

(1976) 01 BOM CK 0020

In the Bombay High Court

Case No : A.F.O.D. No. 450 of 1968 and First Appeal No. 503 of 1968

Purshottam Waman Gabale and Others

APPELLANT

Vs

Shripad Ramchandra Pargaonkar and Others

RESPONDENT

Date of Decision : 27-01-1976

Acts Referred:

Hindu Succession Act, 1956 — Section 18

Citation : AIR 1976 Bom 375

Hon'ble Judges : Sapre, J;Apte, J

Bench : Division Bench

Advocate : J.R. Lalit, A. F.O.D. No. 450 of 1968 and R.V. Jahagirdar and S. N. Deshpande, F.A. No. 503 of 1968, for the Appellant; K.J. Abhyankar, R.V. Jahagirdar and S. N. Deshpande and P.L. Naik, for S.G. Mandrekar, for the Respondent

Judgement

Sapre, J.—These two appeals, one by defendants Nos. 1 to 4 and the other by defendant No. 5, arise out of a suit brought by the original plaintiff Bhimabai (who died during the tendency of these appeals and whose two sons have been brought on record as her heirs) to recover possession of two house properties situate in the city of Kolhapur. One of these bears City Survey No. 18/1-2 and the other bears City Survey Nos. 131/1 to 3. In City Survey No. 18/1-2 Bhimabai claimed one-half share. In regard to City Survey No. 131/1 to 3, she claimed possession of the entire house. City Survey No. 18/1-2 is the property involved in First Appeal No. 450 of 1968 where the appellant is defendant No. 5. City Survey No. 18/1-2 is an possession of defendants Nos. 1 to 4. city Survey No. 131/1 to 3 is not in actual physical possession of defendant No. 5. A portion of it is in possession of defendants Nos. 6 to 9, who are brothers, as tenants. Another portion of the house is in possession of defendants Nos. 10 to 12, who are also brothers, as tenants. The third portion comprising a room near the entrance door is in possession of defendant No. 13. Defendant No. 5 claims to be in possession of these three portions of City Survey Nos. 131/1 to 3 symbolically as the owner through his tenants or sub-tenants. One more relief was claimed by Bhimabai in

the suit, namely, rent in respect of a land situate at Bachani. Defendant No. 14 was concerned with this relief. Bhimabai, however, gave up that claim so far as the present suit was concerned and nothing, therefore, need be said so far as defendant No. 14 is concerned.

2. In order to understand the relationship between Bhimabai and defendants Nos. 1 to 5, the following genealogy is relevant:-

(See Genealogy Table on Next Page)

Vishnu was the common ancestor. He had two wives, Sita and Rama. From Sita he had three sons and two daughters: Rangopant, Waman and Shankar as sons and Bhimabai and Ganga as daughters. Ganga died long ago. Thereafter, Shankar died in 1920. Waman died in 1947. Rangopant died in 1949. Defendants Nos. 1 to 4 are the sons of Waman. Defendant No. 5 Rajaram is the son of Rangopant. Parvati was the wife of Shankar and she died on 16th August 1958. The plaintiff is the sister of Shankar. Amongst the children of Vishnu from Rama, Savitri and Kamala died long ago. Vasudeo died in 1944. Pandurang was alive when Parvati died on 16th August 1958 and he was also alive till the filing of the suit.

3. During the lifetime of Vishnu, the family was joint and owned extensive moveable and immovable properties. In 1903, after the death of Vishnu, the five sons, Rangopant, Waman, Shankar, Vasudeo and Pandurang, effected a partition of the joint family properties. Shankar was a minor at that time and he was represented in the partition by his elder brother Waman. It appears that some disputes had arisen among the brothers and, therefore, one Antaji Narayan Moghe was appointed an arbitrator to partition the properties. He brought about the partition and gave separate awards, one each in favour of each of the five brothers. The awards were filed in Court and decrees were passed under which each of the five brothers got the property of his share in the partition.

