

(2007) 05 CAL CK 0060

In the Calcutta High Court

Case No : G.A. No. 2053 of 2006 and C.S. No. 168 of 2006

Oriental Mercantile Co. Ltd.

APPELLANT

Vs

Binod Behari Dutt Trust and Others

RESPONDENT

Date of Decision : 08-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Evidence Act, 1872 — Section 116

Hindu Womens Right to Property Act, 1937 — Section 3, 3(1), 3(3)

Citation : (2007) 3 CHN 386

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : S. Tibrewal, O.P. Sharma and Reetabrata Mitra, for the Appellant; Debal Banerji, Pramit Ray, Lopita Banerjee, Rajrupa Bhattacharjee and Debapriya Majumdar, for the Respondent

Judgement

Aniruddha Bose, J.—The instant interlocutory motion has been taken out by the plaintiff primarily to negate the impact of a decree for eviction passed against them by the Court of learned First Munsiff, at Alipore. The proceeding for execution of the said decree, which was passed on or about 30th September, 1997 is pending before the Court of learned 1st Civil Judge, Junior Division at Alipore, being Title Execution Case No. 1 of 1998. The first defendant, who at present is prosecuting the execution proceeding claims to be the owner in respect of certain premises comprised of three holding numbers, being 36A, 36B and 36C, Pratapaditya Road, Kolkata, of which the plaintiff was the tenant. The exact date of commencement of the tenancy has not been disclosed, but it has been pleaded that the plaintiff was inducted as a tenant much prior to the year 1951.

2. One Heramba Chandra Chowdhury was the original landlord of the plaintiff. It appears that he purchased the premises in the year 1941. He passed away in the year 1951, survived by his widow, Rajbala Debi, two sons Sasanka Sekhar and Kalikesh and four daughters. Rajbala Debi passed away on or about 14th

November, 1972. She died testate, bequeathing, inter alia, her undivided share in the premises to her two sons in equal shares. Probate of the Will of Rajbala was granted on or about 23rd December, 1974 and it is the case of the first defendant that before grant of Probate, citation was issued upon the four daughters. As regards title of Rajbala to the subject property, the case of the first defendant is that she acquired life estate in the 1/3rd share therein under the provision of the Hindu Women's Right to Property Act, 1937 on death of Heramba. Upon enactment of Hindu Succession Act, 1956, her life estate became absolute estate. In the year 1984, Sasanka Sekhar and Kalikesh instituted a suit for recovery of possession of the premises in question against the plaintiff herein. This suit was registered as Title suit No. 728 of 1984 in the Court of learned First Munsiff at Alipore, which shall be henceforth referred to as the learned First Court.

3. During the pendency of the suit, Sasanka Sekhar passed away in the year 1995. He was survived by his widow, Dhira Chowdhury and married daughter, Ranu Mukherjee who were his legal heirs. They have been impleaded as the second and the fourth defendants in the present suit. So far as the present interlocutory motion is concerned, I find from the affidavit of service that on 14th July, 2006, notice of the present proceeding was sent to them by registered post, but barring the first defendant, none of the defendants has contested the present proceeding. The copies of the notice sent to the defendant Nos. 2 and 3 has been returned with the endorsement "left".

4. The Title Suit No. 728 of 1984 was decreed in favour of the plaintiff therein in the year 1997. The appeal preferred against the judgment and decree of the learned First Court by the plaintiff herein was dismissed by the First Appellate Court by a judgment and order dated 19th September, 2000. The second appeal of the plaintiff (in the present suit) was also dismissed by an Hon'ble Division Bench of this Court on 10th May, 2001. The plaintiff was also unsuccessful in their attempt to have the judgment and order of this Court dismissing the Second Appeal reviewed. In the year 1998, the proceeding for execution of the decree passed in T.S. No. 728 of 1984 was initiated by the decree holders.

