

(2012) 02 GAU CK 0130

In the Gauhati High Court

Case No : Regular Second Appeal No. 144 of 2009

Guneshwar Rajbongshi

APPELLANT

Vs

Kamales War Rajbongshi and Another

RESPONDENT

Date of Decision : 24-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Specific Relief Act, 1963 — Section 34, 42

Citation : (2012) 3 GLD 198 : (2012) 2 GLT 872

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : D. Baruah, Mr. K. Saharia, Mr. P.D. Das and Ms. S. Baruah, for the Appellant; S. Medhi and Mr. Sheeladitya, for the Respondent

Judgement

I.A. Ansari, J.—This second appeal has arisen out of the judgment and decree, dated 07.09.2009, passed by the learned Additional District Judge, Kamrup, Guwahati, in Title Appeal No. 11/2005, where by the learned First Appellate Court has allowed the appeal and set aside the decree, granted in Title Suit No. 306/2002, whereby the learned Civil Judge (Senior Division) No. 3, Kamrup, Guwahati, as trial Judge, had partly allowed the decree inasmuch as it granted a decree declaring that the suit land is a coparcenery property and the plaintiffs as well as the defendants were coparceners in the suit land, but it declined to grant injunction restraining the defendants from selling the suit land. I have heard Mr. D. Baruah, learned counsel for the plaintiffs-appellant, and Mr. S. Medhi, learned counsel for the defendants-respondents.

2. The case of the plaintiffs may, in brief, be described thus:

(i) The land, mentioned in the schedule to the plaint, which is hereinafter referred to as the "suit land", belonged to one Rabiram Sarania, who died leaving behind two sons, namely, Boloram Sarania (since deceased) and Satara Sarania (since deceased). Late Boloram Sarania left behind two sons, namely, Mahendra Rajbongshi @Sarania (since deceased) and Shri Kamaleswar

Rajbongshi@Sarania (the defendant No. 1 in the suit and the respondent No. 1 in this second appeal). Late Mohendra Rajbongshi @ Sarania left behind his wife, Smti Kusum Rajbongshi, and three sons, namely, Shri Birendra Rajbongshi (plaintiff No. 1 in the suit and the proforma respondent in the present appeal), Shri Dhireswar Rajbongshi. and Shri Ramesh Rajbongshi. Smti Kusum Rajbongshi, Shri Dhireswar Rajbongshi and Shri Ramesh Rajbongshi, who were impleaded as the proforma defendant Nos. 2, 3 and 4 in the suit. On the other hand, Late Satara Sarania left behind two sons, namely, Shri Gunadhar Rajbongshi and Shri Guneswar Rajbongshi, Shri Guneswar Rajbongshi being the plaintiff No. 2 in the suit and the appellant in the present appeal.

(ii) Late Rabiram Sarania purchased, during his lifetime, the suit land, which, upon the death of Rabiram Sarania, his two sons, namely, Late Boloram Sarania and Late Satara Sarania (whose descendant the present appellant is) jointly inherited the suit land; but Late Boloram Rajbongshi, being elder between the two brothers, used to look after the suit land. Taking advantage of the simplicity of Late Satara Sarania, Late Boloram Rajbongshi @Sarania got his name mutated in respect of the entire suit land, though both the brothers, namely, Boloram and Satara remained in joint possession of the suit land and kept cultivating the same and enjoying the fruits of their cultivation. The plaintiffs along with the defendants, being the descendants of Late Rabiram Sarania, continued to enjoy the suit land as coparceners and the entire suit land remained in joint possession of the plaintiffs as well as the defendants. However, on 30.11.2002, the plaintiffs came to learn from one Sri Kishore Patowary that the defendant No. 1, who is respondent No. 1 herein, had entered into an agreement for sale with the said Kishore Patowary, whereunder 2 Bighas of land, out of the total suit land, measuring 12 Bighas 6 Lechas, were to be sold by defendant No. 1 to Kishore Patowary aforementioned. Being alarmed by the information, which they had so received, the plaintiffs instituted the suit, wherein the reliefs, which they had sought for, read as under:

(a) For a decree for declaration that the suit property, described in schedule A of the plaint, is a Hindu co-parcenary property and parties in the suit are co-parceners;

(b) For a decree for permanent injunction prohibiting the defendant No. 1, Shri Kamaleswar Rajbongshi, not to transfer any part of land in any manner and to deliver possession of the land to a stranger till the co-parcenary property is partitioned amongst the coparceners;

(c) For any other relief or reliefs the parties are entitled to in accordance with law and

(d) For cost of the suit.

3. Except the defendant No. 1, namely, Kamaleswar Rajbongshi, no other defendants contested the suit. In his written statement, defendant No. 1 contended, inter alia, that the suit was bad in law as the same suffered from non-

joinder of necessary parties and that the suit was barred by limitation, the case of the defendant No. 1 being, in brief, as under:

(i) In his written statement, defendant No. 1 admitted that the suit land, originally, belonged to Late Rabiram Sarania, who had two sons, namely, Boloram and Satara. It was also not disputed that the parties to the suit were linear descendants of Boloram Sarania and Satara Sarania.

It was, however, alleged by the defendant No. 1 that before Boloram's death, Satara left his parental house for good and he became a member of another family in a different village, where he became "ghar jamai" (i.e., son-in-law, who starts living in the house of his parents-in-law) and relinquished all his rights over the properties belonging to his father, Satara, and, in such circumstances, Boloram, on the death of his father, Rabiram, became the sole owner of the suit land and got his name mutated in respect thereof as back as in the year 1965. Notwithstanding the fact that the defendant contended, as indicated hereinbefore, that Robiram became the sole owner of the suit land, the defendant conceded, in paragraph 20 of the written statement, that out of the 12 Bighas 6 Lechas of the suit land, Late Mahendra Sarania was entitled to 6 Bighas of land and plaintiff No. 1, having two brothers, namely, Dhireswar Rajbongshi (Proforma Defendant No. 3) and Ramesh Rajbongshi (Proforma Defendant No. 4), was entitled to 2 Bighas and 1 Lecha of the suit land. It was further claimed by the defendant No. 1, in his written statement, that the plaintiff was in possession of 31/2 Bighas of the suit land and the other two of his brothers i.e. the Proforma Defendant Nos. 3 and 4, having not claimed any share in the property, the Plaintiff No. 1 cannot claim more than 31/2 Bighas of the suit land, which he is already in occupation of.

4. Thus, the defendant No. 1, while, on the one hand, contended that Satara Sarania left his parental house and relinquished his rights, if any, on the properties belonging to his father, Rabiram, the defendant No. 1 in the suit, admitted, at the same time, the fact that the plaintiff No. 1 was in possession of the suit land, but claimed that only a plot of land, measuring 31/2 Bighas, was in possession of plaintiff No. 1, though Late Mohendra Sarania, who was son of Boloram Sarania, was entitled to 6 Bighas of land.

