamentary or intestate succession of interest of a male Hindu in a Joint Hindu Family governed by Mithakshara law. The meaning of the expression 'interest of male Hindu' is found in explanation part. That interest is notional in the sense, what the deceased had taken in case a partition had taken

place during his lifetime. The notional share is treated as separate property of the deceased male Hindu and the devolution of this notionally carved out share takes place in accordance with section 8. To this limited extent section 8 has applicability in section 6 of 1956 Act.

22. If Section 6 of 1956 Act is compared with the amendment brought to it in the year 2005, the notable distinction is that devolution by survivorship appears to have been taken away and as sub-section (3) evinces, if a Hindu dies after the commencement of the Amendment Act, his interest in the property of a Hindu Joint Family governed by the Mitakshara Law shall devolve by testamentary or intestate succession as the case may be and not by survivorship. This may lead to an interpretation that devolution by testamentary or intestate succession is the only permitted mode of devolution and devolution by survivorship does

not take place at all. If this kind of interpretation is given, it will have a disastrous effect, for it was not the intent to bring about amendment. The primary intention was to confer coparcenary right on the daughter. Once a daughter is treated a coparcener, she gets a right to claim partition in the coparcenary property even during the lifetime of her father. If partition is sought after the death of father, again the devolution of the property among all the coparceners takes place according to rule of survivorship and only the interest of the deceased Hindu will devolve by testamentary or intestate succession. Here again the fiction of notional partition can be conceived to determine the share of the deceased which has to be inherited by way of succession by his heirs who are entitled to share in accordance with section 8.

23. Now the judgment of the Hon'ble Supreme Court in ***Chander Sen*** is to be referred

to. Unless the facts in ***Chander Sen*** are understood properly, the actual principle laid down therein cannot be deciphered. The facts are that Chander Sen was the son of Rangilal and they constituted Hindu Undivided Family which had some immovable property and was carrying on family business in the name and style of Khushiram Rangilal. On 10.10.1961, there was a partial partition in the family and the business was divided between father and son. Thereafter the father and son carried on a partnership business. The partnership firm was assessed to income tax and the two partners were separately assessed in respect of their individual share in the income of the firm. The house property of the family continued to remain joint. On 17.07.1965, Rangilal died leaving behind his son Chander Sen and the sons of Chander Sen. Rangilal's wife had predeceased him. Chander Sen was the only issue to Rangilal. There was a credit balance of

Rs.1,85,043/- in the account of Rangilal as depicted in the books of the firm. After the death of Rangilal, Chander Sen constituted a joint family with his sons. He filed a return of his net wealth showing what passed on to him by survivorship and also the assets of the business devolved on him after the death of his father. But he did not include a sum of Rs.1,85,043/- standing to the credit of his father in the net wealth of his family when he filed the return as according to him the said sum became his separate property and not the property of the assessee family. Since the Wealth Tax Officer did not accept the stand of Chander Sen and held that Rs.1,85,043/- belonged to the assessee family, dispute arose.

24. If the facts are put to analysis, it becomes very evident that the Hindu Undivided Family consisting of Chander Sen and his father disrupted when partition took place on 10.10.1961.

The partnership business that was commenced by them after the partition was not the family business. A sum of Rs.1,85,043/- belonged to Rangilal as the books of accounts showed that it was credit balance in the account of Rangilal. That means this sum exclusively belonged to Rangilal and it devolved on his son Chander Sen in accordance with section 8 of Hindu Succession Act. This sum was not part of the Joint Family property. In para 7 of the judgment it is clearly observed that the amount could not be said to belong to Joint Hindu Family and qua Chander Sen and his sons it was separate property of Rangilal. On Rangilal's death amount passed on to his son Chander Sen by inheritance. It was in this context that the Hon'ble Supreme Court noticed the effect of section 8 making an observation that son alone would inherit the property of a male Hindu. When Rangilal died, Chander Sen had a son. The presence of Chander Sen's son did not have the

effect of succession by Chander Sen to the said sum to make it a property of joint family. If Shastric Law had been applied, because of presence of Chander Sen's son at the time of Rangilal's death, the money that Chander Sen inherited would have become joint family property. But by virtue of section 4 of Hindu Succession Act, it was held that section 8 would come into picture in this kind of situation and Shastric Hindu Law was not applicable. Unfortunately this position is wrongly applied to give a meaning that even devolution by survivorship of a coparcenary property is governed by section 8 which exclusively deals with inheritance of self acquired or separate property of a male Hindu. However it is true that whenever notional partition is effected to determine the share of the deceased male Hindu, since it becomes separate property of the deceased, the devolution of such interest takes place according to section 8.

