

(2024) 06 BOM CK 0039
In the Bombay High Court
Case No : Second Appeal No. 335 Of 2015

Kamlakar Purushotam Inamdar

APPELLANT

Vs

Rajani Shriram Madiwale

RESPONDENT

Date of Decision : 14-06-2024

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 27
Hindu Succession Act 1956 — Section 6, 6(1), 6(5), 8

Citation : (2024) 06 BOM CK 0039

Hon'ble Judges : Sharmila U. Deshmukh, J

Bench : Single Bench

Advocate : Shriram S. Kulkarni, V. S. Talkure

Final Decision : Disposed Of

Judgement

Sharmila U. Deshmukh, J

1. Both the present appeals arise out the common judgment dated 9th January, 2015 passed by the Appellate Court in Regular Civil Appeal No 97 of 2013 and Regular Civil Appeal No 115 of 2013.

2. Regular Civil Appeal No 97 of 2013 was filed by the original Plaintiff Nos 1 to 3 and Regular Civil Appeal No 115 of 2013 was filed by the original Defendant Nos 7 and 8 challenging the judgment and decree dated 5th March, 2013 passed by the Trial Court in Regular Civil Suit No.132/2010 partly decreeing the suit determining the shares of the parties i.e. 1/18th share of Plaintiff Nos 1 to 3 each, 7/18th share of Defendant No 1, 7/18th share of the Defendant Nos 4 to 6 collectively and 1/18th share of Defendant Nos 7 and 8 collectively in suit properties situated at Mauje Kashidwadi, Taluka Phaltan and Mauje Padali, Taluka Khandala.

FACTUAL MATRIX :

3. Regular Civil Suit No.132/2010 was filed by the Plaintiffs initially against

Defendant Nos.1 to 3 seeking partition and separate possession of property bearing Gat No.149 ad-measuring 4 H 88 R situated at Mauje Kashidwadi. Subsequently the suit came to be amended to include property being Gat No.370/1, Gat No.370/2, Gat No.374, Gat No.363, Gat No.332, Gat No.345 and Gat No.340 situated at Mauje Padali, Taluka Khandala and to implead the legal heirs of the deceased brother-Arvind and sister-Indira. The case of the Plaintiffs was that the suit properties were owned by the propositus Purshottam Govind Inamdar who expired on 16th August 1971 leaving behind him surviving as his legal heirs his wife Rukminibai, sons Arvind and Kamlakar and the Plaintiffs who are the daughters. In the year 1981 their mother Rukminibai expired and after her death the Plaintiffs are entitled to 1/4th share in the suit properties.

4. The amended pleading was that their deceased brother Arvind was of good nature and had looked after the Plaintiffs and hence the Plaintiffs do not seek any share in the suit property situated at village Mouje Padali Taluka Khandala and that there was no previous partition on 16th March, 1981. The Plaintiffs had demanded partition, however the same was refused and hence the suit.

5. By written statement filed prior to the amendment, the Defendant Nos.1 and 2 contended that suit property i.e. Kashidwadi property was earlier bearing Survey No.111 and subsequent to the implementation of consolidation scheme the same was given Gat No.149. The Plaintiff Nos 1, 2 and 3 got married in the year 1952, 1955 and 1971 respectively and thus were not entitled to claim 1/4th share in the property. It was pleaded that on 2nd March 1981, their mother Rukminibai expired and at the time Plaintiffs and Arvind who was alive decided to partition the ancestral properties in the presence of Harishchandra Jagannath Mane and Namdev Waman Jagdale. On 16th March 1981, written partition deed was executed which was scribed by Ramesh Ganesh Kulkarni and executed by all siblings in the presence of Harishchandra Jagannath Mane and Namdev Waman Jagdale who affixed their signatures on the deed as witnesses. As per the partition deed, Gat No 149 at Kashidwadi was allotted to Defendant No.1 and property at Padali was allotted to Arvind and the Plaintiffs were given 50 gms gold ornaments each. It was pleaded that there was no share given in the suit property but as gold was given there was no demand for partition which fact had been suppressed by the Plaintiffs. It was pleaded that the ancestral properties are already partitioned and there cannot be any further partition.

