
(1974) 02 BOM CK 0013
In the Bombay High Court
Case No : F.A. No. 348 of 1969

Rajaram Anna Yede

APPELLANT

Vs

Shashikala Bhagwan Yede and others

RESPONDENT

Date of Decision : 18-02-1974

Acts Referred:

Hindu Succession Act, 1956 — Section 12, 2(c), 20, 21, 22

Citation : (1976) MhLj 47

Hon'ble Judges : R.K. Joshi, J; P.M. Mukhi, J

Bench : Division Bench

Advocate : R.G. Bhadekar, for the Appellant; M.P. Kanade for respondent Nos. 1 and 2 and K.Y. Mandlik, for the Respondent

Final Decision : Allowed

Judgement

R.K. Joshi, J.—The first appeal preferred by original defendant No. 1 involves a somewhat ticklish point of Hindu law relating to succession, which is said to be of no easy solution. Fortunately the facts giving rise to it are admitted and the controversy has been crystallized in the joint purshis Exh. 67 by making certain concession during the course of the trial, the parties having led no oral evidence. Stated briefly, the facts material for the disposal of this appeal are as follows.

2. The pedigree giving us a clear idea of the relationship between the parties to this litigation would read as follows:

Defendant No. 3 Dnyanoba Nana is not shown in this pedigree as he has no longer any interest in the suit property, but he happens to be Bhagwan's father's (Anna's) cousin brother who held one half share in the entire ancestral property. However, as a result of the previous partition in the family between the two branches of the original propositus the following property which is the subject-matter of the suit came to be allotted to the share of Anna, shown in this pedigree.

3. Now the property in dispute comprises of the whole of Survey No. 166

Admeasuring I acre 21 gunthas assessed at Rs. 2.35 with a well standing therein and one half share on the northern side in the remaining three Survey numbers 176, 180 and 185 which works put to 24 acres 8 gunthas assessed at Rs. 25.40. These three pieces are Jirayat (dry) lands. Besides these lands, the parties held two houses and a house site. All these properties are situate in the village Anjanwati in district Bhir. The claim over the moveables, family debts and income of the past years has been given up (vide Exh. 67).

4. Plaintiffs Nos. land 2 who, are respectively the widow and daughter of Bhagwan, have claimed partition and possession of their share which they assessed at one third. Defendants Nos. 1, 2 and 4 inter alia challenged the correctness of this quantum. Dnyanoba (defendant No. 3), who had no interest in the suit property, remained absent throughout. By the joint purshis Exh. 67 the parties called upon the Court to determine the plaintiffs' share.

5. The learned trial Judge worked out their shares at one-twelfth each. However, he not only kept out of partition the bagayat land (Survey No. 166) but allotted the whole of it to plaintiff No. 2, an unmarried daughter of Bhagwan, for her maintenance and marriage Expenses. Next he directed the partition of the remaining property inter alia giving plaintiff No. 2, 1/12th share therein also. This decree, he made, by relying upon certain observations in the case of Rangubai Vs. Laxman Lalji Patil, , decided by a Division Bench of this Court which took the view that while considering the national partition envisaged by Explanation I to section 6 of the Hindu Succession Act, the Court has to take into account what property would be available for partition at the deemed date. While determining the extent of the property available for partition the Court cannot be oblivious of the debts binding on the family, its liability for the maintenance of dependent female members and disqualified heirs, marriage expenses of the unmarried daughters. It may be noticed that plaintiff No. 2 never put forth any such claim for her maintenance and marriage expenses, but being bound by the authority referred to above, the learned trial Judge allowed the same by granting an additional piece (Survey No. 166) out and out to meet her extra claim. It is this part of the decree which is challenged by defendant No. 2 (the appellant) who contends that plaintiffs Nos. 1 and 2 are entitled to nothing more than 1/12th share each in the suit property. The additional allowance made in favour of plaintiff No. 2 is neither warranted by the old Hindu law, nor by the Hindu Succession Act, nor by the "modern" Hindu law. And this is the only point which falls to be determined in this appeal.

6. Mr. Bhadekar for the appellant has raised three contentions: (i) Neither the text nor rule, and interpretation of the Hindu law allow any such provision for the maintenance and marriage expenses of a niece to be made where the brothers go to a partition; (ii) while determining the sharps to be allotted at the notional partition the Court should take into account the provisions in the contemporaneous statutes which codify Hindu law to meet the needs of the modern times and which strived to place a female heir on an equal footing with a

male in the matters of inheritance and law relating to partition and property; and (iii), while working out the notional partition referred to in Explanation I of section 6, the Court must carry it out to its logical end and the deceased whose share is worked out must take it with all the advantages and disadvantages or rights and liabilities. We propose to examine these grounds in some details as they have a far reaching effect.

7. It is common ground that the right of the plaintiffs (to be precise of plaintiff No. 2) to obtain a share in the joint family properties is governed by section 6 of the Hindu Succession Act, 1956 (which would hereafter be referred to as "the Act") which reads thus:

6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.--For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation II is not relevant for this appeal. In view of the proviso to section 6 which is applicable to the present facts, there can be no doubt that the interest of Bhagwan (the husband of plaintiff No. 1 and father of plaintiff No. 2) must devolve on his death as an intestate succession and not by survivorship. Bhagwan having two brothers and a mother living at the time of his death, his share would work out to 1/4th and this position is also admitted. The preferential claimants, so far as Bhagwan's 1/4th share is concerned, would be his widow, daughter and mother (plaintiffs Nos. 1, 2 and defendant No. 4), the heirs falling in Class I. This explains how each of the plaintiffs is entitled to 1/12th share. Nor is there any challenge to the correctness of this arithmetical calculation.