4. The case of the plaintiff Bhimabai was as under:- City Survey Nos. 131/1 to 3, which at that time bore No. 442, was allotted to the share of Shankar in the partition. Shankar had thus become the owner of this house property. City Survey No. 18/1-2 represented two portions out of a house which at that time bore No. 142. House No. 142 was divided into five equal portions, each measuring 76 feet north-south and 7-1/2 feet east-west. One each of these portions. Vasudeo and Pandurang subsequently sold their portions of House No. 142. The portion which fell to the share of Rangopant in House No. 142 subsequently came to be recorded as City Survey No. 19 and this portion was demarcated from the remaining portions of Waman and Shankar by constructing a partition wall. Although Shankar and Waman were given specific portions measuring 76"X71/2", the portion of Shankar being on the Western side and that of Waman being on the eastern side, these two portions were not actually demarcated by constructing a partition wall. The two portions together, therefore, came to be numbered as City Survey No. 18/1-2. Shankar remained in

possession of his portion along with Waman, who was the owner of the eastern half portion. This was till his death in 1920. After the death of Shankar, Parvati succeeded to the property of Shankar and was in possession of both the suit properties. She was in actual possession of her portion of City Survey No. 18/1-2. In respect of City Survey No. 131/1 to 3, she was in symbolical possession through her tenants defendants Nos. 6 to 12. She was thus in possession till 17th June 1956, when the Hindu Succession Act, 1956 came into force. By virtue of Section 14 of the said Act, she became the full owner of the suit properties of which she was a limited owner before 17th June 1956. On her death on 16th August 1958, the plaintiff Bhimabai succeeded to the suit properties as the sole heir of Parvati, she being the sister of Shankar, the husband of Parvati. As defendants Nos. 1 to 5 were denying her claim, she had brought the present suit.

5. Defendants Nos. 1 to 4 admitted that in the partition of the year 1903, the old house No. 142 was divided into five equal shares, each measuring 76 feet north-south and 7-1/2 feet east-west, and the present City Survey No. 18/1-2 represents the two portions of the old house No. 142 that had come to the share of Waman and Shankar, the portion of Waman being on the eastern side and that of Shankar being on the western side. They have thus admitted the title of Shankar to half the western portion of City Survey No. 18/1-2 to start with. Their only defence is that Shankar or, at any rate, Parvati on the death of Shankar never stayed in any portion of City Survey No. 18/1-2 and Waman was occupying the whole City Survey No. 18/1-2 in his own right as owner and adversely first to Shankar and then to Parvati. Waman had thus acquired title to the western half portion of Shankar in City Survey No. 18/1-2 and the title of Shankar and Parvati to that portion had been extinguished. The plaintiff Bhimabai consequently was not entitled to claim possession of the half portion in City Survey No. 18/1-2 and her suit to that extent was liable to be dismissed.

6. The case of defendant No. 5 is as follows:- He does not dispute that in the partition of 1903, the old House No. 442, that is, City Survey No. Nos. 131/1 to 3, was shown in the award decree of Shankar as having fallen to his share. His case is that the old House No. 442 never belonged to the joint Hindu family and it was the self-acquired property of Rangopant who had purchased it under a Bechand Patra dated 7th February 1903, that is, before the partition in August 1903, from one Govind Balkrishna Kalamdane. Defendant No. 5 does not explain why if house No. 442 was the separate property of his father Rangopant, it was allotted to the share of Shankar in the partition. It appears to be his case that it was so shown in the award decree of Shankar nominally, though defendant No. 5 does not state this in so many words in his written statement. Nor does he state the reasons for showing the house in the award decree of Shankar nominally. According to him, Shankar had taken two portions from City Survey Nos. 131/1 to 3 on rent through his guardian Waman from Rangopant and these are the two portions in the possession of defendants Nos. 6 to 9 and 10 to 12 respectively. The case of defendant No. 5 is thus that Rangopant was the owner of City Survey

No. 131/1 to 3 and Shankar and, after his death, Parvati was the tenant of two portions of this house. Parvati had subsequently sublet the two portions to defendants Nos. 6 to 9 and defendants Nos. 10 to 12 respectively and thus defendant No. 5 is in possession of these two portions of the house symbolically through his tenant which Parvati was. The alternative case of defendant No. 5, in so far as the third portion, namely, the one room near the entrance door, is concerned, is that even if Shankar was the owner of City Survey Nos. 131/1 to 3, Shankar or Parvati was never in possession of this room. It was always in the possession of Rangopant and he had leased out that room to tenants. After his death, Vasant, the elder brother of defendant No. 5, had leased out this room to tenants and defendant No. 13 was now the tenant of defendant No. 5. In regard to this room, thus, the title of Parvati had been extinguished by the adverse possession of Rangopant and his sons. The plaintiff Bhimabai was, therefore, not entitled to possession of City Survey Nos. 131/1 to 3 or, at any rate, the one room near the entrance door.