6. Defendant No.3 who is the daughter of Defendant No.1 adopted the written statement of Defendant Nos.1 and 2.

7. Defendant Nos.4 to 6 who are the legal heirs of the deceased son Arvind supported the Plaintiffs.

8. Defendant No.7 and 8 filed their written statement producing the genealogy contending that the Plaintiffs have not specified as to whether the suit properties were the ancestral properties or self acquired properties of Purshottam. It was contended that suit properties were self acquired properties of Purshottam and

as per the provisions of Hindu Succession Act 1956, the four daughters and two sons each are entitled to 1/6th share in the suit properties. It was contended that there was no prior partition of the suit properties and the Defendant Nos.7 and 8 sought share in the property at Kashidwadi as well as Padali. It was contended that as no share was sought by the Plaintiffs in the Padali property the Plaintiffs have relinquished their share in Padali property.

9. Plaintiff No.1 examined herself and deposed that the suit properties are the ancestral properties and Plaintiff Nos.1 to 3 are entitled to 1/4th share each in the suit properties. Plaintiff No.1 deposed that there was no partition on 16th March 1981.

10. In the cross examination by Defendant Nos.1 to 3 Plaintiff No.1 deposed that the property at Padali was ancestral property and property at Kashidwadi was the self acquired property of Purshottam. She further admitted that she does not have any documentary evidence to show that their father had independent source of income from business of crusher and flour mill. She has admitted that the property at Kashidwadi was purchased and the property at Padali is ancestral property. The case put forth by Defendant Nos.1 to 3 that out of the income from the Padali property, property at Kashidwadi was purchased has been denied by the Plaintiff No 1. In the cross examination by Defendant Nos.7 and 8, Plaintiff No 1 deposed that Padali property is ancestral property and Kashidwadi property is self acquired property.

11. Defendant No.3 examined herself on behalf of Defendant Nos.1 and 2 and deposed as to the contents of the plaint. In the cross examination she has admitted that property at Kashidwadi is cultivated by her father and her father could have come to the Court. She has further admitted that the property at Kashidwadi was purchased by her grandfather and at that time the Defendant No.1 was a minor. She has further admitted that the Defendant No 1's financial position is not sound. She has further admitted that as and by way of family arrangement property at Padali was looked after by her uncle i.e. Arvind and property at Kashidwadi was looked after by her father.

12. In the cross examination by Defendant Nos.7 and 8, Defendant No.3 has admitted that property at Padali is ancestral property and property at Kashidwadi was purchased by her grandfather. She has deposed that she is not aware as to whether her grandfather was carrying on business of crusher and floor mill at Kashidwadi. She has further deposed that she is unable to state as to whether property at Kashidwadi is self acquired property. She has further stated that she is unable to state as to whether the property at Kashidwadi has been purchased from joint family income.

13. The witness to the partition deed was examined and in the cross examination he has admitted that Plaintiffs did not sign the partition deed in his presence and they have not relinquished their right in his presence.

14. Defendant No.7 examined himself and deposed that the property at

Kashidwadi is self acquired property of his grandfather whereas the property at Padali is ancestral property. In the cross examination by the Plaintiffs, the suggestion given by the Plaintiffs that the suit properties were self acquired properties was accepted by him. In the cross examination by Defendant Nos.1 to 3, he has admitted that property at Padali is ancestral property. He denied the suggestion that out of the income from the Padali property the Kashidwadi property was purchased.

FINDINGS OF TRIAL COURT:

15. The Trial Court framed the issue as regards the nature of the suit properties and the share of the parties. The Trial Court held that as the Plaintiffs and the Defendant Nos 7 and 8 have failed to prove that the suit properties are the self acquired properties of Purshottam, it can be presumed that the suit properties are joint family properties or coparcenary properties. The Trial Court negated the issue of prior partition and for purpose of determination of shares held that Purshottam was not alive at the time of the amendment to Section 6 of the Hindu Succession Act 1956 and, thus the daughters are not entitled to the benefit of the amended Section 6 and were entitled to a share in their father's share that is 1/18th share each whereas Defendant No.1 is entitled to 7/18th , Defendant 4 to 6 i.e. heirs of Arvind are collectively entitled to 7/18th and Defendant Nos.7 and 8 are collectively entitled to 1/18th share.