8. However, what is strongly urged by Mr. Kanade for the plaintiffs in support of the decree is that by virtue of the overriding provisions of section 4 of the Act, the old law (by this expression we mean any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force before the commencement of the Act) (in juxta-position we would hereafter refer to the codified law as the modern or new law) and the deeming provision contained in Explanation I which envisages the theory of notional partition, the daughter would be entitled to maintenance and the marriage expenses. While working out

the shares at the notional partition, the Court has first to decide what property would be available for such partition. In determining that question provision has first to be made for family debts and such expenses. To appreciate his contention it would be worthwhile to reproduce here section 4 (1) (a) of the Act which is relevant for our purpose.

4. (1) Save as otherwise expressly provided in this Act, --

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act,

9. The language of section 4 admits of no ambiguity. It keeps the provisions of old Hindu law intact or so to say untouched, unless expressly overruled by the Act. On going through the entire Act we find no provision, either overruling the concept of old Hindu law as to what property would be available for partition or to meet such contingencies of maintenance and marriage expenses of unmarried daughters. Therefore, on first impression, Mr. Kanade's arguments appear to be quite attractive and should ordinarily prevail, if the provisions of sections 4 and 6 are to be strictly construed and that too literally. But here we are dealing with certain progressive pieces of legislation and they will have to be liberally construed, particularly where a literal construction would lead to injustice or would do more harm than good.

10. The first part of Mr. Kanade's argument which attempts to define the expression "partition" appearing in Explanation I (supra) takes for granted the partition envisaged by the old Hindu law, but whether the Legislature intended to take it in that sense would be a point for preliminary consideration. For finding the true intention of the Legislature it is admissible to see what was the state of the law before the Act was made and what was the mischief and defect, to cure which the Act was passed. Parliamentary history including the speech of the Minister introducing the bill is admissible as evidence of the circumstances which necessitated the passing of the Act. The Statement of Objects and Reasons or the legislative debates are permissible to be noticed to ascertain the historical setting of an enactment. To this limited extent we intend to look into them. It would be worthwhile to reproduce the pertinent observations of the Supreme Court on this topic in the case of *Shivnarayan Kabra Vs. The State of Madras*, , where it is observed:

...It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute. In construing, therefore, section 2(c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief.

Confining ourselves to this limited ambit, we find that the "partition" was not intended to be taken in that sense as laid down in the old Hindu law referred to in the case of Rangubai Lalji v. Laxman Lalji.

11. Mr. Kanade's argument could be conveniently divided into two parts. The first part is founded on section 304 (page 358 of Mulla's Hindu Law, 13th Edn.) which deals with property available for partition and the second which is a corollary proceeds on the assumption that "that property only" should be taken into account while effecting the notional partition contemplated by Explanation I to section 6. The relevant portion reads thus:

304. Properly available for partition.--(1) In order to determine what property is available for partition, provision must first be made for joint family debt which are payable out of the joint family property, personal debts of the father not tainted with immorality, maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughters. Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of the widow and mother of the last male holder.

(Italics ours).

12. Relying on the italicised portion, Mr. Kanade wants to read them as old law laid down in the texts or as interpreted subsequently. Therefore, the basic question would be to find out what the texts say on the subject and how they have been interpreted. Whether any of them have gone to the length of imposing the liability of the maintenance and marriage expenses of the unmarried brother's daughters on the other brothers when there is a partition between the brothers after the death of the father as is the case here, or to put it little broadly, whether an uncle could be saddled with the marriage expenses of the unmarried niece.

13. Before touching this aspect we may mention here that similar observations are made by the learned Commentators like Shri Raghavachariar in his Treatise on Hindu Law (6th Edition page 402-section 341); Shri Gupte on Hindu Law (2nd Edn. page 264--Article 60) and on page 514 (section 415) of Mayne's Hindu Law, 1953 Edn. But in referring to these Commentaries, we are afraid, Mr. Kanade is making a half-reading or he conveniently ignores to scrutinize the context or the principles laid down in the old law giving rise to such interpretation. Therefore, it would be worthwhile to refer to all these relevant commentaries at some length.

14. Going back to section 304 (page 358) of Mulla's Hindu Law we find in sub-section (2) that a male member placed in a similar situation is not entitled to his marriage expenses from the joint family funds. This is based on the ratio laid down by the Privy Council in the case of Ramalinga Annavi v. Narayana Annavi (1922) L R 49 I A 168 = 42 Bom. L R 1290. Proceeding further, the learned commentator observes on page 359 :

The case, however, of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree.

It is only for the marriage expenses of the father's daughters or sisters that provision should be made, out of the joint family property. The marriage expenses of the son's daughters form only the liability of his branch, and not of the whole joint family unlike the case of the father's daughters.

The first proposition, again is taken from the Privy Council ruling in the case of *Rajagopala v. Venkataraman* A I R 1947 P C 122, and the second from the ruling in *Ramchandra Velayutha Thevar and Others Vs. Seeniathal alias Pirama Rakkasamuthu Ammal*, . The pertinent observations read thus:

The marriage expenses of the son's daughters form only the liability of his branch and not of the whole joint family unlike the case of the father's daughters. It is only for the marriage expenses of the father's daughters or the sisters that provision should be made out of the joint family funds.