25. ***Chander Sen*** was cited before the coordinate bench of this court in ***Pushpalatha N.V Vs V Padma (supra),*** one of us being the member of the bench exposited the actual legal position in Chander Sen. But Sri Dhananjaya Joshi, learned Senior Advocate, in his written argument has mentioned that ***Pushpalatha*** is *per incuriam* on two grounds, firstly the binding decisions of the Hon'ble Supreme Court in ***Yudhishter vs Ashok Kumar [(1987) 1 SCC 204], Bhanwar Singh vs Puran and Others [(2008) 3 SCC 87]*** and ***Uttam vs Saubhag Singh and Others [(2016) 4 SCC 68]*** were not brought to the notice of the coordinate Bench and secondly the Bench was persuaded to rely on ***Rohit Chauhan vs Surinder Singh and Others [(2013) 9 SCC 419].***

26. It is true that in ***Pushpalatha, Yudhishter, Bhanwar Singh*** and ***Uttam*** are not discussed; and instead, reliance was placed on

N.V.Narendranath vs Commissioner of Wealth Tax, A.P [1969(1) SCC 748] and ***Shyam Narayan Prasad vs Krishna Prasad and Others [(2018) 7 SCC 646].*** Therefore it is necessary to refer to ***Yudhishter, Bhanwar Singh*** and ***Uttam*** to examine whether a different view could have been taken in ***Pushpalatha*** had the said three decisions been cited.

27. In ***Yudhishter***, the facts show that a proceeding for ejectment of tenant was initiated before the Rent Controller. In that proceeding a question as to position of respondent therein after coming into operation of Hindu Succession Act, 1956, arose. Applying ***Chander Sen*** it is clearly held that,

> *"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is*

born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court

observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which devolved on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

(emphasis supplied)

28. It becomes clear that whoever inherits self acquired or separate property of a male Hindu according to section 8 of Hindu Succession Act, he or she takes the property as his or her absolute

property and this is not applicable when there is devolution of coparcenary property by survivorship, therefore ***Yudhister*** does not deal with a situation as argued by Sri Dhananjaya Joshi.

29. ***Bhanwar Singh*** is yet another instance of succession to property, to be more precise, separate property of one Bhima, who died in the year 1972 leaving behind his son and three daughters. Sant Ram was the son of Bhima. Bhawan Singh, the son of Sant Ram was born in the year 1977. There was a partition between Sant Ram and his three sisters, and in the revenue records, the shares of each one of them was shown to be ¼. It appears that Sant Ram mortgaged the properties and they sold them. These alienations were challenged by Bhanwar Singh. In these set of facts, the Hon'ble Supreme Court held as below:

"13. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed in Class-I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

14. Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record of rights. A partition had taken place amongst the heirs of Bhima."

30. It is discernible that whenever devolution of separate or self acquired property of male Hindu

takes place, section 8 is applicable, not section 6. But wherever rule of survivorship is applicable, section 8 has no applicability.

31. Lastly in ***Uttam,*** the principles culled out are found in para 18 and they are :

> *"(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).*
>
> *(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.*
>
> *(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female*

relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

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

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

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the

property as tenants in common and not as joint tenants."

32. The above principles make two aspects clear, firstly that devolution of Mithakshara coparcenary property takes place by survivorship, and section 8 is applicable while distributing the notional share of the deceased male Hindu. The last paragraph in ***Uttam*** shows findings on facts of that case, it is not a ratio.

33. The conclusion therefore is that even if the above three decisions had been brought to the notice of the coordinate bench, the legal position would not have changed. This observation is necessary to be made here because judgment in ***Pushpalatha*** was authored by one of us.

34. It is necessary to refer to another judgment of the Supreme Court in ***Shyam Narayan Prasad vs Krishna Prasad and Others***

(supra), since it is later than **Uttam,** it holds the field. In para 12, it is held as below :

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

35. The next question is whether in view of section 4 of Hindu Succession Act, devolution by survivorship of a Mithakshara coparcenary property has been affected as argued by Sri Dhananjaya Joshi. Definitely answer is 'no'. Section 4 has

overriding effect, over any text or rule or interpretation of Hindu Law or any custom or usage of Hindu Law in respect of which provision is made in the Hindu Succession Act. And any other law which was in force before commencement of the Hindu Succession Act ceased to have effect in so far as it was inconsistent with provisions made in the Hindu Succession Act.