5. The learned trial Court framed 6 (six) issues for determination. The issues were:

- (1) Whether the suit is bad for non-joinder of necessary party?
- (2) Whether the suit is barred by limitation?
- (3) Whether the suit property described in the schedule A in the plaint is a Hindu coparcenary property of the parties?
- (4) Whether the plaintiffs are entitled to get the relief of injunction as prayed for?
- (5) Whether the plaintiffs are entitled to get a decree as prayed for?

(6) What other relief/reliefs the parties are entitled to?

6. Both the parties to the suit adduced evidence. By its judgment, dated 09.03.2005, learned trial Court decided issue Nos. 1, 2 and 3 in favour of the plaintiffs inasmuch as the learned trial Court held that the suit was not bad for non-joinder of necessary party and, hence, the suit was maintainable, the suit was also not barred by limitation and that the defendant Nos. 1, 3 and 4 and plaintiff Nos. 1 and 2 are all descendants of Late Rabiram Sarania, that the suit land was their ancestral property and that the suit land is coparcenary property and the parties were coparceners inasmuch as no partition of the suit property had been done amongst the descendants.

7. As regards the issue No. 4, namely, whether the plaintiffs were entitled to get relief of injunction, as had been prayed for, prohibiting the defendant No. 1, Shri Kamaleswar Rajbongshi, from transferring any part of the suit land in any manner and to deliver possession of the land to a stranger till the coparcenary property is partitioned amongst the coparceners, it was held that as the defendants had not tried to dispose of the suit property, no injunction was required to be issued against the defendants.

8. So far as issue No. 5 was concerned, namely, whether the plaintiffs were entitled to get a decree, as had been prayed for, learned trial Court took the view that the plaintiffs were entitled to get declaration to the effect that the suit land was coparcenary property and, accordingly, decreed the suit partly with the declaration that the suit property, described in schedule "A" to the plaint, is a Hindu coparcenary property and the parties to the suit were coparceners. However, the learned trial Court, because of the conclusion, which it had reached, in respect of issue No. 4, by taking the view that the relief of injunction was not required to be given in favour of the plaintiffs inasmuch as the defendants had not tried to dispose of the suit property, declined the plaintiffs' prayer for permanent injunction prohibiting the defendants, namely, Kamaleswar Rajbongshi, from alienating the suit property, or any part thereof, in any manner and/or from delivering possession of the same to a stranger till the coparcenary property was partitioned amongst the coparceners.

9. Thus, in terms of the findings, which had been arrived at in the judgment aforementioned, the suit was partly decreed.

10. Aggrieved by the judgment and decree, dated 09.03.2005, aforementioned, defendant No. 1, namely, Kamaleswar Rajbongshi, preferred an appeal, which, as indicated above, gave rise to Title Appeal No. 11/05, the sole ground of challenge, posed to the impugned decree, being that the suit was not maintainable, because of the bar, which the proviso to Section 34 of the Specific Relief Act, 1963, imposes inasmuch as the plaintiffs, while seeking declaration of the suit property as coparcenary property and the plaintiffs as coparceners in respect of the suit property, had not sought for partition of the suit property, which they ought to have claimed as "further relief."

11. Crucial to note, with regard to the appeal, which the defendant No. 1 had so preferred, is the fact that none of the findings, arrived at by the learned trial Court pertaining to the declaration that the suit property was a coparcenary property and that the parties were in joint possession of the suit property, was put to challenge in the appeal.

12. Because of the ground, on which the impugned decree had been challenged, the learned appellate Court framed only one point for determination, namely, whether the suit was maintainable ? The learned First Appellate Court answered the question, so framed, in the negative. The appeal, therefore, succeeded and the impugned decree, passed by the learned trial Court, as already indicated above, came to be set aside.

13. Contending that the decree, dated 07.09.2009, passed by the learned First Appellate Court, is untenable in law, this second appeal has been preferred by the plaintiff No. 2, namely, Guneswar Rajbongshi.

14. While admitting the appeal against the judgment and decree granted by the learned the First Appellate Court, as many as five (5) substantial questions of law were initially framed. These five substantial questions of law read as under:

(1) Whether the instant suit seeking declaration alongwith the prayer for permanent injunction is maintainable in view of the proviso to Section 34 of the Specific Relief Act, 1963 ?

(2) Whether the relief of injunction would be further relief in the facts of the instant case within the meaning of the proviso to Section 34 of the Specific Relief Act, 1963 ?

(3) Whether it is mandatory for the maintainability of the Suit by a co-owner seeking declaration as regards his co-ownership rights in respect to the suit land alongwith permanent injunction to seek the further relief for partition of the suit land or to seek recovery of possession of his share in respect to the suit land?

(4) Whether the impugned judgment and decree, passed by the learned Appellate Court is perverse?

(5) Any other question as may be allowed to be raised at the time of hearing of this Appeal.

15. However, at a later stage of hearing of the present appeal, two more substantial questions of law were framed. These two questions read as under:

(6) Whether a respondent to a second appeal be permitted to raise a new issue, for the first time, at the Second Appellate stage, which was never raised at any point of time either before the trial Court or the First Appellate Court ?

(7) Whether the concept of coparcener is foreign to the Dayabhaga Law of Inheritance?

16. Let me, now, deal with the seven substantial questions of law, which have

arisen for determination, the question Nos. 1, 2 and 3 being closely interlinked with each other, are taken up for discussion together.

17. It is contended, on behalf of the appellant, by Mr. D. Baruah, learned counsel, that since there was no specific plea taken by the defendant in his written statement, filed in the suit, against the maintainability of the suit, the learned First Appellate Court ought not to have allowed the defendant-appellant to raise the issue of maintainability of the suit at the appellate stage nor was the learned First Appellate Court right in framing the point for determination, namely, as to whether the suit was maintainable on the ground of the proviso to Section 34 of the Specific Relief Act, 1963. Referring to the case of Mst. Rukhmabai Vs. Lala Laxminarayan and Others, , Mr. Baruah points out that, without any specific pleading in the written statement as to why and how a suit is not maintainable and when the learned trial Court had not framed any such issue, the same ought not to have framed by the learned First Appellate Court and that the learned First Appellate Court has committed serious error of law by framing the question for determination, namely, whether the suit was maintainable in the light of the proviso to Section 34 of the Specific Relief Act, 1963,.

18. Controverting the above submissions, made on behalf of the appellant, Mr. Medhi, learned counsel for the respondents, submits that since the maintainability of the suit, in the present case, was a pure question of law, the learned First Appellate Court committed no error in framing the said question for determination, namely, whether the suit was maintainable, because of the proviso to Section 34 of the Specific Relief Act, 1963.