It would be clear from these authorities that the marriage expenses of the father's daughters or sisters should be made out of the joint family funds. When the brothers go to partition without having any sisters, but each or some of them having one or more unmarried daughters, they cannot insist on a provision for maintenance and marriage expenses being made in the first instance from the joint family pool and then to divide the rest. This is for the obvious reason that it is the individual responsibility of every brother or son to get his daughters married from his own share which would be allotted to him in such a partition.

15. The observations of the learned commentator Shri Raghavachariar on this point are very pertinent They read:

The obligation of maintaining and marrying the daughters of a family consisting of father and sons, being a historical (sic) of the daughter's original right to share in the coparcenary Property, is created by the birth of the daughter and rests on the whole family and not only on the father and through him the sons. Hence, the share of a son who institutes a suit for partition against his father and Brother's is liable to a share of the expenses of the marriage of his sister married after the institution of the suit and of other sisters still to be married.

Here again we may point out that the authority relied upon by the learned commentator is reported in *Subbappa v. Ananta Ramayya* I L R (1928) 53 Mad. 84, with which we would deal at some length later on, but suffice it to note that the principles laid down postulate the case of a partition between the father and sons and not amongst the brothers. Another noteworthy feature is that this obligation of maintaining and marrying the daughters of the father in the joint family is a historical remnant of daughters' original right to share in the coparcenary property. It means that in the ancient Hindu law, at a certain stage,

daughter's share, was recognized but it was watered down to a bare right to maintenance and marriage expenses in course of time.

16. Shri Gupte, while dealing With this topic "Distribution of Property" in Article 60, p. 264 (2nd Edn.), refers to four items for which provision is a condition precedent for the partition of the joint family property. In the listed subjects are "the rights of maintenance and the rights to marriage and other expenses". But in the note which has been styled as "Provision for debts" the point is further elucidated by these observations:

Provision ought to be made on partition for (i) the payment of all debts binding on the family, (ii) maintenance of all those entitled to it on partition, (iii) marriage and other expenses of the members of the family entitled to such expenses, and (iv) the rights of residence of the members of the family, if any.

17. It may be noted that the commentary in respect of the marriage expenses is based on certain observations in the case of *Vaikuntam Ammangar v. Kallapiran Ayyangar* I L R (1900) 23 Mad. 512, which again is a case of the partition between the father and son for provision of father's daughters i.e. sisters. Dealing with the same topic further, the learned commentator says that the marriage expenses of the male members need not be provided for, the reason being that once the partition of status takes place a male member of the family is not entitled to have a provision made for his marriage expenses. However, observes the learned author,

The position of female members is Different, the right of a daughter to her marriage expenses and maintenance is based on her right to or interest in the joint family property, and not based on the natural obligation of the father to maintain his children. It has therefore been held that this obligation of the family property is not affected by a partition between the father and his Sons, but the son's share on partition is liable for the marriage expenses of his sister in proportion to the son's share in the property divided. (p. 265)

18. Mayne who deals with this subject more exhaustively has quoted the texts in the foot-notes and has noted the difference in the views of the various commentators. It would be advantageous to reproduce the summary thereof which finds place in section 415 (pages 514-515, 1953 edn.):

S. 415. Normally the assets actually existing at the date of the disruption of the joint status are the properties available for division. Before the division of the joint estate is made, it is necessary to make provision for the liabilities of the joint estate, such as (1) the debts due or claims against the family; (2) charges on account of maintenance of disqualified heirs, of female members and of others who are entitled to be maintained; (3) marriages and such other family ceremonies as have to be provided for.

Where the division takes place between, the, father and the sons, provision must be made for the discharge of the father's debts, neither illegal nor immoral, as

well as for other family debts. It has been held that a coparcener who is unmarried at the date of the severance in interest is not entitled at the partition to have a provision made for his marriage expenses, even where he marries before the decree in the suit for partition is made. This proceeds not on the view that marriage is not an obligatory samskara, but on the ground that when a severance takes place in a joint family, a claim for the expenses of a prospective marriage of a sharer cannot be a liability of the joint estate. In the case of an unmarried brother, he has his share to look to and in the case of an unmarried son or grandson it is a liability of his branch.

Provision however should be made for the marriage expenses of unmarried sisters. Yajnavalkya says: "Uninitiated sisters should have their ceremonies performed by those brothers who have already been initialed, giving them a quarter of one's own share." The Smritichandrika as well as the Dayabhaga are equally clear that the separated brothers must provide a fund for the marriage expenses of their unmarried sisters. The rule in the Mitakshara that the unmarried sisters are entitled to a share of the inheritance after the death of their father has been cut down to a provision for marriage expenses and maintenance till marriage.

In the foot notes we get a survey of the views expressed by the different learned commentators which it is needless to repeat. Suffice it to say that it is clear why a male member entitled to a share in the joint family is not given a right to claim expenses of his prospective marriage. He can look to his own share for the said expenses and in the case of an unmarried son or grandson it is the liability of his branch.

19. Pausing for a while here, by parity of reasoning, we may observe that if the new law makes a provision for a share to a female, this logic of looking to her own share for her marriage expenses and maintenance should hold good. Another impelling reason which weighed with the old law givers to make provision for unmarried daughters i. e. sisters, is to be found in the last observation which we may mention even at the cost of repetition:

The rule in the Mitakshara that the unmarried sisters are entitled to a share of the inheritance after the death of their father has been cut down to a provision for marriage expenses and maintenance till marriage.