5. On the death of Sasanka Sekhar, his undivided one-half share in the subject-property appears to have devolved on the defendant Nos. 2 and 4. In the present suit, however, the extent of claim of ownership of Sasanka Sekhar and Kalikesh, and consequentially of Kalikesh, Dhira and Runu in the subject-property has been questioned by the plaintiff, and I shall refer to this aspect of the controversy in the later part of this judgment. For the present I shall proceed in the manner the question of devolution of title appears to have had been understood by the parties till the institution of the present suit.

6. On 30th April, 2002, during the pendency of the execution proceeding, the defendant Nos. 2, 3 and 4 executed a Deed of Gift in favour of the defendant No. 1. In the pending execution proceeding, the first defendant had applied for being substituted in the place and stead of the decree-holders therein. This application

for substitution appears to have been allowed by the Executing Court.

7. In the suit, out of which the present interlocutory motion has been taken out, the main claim of the plaintiff is for a decree for adjudging the Deed of Gift (the "Deed" in short) to be illegal, void, non est and unenforceable and for delivery up and cancellation of the same. There is also claim for perpetual injunction restraining the first defendant from acting in pursuance of or giving effect to this Deed. The prayer in the interlocutory motion is for temporary injunction in the above terms. Such prayer, if granted, would effectively render the execution proceeding nugatory till the order for temporary injunction subsists. The first defendant, as I have indicated earlier, is prosecuting the execution proceeding on the strength of their title acquired from this Deed of Gift. Thus, if they are prevented from relying upon this Deed of Gift, the result thereof would be that they would not be able to take any step in the execution proceeding.

8. The plaintiff's case is that on death of Heramba Chandra in the year 1951, along with Sasanka Sekhar, Kalikesh and Rajbala, the four daughters had also inherited the estate and undivided share of each of them in the premises in question was one-seventh. Hence, Rajbala having inherited one-seventh share in the subject-property could not have bequeathed undivided one-third share therein to Sasanka Sekhar and Kalikesh. On the same logic, on the death of Sasanka Sekhar, his legal heirs being defendant Nos. 2 and 4 herein could not inherit undivided one-half share of the entire property. The defendant Nos. 2, 3 and 4 also, at the time of making of the gift were entitled only to undivided three-seventh share in the said property, the remaining four-seventh share having vested in the four daughters of Heramba Chandra. Thus, they could not make a gift of the entire property. On this ground, Mr. Tibrewal, learned Senior Counsel appearing for the plaintiff has submitted that the Deed of Gift is void, and the first defendant cannot be permitted to take any advantage of the same.

9. In addition, Mr. Tibrewal has argued that under the 1973 Act, on the death of a male Hindu life interest in his estate devolved on his widow as also the widow of a predeceased son of the deceased in their proportionate shares, and in the suit which has been decreed against his clients there is no pleading to the effect that Heramba Chandra was not survived by any widow of his predeceased son, if any, at the time of his death. He has further submitted that there is also no pleading to the effect that the subject-property was not joint family property, and thus shares of the widow and two sons of Heramba Chandra could not be determined in the absence of any pleading to that effect. The plea of the plaintiff is that as there was no partition of the property, the shares of the individual heirs could not be accepted. In this regard, he has referred to the well-known treatises entitled "Hindu Law, Principles and Precedents" by N.R. Raghavachariar (Seventh Edition).

10. Further contention of Mr. Tibrewal is that the right of the widow in the estate of her deceased husband crystallised only on partition, and not immediately on the death of her husband. In the latter case, in the absence of partition, it

remains a fluctuating right. Two authorities relied on for this proposition of law by him are the decisions of the Hon''ble Supreme Court in the cases of Potti Lakshmi Perumallu Vs. Potti Krishnavenamma, and Shamlal and Others etc. Vs. Amarnath and Others, . He has also cited a decision of this Court in the case of Provash Ch. Roy Vs. Prokash Ch. Roy and Others for the purpose of establishing the proposition that the right that devolves on a widow under the 1937 Act on the death of her husband is in the nature of limited interest in the property and a widow does not become full owner of her deceased husband's estate.