FINDINGS OF APPELLATE COURT:

16. As against this, two appeals came to be preferred. Regular Civil Appeal No.97 of 2013 was preferred by the Plaintiffs and Regular Civil Appeal No.115 of 2013 was preferred by Defendant Nos. 7 and 8. By common judgment the Appellate Court held that there was no necessity to frame the issue of the nature of the properties as it is not the case of the Plaintiffs that the properties were ancestral properties of their father Purshottam. The Appellate Court further held that the pleadings as regards the properties being owned by Purshottam has not been denied by Defendants in their written statement. The Appellate Court held that there was no controversy between the parties regarding the nature of the suit properties that it is self acquired properties and by holding that properties are self acquired properties declared that Plaintiff Nos. 1 to 3 and Defendant No.1 are entitled to 1/6th share, Defendant Nos.4 to 6 are collectively entitled to 1/6th share and Defendant Nos.7 and 8 are collectively entitled to 1/6th share.

SUBSTANTIAL QUESTIONS OF LAW:

17. Second Appeals came to be admitted vide order dated 28th February 2024 on the following substantial questions of law:

(I) Whether the finding of the 1st Appellate Court that the suit property was the self acquired property is based on misreading of the evidence on record and the evidence which has come on record ?

(II) Whether on proper appreciation of the evidence the Plaintiff can be stated to

have discharged the burden of proving that the suit properties are the self acquired properties ?

(III) Whether the Courts have properly interpreted amended Section 6 of the Hindu Succession Act, 2005, while granting equal share to the Plaintiffs ?

18. At the time of hearing of the Appeals, the position of law was settled by Apex Court in Vineeta Sharma vs. Rakesh Sharma and Ors., (2020) 9 SCC 1. In view thereof the shares of the parties would be determined on the issue as to whether the properties are self acquired or ancestral properties. The shares of Defendant Nos.7 and 8 would depend on the question whether deceased daughter would have right in coparcenary property. During the hearing of the Appeals, with consent of the parties, the substantial questions of law were rephrased as under:

(i) Whether the finding of the 1st Appellate Court that the suit properties were self acquired properties of Purshottam is based on misreading of the evidence on record ?

(ii) Whether the burden of proving that the Kashidwadi property was the joint family property was upon the Defendant Nos.1 to 3 and if yes, whether the burden has been discharged ?

(iii) Whether upon proper interpretation of the amended Section 6 of Hindu Succession Act, 1956, the Defendant Nos 7 and 8 being legal heirs of daughter-Indira, who had expired prior to the commencement of amendment Act of 2005, would be entitled to share in the ancestral properties ?

SUBMISSIONS:

19. Mr. Kulkarni, learned counsel for appellants has taken this Court through the record and would submit that it was specific case of Defendant Nos.1 to 3 that the property at Padali was ancestral property and out of the income of ancestral property, property at Kashidwadi has been purchased. He further points out the evidence on record and would submit that as regards Padali property, the specific case put forth by Defendant Nos. 7 and 8 in the cross examination of the Plaintiff No 1 is that Padali property is the ancestral property. He submits that the Plaintiffs did not plead about the nature of properties in the plaint however in evidence has deposed that the properties are ancestral properties. He submits that the Appellate Court erred in holding that there was no controversy about the nature of the properties. He submits that the evidence on record is more than sufficient to demonstrate that there was dispute between the parties as regards the property at Kashidwadi whereas the accepted case was that the property at Padali is joint family property. He submits that the Trial Court has therefore rightly framed the issue as regards nature of the properties. He submits that the Trial Court has rightly granted share to the legal heirs of the deceased Indira in the share of Purshottam by considering the properties at Kashidwadi and Padali as ancestral properties. He submits that Indira would not be entitled to the benefit of the amendment to Section 6 of Hindu Succession Act 1956 as she had

died prior to the amendment coming into force. He submits that the Appellate Court has held the properties to be self acquired properties and thereby given equal share to the parties which suffers from perversity. He submits that in event it is held that the property at Kashidwadi is ancestral property, the deceased daughter Indira will not get any share. He submits that by application under Order 41 Rule 27 of CPC which is filed in the present proceedings the death certificate of Indira is annexed which shows the date of death prior to 2005. He relies upon the following judgments:

1. Ganduri Koteshwaramma and Anr. vs. Chakiri Yanadi and Anr., (2011) 9 Supreme Court Cases 788,
2. Prakash and Ors vs. Phulavati and Ors., (2016) 2 Supreme Court Cases 36;
3. Danamma @ Suman Surpur and Anr. vs. Amar and Ors., (2018) 3 Supreme Court Cases 343;
4. Badrinarayan Shankar Bhandari and Ors. vs. Omprakash Shankar Bhandari, 2014 SCC Online Bom 908;
5. Prasanta Kumar Sahoo and Ors. vs. Charulata Sahu and Ors., (2023) 9 Supreme Court Cases 641;
6. Makhan Singh (Dead) by Lrs. vs. Kulwant Singh, (2007) 10 Supreme Court Cases 602.