This reflects on the evolution of the old Hindu law, what one may call or has been described by the Supreme Court as "Shastric Law". It seems to us that at one time Daughter's and sister's rights to inheritance were recognised but in course of time they were scissored down to a provision for marriage expenses and maintenance till marriage. The idea predominantly seems to be to preserve the property as far as possible in the same family and not to allow it to pass outside.

20. Dealing with the rights of daughters and unmarried sisters in para. 436, page 537 the learned author has pointed out as follows:

436. Where a partition takes place during the life of the father, the daughter has no right to any special apportionment. She continues under his protection till her marriage; he is bound to maintain her and to pay her marriage expenses, and the expenditure he is to incur is wholly in his discretion. But where the division takes place after the death of the father, the same texts which direct that the mother should receive a share equal to that of a son, direct that the daughter should receive a fourth share. Manu directs: "To the maiden sisters, the brothers shall severally give portions out of their shares, each out of his share one-fourth part." Yajnavalkya requires that brothers should have their unmarried sisters married at their expense giving them a quarter of their own share. The provision of a quarter share was confined to unmarried sisters only, married sisters not being entitled to any share along with their brothers. Obviously, the provision was meant for the expenses of marriage as well as for a gift or dowry in connection with marriage. This is evident from the Arthashastra of Kautilya and Narada. The latter says: "They shall maintain her upto the time of Marriage, afterwards let her husband keep her."

On the question whether unmarried sisters were sharers along with their brothers or were only entitled to an amount sufficient for their marriage, there has been an acute difference of opinion from early times amongst the commentators. Asahaya, Medhatithi, Vijñanesvara, Nilakantha, and Mitramisra combat the view that the provision is only for an amount sufficient for marriage expenses, the Mitakshara going farthest and declaring that after the decease of the father an unmarried daughter participates in the inheritance." Bharuchi, Apararka, the Smritichandrika, Jimutavahana and his followers, the Madhaviya, the Sarasvathi Vilasa, the Vivada Ratnakara and the Vivadachintamani, all take the view that the mention of a definite fourth only meant that an amount must be allotted to each daughter as would be sufficient for her marriage. But the extreme position in the Mitakshara that an unmarried sister was along with her brother entitled to a share in the inheritance had probably no foundation in usage nor has modern usage been in accordance with it.

21. In this context we may make a passing reference to certain passages from the General Principles of Hindu Jurisprudence by Priyanath Sen (Tagore Law Lectures, 1909), published by the University of Calcutta, 1918 edn. In the Chapter of "The Law of Succession" the learned author has pointed on a survey of the old texts that

there was no such thing as succession, properly so called, in an undivided family. The whole body of such a family, consisting of males and females, constitutes a sort of a corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance.

On referring to the of quoted Manu's saying "the father protects a woman in her childhood, the husband during her youth, the son in old age; a woman has no right to independence; that being her position it was quite natural that she could

not take the inheritance" he hastens to add that "the few cases in which she was called to do so seem to have been subsequent concessions made for special reasons in favour of a few very near relations such as a wife, daughter, mother and the like". But in a later era, the rights of these were curtailed equating them with the right to maintenance and marriage expenses. Summarizing the topic, says the author further:

The conclusion, therefore, at which we arrive is that the Mitakshara recognised the principle of the exclusion of females from inheritance unless admitted by special texts with this difference that in the case of the property of an undivided coparcener no question of succession can properly arise by reason of the rule of survivorship.

Where property devolved by survivorship, a duty was cast upon those who took the estate to look to the welfare of such females who were excluded from inheritance by making adequate provisions. This appears to us to be the consistent current flowing in the subsequent development of old Hindu law which took away female's right to a share provided in the ancient Hindu law. When the right to share was taken away, this rule of making provision was substituted.

22. This takes us to the next question as to on what principles or text and rule of law, the making of a provision for maintenance and marriage expenses before effecting a partition, is based. It is needless to consider the other items like family debts, funeral expenses etc. as they do not arise in this case. Confining ourselves to the point at issue, we find that all the learned authors commenting on "Hindu law" referred to above, formulate this proposition by relying upon the rulings in AIR 1925 32 (Lahore) and Subbayya v. Ananta Ramayya. On going through them we find that the subject is more exhaustively dealt with in Subbayya's case with reference to old texts and interpretation of Hindu law by the subsequent commentators. Therefore, we propose to deal with it at some length.

23. In Subbayya's case the suit was brought by a son in the year 1922 against his father, step brothers, four step sisters, (out of whom three were unmarried at the date of the suit, and one of them came to be married during the pendency of the suit) and the step mother. The father, who figured as defendant No. 1, resisted the claim of the son, who had brought the suit on various grounds and one of them was his claim for provision for the marriage expenses of the unmarried daughters. The plaintiff (son) rejoined that his share in the joint family property was not liable therefor, after the disruption of the the coparcenary. The coparcenary disrupts the moment he conveys his unequivocal intention to separate. If there is no previous notice, the suit itself is such a communication. The trial Court upheld the father's claim, but the first appellate Court turned it down; therefore, the father approached the High Court. The matter was heard by a Full Bench presided over by their Lordships Ramesam, Jackson and Reilly JJ. (Jackson J. dissenting). The main contention of the father was that the daughters are entitled to be maintained by the joint family including

the father. The right is historically the remnant of the original right to a share in the property itself. He further contended that the partition between the male members does not put an end to the right but the members or at least the members of a branch continue to be liable for her maintenance. It was conceded by the learned advocate for the son (plaintiff) that the members of the joint family who get the property by survivorship after the father's death are liable for marriage expenses of his daughters but not on partition, the argument advanced for the son was that such liability of the joint family during the father's lifetime accrued because of the father's obligation to maintain and bear the marriage expenses of the daughters and the obligation falls upon the joint family through him, and when there is a partition, it is confined to the father and his share only.