7. On an appreciation of the oral and documentary evidence adduced by the parties, the learned trial Judge recorded the following findings:- Waman was never in adverse possession of the portion of Shankar and Parvati in City Survey No. 18/1-2. After the death of Waman also, defendants Nos. 1 to 4 were never in adverse possession of the said portion till the death of Parvati on 16th August 1958. The title of Parvati to the half western portion of City Survey No. 18/1-2 was thus not extinguished. (The plaintiff had claimed half-share in the house by partition and separate possession. The learned trial Judge has passed a decree for possession of the specific western portion of City Survey No. 18/1-2. That was also proper because a partition had already been effected amongst the five brothers and two specific portions of the old house No. 142, which now comprise City Survey No. 18/1-2. had fallen to the share of Waman and Shankar, though the two portions had not been actually demarcated on the spot by building a partition wall.) City Survey Nos. 131/1 to 3 had fallen to the share of Shankar in the partition of the year 1903. It may be that the house was previously purchased by Rangopant in his name, but that could be for the reason that he was the eldest male member of the family after the death of the father Vishnu. At any rate, he had thrown the house in the hotchpotch and on the basis that it forms an item of the joint family property, it was allotted to the share of Shankar. There was no averment that it was nominally included in the award decree of Shankar, nor any case was pleaded why this was done so. Shankar having thus become the owner of City Survey Nos. 131/1 to 3 under the award decree, he could not be divested of that title merely by Waman executing rent notes in favour of Rangopant in respect of two portions of the house, assuming that Waman had done so and was competent to do so. Shankar and, after his death, Parvati were thus the owners of City Survey No. 131/1-2-3. They were in symbolical possession of the two portions now in possession of defendants Nos. 6 to 9 and Defendants Nos. 10 to 12 respectively through their tenants. In regard to the room to some persons, but that was only upto the year 1935 and

thereafter the room had fallen down and was reconstructed in the year 1961. It could not, therefore, be said that Parvati had lost title to this room by the adverse possession of Rangopant and his sons. Parvati being thus the owner of both the house properties in suit and the plaintiff being the sole heir of Parvati was entitled to succeed to the suit properties. The learned trial Judge accordingly passed a decree for possession of City Survey Nos. 131/1 to 3 in favour of the plaintiff as also for possession of the half western portion of City Survey No. 18/1-2. In regard to the former, however, the plaintiff was to get only symbolical possession so far as the two portions in the possession of defendants Nos. 6 to 12 as tenants were concerned, because they were the tenants of Parvati and were entitled to stay in those portions. In regard to the one room in City Survey Nos. 131/1 to 3 near the entrance door, defendant No. 13 having been let into the room not by Parvati but by the sons of Rangopant, including defendant No. 5, who had no title to the room, and the possession of defendant No. 13 of the room being thus unauthorised, the plaintiff was held to be entitled to the actual possession of that room.

8. Mr. Jahagirdar for the appellant-defendant No. 5 in First Appeal No. 503 of 1968 has raised the following points in his appeals:- The plaintiff Bhimabai had claimed the suit properties as a reversioner of Shankar, the husband of Parvati. This she could not do. when Shankar died in 1920, Parvati succeeded to the suit properties as a widow and held the properties as a limited owner, but that was the position till 17th June 1956. On that date, on the Hindu Succession Act, 1956 coming into force, Parvati became the absolute owner of the suit properties. The plaintiff had, therefore, to claim the suit properties as an heir of Parvati and not as a reversionary heir of Shankar. Secondly, the plaintiff is not the sole heir of Parvati. Admittedly, Pandurang, the step-brother of Shankar, was alive when Parvati died on 16th August 1958 and he was also alive when the suit was filed. Pandurang was, therefore, entitled to succeed to the suit properties along with Bhimabai. The suit by Bhimabai alone was, therefore, not competent. Thirdly, City Survey Nos. 131/1 to 3 was the self-acquired property of Rangopant. Shankar or Parvati was not the owner of this property. After the death of Rangopant and Vasant, defendant No. 5 had become the owner of this property. The plaintiff cannot, therefore, claim the property. Fourthly, in the alternative, Rangopant and now defendant No. 5 had become owner of the one room near the entrance door by adverse possession and the plaintiff was not entitled to get possession of this room on the basis of her title.