19. While considering the above submissions, made on behalf of the parties concerned, it needs to be noted that the maintainability of a suit may, in a given case, be a pure question of law, but need not, necessarily, be, in each and every case, a question of law. The maintainability of a suit may be a pure question of law or it may be a mixed question of law and fact. In the present case, the issue of maintainability was not a pure question of law inasmuch as it was a mixed question of law, for, the defendant had contended, in his written statement, that the suit property was not a joint property of the plaintiffs and the defendants. In such circumstances, the question was whether the suit property was a joint property and, if so, whether a declaration, as regards joint ownership of the property, could have been granted to the plaintiffs, when the plaintiffs had not sought for partition of the suit property. The reference, which Mr. Baruah has made to the case of Rukhmabai (supra), is quite relevant in the context of the facts of the present case inasmuch as, at paragraph 30 of its decision, in Rukhmabai (supra), the Supreme Court has observed as under:

30. The next question raised by the learned Counsel for the appellant is that the suit should have been dismissed in limine as the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of S. 42 of the Specific Relief Act. The proviso to S. 42 of the said Act enacts that "no Court shall make any such declaration when the plaintiff, being

able to seek further relief than a mere declaration of title, omits to do so". It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. The learned Counsel for the appellant contends that in the plaint the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court and, therefore, the plaintiff should have asked for a permanent injunction restraining the appellant from interfering with his possession. The appellant did not take this plea in the written statement; nor was there any issue in respect thereof, though as many as 12 issues were raised on the pleadings: nor does the judgment of the learned District Judge disclose that the Appellant raised any such plea. For the first time the plea based on Section 42 of the Specific Relief Act was raised before the High Court, and even then the argument advanced was that the consequential relief should have been one for partition: the High Court rejected the contention on the ground that the Plaintiff, being in possession of the joint family property, was not bound to asked for partition if he did not have the intention to separate himself from the other members of the family. It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for this question should have been raised at the earliest point of time, in which event the plaintiff could have been asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act. In the circumstances, we are not justify in allowing the Appellant to raise the plea before us.

(Emphasis added)

20. From the above observations, made by the Supreme Court and emphasized by this Court, it becomes clear that a plea, as regards non-maintainability of a suit on the ground that it is barred by the proviso to Section 42 of the Specific Relief Act, 1877 (now, Specific Relief Act, 1963), cannot be raised, for the first time, in an appeal, because such a plea ought to be raised at the earliest point of time (i.e., in the suit itself) so that the plaintiff can ask for necessary amendment in his plaint to comply with the proviso to Section 42 of the Specific Relief Act (now Specific Relief Act, 1963).

21. In the light of the authoritative pronouncement, in *Rukhmabai* (supra), one can safely hold, even in the present case, and I do hold, that when the defendants, in the present suit, had not taken the plea as regards the non-maintainability of the suit on the ground that the same was barred by Section 34 of the Specific Relief Act, 1963, and having, thus, given no opportunity to the plaintiffs (appellant herein) to make amendment of their plaint, the learned First Appellate Court ought not to have framed any question as regards the issue of non-maintainability contrary to what was done by the learned trial Court.

22. What can also not be ignored is the fact that the learned First Appellate Court has, for the purpose of answering the issue as regards the non-maintainability of the suit, in the negative, did not take into account the fact that it had been specifically pleaded by the plaintiffs, at paragraph 8 of the plaint, that the

plaintiffs and the defendants were in joint occupation of the suit land. Evidence was also adduced, in this regard, and the learned trial Court, while answering the issue No. 5, gave a specific finding that the suit property was in joint possession of the plaintiffs and the defendants inasmuch as the suit property had not yet been partitioned. This finding of the learned trial Court, as already indicated above, was never put to challenge in the First Appeal.

23. In the circumstances mentioned above, the question of seeking of further relief of recovery of possession if the suit property or any part or portion thereof was not really necessary. When the plaintiffs were seeking declaration of their joint ownership of the property, it was not at all necessary for them to seek the relief of partition too, because, the relief of partition was not a "further relief, but another relief; whereas, Section 34 of the Specific Relief Act, 1963, relates to further relief and not any other relief.

24. A person, while seeking a declaration of his co-ownership of a suit property, may not, if he does not so desire, seek partition of the suit property. So long as a joint owner of a suit property does not wish to sever his relationship with the other members of his family/co-owners, he need not ask for partition of the suit property and he may remain contented by seeking mere declaration of his title as a co-owner of the property. Such a suit cannot be held to be bad in law. I would also point out, in this regard, that the decisions, which had been relied upon by the learned First Appellate Court in order to reach the conclusion, which it has reached, namely, that the suit was barred by the proviso to Section 34 of the Specific Relief Act, 1963, is not a correct appreciation of the decisions, which the learned First Appellate Court has referred to and relied upon.

26. Before, however, I proceed further, let me reproduce hereinbelow Section 34 of the Specific Relief Act, 1963, which is *pari materia* to Section 42 of the Specific Relief Act, 1877. Section 34 reads as under:

34. Discretion of court as to declaration of status or right.- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and whom, if in existence, he would be a trustee.

26. A careful reading of the provisions, embodied in Section 34, makes it clear that any person, entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, give a

declaration therein that the person is entitled to such right and the plaintiff need not, in such a case, ask for any further relief. The proviso to Section 34, however, stipulates that no Court shall make any such declaration, where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The term, "further relief, used by the legislature cannot be equated with the term, "other relief. Further relief would mean a consequential relief flowing indispensably from a declaration to legal character or right to the property, which the plaintiff claims. To put it a little differently, the term, further relief, signifies that it must be a relief appropriate to and, indispensably consequent upon, the assertion of right or title.

27. The proviso to Section 34, no doubt, forbids a suit for pure declaration without a further relief, but does not compel a plaintiff to seek all the reliefs, which he may, otherwise, be entitled to. Nor Section 34 debars a plaintiff to obtain a relief, which he wants, unless he, at the same time, asks for a relief, which he has not sought for. A reference made, in this regard, by Mr. Baruah to the case of Joy Narayan Sen v. Srikantha Roy ors. (Calcutta Weekly Notes Vol. XXVI 206) is not irrelevant inasmuch as in the decision of the Division Bench, in Joy Narayan Sen (supra), the Calcutta High Court has taken the view that plaintiff need not ask for a partition, for, it is not obligatory for the plaintiff to ask for partition in every case, particularly, when the plaintiff claims that he is in joint possession of the immovable property along with the defendants and, in such a case, the plaintiff need not ask for determination of his share in the joint property and partition thereof. Dealing with the scope of Section 42 the Specific Relief Act, 1877 (now, Specific Relief Act, 1963), the Court observed as under:

We hold accordingly that where, as in the case before us, the Plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed, declaration of title is all that the Plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. The conclusion follows that the Subordinate Judge has erroneously held that the proviso to sec. 42 of the Specific Relief Act is a bar to the relief claimed by the Appellant.

The result is that the appeal is allowed and the suit decreed with costs in both Courts payable by the first Defendant. The Plaintiff will have a declaration in terms of the first clause of his prayer in the plaint.