24. While examining these contentions, a reference to the history of the law as to the basis of this fight was made. The pertinent observations which find place on page 92 run thus:

.... We may examine the history of the law as to the basis of the right of the daughter to be maintained and to be married. It seems to me that so far as the joint-family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint-family. No doubt in all systems of law, a parent is bound to maintain his child till a certain age.

Proceeding further, his Lordship Ramesam J. adds (p. 93):

.... But whatever may be the true view as to the liability of a father to marry his daughter considered by himself and by reason of the parental relation and apart from the possession of the joint-family property, so far as the possession of the joint family property is concerned, there is no doubt that the father is bound to marry his daughter, and that, not because of a religious injunction about pre-puberty marriage, but because of a better reason, namely, the daughter's right to be married is really the historical remnant of a larger right. It is therefore futile to confuse the two obligations, namely, the obligation of the father as a mere parent apart from property and the obligation of the father by reason of the possession of the joint-family property. It is therefore not correct to say that the latter obligation is derived from the former. I think the two are independent and it is not that one is based upon the other. For this purpose we have to examine the growth of the law relating to the rights of brothers and sisters in a joint-family from the earliest times up to the present day. In the very early law of property, the sons had no right to compel partition against the wish of the father except in one special case, which was, where he was old, disturbed in intellect or diseased. Omitting this special case, in general, the father may make a partition because he desires it or because he has no desire for wealth, and is disinclined to pleasure and his wife is incapable of bearing further children. Omitting these three cases, the only case that remains is after his death, when, of course, a partition can be made by sons.

On taking a survey of the relevant texts, his Lordship observed that:

... Now it is settled law that the daughters are not entitled to a share, but all the same the discussion shows that the right of the daughter for maintenance up to the going to the husband's house and for marriage expenses is the present remnant of the right to a share. Therefore the right of the daughters in the father's lifetime, however much it cannot be enforced by partition, must still be described as a right or interest in the property." (P. 97)

In Sarkar's Hindu Law, 6th edition, page 328, the unmarried daughter's right is thus described:

Similarly an unmarried daughter acquires an imperfect right in the father's property by virtue of which she enjoys the same and is maintained out of it until marriage and is also entitled to a quarter share, if partition takes place before her marriage, that is to say, when she continues as a member of the family.

We agree with this passage. It seems to us that in the early law both the rights of the sons and the daughters were imperfect rights in the property which cannot be materialized by compelling partition against the wishes of the father, but whereas the sons' right gradually developed into a right to compel partition, the daughters' right first became a right to compel partition against the brothers only and not against the father, and later degenerated into merely a right to maintenance and marriage expenses. The subsequent passage sheds more light on this topic and it reads thus (p. 98):

... I have taken pains to trace the early history of the law and draw the above inference simply for the purpose of showing that the right to get expenses out of the joint-family property is not a right derived from the parental obligation of the father to maintain a child but an independent obligation arising out of the joint-family property law.

25. The learned Judge next proceeded to consider the second question as to on whom does the obligation fall. It was urged that it would fall on the father only because it is an obligation peculiar to the father by reason of his parental position. On pointing out the distinction of the binding nature of father's debts on the whole family and the son's debts, the learned Judge spoke thus (p. 100):

... To put the matter briefly, the obligations of an ancestor and his family would fall after partition upon all the members of the family, but the obligation of the head of a sub-branch will fall upon that branch after partition and not on other collateral branches or upon members higher in the genealogical tree.

The entire topic is discussed and concluded in the following words by the learned Judge (p. 103):

In the case of male members, the right to maintenance and marriage is a right existing during jointness and it is in addition to the claim for partition. When a family is divided, there are no more items of accounts to be settled by

coparceners. When the member himself sues for partition, it may be said that he elects to get one advantage and lose another advantage.... In the case of a daughter, her rights to maintenance and to marriage expenses are not in addition to the right of partition but in substitution for an ancient right to a share which has now become obsolete.

Thus, it would be clear that after the father's death, brothers, who are liable for the marriage expenses of their sisters, cannot put an end to her right by dividing the property between themselves and there cannot be a different result during the father's lifetime because of the peculiar position the father holds vis-a-vis the joint family and the property. Ultimately the majority judgment summarizes the law on the subject in the following words (p. 118):

... on partition between a father and his sons the sons remain liable for the marriage expenses of their sisters in proportion to their shares of the property divided.

These principles have been followed in the subsequent case of *Alagammai Achi v. Veerappa A* I R 1956 Mad. 428. Another authority of the same High Court which is somewhat nearer the point in issue is to be found in the case of *Ramchandra v. R. Ammal* to which a reference is already made in one of the foregoing paragraphs. In that case the plaintiff, second wife of one Ramchandra Velayutha, who died on May 24, 1946, sued for partition and for separate possession of a half share of non-agricultural properties claiming it under the Hindu Women's Rights to Property Act. Defendant No. 1 was the grand-son of Ramchandra Velayutha by his predeceased son. Defendants Nos. 2 and 3 were the sisters of defendant No. 1, defendant No. 4 being their mother. The suit was resisted on various grounds and one of them was, who should bear the expenses of the marriages of defendants Nos. 2 and 3 and whether they should come out of the joint family fund. It was urged for the contending defendants that so long as the family continued to be joint, it is the liability of all the members of the joint family to get the daughters in the family married. In support of such a line of reasoning reliance was placed on the authority in *Ranganaike Ammal v. Ramanuja Aiyangar* I L R (1911) 35 Mad. 728, and certain observations of Ramesam J. in Subbayya's case referred to above. But in para. 11 of the judgment their Lordships noted with approval the observations of Ramesam J. which made a distinction between the marriage expenses of the father's daughter and son's daughter. They ruled that the marriage expenses of the son's daughters form only the liability of his branch and not of the whole joint family unlike the case of the father's daughters.