9. Mr. Lalit for the appellants-defendants Nos. 1 to 4 in First Appeal No. 450 of 1968 has adopted the second submission of Mr. Jahagirdar, namely, that Bhimabai was not the sole heir of Parvati and Pandurang was equally entitled to the suit properties as an heir of Parvati along with Bhimabai. The additional submission of Mr. Lalit is that Waman had acquired title to the portion of Shankar in City Survey No. 18/1-2 by adverse possession and after the death of Waman, defendants Nos. 1 to 4 are in possession of that portion as owners. The plaintiff is, therefore, not entitled to claim possession of the portion of Shankar in City

Survey No. 18/1-2 which was allotted to him in the partition of 1903.

10. The first submission of Mr. Jahagirdar is that the plaintiff Bhimabai could not claim the suit properties as a reversioner of Shankar on the death of Parvati, as Parvati had become the absolute owner of the suit properties from 17th June 1956 in view of Section 14 of the Hindu Succession Act, 1956, and she had to claim the suit properties only as an heir of Parvati. Mr. Abhyankar on behalf of the sons of Bhimabai does not dispute the legal position. But, as rightly pointed out by Mr. Abhyankar, the plaintiff has not claimed the suit properties as the reversioner of Shankar on the death of Parvati. The necessary allegations in the plaint are in paragraphs 2 and 3. Although the allegations in these paragraphs are not quite categorical, the over-all effect of those allegations is that Parvati was the owner of the suit properties when she died in 1958 and on her death the plaintiff Bhimabai had become the owner of the suit properties as the heir of Parvati. It was to explain how Bhimabai was the heir of Parvati that it was stated that she was the sister of the husband of Parvati. If the plaintiff were to claim as reversioner of Shankar on the death of Parvati, the allegations in the plaint would have been different. For example, in that case it would have been stated that Parvati was in possession as a limited owner and the suit properties were held by her as a widow's estate at the time of her death and on her death, the plaintiff was entitled to succeed as an heir of Shankar. u/s 15 of the Hindu succession Act, 1956, the property of a female Hindu who dies intestate devolves firstly upon her sons and daughters and the husband and secondly upon the heirs of the husband. In the present case, Shankar and Parvati had no issue and Shankar had pre-deceased Parvati. The heirs of Parvati could, therefore, be only the heirs of her husband and in this view of the matter, the reference in the plaint that the plaintiff is the sister of Shankar, the husband of Parvati, does not mean that she was claiming the suit properties as a revision of Shankar on the death of his widow Parvati. The suit has thus been brought by the plaintiff as an heir of Parvati and it is maintainable.

11. Turning to the second submission of Mr. Jahagirdar, which was also the submission of Mr. Lalit, neither defendants Nos. 1 to 4 nor defendant No. 5 had taken a plea that Bhimabai alone was not the heir of Parvati and Pandurang was also an heir of Parvati along with Bhimabai. But this is a pure question of law arising on facts about which there is no dispute. Those facts are that at the time of the death of Parvati on 16th August 1958, Pandurang was alive and he was also living when the present suit was filed. Pandurang was related to Shankar. He was a step-brother or brother of Shankar by half blood, whereas Bhimabai was the sister of Shankar by full blood. There is no dispute that there was no other heir of Parvati besides Bhimabai and Pandurang when she died on 16th August 1958. Section 15(1) of the Hindu Succession in Act, 1956, (hereinafter referred to as "the Act"), gives the rules of succession in the case of a female Hindu dying intestate. For our purposes, only clauses (a) and (b) of sub-section (1) are relevant and they are as under:-

"15. (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in S. 16,-

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband."

12. As we have stated, Shankar and Parvati did not get any issue and Shankar pre-deceased Parvati. There were, therefore, no heirs as specified in clause (a). The persons then entitled to succeed under clause (b) were the heirs of Shankar. Section 8 of the Act lays down succession to a male Hindu dying intestate. Here again, we were concerned only with clauses (a) and (b) and they are as under:-

"8. The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule."

There is no dispute that there are no heirs specified in class I of the Schedule and the heirs will have to be found under clause (b). Class II of the Schedule contains several entries, but we are not concerned with entries beyond Entry II. The first two entries in class II are:-

"I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister."