(Emphasis added)

28. The above observations, made in Joy Narayan Sen (supra), Ramkamal Banik Saha (supra) and Munnu Chamar (supra), reinforce and fortify this Court's conclusion that a plaintiff may institute a suit seeking relief of declaration of his status as a joint owner of a suit property with a view to removing the cloud of

doubt, on his title, created by the act(s) of the defendant(s) and, in a suit of this nature, it is the declaration of title, which the plaintiff needs, and he cannot, consequently, be called by the Court to ask for consequential relief of partition, too, unless he desires the suit property to be partitioned amongst the co-owners or joint owners, as the case may be.

29. In yet another decision, in *Ramkamal Banik Saha Vs. Syam Sunar Banik Saha* : AIR 1924 Calcutta 411, a Division Bench of the Calcutta High Court has expressed similar view, as in the case of *Joy Narayan Sen* (supra), by laying down that a suit for declaration should not be dismissed on the ground that it is barred by the proviso to Section 42 of the Specific Relief Act, 1877, unless it is quite apparent that the plaintiff should seek further relief, which he has failed to claim, though such relief flows directly and necessarily from the declaration sought for. It has been made further clear, in *Ramkamal Banik Saha* (supra), that the proviso to Section 42 forbids a suit for pure declaration without further relief; but it does not compel the plaintiff to seek all the reliefs, which he could possibly be granted, or debar him from obtaining a relief, which he wants unless, at the same time, he asks for a relief, which he does not want.

30. In tune with the law laid down in *Joy Narayan Sen* (supra), and *Ramkamal Banik Saha* (supra), the Allahabad High Court has observed, in *Munnu Chamar Vs. Hari Narain & Anr.* :AIR 1947 All 352, thus:

The contention is that it was necessary for the plaintiffs to seek further relief than a mere declaration in the shape of an injunction restraining defendant 2 from executing the decree in question by attachment and sale of the house in suit and that no such further relief having been sought, the declaration prayed for ought to be refused. In our judgment, this is a wholly untenable argument. The object of the proviso is to prevent a multiplicity of suits by preventing a person from getting mere declaration of right in one suit and then seeking the remedy, without which the declaration would be useless and which could have been obtained in the same suit, in another. As has been pointed out in various judgments of the Courts, the expression used by the Legislature is not "other relief but "further relief. The further relief must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to. and necessarily consequent on, the right or title asserted.

31. From the decision, in *Joy Narayan Sen* (supra), *Ramkamal Banik Saha* (supra) and *Munnu Chamar* (supra), it becomes, if I may reiterate, more than abundantly clear that a mere declaration of title to an immovable property, as a co-owner or joint owner, is possible to be obtained by a person, as plaintiff, who is in joint possession of the property, and, in such case, the plaintiff, unless he so desires, need not seek, nor can he be compelled to seek, a decree for partition of the joint property.

32. Coupled with the above, Mr. Baruah has also considerable force in his submission that, in the case at hand, the plaintiff, apart from seeking the relief of

declaration, as indicated above, had also sought for consequential relief of injunction restraining the defendant from selling the property, or disposing of the property, and the relief of injunction, so sought for along with the decree for declaration of title, is a consequential relief. In support of his submission, Mr. Baruah places reliance on decision of the Supreme Court, in the case of C. Mohammed Yunus Vs. Syed Unissa and Others, , wherein a three Judge Bench of the Supreme Court has held, at paragraph 6 of its decision, that a suit for declaration with consequential relief for injunction, is not a suit for declaration simpliciter: rather, it is a suit for declaration with further relief. This apart, what is most crucial in the decision, in Mohd. Yunus (supra), is that the Supreme Court made it also clear that the question as to whether further relief, claimed in a particular case as consequential upon a declaration, is adequate, must always depend upon the facts and circumstance of each case meaning thereby that the question as to whether a relief would or would not be regarded as a further relief would depend on the facts and circumstances of a given case. The relevant observations made, in this regard, by the Supreme Court, in Mohd. Yunus (supra), read as under:

6.....a suit for declaration with a consequential relief for injunction is not a suit for declaration simpliciter: it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case. In Kunj Behari Prasadji Purshottam Prasadji v. Keshavlal Hiralal, it was held that Section 42 of the Specific Relief Act does not empower the court to dismiss a suit for a declaration and injunction and that an injunction is a further relief within the meaning of Section 42 of the Specific Relief Act. In that case, the plaintiff had claimed that a certain will was null and void and that being a close relative of the last holder of a gadi, he was entitled to be the Acharya in the place of the last holder and for an injunction restraining the defendants from offering any obstruction to his occupation of the gadi. It was held that such a suit was maintainable.

(Emphasis added)

33. In the case at hand, when the plaintiffs had sought for declaration of their status as co-owners of the suit land and also the consequential relief of injunction, prohibiting the defendants from disposing of the suit land, it was not imperative for the plaintiffs to seek partition of the suit land too; whereas, the learned First Appellate Court has allowed the appeal only on the ground that the plaintiffs had not sought for, while seeking declaration of their status as co-owners of the suit land, a decree for partition of the suit land.

34. Turning to the cases, which the learned First Appellate Court has relied upon, it may be pointed out that the case of Ram Saran and Another Vs. Smt. Ganga Devi, , which the learned First Appellate Court has relied upon, is a case, wherein the plaintiffs had instituted a suit seeking declaration that they were the absolute owners of the suit property, but they had not claimed that they were in

possession of either whole or any part of the suit property; whereas, the evidence on record clearly revealed that the defendant was in possession of a part of the suit property. The Supreme Court, in such circumstances, pointed out that since the defendant, Ganga Devi, was in possession of some part of the suit property and the plaintiffs had not sought for possession of the suit property, while seeking declaration of their exclusive title over the entire suit property, the suit was barred by Section 34 of the Specific Relief Act, 1963, inasmuch as the plaintiffs, while seeking declaration of their exclusive ownership of the suit property, ought to have also asked for recovery of possession of that portion of the suit land, which was in possession of Ganga Devi. It was in the context of such fact situation that the decision, in Ram Saran's case (supra), was rendered.

35. To put it a little differently, the case of Ram Saran (supra) was a case, wherein the plaintiff had sought for declaration of their absolute ownership of the suit property and, while seeking such a declaration, they had not asked for recovery of possession of that part or portion of the suit property, which had been in the possession of the defendant, Ganga Devi. Since a mere declaration of title, in favour of the plaintiffs, would have served no purpose without recovery of possession, the Supreme Court held that the suit was barred by the proviso to Section 34 of the Specific Relief Act, 1963; whereas, the case at hand is one, wherein the plaintiffs claimed to be in joint possession of the suit property and this assertion of the plaintiff was found to be correct by the learned trial Court and the finding, so rendered by the learned trial Court, was never put to challenge or disputed in the First Appeal by the defendants. In the circumstances, therefore, of the present case, seeking of partition of the suit land was not at all necessary so long as the plaintiffs did not desire partition of the suit land and were only interested in removing the cloud of doubt on their title to the suit land, which the alleged deed of agreement of sale, which the defendants entered into, had created.