11. During the course of hearing of the present interlocutory motion, two supplementary affidavits have been filed on behalf of the plaintiff affirmed on 14th and 26th July, 2006 respectively. In the first supplementary affidavit a point has been taken that the Deed of Gift dated 30th April, 2002 was not registered on the date the application for substitution in the execution proceeding was filed and the registration was effected after payment of deficit stamp-duty only on 20th February, 2006. On this count, a complaint has been made in the first supplementary affidavit that the application for substitution was allowed on the basis of wrong allegation in the application for substitution that the deed was registered on 30th April, 2002. In the second supplementary affidavit a photocopy of an extract from the Minute Book of the 32nd meeting of the Board of Directors of the plaintiff company held on 1st February, 1942 has been annexed. The first resolution minuted therein relates to shifting of the registered office and godown of the company to 36A and 36B, Pratapaditya Road, Calcutta. These are the premises, which form the subject-matter of the present proceeding. The minutes of this meeting were sought to be relied upon by the plaintiff in support of their case that they had become tenant of the subject premises long prior to the year 1951.

12. On these two affidavits, on behalf of the first defendant objection has been taken on the ground that no formal leave was obtained for filing the supplementary affidavits and the averments made therein should not be taken note of by this Court. However, in their affidavit-in-opposition the first defendant has referred to these two supplementary affidavits and dealt with the allegations contained therein. Moreover, the documents which are sought to be introduced through these affidavits consist of records of certain proceedings which appear to have had taken place in ordinary course of business. Hence, I am taking cognizance of these documents for the purpose of prima facie assessment of the strength of the case of the competing parties.

13. The legal basis of the argument in support of the motion, as advanced by Mr. Tibrewal is that under the Dayabhaga School of Hindu Law, which admittedly governs the defendant Nos. 2, 3 and 4, a daughter is a sapinda heir, and has equal right of inheritance as that of widow and son(s) of a deceased male Hindu. In support of his submissions, he has relied on a decision of an Hon''ble Division Bench of this Court in the case of Sankar Dome Vs. Kalidasi Dasi, . He has also referred certain passages from the well-known treatise on Hindu Law entitled

"Principles of Hindu Law" (19th Edition) by Sir Dinshaw Mulla in support of this proposition. He further argued that the Hindu Womens" Right to Property Act, 1973 had no application to Dayabagha School of Hindu law.

14. Mr. Banerji, learned Senior Counsel appearing for the first defendant has taken three-fold defence opposing the prayer of the petitioner for temporary injunction. The first limb of his defence is that the present interlocutory motion and the suit itself is primarily to resist the execution proceeding. The plaintiff, in view of the provisions of Section 47 of the CPC ought to have approached the Executing Court for such relief. The present suit, he submitted, was not maintainable. The second limb of his defence is that the plaintiff had all material times accepted Sasanka Sekhar and Kalikesh as the landlords, and the devolution of title of the subject-property on the first defendant through Kalikesh and the second and fourth defendant is undisputed. In the present proceeding, in effect, the plaintiff was seeking to deny the title of the landlords, which was impermissible under the provisions of Section 116 of the Evidence Act, 1872. He relied on two authorities of the Hon"ble Supreme Court on this point, being Sri Ram Pasricha Vs. Jagannath and Others, and Kanta Goel Vs. B.P. Pathak and Others, .

15. On merit, Mr. Banerji"s case is that under the Dayabhaga School, though the daughter is a sapinda heir and entitled to inherit the estate of a deceased male Hindu dying intestate, in order of preference, the daughter"s right to inherit comes after and in default of the son(s) and the widow. Thus under the Customary Hindu Law, in the event a male Hindu governed by the Dayabhanga School died intestate after the enactment of the 1937 Act leaving behind son, widow and daughter, his estate would devolve on his son first. His widow would have life estate in view of the provisions of 1937 Act. The daughter could inherit the property only in default of the son and the widow. In support of his submissions, he has relied on the following authorities:

(a) A decision of an Hon"ble Division Bench of this Court in the case of Uma Kanta v. Bedbati 46 CWN 113.