There is no dispute that the heir in the first entry is not there and the heirs are as mentioned in Entry II. In this entry, a brother and a sister have been mentioned as heirs. u/s 9 of the Act, so far as it is relevant for our purposes, the heirs in the first entry in class II are to be preferred to those in the second entry; those in the second entry are to be preferred to those in the third entry and so on in succession. u/s 16 also, the order of succession amongst the heirs referred to in Section 15 is controlled by three Rules, Rule 1 of which says:-

"Rule 1. Among the heirs specified in sub-section (1) of Section 15 those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously."

13. The over-all effect of these provisions in the Act, so far as it is relevant for our purposes, is that the heirs in Entry II, namely, the brother and sister, take simultaneously. Now, Bhimabai was the sister of full blood of Shankar, Pandurang, on the other hand, was a brother of half blood of Shankar. Section 18 of the Act provides:-

"18. Heirs related to an intestate by full blood shall be preferred to heirs related

by half blood, if the nature of the relationship is the same in every other respect."

It is plain that a full brother is preferred to a half brother and a full sister is preferred to a half sister. The question that presents some difficulty, however, is whether the nature of the relationship with the intestate of his brother and sister enumerated in Entry II of Class II of the Schedule can be said to be the same in every respect, so that a full brother would be preferred to a half sister or a full sister would be preferred to a half brother. In other words, the question is whether Bhimabai as the sister of full blood of Shankar excludes Pandurang who is the brother of Shankar by half blood. This depends upon the interpretation of the words "if the nature of the relationship is the same in every other respect" in Section 18.

14. The contention of Mr. Abhyankar for the sons of Bhimabai is that all that the expression means is that the heirs should be equally related and the test is that there should be the same degree in ascent and descent in the case of the heirs mentioned in the entry which represents a group of heirs. In other words, according to him, the brother and sister are both related to the father of the intestate as his children and the degree of descent is the same. The nature of the relationship being thus the same in the case of brother and sister, the heir related to the intestate by full blood has to be preferred to the heir related to him by half blood. Bhimabai had, therefore, to be preferred to Pandurang as the heir of Shankar.

15. According to Mr. Abhyankar, this interpretation of Section 18 would be in keeping with the general principles of the Hindu Law. For this, he has relied upon the decision of the Privy Council in AIR 1933 141 (Privy Council) Under the text of Mitakshara "to the nearest sapinda the inheritance next belongs", a principle has been stated that "among brothers such as are of the whole blood take the inheritance in the first instance". Before the decision in Gurudas v. Laldas, there was a conflict of views between the Bombay High Court on the one hand and Allahabad, Calcutta and Madras High Courts on the other as to whether the above principle is confined to the case of brothers of the propositus or whether it states a principle applicable to all sapindas in the same degree of consanguinity. In Gurudas v. Laldas on Lakshmidas was the common ancestor. He had two wives, Dularkuar and Phulkuar. From Dularkuar, he had two sons Laldas and Bajrangdas. Laldas was the plaintiff and one of the respondents to the appeal before the Privy Council. From Phulkuar, Lakshmidas had two sons Ramkrishnadas and Gurudas. Gurudas was the defendant and the appellant to the appeal before the Privy Council. The wife of Ramkrishnadas was Rajkumar and their son was Bhagwatdas. Bhagwatdas died without an issue and the question was who was entitled to succeed to the property of Bhagwatdas. The rival claimants were Gurudas, the father's brother of the whole blood, and Laldas and Bajrangdas, the father's brother of half blood. On the death of Bhagwatdas, Gurudas obtained possession of the properties. Laldas, therefore, sued him in the District Court claiming one-third share. Bajrangdas did not join as a plaintiff and was,

therefore, made a co-defendant. The District Court dismissed the suit holding that Gurudas alone was entitled to succeed because as between sapindas in the same degree of descent from the common ancestor, those of the half blood were excluded by those of the whole blood. Laldas appealed to the Court of the Judicial Commissioner. That Court held that as between uncles no preferential right was attached to the whole blood, and that Laldas was entitled to a one-third share in the properties. Gurudas then appealed to the Privy Council. The Privy Council reversed the decree of the Court of Judicial Commissioner and restored that of the District Court holding that the rule of preference of the whole blood to the half blood is a rule of general application among sapindas and is not confined to the case of brothers of the propositus. The Bombay view to the contrary was thus overruled.