36. So far as the decision, in Ghulam Mohiuddin Vs. The Official Assignee and Others, , is concerned, which has also been relied upon by the learned First Appellate Court, it was a case, wherein the suit was for a declaration that the lease, executed in favour of the defendants, was null and void. While seeking this declaration, the defendants did not seek recovery of possession of the leased property, though, same as in the case of Ram Saran's case (supra), the defendants were, admittedly, in possession of the property, which had been leased out. It was in the context of such facts and circumstances of the case that the Court took the view that the decree, even if granted, would be of little consequences, for, a suit for possession would have to follow if the defendants were to be evicted and that it was incumbent on the plaintiffs, in such a fact situation, to seek the further reliefs including that of possession.

37. Coming to the case of Dattatraya Ramrao Chorghade Vs. Shakuntalabai : AIR 1956 Nag 95, it may be pointed out that the question, which arose in the appeal, in Dattatraya Ramrao Chorghade (supra), was whether the property in the suit

was the separate property of Ramkrishna or was the joint property of himself and the defendant. The Court took the view that the property, in question, was acquired property of the defendant. Since it was not the case of the defendant, in *Shakuntalabai (supra)*, that the plaintiffs suit should be dismissed, because the plaintiff was entitled to consequential relief of possession and had not sought for the same, the High Court held that the defendant could not make out a new case in appeal and call upon the Court to refuse the plaintiff the relief of declaration and dismiss her suit, because she had not asked for the relief for possession. The case of *Dattatraya Ramrao Chorghade (supra)* is not, thus, of any help to the defendant-respondent.

38. So far as the case of *Jugraj Singh and Another Vs. Jaswant Singh and Others*, is concerned, which the learned First Appellate Court has relied upon, one may note that this case is really of no relevance in the present case inasmuch as the case of *Jugraj Singh (supra)* relates to rectification of a defect in the sale deed by virtue of a second power of attorney, which had been executed by the vender in favour of the person, who had got the sale deed executed and registered. Such a rectification was, in the light of the decision, in *Jugraj Singh (supra)*, permissible in law. In *Jugraj Singh (supra)*, the Supreme Court has pointed out that the appellants were not entitled to any declaration, because they were entitled to ask for cancellation of the order of Collector and also for injunction, which they had not sought for, and, hence, their suit was barred by the proviso to Section 42 of the Specific Relief Act. In the case of *Jugraj Singh (supra)*, the reliefs were necessarily not available on the date the plaintiff had sought for declaration; whereas, in the case at hand, there was no bar for plaintiffs to seek declaration of their co-ownership or joint-ownership of the suit property without seeking partition thereof, because so long as the plaintiffs did not desire partition of the suit property, they need not ask for partition of the same, while seeking declaration of their status as the co-owner of the property.

39. During the course of the hearing of this second appeal, Mr. Medhi, learned counsel for the respondents, has pointed out that the plaintiffs' suit was otherwise also bad in law inasmuch as the plaintiffs had sought for declaration to the effect that the suit property was a Hindu coparcenary property and the parties, in the suit, were coparceners. Mr. Medhi, learned counsel, contends that as the parties to the suit are governed by Dayabhaga School of Hindu law, they could not have been regarded as coparceners inasmuch as coparcenary is a concept applicable to only those persons, who are governed by Mitakshara School of Hindu Law. In substance, what Mr. Medhi contends is that coparcenary is a concept available only to the Mitakshara School of Hindu law and cannot, according to him, be invoked in the case of parties, who are governed by Dayabhaga School of Hindu Law.

40. As there is no dispute that the parties to the suit are governed by Dayabhaga School of Hindu Law, the question, which arises for consideration, is: whether the concept of coparcenary is foreign to Dayabhaga School of law of inheritance ?

41. Before the question, posed above, is effectively answered, it may be pointed out that, reacting to the submission, so made by Mr. Medhi with regard to the concept of coparcenary property, it was contended by Mr. Baruah, learned counsel, that in the second appeal, the respondents cannot be permitted to raise a new issue for the first time inasmuch as the question/issue had never been raised by the respondents. Controverting the submission of Mr. Baruah, Mr. Medhi has referred to Order 41 Rule 33 CPC and contended that Order 41 Rule 33 empowers the appellate Court to pass any decree or make any order, which it ought to have passed, or made, so as to do complete justice.

42. Order 41 Rule 33, which Mr. Medhi, learned counsel, has relied upon, reads as follows:

ORDER 41 Appeals from Original Decrees 33. Power of Court of appeal-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decree are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the Appellate Court shall not make any order u/s 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

43. From a careful reading of the provisions embodied in Order 41 Rule 33, it becomes clear that it is an enabling provision empowering the appellate Court to pass any decree or make any order, which ought to have been passed or made and to pass or make such further or other decree or order as the case may require.

44. In fact, in *Pralhad and Others Vs. State of Maharashtra and Another*, , the Supreme Court has pointed out, at paragraph 18, that Order 41 A>is an enabling provision, whereby the appellate Court is empowered to pass any decree or make any order, which ought to have been passed or made, and to pass or make such further or other decree or order as the case may require. The Supreme Court also points out, in *Prahlad and others* (supra), that the expression, "order ought to have been made", appearing in Order 41 Rule 33, would obviously mean an order, which justice of the case requires to be made, and this is made clear from the expression used in the said Rule by saying "the court may pass such further or other order as the case may require". The expression, "case", according to the decision in *Prahlad and others* (supra), would mean the justice of the case, though this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

45. However, relying on *Banarsi and Others Vs. Ram Phal*, , the Supreme Court has pointed out, in *Prahland and others (supra)*, that the power, under Order 41 Rule 33, can be exercised subject to three limitations. Firstly, this power cannot be exercised to the prejudice of a person, who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim, which has been given up or lost; and thirdly, this power cannot be exercised, when such part of the decree, which has been permitted to become final by a party, is reversed to the advantage of that party.

46. Strictly speaking, one may contend, as does Mr. Baruah, that the power, under Order 41 Rule 33, cannot be exercised in the present case, when a part of the decree, as pointed out above, has been permitted to become final. In this regard, Mr. Baruah points out that the learned trial Court's findings that the suit land is a coparcenary property, the same has not yet been partitioned and both parties are in joint possession of the property have remained undisputed.

47. While considering the above submissions, made on behalf of the plaintiffs-appellant, it needs to be pointed out that in the case at hand, the decree, granted by the learned trial Court, has been set aside by the learned First Appellate Court. In such circumstances, it is clear that though the ground, for setting aside the decree, may be different from what the defendant-respondent had contended in the written statement, the fact of the matter remains that the decree, granted by the learned trial Court, no longer survives.

48. It is, therefore, in the considered opinion of this Court, necessary to examine the issue, which Mr. Medhi, learned counsel, has raised, the issue being, as already indicated above, whether the concept of coparcenary is foreign to the Dayabhaga school of inheritance?