36. Plain reading of this section gives no meaning that coparcenary concept is abrogated, section 6 of Hindu Succession Act recognizes Mithakshara coparcenary and amendment brought to section 6 in the year 2005 reinforces that concept. If ***Chandersen*** and ***Uttam*** are applied in the way learned counsel for respondents argued, section 6 becomes redundant.

37. Kashyap N Naik has referred to some other decisions. ***Hardeo Rai vs Shakuntala Devi and Others [(2008) 7 SCC 46]*** is a case of

specific performance. The facts therein show that the appellant being the defendant in the suit entered into an agreement with the plaintiff for selling a landed property. His main defence was that the property belonged to joint family, in the sense that he alone had no right to enter into agreement. But in the agreement there was a recital that a partition had taken place and each of the four co-sharers was in possession of separate portions of the property allotted to them. In para 21 of the judgment there is an observation on facts that appellant admitted his separate possession. In dealing with such a situation it was held by the Supreme Court as below :

> *"22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-*

> *parcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common". The decision of this Court in State Bank of India (supra), therefore is not applicable to the present case.*
>
> *23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."*

38. In this decision it is not forthcoming whether the appellant had a son or not. If the appellant had no son, he became absolute owner of the property given to his share in the partition of the joint family properties, and if he had a son, the latter would derive interest by birth.

39. ***Shub Karan Bubna vs Sita Saran Bubna and Others [(2009) 9 SCC 689]*** does not require detailed reference as it discusses the meaning of 'partition'.

40. The judgment of Allahabad High Court (Lucknow Bench) in ***Anand Swarup Chaudhary vs Judge, Small Causes Court, Faizabad and Others [(2011) SCC Online ALL 1168]*** deals with succession to self acquired property. Paras 20 and 29 extracted below, make the factual position clear.

> *"20. Indisputably, the property in question is the self-acquired property of late Sri Laxmi Nath Chaudhary which was opened for succession on his death on 29.11.1982. Clearly, therefore, the question of succession would be determined according to section 8 of the Act, 1956 which was the law in force at the time succession stood open.*
>
> *29. Therefore, it may be pertinent to state that the argument of Sri R.B.Yadav the property was Mitakshara coparcenary property and therefore devolution of interest of coparcenary property is governed by section 6 of the Act is not sustainable in light of the fact that the property was not a coparcenary property*

but self-acquired property of Sri Laxmi Narayan Chaudhary and that such property had been partitioned which was confirmed even by the Supreme Court and therefore, the scheme provided for devolution of interest under section 6 of the Act is not applicable in the instant matter."

41. ***Marabasappa (dead) by LRs and Others vs. Ningappa (dead) by LRs and Others [(2011) 9 SCC 451]*** discusses the issue relating to rights over property of Hindu woman, and therefore this judgment has no relevancy in the context of matter under discussion.

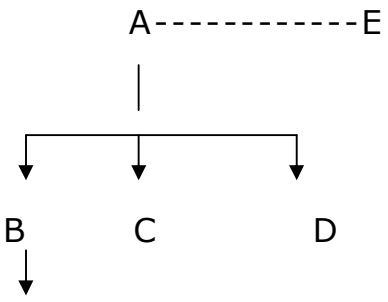
42. Since with reference to partial partition section 19 was referred to by learned counsel for respondents, the scope of that section is to be considered. This section was referred in the context of partial partition effected in the year 1955 and it was argued that if in a partition a property was not subjected to partition, status of joint family would be disrupted and in respect of

property kept in joint names, the members would hold the property as tenants in common. In this regard reliance has been placed on ***P.Cheradappa Pai vs Agricultural Income Tax Officer (AIR 1970 MYS 168)***, in which it is held that, in regard to any portion of the property that remained undivided the presumption would be that members of the family would hold it as tenants in common until a special agreement to hold as joint tenants is proved. Section 19 reads as below.