16. The above decision, however, is of little assistance when we are required to interpret the language used in a certain section of a statute which has come into force subsequently and when the law of inheritance has undergone a change of a far reaching effect. We will have rather to interpret the words "if the nature of the relationship is the same in every other respect" in Section 18 of the Act having regard to the material provisions in the Act itself.

17. Mr. Abhyankar next relies upon a decision of the Punjab and Haryana High Court in *Sarwan Singh v. Dhan Kaur* AIR 1971 P& H 323, where a similar question, as in the present case, had arisen and it was held that the sisters of the full blood have to be preferred to the brother of half blood of the intestate. Mr. Abhyankar supports the reasoning of the learned Judges of the Division Bench in that case and invites a finding from us that in the present case also, Bhimabai as the sister of the full blood of Shankar excludes Pandurang who was the brother of the half blood of Shankar. In that case, one Lahna had two wives. The first wife was Partapo who had two sons Kishan Singh entitled to his estate. Dhan Kaur and Ind Kaur as the sisters of the full blood of Babu Singh. Kishan Singh and Sarwan Singh, on the other hand, claimed that they too along with Dhan Kaur and Ind Kaur were entitled to succeed to the estate of Babu Singh as they were the brothers of Babu Singh as they were the brothers of Babu Singh, though of half blood. The learned Judges held in that case that Dhan Kaur and Ind Kaur as the sisters of the full blood were alone entitled to succeed to the estate of Babu Singh and Kishan Singh and Sarwan Singh being the brothers of the half blood of Babu Singh were totally excluded. The reasons given by the learned Judges for holding that the sisters of full blood excluded the brothers of half blood were:- (1) Section 18 is a substantial reproduction of the rule of Hindu Law whereby relations of the full blood are preferred to those of the half blood. (2) Section 18 lays down a rule of general applicability to heirs, male and female alike. (3) In interpreting the words "if the nature of the relationship is the same in every other respect", the nature of the relationship of the heirs with the intestate is to be taken into consideration. For the purpose of preference, the Act makes no distinction between a son and a daughter and the nature of the relationship of both with the father or the mother is that of a child. Thus, the

nature of the relationship of brothers and sisters, being the children of the father of the intestate, is the same. The nature of relationship is to be reckoned in terms of the degree of ascent or descent or both. The section speaks of the nature of the relationship being the same and not the relationship being the same. (4) The words "in every other respect" mean that the rule will not be applicable if an heir is preferred under any other provision of the Act.

18. We have to examine whether these can be valid reasons for reaching the conclusion on the interpretation of Section 18 of the Act that sisters of the full blood exclude the brothers of the half blood. It is the third reason which, in our view, needs a fuller consideration and it is here where the matter presents difficulty. In regard to the first reason that Section 18 is a substantial reproduction of the rule of Hindu Law whereby relations of the full blood are preferred to those of the half blood, that rule would have also been implicit in Section 18 had the section ended with the word "half-blood", that is, if the section were merely to state "heirs related to an intestate by full blood shall be preferred to heirs related by half blood". In that case, all the heirs in an entry who were related to an intestate by half blood would be excluded and there would be no difficulty in finding out who can be the heirs. In regard to the second reason given by the learned Judges that Section 18 lays down a rule of general applicability to heirs, male and female alike, that is a reason which is neither here nor there and does not take us any further for the purposes of interpreting Section 18. In regard to the fourth reason, the learned Judges have said that the rule will not be applicable if an heir is preferred under any other provision of the Act. But they have not clarified what they exactly mean thereby.

19. The only reason that we will have to consider seriously is thus the third reason given by the learned Judges. As in the present case, the contest in *Sarwan Singh v. Dhan Kaur* AIR 1971 P&H 323 was between a brother and sister in Entry II of the heirs of Class II of the Schedule. As we have shown, there are four kinds of heirs in Entry II, viz., (1) son's daughter's son, (2) son's daughter's daughter, (3) brother and (4) sister. Under Rule 1 of Section 16, all these four categories of heirs included in one entry take simultaneously. The entry itself does not speak of a particular heir being of full blood or half blood. Under the entry, there is no disqualification for an heir of half blood to be excluded. As will be clear from the explanation below the entries specified in Class II of the Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood. This makes it abundantly clear that in the entry itself no disqualification has been attached to an heir of half blood for being excluded. The exclusion of an heir of half blood comes in where Section 18 applies. Section 18 is thus an exception to the rule of succession which, in the present case, we get by reading Section 15(1)(b), Rule 1 of Section 16 and the second entry in Class II of the Schedule together. Section 18 is not only an exception. It is a "limited exception", if we may use that expression, in the sense that merely because a brother, for example, is of half blood, it would not exclude him from inheritance. For example, suppose there are a son's