26. Mr. Kanade was unable to cite any authority which takes the view that when brothers go to a suit for partition (or a brother's widow brings such a suit as in the present case) the liability of the marriage expenses of the unmarried daughters of the suitor can be cast on the other brothers. A survey of the various authorities cited at the bar and some others perused by us, point out that obligations of the father and his family would fall after partition upon all the

other members of the family, but that is not the case in respect of the brother. Therefore, we are of the opinion that a reference to maintenance and marriage expenses of an unmarried daughter finding place in section 304 (page 358) of Mulla's Hindu Law is restricted in its scope and does not admit of any wider import as has been sought to be done by the learned trial Judge. These texts or the authorities do not cover the entire field nor do they purport to give an additional advantage to unmarried daughters and sisters. The reasoning which impelled the old law-givers to make such provision which has already been alluded to by his Lordship Ramesam J. with whom we respectfully agree, was that the property was being taken by survivorship by the other members. Secondly, in the ancient law these females were given a share but later on it was denied to them and was substituted by a right to maintenance and marriage.

27. The next question would be whether when the new Act revives the old law and confer on them a right to share, can they still insist upon these additional benefits of expenses for marriage and maintenance. With respect, we are of the opinion, they cannot.

28. Mr. Bhadekar for the appellant pressed into service one more aspect of this very problem and tried to convince us that the modern law makers who brought the Hindu Succession Act and three more allied Acts on the statute book during the same year 1956 co-related them to the law of property and inheritance. The modern law makers who were out to make fundamental and radical changes in the ancient law, have proved more liberal and in certain respects have placed the females on a better footing so far as their proprietary rights are concerned. Even if in the earliest enactment viz. the Hindu Succession Act, there remained a lacuna or sections 4 and 6 created some ambiguity, still they have been rectified by making adequate provisions in the subsequent Acts of the same year. Mr. Bhadekar further argued that in these days of equality when every endeavour is made to place females on par with males and do away with every sort of discrimination in almost all the walks of life, in interpreting such statutes the Court should take a broader view and not be carried away by the letter of the law. If a survey of the modern Hindu law reveals that no female is left destitute and adequate provision is made by some other sister statutes, then the object as well as the policy of the legislation should be taken into account to answer the problems arising from the shortcomings, if any, contained in this Act. With this end in view, Mr. Bhadekar took us through the relevant provisions of (i) the Hindu Adoptions and Maintenance Act, 1956, (ii) the Hindu Minority and Guardianship Act, 1956, and (iii) the Hindu Succession Act, 1956. In all these Acts, the overriding effect finding place in section 4 of the Act is identically worded.

29. Now, the Hindu Adoptions and Maintenance Act, 1956 came on the statute book on December 21, 1956 nearly after six months of the Hindu Succession Act, 1956. Section 3 (b) of that Act defines maintenance to include -- (i) in all cases, provision for food, clothing, residence, education and medical attendance and

treatment; (ii) in the case of an unmarried daughter, also the reasonable expenses of and incidental to her marriage. Section 21 enumerates the relatives of the deceased who could be called dependents. In this long list are included the widow and unmarried daughters of the deceased as well as of his predeceased son. It is needless to refer to the other categories for the purposes of the present litigation. Then comes section 22, the relevant portion of which would read thus:

22. (1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

Sections 21 and 22 when read with section 23 make it further clear that it shall be in the discretion of the Court whether any, and if so what, maintenance shall be awarded under the provisions of this Act. The general rule laid down in these sections is that a dependant of a male or female deceased Hindu, who has not obtained any share in the estate of the deceased (dying after the commencement of this Act) is entitled to claim maintenance from those who take the estate. Nothing can be more clearer than this as to the intention of the Legislature and the object of the modern law makers. Relying on these provisions it was further submitted by Mr. Bhadekar that the expression "who has not obtained any share" is of considerable importance and great significance. In the first instance explicitly it connotes that those who have not obtained the share are entitled to maintenance, which includes marriage expenses in the case of unmarried daughter, but impliedly they convey that those who have obtained a share are not entitled to any such additional advantage of maintenance. In other words, the share given is virtually in liquidation of this liability cast upon those who take the estate. In a given case a widow and unmarried daughter like the present plaintiff may not choose to file a suit for partition and/or obtain a share. So long as they do not obtain their share, those who take the estate of the deceased are answerable for these claims. On obtainment of a share, their rights for maintenance and marriage expenses must come to an end. An unmarried daughter cannot have a double benefit of taking the share of her father and of burdening the uncle with her maintenance and marriage expenses or making it a charge on his share which would be allotted to him in the partition. She is presented with a choice and if she adopts one, the other is lost to her. Our attention was also drawn to the fact that a daughter now could be taken or given in adoption. Section 12 (b) of the Act provides that any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property,

including the obligation to maintain relatives in the family of his or her birth. This provision, according to Mr. Bhadekar, is an additional advantage and in a given case the unmarried daughter would get the dual benefit. Mr. Kanade rejoined that such or similar considerations should not weigh with the Courts which are called upon to determine the rights and liabilities of the parties with reference to a particular statute which is a self-contained Code. If sections 4 and 6 of the Hindu Succession Act read together confer a right, may be ex facie more advantageous to the unmarried daughters, the remedy would lie elsewhere. It would be for the Legislature to amend the Act suitably. This Court while seeking to interpret the law, need not be carried away by equitable considerations or questions of comparative hardships in determining the legal rights.