20. Per contra, Mr. Talkute, learned counsel for respondent Nos.1 to 3 would submit that in the plaint there was no pleading about nature of the properties and subsequently Respondent Nos.4 to 8 were impleaded and properties at Padali was included in the plaint. He submits that the specific case set out in paragraph No.2 that the suit properties belonged to Purshottam had been simply denied by Defendant Nos.1 to 3 without any specific case being put forth. He submits that in the written statement it is not their case that the property at Kashidwadi is ancestral property.

21. He submits that the case of Defendant Nos.7 and 8 is that both the properties are self acquired properties. Pointing out to the evidence of the Plaintiffs he submits that in the evidence PW-1 has deposed that the suit properties are ancestral properties and in the cross examination by Defendant 7 and 8 the case put forward is that Padali property is ancestral whereas Kashidwadi property is self acquired property. He further submits that no case has been pleaded or proved by the Defendant Nos 1 to 3 about the existence of the joint family nucleus. Pointing out to the cross examination of DW-1, he submits that despite Defendant No.1 being available for cross examination, Defendant No.3 had stepped into witness box who was not aware about the nature of the properties. He submits that even in her cross examination, the case of Defendant Nos.7 and 8 was that Padali properties are ancestral properties and that there is an admission by DW-1 that the property at Kashidwadi was purchased by her grandfather. He submits that as Purshottam expired on 16th

August 1971 the succession opened in 1971 and at that point of time two sons and three daughters were alive and even if it is accepted that Indira died in the year 1953 as the succession opened in 1971 even sons and daughters of Indira would have share in the property. He has taken this Court through the decision in the case of Vineeta Sharma vs. Rakesh Sharma and Ors., (2020) 9 SCC 1 and would submit that it is clear from the said decision that daughter is treated as coparcener in the same manner as a son and by virtue of amendment, the discrimination with daughter has been done away with. He submits that the Apex Court has held that coparcenary right is by birth and it is not at all necessary that father of the daughter should be living as on the date of amendment. He submits that it is irrelevant whether the daughter was alive or not as succession opened in the year 1971. He submits that Kashidwadi property being self acquired property all the parties will get 1/6th share and the Padali property being ancestral property, the parties including the sons of the deceased Indira will get equal share. He submits that declining of the benefit of the amended Section 6 of Hindu Succession Act, 1956 to the heirs of deceased Indira would result into a discrimination between the daughters, only by reason of death of one of the daughters. He submits that as the Apex Court has already held that by virtue of birth daughter becomes coparcener in her own right as a son, the legal heirs of deceased daughter cannot be denied the benefit of 2005 Amendment. He submits that any such denial would result into a discrimination between the legal heirs of predeceased son and predeceased daughter. In support he relied upon the following decisions:

1. Rangashamaiah (Since Deceased by His Lrs) vs. Rangahanumaiah (Since Deceased by His Lrs), Regular Second Appeal No.1171/2015 (PAR);
2. Channabasappa s/o Shivappa Hosamani vs. Smt. Parvatevva @ Kasturevva w/o Chandrashekhar Hadimani, Writ Petition No.105363/2023 (GM-CPC);
3. Thangam and Another vs. Navamani Ammal, 2024 SCC Online SC 227;
4. D.S. Lakshmaiah and Anr. vs. Balasubramanyam and Anr., (2023) 10 Supreme Court Cases 310;

22. In rejoinder Mr. Kulkarni would submit that if the property at Kashidwadi is held to be the self acquired property the same would devolve upon the parties in accordance with the intestate succession and in accordance with general rules of succession as per Section 8 of Hindu Succession Act 1956. He submits that it is an admitted position that Padali property is ancestral property and in that event as per the settled position in law only the daughter who is alive as on the date of amendment i.e. 9th September 2005 will be entitled to a share. He has taken this Court in detail through decision in the case of Vineeta Sharma (supra) and would submit that it is very clear from the said decision that what has been held by the Apex Court is that amendment has retro active application and is not retrospective. He submits that the provisions operate as regards the rights on and from the date of amendment that is 9th September 2005 as from that date