49. While considering the question posed above, it needs to be pointed out that coparcenary is not a terminology of Hindu law; it is, rather, a word of English language, which *Black's Law Dictionary* (9th Edition), describes thus:

Such estate arises where several take by descent from same ancestor as one heir, all coparceners constituting, but one heir and having, but one estate and being connected by unity of interest and of title. A species of estate, or tenancy, which exists, where lands of inheritance descend from the ancestor to two or more persons.

50. From the above description of the concept of coparcenary, as given in *Black's Law Dictionary* (9th Edition), it becomes transparent that at the root of the concept of coparcenary lies the concept of inheritance of ancestral property, by descent, from one ancestor. A difference does exist between Dayabhaga and Mitakshara Schools of Hindu law; but it would be incorrect to suggest that coparcenary property would mean only such a property, which involves people governed by Mitakshara law. One may, in this regard, refer to Mulla's *Principles of Hindu Law*, 20th Edition, wherein Section 275 deals with the striking differences in the concept of coparcenary in Dayabhaga School of Hindu Law vis-

a-vis the concept of coparcenery in Mitakshara School of Hindu Law. The observations made in Mulla's Principles of Hindu Law (20th Edition) read as under:

CONCEPTION OF ANCESTRAL PROPERTY ACCORDING TO DAYABHAGALAW

As under the Mitakshara law, so under Dayabhaga law, ancestral property is that which is inherited from a father, paternal grandfather or great grandfather. Under Dayabhaga law, however, the male issue or the inheritor does not acquire any interest by birth in such property, as they do under Mitakshara law.

Each coparcener takes a defined share:

The essence of a coparcenery under the Mitakshara law is unity of ownership. On the other hand, the essence of a coparcenery under Dayabhaga law is unity of possession. It is not unity of ownership at all. The ownership of coparcenery property is not in the whole body of coparceners. Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately, when inheritance falls in. It does not fluctuate with birth and deaths in the family. Even before partition, any coparcener can say that he is entitled to a particular share, one third or one fourth. Thus, if A dies leaving three sons, B, C and D, each son will take one third, and each one will be the owner of his one third share. The sons are coparceners in the sense that their possession of the property inherited from A is joint. It is the unity of possession that makes them coparceners. So long as there is unity of possession, no coparcener can say that a particular share of the property belongs to him; that he can say only after a partition. Partition then, according to the Dayabhaga law, consist in splitting up joint possession and assigning specific portions for the property to the several coparceners. According to Mitakshara law, it consists in splitting up joint ownership and in defining the share of each coparcener.

No doubt, a coparcenery, under Mitakshara law, also is characterized by unity of possession, however, that is only an appendage to the unity of ownership. Such being the case, it is not necessary to constitute a partition under that law, so that the unity of possession should also be destroyed and specific portions of the property assigned to the coparceners. It is quite enough if the unity of ownership is destroyed, and the share of each coparcener is defined, so that any one coparcener can say that he is the owner of a definite share, one-third or one-fourth. Nothing further need be done. The members may continue joint in possession, however, the coparcenery is dissolved. Hence, the share of each members will, on his death, pass to his heirs. The members having separated, the principle of survivorship cases to apply.

Presumptions as to coparcenerv property:

The presumptions with regard to joint family and joint family property which apply to cases under Mitakshara law, would seem to apply also to cases under Dayabhaga law. (See Charandasi Debi and Others Vs. Kanai Lal Moitra and

Others, .

However, there is no presumption under Dayabhaga law that property purchased by a son in his name his father's lifetime and of which the son has been in possession since its purchase, is joint family property. The burden of proof in such a case lies on those who deny the ownership of the son. Where the property purchased by one of the sons in a house, even though the father and the sons are living in it, the onus of proving that it was thrown into the common stock, or that they also contributed to the acquisition, is on the other sons. (See Hemchandra Ganguli Vs. Matilal Ganguli (1933) 60 Cal 1253).

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Coparcenery:

An estate that arises, when two or more persons jointly inherit from one ancestor, the title and right of possession being shared equally by all. Coparcenery was a form of co-ownership created by common-law rules of descent upon intestacy, when two or more persons together constituted the decedent's heirs. Typically, this situation arose, when the decedent was survived by no sons, but by two or more daughters so that the daughters took as coparceners.

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COPARCENERS ACCORDING TO DAYABHAGA LAW

According to Mitakshara law, the foundation of a coparcenery is first laid on the birth of a son. The son's birth is the starting point of a coparcenery according to that law. Thus, if a Hindu, governed by Mitaksham law, has a son born to him, the father and son at once become coparceners.

According to Dayabhaga law, the foundation of a coparcenerv is that which is laid on the death of the father. So long as the father is alive-there is no coparcenerv in its strict sense of the word between him and his male issue. It is only on his death, leaving two or more male issues. that a coparcenery is first formed. In the previous editions of this book, the author had stated:

The formation of a coparcenery does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition, but, until then the heirs hold the property as coparcener.

These observations must obviously be read in the context of a father dying and leaving behind two or more male issues, who would constitute a coparcenery,

though of course, in then-case there would be only unity of possession and not any unity of ownership.

Before the Hindu Women's Right to Property Act 1937. the male issues inherited his property, separate as well as ancestral, as his heirs, but, as between themselves, they held it as coparceners, and the property inherited from the deceased was coparcenary property. On the death of anyone of the coparceners, his heirs succeeded to his share in the coparcenary property and they became members of the coparcenary. Such heirs, in default of male issue, could be his widow or widows, or his daughter or daughters. These two, though females, got into the coparcenary. representing the share of their husband or father as the case might be. A coparcenary under Dayabhaga law could. thus, consists of male as well as females. Under Mitakshara law, no female can be a coparcener with male coparceners. However, even under Dayabhaga law, a coparcenary could not start with females. Thus, if a person died leaving two or more widows, or two or more daughters, they could not constitute a coparcenary. The effect of the Hindu Women's Right to Property Act, 1937. was not to abolish or disrupt the Dayabhaga joint family. However, the share of a coparcener in the coparcenary property (as in case of his separate property) devolved on his widow along with his male issue, and if he did not leave any male issue, his share devolved on his widow, daughter and other heirs as before.

The effect of the Hindu Succession Act, 1956. is not to abolish or disrupt the Dayabhaga joint family. However, the share of a coparcener in the coparcenary property (as in the case of his separate property) will devolve by succession according to the provision of that Act upon the heirs there specified.

In case of a male Hindu, governed by Dayabhaga school, dying intestate and leaving ancestral property, of which, according to Dayabhaga law, as interpreted by the courts, he was in position of as an absolute owner, such property also will (as in case of his separate or self acquired property) devolve by succession according to the provisions of that Act, upon the heirs there specified.

The question of formation of a coparcenary by operation of law and as to who can be members of such coparcenary in case of a male Hindu governed by Dayabhaga school dying intestate, after the coming into operation of that Act, leaving separate or ancestral property and leaving him surviving as his heirs inter alia to or more male issues, will depend on the same principles, on which under the previous law, a coparcenary could be formed consisting of males and females.