30. Our attention was also drawn by Mr. Bhadekar to the provisions contained in sections 20 and 23 of the Hindu Succession Act. Section 20 confers on a child which was in the womb at the time of the death of an intestate and subsequently born alive, to have the same right to inherit to the intestate as if he or she had been born before the death of the intestate and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate. In simple words vested rights are conferred with retrospective effect on the child to come into the world.

31. We find considerable substance in the arguments of Mr. Bhadekar. The language of the various sections relied upon by him is plain and admits of no ambiguity. Generally speaking a subsequent Act of Parliament affords no useful guide to the meaning of another Act which came into existence before the later one was ever framed. Under special circumstances, the law does however admit of a subsequent Act to be resorted to for this purpose, but the conditions under which the later Act may be resorted to for the interpretation of the earlier Act are strict. Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings. This is the ratio of the Supreme Court ruling in *Income Tax Officer, Distt. II(ii), Kanpur and Others Vs. Shri Mani Ram etc.*, . Similarly it has been observed by the Supreme Court in the case of *The State of West Bengal Vs. Nripendra Nath Bagchi*, . "To find out the meaning of a law recourse may legitimately be had to the prior state of law, the evil sought to be removed and the process by which the law was evolved". We would point out in due course that there is some ambiguity in the expression "notional partition" appearing in Explanation I of section 6 or to put it little mildly, one can say that it is capable of different meanings. A little later we would deal with this aspect of what amounts to a notional partition and what in general is the effect of a deeming provision.

32. Our attention was also drawn to section 8 of the Hindu Minority and Guardianship Act, 1956 which places a restriction on the powers of a natural guardian to dispose of the minor's property. The guardian cannot dispose it of without the Court's permission. The Court grants permission if the alienation is for the benefit of the minor or for realization, protection and benefit of the

minor's estate. This further check protects the minor's estate which is supposed to make adequate provision for its maintenance and marriage expenses. On a review of these new Acts, Mr. Bhadekar further urged that those who were neglected have been provided for and the limited estates have been converted into absolute ones; therefore, they need no additional protection, nor can they claim extra advantages. If we are right in our view that all these Acts of 1956 constitute a composite new Hindu Code, (and we are of that opinion), and make provisions for succession or cover the field of law relating to inheritance, property and maintenance of the dependants, then the provisions in the subsequent enactments could be looked into. In that case it will be extremely difficult to dismiss these arguments of Mr. Bhadekar. On the other hand, to our mind, these provisions seem to have been made for the betterment of the females who were at one time neglected, nay at one stage treated as no better than chattel.

33. Even if these aspects founded on the subsequent statutes are ignored or held to be untenable on the canons of interpretation, we are of the view, on the initial point as to what property is available for partition within the meaning of section 304 (p. 358) of Sir Dinshah Mulla's Hindu Law, that no text, rule or interpretation of law prohibits from throwing into hotchpot the entire property mentioned in Exh. 67 for division by metes and bounds. Under the facts and circumstances of this case, we are convinced that there is no necessity for setting apart any property for the maintenance and marriage expenses of plaintiff No. 2. Nor is she entitled to an additional benefit.

34. This takes us on to the next point covered by the proviso and Explanation I of section 6 which speaks of the deeming provision and notional partition. Reduced to simplicity it lays down that the share of the deceased (in this case, of Bhagwan) has to be fixed as if he had asked for a partition just before his death and that share would devolve on his heirs viz. the plaintiffs in the instant case. At this crucial point of time which speaks of a notional partition, there would be present Bhagwan, his two brothers (defendants Nos. 1 and 2) and mother Gangubai sitting together for effecting the partition. Bhagwan would get one-fourth share and nothing more. He could not have compelled his brothers to make provision for the maintenance and marriage expenses of his unmarried daughter plaintiff No. 2. His one-fourth share would devolve equally on his widow, daughter and mother, each getting one-twelfth share. This would be the quantum of their respective shares and its correctness, as observed earlier, is not at all challenged.

35. Even if it be found that our view on the first point as to the setting apart of some property for the maintenance and marriage expenses of plaintiff No. 2, is not correct, and in determining what property is available for partition a fraction thereof be excluded as has been done by the learned trial Judge, still there would be one more dimension to this question.

36. Section 6 envisages notional partition on the assumption of Bhagwan being

present to claim his share. On the facts stated above, one can easily visualize that at this partition would be present Bhagwan (of course notionally) his two brothers defendant Nos. 1 and 2 and mother. Either under the old law or even under the new law he could not have dared to ask for a provision being made in the first instance for the maintenance and marriage expenses of his unmarried daughter, If he were to press such a claim and if the law were to entertain it, the other brothers would rise with similar counter claims in respect of their own unmarried daughters, if any. Then the next question would arise whether such claims could be sustained either under the old or new law. In the new law there is no provision, nor does the old law give them any preferential treatment. Under these circumstances, the Courts, will have to consider anxiously why an exception be made in the case of Bhagwan. The plausible answer may be that he is no more. But for such an eventuality there is no provision, nor does it sound rational or logical.