the daughter is conferred with the right in the same manner as that of the son. He submits that amended Section 6(1) the use of words "on and from commencement of the Hindu Succession Amendment Act, 2005 the daughter shall have the same right in the coparcenary as she would have had if she had been a son assumes significance. He submits that the Full Bench of this Court in the case of Badrinarayan Shankar Bhandari and Ors. vs. Omprakash Shankar Bhandari, 2014 SCC Online Bom 908 has specifically held that heirs of the daughter who died before 9th September 2005 would not get benefit of amendment Section 6 of Hindu Succession Act, 1956. He submits that the Apex Court in the case of Vineeta Sharma (supra) has noted the decision of the Full Bench which had held that the amendment has retro active application. He would further point out that the Apex Court has further held in paragraph 114 of Vineeta Sharma (supra) that if daughter is alive on the date of enforcement of the amendment Act, she becomes coparcener from the date of the amendment Act irrespective of the date of birth earlier in point of time.

23. He would further submit that in the written statement of Defendant Nos.1 to 3 it has been specifically pleaded that the ancestral properties were divided amongst the parties. He submits that in the Plaintiff's evidence the Plaintiff has admitted that the properties are ancestral properties. He submits that case of the Plaintiffs and Defendant Nos.7 and 8 that the properties are the self acquired properties is by virtue of the apprehension that if the properties are held to be ancestral properties the heirs of Indira will not be entitled to any share. He submits that as regards previous partition, the witness has been examined to prove partition. He points out to the partition deed which is at page 46 of the petition and submits that partition deed has been signed by all the parties.

REASONS AND ANALYSIS:

24. The genealogy about which there is no dispute between the parties is reproduced for better understanding of the relationship interse.

25. Initially the suit came to be filed by the Plaintiffs only against the Defendant No.1, his wife and daughter seeking partition of Kashidwadi property and subsequently the legal heirs of deceased brother Arvind and deceased sister Indira came to be impleaded and property at Padali was included in which the Plaintiffs did not claim any right. The pleading in the plaint is that the suit properties were owned by Purshottam and in the written statement of Defendant Nos. 1 to 3 there is no pleading as regards the nature of the properties and what has been pleaded is that ancestral properties came to be divided by executing partition deed on 16th March, 1981. The Defendant Nos.7 and 8 have claimed that both the properties are self acquired properties of Purshottam and have claimed their share in the suit properties.

26. The pleadings indicate that the parties were at issue as regards the nature of the properties, whether ancestral or self acquired. The suit being suit for partition, for the purpose of determining the shares of the parties, the nature of

properties assumes significance. The Trial Court had therefore rightly framed the issue as regards the nature of the properties. The Appellate Court lost sight of the fact that in partition suit, the parties were interchangeable and in event dispute is raised by Defendants about nature of properties, an issue in that regard was required to be framed.

27. The suit properties comprises of two properties one at Padali and one at Kashidwadi. The Plaintiffs had come with a case that the suit properties were owned by Purshottam. In the evidence PW-1 has deposed that the suit properties are ancestral properties. In cross examination, PW-1 has admitted the suggestion given by Defendant Nos 7 and 8 that Padali property is ancestral property. Defendant No 3 has deposed that the suit properties are ancestral properties and has accepted the suggestion given by Defendant No 7 and 8 that the Padali property is ancestral property. Defendant No 7 has deposed that the Padali property is ancestral property. The evidence on record thus establishes that Padali property is ancestral property.

28. The dispute is essentially as regards Kashidwadi property. The Defendant Nos 1 to 3 claims Kashidwadi property to be joint family property having being purchased out of the income from Padali property whereas the Defendant Nos 7 and 8's case is that the properties are self acquired properties of Purshottam. The pleadings in the plaint and the admissions given by the Plaintiff disclose that the Plaintiffs are unsure about the nature of Kashidwadi property. Plaintiff No 1 has deposed that the suit properties are ancestral properties however in the cross examination by Defendant No 7 and 8 she has stated that Kashidwadi property is self acquired property. In the cross examination by Defendant No 7 and 8 the Defendant No 3 has admitted that Kashidwadi property was purchased by Purshottam. She has further stated that she is not aware as to whether Kashidwadi property was Purshottam's self acquired property.

29. Defendant No. 7 in his evidence has deposed that Padali property is the ancestral property whereas Kashidwadi property is the self acquired property. Defendant No 7 has denied the suggestion of Defendant Nos 1 to 3 that the Kashidwadi property was acquired out of income from Padali property.