It must, however, be noted that the sons, whether before or after the coming into existence or ratification of that Act, become tenants-in-common and not joint tenants in respect of property inherited by them from their fathers. It must also be noted that the joint family system or the coparcenary, which prevails in Bengal, has to be carefully distinguished from the joint family or the coparcenary under the Mitakshara School. As pointed out by the Supreme Court in

Commissioner of Wealth Tax, W. Bengal Vs. Bishwanath Chatterjee and Others, . the coparceners have only unity of possession, and not unity of ownership. Each coparcener takes a defined share in the property and is the owner of his share, and in such defined share belongs to the coparcener.

(Emphasis is added)

51. From the description of coparcener, as given in Mulla's Principles of Hindu Law, 20th Edition, what becomes evident is that the concept of coparcenery is not wholly foreign to Dayabhaga School of Hindu Law and though there are striking differences between the concept of coparcenery in Dayabhaga Law vis-a-vis Mitakshara law, coparcenery is not a concept confined to, or exclusively applicable to, Mitakshara school of Hindu Law. Under Dayabhaga law, the foundation of coparcenery is laid on the death of the father. So long as father is alive, there is no coparcenery in the strict sense of the word between him and his male issues. It is only on his death, leaving two or more male issues, that a coparcenery is formed; whereas the foundation of a coparcenery, in Mitakshara school of law, is, first, laid on the birth of a son inasmuch as son's birth becomes the starting point of the coparcenery in Mitakshara School of Hindu Law. Consequently, if a Hindu, governed by Mitakshara law, has a son born to him, the father and son, at once, become coparceners. Thus, in Mitakshara, there is unity of ownership; whereas in Dayabhaga, there is only unity of possession, because formation of coparcenery does not depend on the acts of the parties, it is a creation of law and is formed spontaneously on the death of the ancestor provided that the father dies leaving two or more male issues, who would constitute a coparcenery.

52. Mulla's Principles of Hindu Law also clarifies that before the Hindu Women's Right to Property Act, 1937, was enacted, only the male issues, in the Dayabhaga School of Hindu Law, inherited their father's property, both separate as well as ancestral, by virtue of their status as heirs; but between themselves, they held the properties as coparceners and the property, inherited from the deceased, was coparcenery property. On the death of any one of the coparceners, his heirs succeeded to his share in the coparcenery property and they became members of the coparcenery. Such heirs, in the absence of male issue, could be his widow(s) or daughters). The widow(s) or daughters), though female, got into the coparcenery representing her husband or father, as the case maybe.

53. Thus, in the absence of male issues, the property could have gone to the widow of the deceased or his daughters). Logically, therefore, a coparcenery, under the Dayabhaga law, could constitute of male as well as female; whereas no female, under the Mitakshara law, can be a coparcener. However, I may reiterate, even under the Dayabhaga law, a coparcenery could not start with female. Thus, if a person, governed by Dayabhaga law, died leaving behind two or more wives or daughters, they could not constitute a coparcenery.

54. The effect Hindu Women's Right to Property Act, 1937, was not to abolish or disrupt the Dayabhaga joint family. However, the share of coparceners, in coparcenary property, as in the case of separate property, devolved on his widow along with his male issues and if he did not leave any male issue, his share will devolve on his widow, daughter or other heirs. Similarly, the effect of Hindu Succession Act, 1956, is not to abolish or disrupt Dayabhaga School of joint family. However, the share of a coparcener, in the coparcenary property, in the case of his separate property, will, according to the provisions of the Hindu Succession Act, 1956, devolve upon the heirs specified in the said Act.

55. From what have been reproduced above, it can be safely gathered that inheritance of property by a Hindu, governed by Dayabhaga or Mitakshara school of law, along with other heirs of the ancestor, whose property is inherited, would constitute coparcenary, the distinction between the two schools of Hindu Law being that in Mitakshara school of law, foundation of a coparcenary is laid on the birth of a son. In other words, it is son's birth, which is the starting point of coparcenary in Mitakshara School of law. Thus, if a Hindu, governed by Mitakshara school of Hindu law, has a son born to him, the father and son both would become coparceners; whereas, according to Dayabhaga law, foundation of coparcenary is laid on the death of the father, because so long as father remains alive, there is no coparcenary, in the strict sense of the word, between him and his male issues and it is only on the father's death, leaving two or more male issues, that a coparcenary is first formed by the male issues.

56. The Hindu Succession Act, 1956, does not abolish the Dayabhaga joint family, but share of a coparcener, in the coparcenary property, will devolve by succession, according to the provisions of Hindu Succession Act, 1956, upon the heirs specified therein.

57. From the above discussion, it becomes also evident that joint family system is, in a way, coparcenary. In Mitakshara School, coparceners have only unity of ownership inasmuch as the whole body of coparceners, in Mitakshara Law, is the owner and no individual can claim, while the family is undivided, that he has a definite share in the property inasmuch as his interest is always fluctuating being liable to be enlarged by deaths and diminished by birth in the family and it is only on partition that he becomes entitled to a definite share. On the other hand, essence of coparcenary, under the Dayabhaga School, lies in unity of possession and not unity of ownership. In Dayabhaga school of law, every coparcener takes a definite share of the property and he is the owner of the share.

58. In his article, "Coparcenary under Hindu Law: Boundaries redefined", learned author, Professor Vijender Kumar, has pointed out that coparcenary, as understood in Hindu law, has its origin in the concept of Daya as explained by Vijnaneshwara, while commenting on Yaj navalkyasmriti in the Daya vibhaga prakranam vayavahara adhaya. Here, Vijnaneshwara discussed that Daya is only that property, which becomes the property of another person, solely by reason of relation to the owner. The words solely by reason of relation exclude any other

cause, such as purchase or the like. Therefore, the unique concept of coparcenery is the product of ancient Hindu jurisprudence, which later on, became the essential feature of Hindu Law, in general, and Mitakshara school of Hindu Law, in particular.

59. The learned author has further observed that the concept of coparcenery, as understood in the general sense in English law, has different meaning in India or Hindu legal system. In English law, coparcenery is the creation of act of parties or creation of law. In Hindu law, coparcenery cannot be created by acts of parties; however, it can be terminated by acts of parties. The coparcenery, in Hindu law, was limited only to male members, who descended from the same male ancestors within three degrees. These coparceners have important rights as regards property of the coparcenery; but so long the coparcenery remains intact, no member can claim any specific interest in any part of the property of the coparcenery, because of the specific nature of coparcenery in the Mitakshara School of Hindu law.

60. However, points out Professor Vijender Kumar, under Hindu law, the coparcenery, in the Mitakshara and the Dayabhaga Schools of Hindu law, has different meanings with the result that this difference, in the concepts of coparcenery of the Mitakshara and the Dayabhaga Schools of Hindu Law, resulted in the difference of definition of partition and the duty of the son to pay the debt of his father. Therefore, the deviation, in the original concept of coparcenery, is the result of social and proprietary influence. Hence, when females are made entitled to become coparceners, it does not militate against the nature and concept of coparcenery, because it is the social and proprietary aspect, which prominently makes it necessary that females should be included in the concept of coparcenery.