(b) The decision of the Judicial Committee of the Privy Council in the case of Moniram Kolita v. Kerry Kolutany 7 IA 115.

He has also referred to certain passages from the following texts on Hindu Law:

(i) Principles of Hindu Law by Mulla (Nineteenth Edition)

(ii) Treatise on Hindu Law and Usage by Mayne (Fifteenth Edition)

(iii) Hindu Law by S.V. Gupte [3rd (1981) Edition]

16. I shall take up the two ground of objection on the point of maintainability first. These issues have been raised in the present interlocutory proceeding mainly for resisting the prayer for interim order. Under these circumstances, I am to consider the plaintiff"s case on these two preliminary points mainly for testing

the strength of the plaintiff a case at the prima facie stage for deciding as to whether the plaintiff is entitled to temporary injunction in aid of the main suit or not. Thus, my opinion on these two issues would be my prima facie view only.

17. Are the questions raised in this suit required to be determined by the Executing Court alone, in view of the provisions of Section 47 of the Code? That is the first ground of preliminary objection by the first defendant. The plaintiff's contention on this point is that they became aware of the alleged extent of ownership in the subject property of the heirs of Heramba Chandra only on 6th July, 2006, when they could obtain the certified copy of the Deed on 6th July, 2006. Mr. Tibrewal has also relied on the case of Mahendra Kanji Sicca v. Pradip Kumar Ghosh reported in 2006(3) CHN 37 in support of maintainability of this suit. His case is that subject-matter of the two suits are different and the issues involved in the present suit is not covered by the decree passed in T. S. No. 728 of 1984.

18. On this point, I am prima facie satisfied that the present suit, as framed, is not maintainable. What is under challenge is the legality of a Deed of Gift in the present suit on the basis of which the first defendant is prosecuting the execution application. The plaintiff claims to have come to know of this Deed subsequent to the filing of the suit, after the decree was passed. On this basis, the plaintiff is seeking to stall execution proceeding. What is being challenged by the plaintiff in substance, however, is the title of Sasanka Sekhar and Kalikesh to the suit property. This question has been raised by the plaintiff in the execution proceeding as well, which they are resisting as the judgment-debtor. The facts in the case of Mahendra Kanji Sicca (supra), however, were entirely different. In that case, the executor of the estate of the deceased plaintiff who was successful in a suit for eviction had instituted a fresh suit to prevent acts of sub-letting and certain other modes of utilisation of the suit property. In that context, an Hon'ble Single Judge of this Court held:

Undisputedly, the subject-matter of the earlier suit and the present suit is the same, but the earlier suit and the present one are based on different causes of actions. Reliefs claimed in the present suit are different from the reliefs claimed in the earlier suit.

...The Executing Court cannot go behind the decree. The decree passed in the earlier suit did not contain the reliefs claimed in the present suit.

Issues not covered by the decree are not the questions relating to the execution, discharge or satisfaction of the decree.

19. The issues in the present suit relate back to events which took place prior to the passing of the decree, and in view of the specific bar u/s 47 of the Code, I am of the prima facie view that this suit is not maintainable. This suit involves a question as to whether the first defendant is the proper representative of the plaintiffs in Suit No. 728 of 1984 or not. The argument of Mr. Tibrewal that there is no pleading that Heramba was not survived by the widow of a predeceased son

and that the property in question was not partitioned as also that the right of Rajbala did not crystallise without partition cannot be raised in this suit in view of the provisions of Section 47 of the Code. Moreover, such arguments have to be rejected on merit also, and the reason for rejection of the plaintiff's case on merit on the latter ground I shall discuss in the later stage of this judgment.