30. There is no dispute that Kashidwadi property was purchased by Purshottam, however there is no evidence produced on record to establish the source of funds for purchase of Kashidwadi property. Admittedly the family was joint at the time of purchase of Kashidwadi property, however there is no presumption that a family because it is joint possesses joint property. In a suit for partition, the party asserting the existence of joint family property has to prove the nucleus with which such property could be acquired and it is only then the onus shifts on the person claiming it to be self acquired to prove the same.

31. To put it simply where a property is claimed to be joint family property, the burden is upon the person asserting the same to show that there was a joint family nucleus from which the property was purchased and it is only when the

initial burden has been discharged that the onus shifts upon the person who claims it to be self acquired property to prove the same. The Apex Court in the case of D. S. Lakshmaiah and Another vs. L Balasubramanyam and Anr., 2003 SCC Online SC 915 has affirmed the said principle in paragraph 18 as under:

"The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

32. Applying the law laid down by the Apex Court in D. S. Lakshmaiah and Anr. (supra) to the facts of the present case, the initial burden was upon Defendant Nos 1 and 3, who claimed the Kashidwadi property to be joint family property to prove the nucleus from which the Kashidwadi property was purchased. The Defendant No 1 did not step into the witness box and evidence was led by his daughter who has admitted that she is not aware whether the Kashidwadi property was purchased out of joint family income. This admission of Defendant No 3 has proved fatal to the case of the Defendant Nos 1 to 3. That apart, it is not even the pleaded case of Defendant Nos 1 to 3 that the Kashidwadi property was purchased out of the income generated from the Padali property and in cross examination new case is sought to be put forth. As Defendant Nos.1 to 3 failed to prove that the Kashidwadi property was purchased from the joint family income, the burden did not shift upon the Plaintiffs to prove that it was self acquired property. As the Kashidwadi property was owned by Purshottam about which there is no dispute, the Kashidwadi property assumes the character of self acquired property in the absence of any evidence to the contrary.

33. The Appellate Court committed an error by holding that there is no dispute as regards the nature of the properties as the Plaintiffs have not pleaded that suit properties were ancestral properties of their father. The written statement of Defendant Nos.1 to 3 putting forth the case of partition has specifically set out that ancestral properties were partitioned whereas Defendant Nos.7 and 8 in their written statement had pleaded that the suit properties were self acquired properties. The Appellate Court did not consider the fact that the suit was for partition of the properties and the evidence on record more than sufficiently disclosed the dispute as regards the nature of the properties. The Appellate Court was therefore not right in holding that the case of all the parties was that the suit property was separate property of Purushotam and therefore there was no need of an issue on this point. The findings of the Appellate Court was therefore based on mis-appreciation of evidence on record and suffers from perversity.

34. The next issue which arise for consideration is the shares of the parties in the properties i.e. Padali property which is ancestral property and Kashidwadi

property which is the self acquired property. The Defendant no.7 though earlier represented by Advocate during the proceedings had informed this Court that papers were returned. However substantial arguments were advanced by Mr. Kulkarni and Mr. Talkute on the aspect of determination of shares.

35. The law as regards the daughter's right in coparcenary property has been settled by the Apex Court in the case of Vineeta Sharma vs Rakesh Sharma and Others(supra). Mr. Kulkarni and Mr. Talkute would jointly submit that the law being settled, the shares of the parties be determined by this Court and need not be remanded to trial Court only for determination of shares. As regards the share of deceased daughter Indira, substantial arguments were canvassed in event the suit properties were held to be ancestral property. The common submission is that Kashidwadi property if held to be self acquired property, even Indira's heirs i.e. Defendant Nos.7 and 8 would get a share.

36. Mr. Talkute, learned counsel for Respondent Nos.1 to 3 does not dispute the fact that the daughter Indira had expired before the amendment to Section 6 of the Hindu Succession Act in the year 2005. Section 6 of the Hindu Succession Act 1956 underwent a sea change by virtue of Amendment Act, 2005 by which daughters were given equal right in coparcenary property as she would have had she been a son and reference to Hindu Mitakshara coparcener was deemed to include a reference to daughter as coparcener. Subsequent to the amendment there was conflicting verdicts rendered by two Division Benches of the Apex Court in the case of Prakash vs. Phulavati, (2016) 2 Supreme Court Cases 36 and Danamma Alias Suman Surpur and Anr. vs. Amar and Ors., (2018) 3 Supreme Court Cases 343.