61. In Hindu law of succession, rightly obsencs Professor Vijender Kumar, the coparcenery is not yet codified. There are two Schools, viz., the Mitakshara and the Dayabhaga. According to the Mitakshara School, there is unity of ownership meaning thereby that the whole body of coparceners is the owner and no individual can claim, while the family is undivided, that he has a definite share in the property inasmuch as his interest is always fluctuating being liable to be enlarged by deaths and diminished by birth in the family. There is also unity of possession and enjoyment. Katyayana expressly states, Prof. Vijender Kumar points out, that the joint family property devolves by survivorship, that is, on the death of a coparcener, his interest lapses and goes to the other coparceners. The conception of coparcenery, under the Dayabhaga School, is entirely different from that of the Mitakshara School. Under the Dayabhaga School, sons do not acquire any interest by birth in ancestral property; but the son's right arises only on the father's death and the sons take property as heirs and not as survivors. On the other hand, in Mitakshara School, the interest of a coparcener over a coparcenery property is a fluctuating interest, capable of being enlarged by deaths in the family and liable to be diminished by births in the family. It is only

on partition that he becomes entitled to a definite share.

62. According to Dayabhaga School, correctly observes Prof. Vijender Kumar, the foundation of a coparcenary is laid on the death of the father. So long as the father is alive, there is no coparcenary in its strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that a coparcenary is first formed. Thus, it would be correct to say that the formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately upon partition; but, until then, the heirs hold the property as coparceners. These observations must obviously be read in the context of a father dying leaving two or more male issues, who would constitute a coparcenary, though, of course, in their case, there would be only unity of possession and not unity of ownership. Thus, till a partition, by metes and bounds, takes place, each coparcener can say what his share will be, but, none of them can say that such and such property will fall into his share. Each coparcener is in possession of the entire property, even if he has no actual possession inasmuch as possession of one is the possession of all. No one can claim any exclusive possession of property unless agreed upon by coparceners.

63. What emerges from the above discussion is that coparcenary is nothing, but a concept of joint family, members of the family having common rights, title and interest over the property of their common ancestor. In Assam, therefore, the Hindus, who are governed by Dayabhaga school of Hindu law, are, nevertheless, in respect of their ancestral properties, coparceners so long as they remain joint. As the coparcenary is creation of law and is not formed by the act of the parties, the two sons of a Hindu family would, on the death of the father, succeed, under the Dayabhaga School of law, to the father's property in equal share. If the two sons had been living together with the father, they would be regarded as coparceners until the time they choose to separate. Hence, a property, which is derived by way of descent, from a common ancestor, would be regarded to be in joint possession of all the persons entitled to succeed to the property until the time they choose to separate. Hence, so long as partition is not made, the Hindus, governed by Dayabhaga law, will remain jointly in possession of every part and parcel of their coparcenary property inherited by them from their common ancestor, though each one of them would have a defined share.

64. Mr. Baruah, learned counsel, is, therefore, correct, when he submits that coparcenary may come into play by way of succession or may be on account of combination of survivorship and succession. In the case of Mitakshara School of law, while it is both, survivorship and succession, a Hindu, governed by a Dayabhaga School of Law, inherits a property by way of succession only meaning thereby that in the Dayabhaga school, a male issue, born to his father, would not become the owner of his father's property or shareholder of his father's property, but would inherit the father's property or a share therein on the death of the father; whereas in Mitakshara, son would become a co-owner of the

property, no sooner he is born.

65. No wonder, therefore, that in *Charandasi Devi Vs. Kauai Lai* (AIR 1955 Cat 206), the Court has pointed out that presumption, with regard to joint family and joint family property, which applies to Mitakshara law, would apply to Dayabhaga law as well, though there is no presumption, under the Dayabhaga law, that the property, purchased by a son in his name, during his father's life time and of which son has been in possession of since its purchase, is the joint family property. The burden of proof, in such a case, would lie on those, who deny ownership of the son (See *Sarada Vs. Mohananda* (194)31 Cal 448).

66. If the above principles are kept in mind, it becomes clear that though governed by the principles of coparcenery, as applicable to Dayabhaga School of Hindu Law, the appellants and the defendants, who come from the common ancestor, Rabiram, inherited Rabiram's property, as clearly held by the learned trial Court, in their capacity as coparceners and the property, in question, the learned trial Court has correctly observed, is the coparcenery property. On the death of Kamaleswar Rajbongshi, his heirs succeeded to the share of Kamaleswar in the said coparcenery property and they became members of the coparcenery.

67. In the case at hand, too, when the parties to the suit were, admittedly, descendants from their common ancestor, Rabiram Sarania, who was the owner of the entire suit property, they would be presumed to be jointly in possession of the property until contrary is proved. In this regard, one has to take into account, if I may reiterate, that the learned trial Court has held that the suit land is the ancestral property of the defendants and the plaintiffs and no partition amongst the defendants has taken place. These findings were never assailed. The learned trial Court, as has been rightly pointed out by Mr. Baruah, also held that the suit property was coparcenery property and that the parties are coparceners. This finding, too, was not disputed in the first appeal. What was disputed was the maintainability of the suit.

68. When, therefore, the plaintiffs could successfully prove that the suit land had been inherited by mem from their common ancestor Rabiram Sarania, the learned trial Court was wholly correct in describing the parties to the suit as coparceners and in describing the suit land as coparcenery property, though the parties to the suit are Hindus governed by Dayabhaga school of law.

69. What the plaintiffs sought for was declaration of their status as coparceners in respect of the suit land, which was described as coparcenery property. In the face of the evidence on record and the law relevant thereto, the plaintiffs had, indeed, been proved to be coparceners in respect of the suit property, which was the coparcenery property. This decree of declaration, granted by the learned trial Court, was not in breach of Section 34 of the Specific Relief Act, 1963.

70. Though the plaintiffs could have asked for partition, they chose not to seek partition and it was up to them to seek or not to seek partition. So long as they choose to remain joint owners and possessors of the said land, law allows them

to remain as joint owners and possessors of the suit land. When they chose not to ask for partition, it could not have been held that they ought to have asked for partition, when they were seeking declaration of joint ownership of the property, particularly, when the plaintiffs were also in joint possession of the property, in question, the property having not been partitioned at any stage.

71. Because of what have been discussed and pointed out above, this Court does not find that the decree, granted by the learned trial Court, suffered from any infirmity, legal or factual, and the same ought not to have been reversed or interfered with by the learned First Appellate Court.

72. In the result and for the reasons discussed above, this appeal succeeds. The impugned decree, passed by the learned First Appellate Court, is, therefore, set aside and the decree, granted by the learned trial Court, is hereby upheld and affirmed.

73. With the above observations and directions, this appeal shall stand disposed of with cost. Send back the LCR.