20. The preliminary objection on the second count was based on the principle that the defendant tenant is not entitled to deny title of the landlord. On this point, reliance has been placed on the case of Sri Ram Pasricha (*supra*) This authority deals with the principle of tenant's estoppel. In the case of Sri Ram Pasricha (*supra*), It has been held:

...under the general law, in suit between landlord and tenant the question of title to the leased property is irrelevant....

The principle embodied in Section 116 of the Evidence Act, 1872 prohibits a tenant from questioning the title of the landlord. In the case of Anar Devi (Smt) Vs. Nathu Ram, , it has been held that a tenant of immovable property under a landlord who becomes a tenant under another landlord who derived the title from the original landlord, by accepting the latter to be the landlord, cannot be permitted to deny his title.

In the present case, the plaintiff had accepted Sasanka Sekhar and Kalikesh as the landlords. What is being questioned now, however, is the right of the first defendant to proceed with the execution application, on the ground that they did not derive title to the suit property as their predecessors-in-title did not have such right. In their effort to resist the decree thus, the plaintiff is primarily questioning the quality of the title of the two brothers. This, in *prima facie* view, is not permissible under the principle of tenant's estoppel. The ratio of the decision of the Hon''ble Supreme Court in the case of Sheela and Others Vs. Firm Prahlad Rai Prem Prakash, also does not assist the plaintiff in the facts of the present case. In this case, the Hon''ble Supreme Court observed in paragraph 16, referring to an earlier decision of the Hon''ble Supreme Court in the case of Tej Bhan Madan Vs. II Additional District Judge and Others, :

After the creation of the tenancy if the title of the landlord is transferred or devolves upon a third person the tenant is not estopped from denying such title. However, if the tenant having been apprised of the transfer, assignment or devolution of rights acknowledges the title of the transferee either expressly or by paying rent to him, the rule of estoppel once again comes into operation for it is unjust to allow the tenant to approbate and reprobate and so long as the tenant enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor is?

The facts giving rise to the dispute in the case of Sheela (*supra*) were also not similar to the present case, and in fact, are substantially different. In that case, the tenant/defendant took the plea that it was not clear how the title of the suit property came to be vested in the plaintiff, which was a partnership firm, through

one Frahlad Raj, who was not a natural-born son of the original landlord. What the plaintiff are seeking to do in the present proceeding is not to require the landlords, or their representatives, to prove their ownership or title but are denying their full title or ownership in the suit property. In the present case, the devolution of the title is traceable to the landlords. Moreover, the status of Sasanka Sekhar and Kalidas as co-owners of the subject-property remains undisputed. It is the extent of their share which is being questioned. In the case of Kanta Goel (*supra*), it has been held that one co-heir of deceased landlord could sue for eviction in absence of other co-heirs who had no objection. In the present case, there is no indication that there was any objection from the four daughters of Heramba Chandra. Nor they have been impleaded as parties to the present suit.

21. The arguments on merit is primarily based on the inheritance status of the daughters of a Hindu male governed by Dayabhaga School of law dying intestate. Mr. Tibrewal's main case on this point has been that the status of a daughter being equal to a son under the Dayabhaga School, being sapinda heirs, on the death of Heramba Chandra his four daughters has inherited shares in his estate equal to that of Raj Bala, Sasanka Sekhar and Kalikesh. In the case of Sankar Dome v. Kalidassi Dasi (*supra*) it has been held:

The parties are governed by the Bengal or Dayabhaga School of Hindu Law and, under the said system, five females are recognised as special sapindas under special texts on the theory of spiritual benefit. The daughter comes in as a special sapinda after the widow upon the footing that, through her son, she offers funeral oblations to her father.

He has relied on another decision of this Court of this point being the case of Radha Raman v. Gopal reported in 31 CLJ 81. This judgment primarily deals with the principle which governs the law of inheritance in the Dayabhaga system, and that is the principle of spiritual benefit.