> ***"19. Mode of succession of two or more heirs.—***
> *If two or more heirs succeed together to the property of an intestate, they shall take the property,—(a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and (b) as tenants-in-common and not as joint tenants."*

43. The language of the section connotes the meaning that it applies to intestate succession to the property, to be more specific, self acquired or separate property of male or female Hindu under

sections 8 or 15 of the Act. In case a partial partition of the properties devolving on heirs by intestate succession takes place, the property which remains undivided will be held by all the members as tenants in common. In so far as coparcenary property is concerned, if a partial partition takes place, the property which remains undivided will be held by coparceners as tenants in common as against third parties who are not members of coparcenary, but the coparceners hold the undivided property as joint tenants. To illustrate, there is a joint family represented as below :



A and E are brothers, there was already a division of ancestral coparcenary properties between A and E. Among A, B, C and D, there takes place partial partition. One property is kept in the joint names of A and B. In that event, E, who had already separated from his brother A, is a third party and as against him, i.e, A and B possess the property as tenants in common. C and D also become third parties because they are separated. B1 was born to B after partition and he takes interest by birth. Because of birth of B1, A, B, and B1 do not become tenants in common; they are joint tenants; B1 can enforce partition because of vesting of coparcenary right in him. If B1 is not born, A and B hold the property as tenants in common. This can be deduced from the principle that when a partition of a coparcenary property takes place, the share allotted to each of the members is ancestral property in his hands as regards his own issue though it is looked upon as separate property as

regards the separated members. In ***C. Krishna Prasad –vs- C.I.T., Bangalore [1975 (1) SCC 160]***, it is held as follows:

> *"8. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to "his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law 14th Ed)……"*

44. With this discussion, if the undisputed facts in this case are seen, the partitions of the year 1955 and 1966 exclude defendants 5 to 19 from the suit in relation to properties other than items 1 to 3 of the plaint schedule. Though it is the specific contention of the first defendant that the properties other than items 1 to 3 were self acquisitions and therefore the plaintiff is not

entitled to claim partition as devolution on the first defendant was under section 8 of the Act, according to the plaintiff, income from items 1 to 3 of the plaint schedule was the source for acquisition of other plaint schedule properties. This is a disputed question of fact which the plaintiff has to prove as has been held by the Supreme Court in ***Makhan Singh (dead) by LRs vs Kulwant Singh [(2007) 10 SCC 602].*** In view of the past partition, the suit survives only against defendants 1, 4 and LRs of defendant no.3 in respect of properties that fell to the share of defendant No.1.

45. As regards items 1 to 3 of plaint schedule, it is stated in the memo filed by counsel for respondent No.1 that items 1 to 3 were the self acquired properties of Bore Gowda. But this statement is contrary to the plea taken in the written statement of defendant No.1. In para 15

of written statement filed by defendant No.1, it is stated as below:

> *"Except the agricultural lands shown as item No.1, 2 and 3 in plaint para 4 under the caption "Immovable Properties (Schedule A) in pages 5 and 6 of the plaint i.e., agricultural lands situated in Narihalli Village, Hosahalli Village and Pura Village in Chennarayapatna Taluk of Hassan District, Karnataka State, the remaining properties mentioned in the plaint and described as items 4 to 15, are neither joint family properties nor HUF properties nor ancestral properties of late Boraiah Gowder or late P.B.Nanjaiah……"*

46. It appears that items 1 to 3 of the plaint were not subject matter of partitions that took place in the year 1955 or 1966. As stated in the written statement of the first defendant there were tenancy litigations and no member of the family was in possession of those lands until their possession was taken on 12.11.2008 through the intervention of the Tahasildar of Chennarayapatna

Taluk. Therefore the defendants 5 to 19 cannot be excluded from the suit insofar as items 1 to 3 are concerned. And now, the final conclusion is that the impugned order cannot be set aside in entirety. Suit survives to a limited extent to examine the entitlement of the plaintiff to partition as per foregoing discussion. Hence the following:

ORDER

(i) *Appeal is partly allowed and impugned order is modified.*

(ii) *Suit stands dismissed as not maintainable against defendants 5 to 19 in respect of properties which were allotted to the shares of Devaiah Gowder, Ramoo Gowder and N.Chandappa under two registered deeds dated 04.03.1955 and 27.04.1966. However the suit will continue against defendants 1 and 4 and legal representatives of defendant No.3 in respect of properties which were allotted to the share of the first defendant.*

(iii) Suit will continue against all the defendants in respect of items 1 to 3 of the plaint schedule.

(iv) In view of modification of the impugned order, the suit is restored to the file of the trial court and the matter stands remanded to the trial court.

(v) The trial court shall recast the issues in accordance with observations made above and decide the suit on merits expeditiously.

(vi) The parties shall appear before the trial court on 13.11.2024.

(vii) All pending interlocutory applications stand disposed of.

There is no order as to costs.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(UMESH M ADIGA)
JUDGE

Ckl/BVV
LIST NO.: 19 SL NO.: 1