daughter's son and a brother of half blood as the only heirs. Section 18 cannot, therefore, be resorted to for excluding the brother of the half blood, because the nature of the relationship of a brother and son's daughter's son is not the same even if we hold that the concept of "equally related" is implicit in the expression "if the nature of the relationship is the same" in Section 18. A son's daughter's sons is much farther away from the intestate than the brother, taking the ascent and descent of their relationship from the intestate. When Section 18 thus is a limited exception, in our view, it must be strictly construed and the construction should be with a view to include, rather than to exclude, an heir of half blood from inheritance.

20. In construing the words "if the nature of the relationship is the same", the test, in our opinion, cannot be the broad test of the heirs being equally related, that is, the test of there being the same degree in ascent or descent from the intestate. The classification of heirs in Entry II is not on the basis of nearness of blood relationship. For example, the heirs in the first two categories are much farther away than the heirs in the last two categories. In other words, the heirs in the first two categories are much far removed from the intestate than the heirs in the last two categories. There is no reason why the concept of "equally related" in the sense that the heirs are removed from the intestate to the same degree should be introduced in interpreting the words "if the nature of the relationship is the same". We do not find any material difference in the expression "the nature of relation being the same" which the learned Judges in *Sarwan Singh v. Dhan Kaur* AIR 1971 P&H 323 have pointed out. To us it appears to be a case of distinction without a difference. It appears to us that nothing more than a plain meaning should be given to the expression "if the nature of the relationship is the same" in Section 18. If that plain meaning is given, then the nature of the relationship of a brother from the intestate is not the same as that of the sister from the intestate. The nature of the relationship of these two heirs can be the same if the concept of "equally related", that is, being the same degree away in ascent or descent from the intestate, is incorporated in Section 18. But there is no reason why such a concept should be incorporated which can only be foreign to Section 18.

21. We cannot also lose sight of the words "in every respect" and "other". The word "other" appears to us to mean other than full blood or half blood. The question is whether a brother and sister are such heirs where the nature of the relationship could be said to be the same in every respect. Taking the plain meaning, not incorporating the foreign concept of "equally related", and having regard to the fact that Section 18 is an exception and a limited exception by the application of which a brother of half blood in Entry II will be excluded, the meaning that should be given to the expression "if the nature of the relationship is the same in every other respect" is that only if there is a brother of full blood and a brother of half blood, then the brother of full blood will exclude the brother of half blood. Similarly, where there is a sister of full blood and a sister of half blood, the former will exclude the latter. But if there is a brother of half blood and

a sister of full blood, the former will not be excluded by the latter. It will thus be only the presence of a relation of an heir of half blood along with an heir of full blood in that particular category of the heir that the full blood heir will exclude the half blood heir. It is only by this interpretation that the exception in Section 18 will be attracted to the minimum to the clear category of persons sought to be excluded and the scope of the exception will not be enlarged to exclude the category of persons who are otherwise not excluded by the general provisions of succession and the rules of inheritance.

22. In this view of the matter, we hold that Pandurang was also a co-heir along with Bhimabai entitled to succeed to the suit properties on the death of Parvati on 16th August 1958. Pandurang, however, was not made a party to the suit. Defendants Nos. 1 to 5, however, had not taken a plea in their respective written statements that Pandurang was a necessary party and that he should be impleaded. An opportunity will have, therefore, to be given to the plaintiff (now her heirs) to implead Pandurang's heirs (Pandurang having died in the year 1967 after the suit was instituted) and the rights of the plaintiff's heirs and the heirs of Pandurang will have to be determined in the presence of the heirs of Pandurang. But that can be done only after the findings on other submissions are recorded and if Parvati is found to be the owner of the suit properties at the time of her death.

(Rest of the judgment is not material for this report).

23. Order accordingly.