22. I have considered the submissions of the learned Counsel appearing for the parties as also the authorities cited and the texts referred to by them. While the heritability of the daughter under the Dayabhaga School is not in dispute, and recognised in the decisions of Sankar Dome (*supra*) and Radha Raman (*supra*), the manner in which such inheritance takes place, in my opinion is not the manner. Mr. Tribewal is persuading this Court to construe. The daughter, prior to coming into operation of the Hindu Succession Act, 1956 was entitled to inherit property only if the sapinda heirs of the deceased higher in the order of preference were in default. This position in customary Hindu Law is clear from the following passage from Mullah's Principles of Hindu Law (19th Edition):

88. Order of Succession Among Sapindas.--The Sapindas of the Bengal School are divided into two classes, namely: (1) sapindas ex parte paterna and (2) sapindas ex parte materna. Numbers 1 to 32, except the five females, namely, Nos. 4, 5, 8, 14 and 20 are sapindas ex parte materna. Numbers 33 to 53 are

sapinda ex parte materna. Sapinda ex parte paterna. do not succeed until after Sapinda ex parte paterna. The five female Nos. 4, 5, 8, 14 and 20, succeed by virtue of special texts.

The sapindas succeed in the following order:

1-3. Son, grandson and great grandson, illegitimate son of a Sudra by a Brahmin concubine.

4. Widow.

5. Daughter.

This order of preference is also recognised by two other commentators of Hindu Law, Mayne and S.V. Gupte.

23. In the case of Uma Kanta (supra) the point of dispute was whether a married daughter, whose husband was willing to adopt a son could come within the ambit of the expression of Putrabati (endowed with son) and Sambhabitaputra (having or likely to have a son) which would have given her preferential right of succession. The Hon^{ble} Division bench of this Court decided this question in the affirmative. The ratio of this judgment does not have a direct bearing on the present case, but a passage from Dayabhaga referred to in that judgment is relevant in the context of the dispute between the parties. This passage, in Chapter XI, Section 11 of Dayabhaga is reproduced below:

The daughter's right of succession on failure of the wife is declared. On that subject Manu and Narada say, "The son of a man is even as himself; and the daughter is equal to the son; how, then, can any other inherit his property, notwithstanding the survival of her, who is as it were himself?" Narada particularises the daughter as inheriting in right of her continuing the line of succession: On failure of male issue, the daughter inherits, for she is equally a cause of perpetuating the race; since both the son and daughter are the means of prolonging the father's line.

24. The controversy before the Judicial Committee in the case of Moniram Kolita (supra) was as to whether the estate of the deceased husband inherited by a widow governed by the Bengal School (i.e. the Dayabhaga School) stood forfeited by reason of unchastity. The opinion of the Judicial Committee was that it did not stand forfeited. In the facts of the present case, however, this decision again has no bearing, except the observation of the Judicial Committee to the following effect:

According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which see the Shivagunga Case (1) does not take a mere life estate in the property....

(emphasis added).

This establishes that the order of preference for succession operated not simultaneously but in default of the prior category, the sons forming the highest grade in order of preference.

25. Mr. Tibrewal had also argued that 1937 had no application vis-a-vis those governed by the Dayabhaga School. But this argument has to be rejected in view of specific provision of Section 3 of the Hindu Women's Right To Property Act (XVIII of 1937):

3. Devolution of property.--(1) When a Hindu governed by Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall subject to the provisions of Sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son shall inherit in the like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

In Mayne's Treatise of Hindu Law & Usage (19th Edition), the legal position on this count has been stated to be:

The Hindu Women's Rights to Property Act, 1937, which confers rights on Hindu women affects the Dayabhaga law also with the result that the widow takes even in the presence of male issue for the same share as a son. So also the widows of a predeceased son and of a predeceased son of a predeceased son are entitled, to inherit, both along with the male issue and the widow and in their default, for the prescribed shares.