37. In Prakash vs. Phulvati (supra), two bench Judge of the Apex Court held that Section 6 is not retrospective in operation and applied when both coparcener and daughter were alive on the date of commencement of the Amendment Act that is 9th September 2005 irrespective of date of birth of the daughter. It was further held that the requirement of partition being registered provided in the explanation to Section 6(5) can have no application to a statutory notional partition on the opening of succession as provided in the unamended Section 6 having regard to nature of such partition which is by operation of law.

38. In subsequent decision of Danamma alias Suman Surpur (supra), co-ordinate bench of Apex Court held that the amended provision confer full rights upon the daughter coparcener and any coparcener including daughter can claim partition in the coparcenary property. In that case the father of coparcener was not alive when the amendment came into force and the Apex Court granted equal share to the daughters.

39. Reference was made to the larger bench of Apex Court in view of the conflicting decisions in Prakash vs. Phulvati and Danamma alias Suman Surpur in Vineeta Sharma vs Rakesh Sharma. The Apex Court referred to the historical background of the Hindu law, the concept of coparcenary in Joint Hindu family

and formation of coparcenary property as well as to the principles of unobstructed and obstructed heritage. After considering the unamended and amended provisions of Section 6 of 1956 Act, as well as the statement of objects and reasons, the Apex Court held that the goal of general justice as constitutionally envisaged is achieved and the discrimination made is taken care of by substituting the provisions of Section 6 of 2005 amendment by which daughter is treated as a coparcener in the same manner as a son. The Apex Court noted that before the amendment, Section 6 provided that on the death of male Hindu the coparcener's interest in event he had left surviving a female relative of Class I heir or male relative of such female, legal fiction of partition took place and from the commencement of the Amendment Act the daughter is conferred with the right by birth. The Apex Court held that though the rights can be claimed with effect from 9th September 2005 the provisions are of retro active application. The Apex Court held that as the coparcenary right is by birth, it is not at all necessary that father should be living as on the date of amendment as she had not been conferred the right of coparcener by obstructed heritage and daughter would step into the coparcenary as that of son by taking birth before or after the Act. However the daughter born before can claim this right only with effect from the date of amendment i.e. 9th September 2005 with saving of past transactions as provided under the statute. The Apex Court held that the effect of amendment is that daughter is made coparcener with effect from the date of amendment and daughter can assert the right on and from 9th September 2005.

40. In paragraph 80, the Apex Court in Vineeta Sharma(supra) disagreed with the concept of living coparcener as held in the case of Prakash vs. Phulvati (supra) and opined that daughter should be living on 9th September 2005.

41. In paragraph 114 of Vineeta Sharma (supra), the Apex Court held that what has been recognized as partition by legislation under Section 6, accordingly rights are to be worked out. The Apex Court rejected the effect of statutory fiction of proviso to Section 6 as discussed in Prakash vs Phulvati and Danamma and held that if a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of Amendment Act irrespective the date of birth earlier to the point of time. The reference was answered in paragraph 137 as under:

"137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father

coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been effected (sic effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly."

42. The dictum of the Apex Court as noted from the decision of Vineeta Sharma ((supra) is that the daughter acquires interest in the coparcenary by birth and the rights can be claimed with effect from 9th September 2005. The provisions were held to be of retroactive application as they confer benefits based on an antecedent event, the antecedent event being birth of daughter. The Apex Court was answering the reference concerning interpretation of Section 6 of Hindu Succession Act, 1956 as amended by the Amendment Act of 2005. The Apex Court while answering the reference has categorically observed that the right can be asserted by the daughter on and from 9th September, 2005 although the right is acquired by birth. It can thus be concluded that as assertion of the right is from 9th September, 2005 the daughter should be living as on 9th September, 2005. In the process of answering the reference, the Apex Court has touched upon every aspect of the right of the daughter vis a vis the amendment of the year 2005 to Section 6 of Hindu Succession Act, 1956. The Apex Court has categorically observed that the daughter can assert the right on and from 9th September, 2005 which right is given by birth and is to be exercised from the particular date i.e. 9th September, 2005. As

the exercise of the right is from 9th September, 2005, the Apex Court has opined in paragraph 80 that the daughters should be living on 9th September, 2005 and has held in paragraph 114 that if a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from date of the Amendment Act.