26. The position, as it emerges from these treatises and authorities, is that in the year 1951, when Heramba Chandra passed away, Sasanka Sekhar and Kalikesh

as his sons and first category of heirs in order of preference for succession under the Dayabhaga School inherited 1/3rd share of his estate each. That is so because under the provisions of Section 3(1) of the 1937 Act, his widow had inherited life interest in 1/3rd share of the estate. The daughters of Heramba Chandra thus had no share in the subject property. Rajbala's rights in respect of her share became absolute upon enactment of the Hindu Succession Act, 1956. As she bequeathed her share in the property in favour of Sasanka Sekhar and Kalikesh, they became absolute owners of the subject property on Rajbala's death.

27. Mr. Tibrewal's argument that the daughters had inherited four-seventh share in the subject-property thus cannot be accepted. I also decline to accept his submission that in the absence of any pleading to the extent that the subject property is not joint family property or that there was no surviving widow of pre-deceased son of Heramba Chandra at the time of his death, the respective shares in the subject property as claimed by Sasanka Sekhar and Kalikesh has to be disbelieved. The decisions of the Hon'ble Supreme Court in the cases of Shamlal (supra) and Lakshmi Perumallu (supra) are for the propositions that Hindu Women's Rights to Property Act applies to separate property left by a Hindu male and does not apply to coparcenary property. The reference to "HINDU LAW, Principles and Precedents" by N.R. Raghavachariar was also to substantiate the case of the plaintiff on this point. But in the present case, there is nothing to show that the property of Heramba Chandra was coparcenary property. In fact, in paragraphs, 2(a) and (b) of the petition in support of the notice of the motion, the plaintiff themselves have admitted the position that Heramba had purchased the property in question and on his death he was survived by his widow, two sons and four daughters. The said two paragraphs, verified as true to the knowledge of the deponent of the affidavit, are reproduced below:

2. Your petitioner states and submits that:

(a) On or about November 7, 1941 one Heramba Chandra Chowdhury (since deceased), of Guptipara purchased the property being the premises Nos. 36A, 36B, and 36C, Pratapaditya Road, P.S. Tollygunge, Calcutta-700 026, hereinafter referred to as "the said entire property", more fully described under a Schedule annexed to the plaint being annexure "A" hereto.

(b) The said Heramba Chandra Chowdhury, died intestate on January 17, 1951 leaving him surviving his widow Late Rajbala Devi, two sons Sasanka Sekhar Chowdhury (since deceased) and Kalikesh Chowdhury (the defendant No. 3) and four daughters. In spite of best efforts, the plaintiff has not been able to ascertain the names and addresses of the said four daughters of the said Late Heramba Chandra Chowdhury.

It is now not open to the plaintiff to contend that Heramba might have been survived by the widow of a predeceased son as well, when the plaintiff themselves have not made out a case on such ground.

28. As regards the question of crystallization of Rajbala's rights, she passed away after coming into operation of the Hindu Succession Act, 1956 when her right in the property had become absolute. Thus, these two decisions do not have any application in the present case. For the same reason, the ratio of the case of Provash Ch. Roy (*supra*) cannot assist the plaintiff. There was no necessity of any partition of the property to confer the right on Rajbala entitling her to bequeath her undivided share in the subject-property.

29. In the supplementary affidavit affirmed on 26th July, 2006, the plaintiff has sought to establish their occupation of the subject-premises in the year 1942. This fact is of no relevance to the present case. The second supplementary affidavit has been filed to demonstrate that the Deed of Gift was not registered on the date the application for substitution was served on 3rd January, 2006. Again, this allegation is of no relevance so far the present proceeding is concerned, as admittedly the Deed was registered finally on 20th February, 2006. In the present suit, the order of the Executing Court allowing the first defendant's application for substitution is not under challenge. Thus, pleadings contained in both the supplementary affidavits are not relevant to the present proceeding.

30. I am, accordingly of the opinion that the plaintiff has failed to make out any case in the present interlocutory motion, and the same is dismissed. Interim order, if any, shall stand vacated.

31. There shall, however be no order as to costs.