43. In recent decision of Apex Court in Prasanta Kumar Sahoo (supra) the Apex

Court noted the decision of Ganduri Koteshwaramma (supra) which held that though substantive right is created on and from 9th incidence of birth. The September, 2005, it relates back to the Apex Court also noted the decision of Danamma (supra) which had taken the view that when a daughter claiming and demanding a share in the coparcenary property is alive on 9th September, 2005, she would be entitled to the benefit of amendment provision irrespective of the death of coparcener prior to the commencement of Amendment Act and held in paragraph 71.5 that the daughter born before the commencement of the 2005 Amendment Act can claim coparcenary rights only with effect from the date of amendment i.e. 9th September, 2005 with saving of past transactions as per proviso the Section 6(1) read with Section 6(5).

44. A Full Bench of this Court in Badrinarayan Shankar Bhandari (supra) was answering the following reference:

"(a) Whether section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act, 2005 is prospective or retrospective in operation ?"

45. The Full Bench held in paragraph 53 in answer to question (a) as under:

"53. In view of above discussion, in our view the correct legal position is that section 6 as amended by the 2005 Amendment Act is retroactive in nature meaning thereby the rights under section 6(1)(b) and (c) and under sub-Rule (2) are available to all daughters living on the date of coming into force of the 2005 Amendment Act i.e. on 9 September, 2005, though born prior to 9 September, 2005. Obviously, the daughters born on or after 9 September, 2005 are entitled to get the benefits of Amended section 6 of the Act under clause (a) of sub-section (1). In other words, the heirs of daughters who died before 9 September, 2005 do not get the benefits of amended section 6."

46. It is therefore clear from the above decisions of the Apex Court that coparcenary right is by birth however the right can be asserted only from the date of amendment 9th September 2005. For the purpose of asserting the right, it is necessary that the daughter should be alive as on the date of amendment i.e. 9th September 2005. This Court is respectfully bound by said decision of the Full Bench of this Court in Badrinarayan (supra) which has laid down in clear terms that the heirs of daughter who died before 9th September 2005 do not get the benefits of amended Section 6. Considering the authoritative pronouncement of Full Bench of this Court the decisions in Channabasappa and Rangashamaiah (supra) of the Karnataka High Court relied upon by Mr. Talkute to plead otherwise cannot be considered.

47. During the hearing, learned counsel for parties had jointly submitted a chart to indicate the shares of parties in event it is held that the properties are ancestral properties as the learned counsel for the parties were of the opinion that the partition suit being of the year 2010, no useful purpose would be served in remanding the matter to the Trial Court to determine the shares by the findings being rendered by this Court.

CONCLUSION:

48. The initial burden of proving that the Kashidwadi property was the joint family property was upon Defendant Nos.1 to 3. As the initial burden of showing the joint family nucleus was not discharged by defendant Nos.1 to 3, the onus did not shift on Plaintiffs or Defendant Nos.7 and 8 to show that the same was self acquired property. The evidence on record establishes that Kashidwadi property is self acquired property of Purushotam whereas Padali property is ancestral property. Upon death of Purshottam, the self acquired property of Kashidwadi would also devolve upon the Defendant Nos 7 and 8, who are the legal heirs of deceased daughter Indira being Class 1 heir as per the Schedule under Section 8 of The Hindu Succession Act, 1956. The Plaintiffs and Defendant No 1 would be entitled to 1/6th share, the Defendant Nos 4 to 6 would be entitled to 1/6th share collectively and Defendant Nos 7 and 8 would be entitled to 1/6th share collectively in Kashidwadi property.

49. The Padali property being ancestral property and Indira admittedly having expired prior to the commencement of the Amendment Act of 2005, no right could be claimed in the ancestral property by Defendant Nos 7 and 8 who are the legal heirs of Indira. Defendant Nos 7 and 8 will only be entitled in the share of Purushotam upon notional partition taking place. The Plaintiffs and Defendant No.1 will each take 7/36th share. Defendant Nos.4 to 6 will collectively be entitled to 7/36th share and Defendant Nos.7 and 8 will be collectively entitled to 1/36th share in Padali property. Substantial question of law is answered accordingly.

50. Interim Application was filed under Order 41 Rule 27 of CPC to produce on record the death certificate of Indira. Mr. Talkute had accepted the position that in any event Indira had died before the amendment Act 2005 and had therefore not seriously opposed the Application. The parties had advanced lengthy submissions as to whether Indira would be entitled to the benefit of the amended provision by accepting the situation that Indira had expired prior to Amendment Act 2005. In view thereof Application under Order 41 Rule 27 of CPC to produce the death certificate on record stands allowed as the position was accepted that Indira had expired before 2005.

51. In view of the disposal of the Second Appeals, other Interim/Civil Applications, if any, do not survive for consideration and stand disposed of.