37. There would be one more answer to such a claim. On the language of section 6 we can say that Bhagwan is supposed to be present at the notional partition. It is by virtue of legal fiction that his share has to be determined. The ambit of this legal fiction has been amply dealt with by the Supreme Court in the case of Commissioner of Income Tax, Delhi Vs. S. Teja Singh, . In para. 6 of the judgment T. L. Venkatarama Aiyar J., speaking on behalf of the Court, said (p. 355):

.. It is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

Then his Lordship cited the observations of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council (1952) A C 109, at p. 132. These observations are to the following effect:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.

38. In the light of these two pronouncements, which we follow with respect. Explanation I to section 6 will have to be interpreted and the share of Bhagwan worked out. As observed by Lord Asquith, we will have to imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. Applying this test to the present facts can we not say successfully and without fear of contradiction that he would have been bound to take care of his unmarried daughter and make provision for her maintenance and marriage. He could not have cast this burden on his other brothers with whom he was effecting a partition. Such a burden, as held by the Madras High Court in Ramchandrd's case, would lie on Bhagwan's branch and not on the whole joint family property. If the law postulates

Bhagwan's presence or presumes the division of the property just before his death, he and/or his share should be burdened with all advantages and disadvantages. To hold otherwise would mean, his death is a relief and benefit to his heirs who would be naturally more aggrieved and a burden on the other coparceners whose shares but for the death would have been augmented. This does not appear to us to be either the meaning or spirit of Explanation I to section 6 read with section 4, or the intention of the Legislature which has aimed at maintaining equality between a male and a female in the matters of property. Very little purpose would be served by taking hypothetical cases and trying to work out advantages and disadvantages. Fortunately, Bhagwan has left only one daughter in the instant case. If he were to leave half a dozen more and if provision were to be made for all of them, then the entire estate would be (sic)ed away and very little would be left to the brothers to be shared, ex(sic) ration and tears. The brothers' birth right to obtain a share in their (sic)joint family estate would thus stand defeated and it would be another blow to the well-recognised and age-long doctrine of getting a share by mere birth. Such incalculable damage to the basic principal of Hindu law does not appear to us to have been aimed at or to have been in contemplation of the modern law makers. Nor are we able to read any such measure in the entire Act.

39. In this context we may refer to the commentary on page 781 of Mulla's Hindu Law, 13th Edition under the caption "Computation of the interest of the deceased coparcener". The learned commentator has observed thus :

The undivided share of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such persons would have to be ascertained according to the law of joint family and partition. The Act regulates succession and does not contain the law of joint family and partition. The rules of Hindu law on the subject in force on the date of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition.

The learned commentator has taken a couple of illustrations and in particular we may refer to illustration (n). These illustrations lay down the mode of ascertaining the share and they nowhere speak of taking into account as to what property would be available for partition at the date of the notional partition. If the concept which has been adopted in *Rangubai Lalji v. Laxman Lalji* were present and well-recognised, there would have been some reference to this aspect in the commentaries on Hindu law by either of these four learned authors whose works we have noticed at great length. That rule in section 304 (p. 358) which has been strongly relied upon is not a rule of law, but one of interpretation and is limited to the narrow scope of the maintenance of dependants and

marriage expenses of unmarried daughters when the partition takes place between the father and his sons.

40. To recapitulate, we are of the opinion that the daughter's right to her marriage expenses which is contemplated in section 304 referred to above, is based on her right to or interest in the joint property and not on the natural obligation of a father to maintain a child; secondly, this right is not affected by partition between father and son, all the shares being proportionately liable. These doctrines proceeded on not only sound but logically good grounds of the daughter's right to a share being recognised by the ancient law givers. It was modified subsequently, giving her only a right to maintenance and that is why the modern law makers felt the necessity of reviving the old law or placing her on the same footing as a male member in the coparcenary. When she has been given a share in the joint property, that itself could be said to be a discharge of the old obligation on the other members to meet the marriage and maintenance expenses. Such heirs cannot have a double advantage at the cost of the other coparceners or male members in the joint family. As already pointed out above, if they do not elect this remedy, they have the alternative to claim maintenance under the Hindu Adoptions and Maintenance 1956. They can prefer to leave the share with the other co-sharers and (sic) upon getting these benefits to which already a reference is made. Therefore, to our mind, neither the old text nor the rules of Hindu law, nor interpretation thereof confer any such additional right on the female heirs who are presented with an option to get their share under the new law. The view taken by the lower Court does not seem to us to be correct.

41. What remains to be considered in this context is the authority of the Division Bench of this Court relied upon by the lower Court in Rangubai Lalji v. Laxman Lalji. The learned trial Judge has allotted extra land to the daughter (plaintiff No 2) over and above her legitimate share of 1/12th. The facts of that case were few and simple. One Lalji died in the year 1959 while in union with his wife Rangubai (plaintiff) and adopted son Laxman (defendant). Soon after Lalji's death Rangubai brought a suit against the adopted son Laxman for partition and possession of her 1/2 share in the joint-family property. Defendant resisted the claim inter alia on the ground that the plaintiff's share would be one-sixth only. The lower Court upheld the plaintiff's contention and made a decree for partition and possession to the extent of one-sixth share. The learned Assistant Judge who heard the appeal, while maintaining the share, slightly modified the decree in other respects. The plaintiff approached the High Court and the matter came before the learned single Judge who, feeling some doubts about the interpretation of sections 4 and 6 of the new Act and an earlier Division Bench ruling in Shiramabai Vs. Kalgonda Bhimgonda and Others, , referred it to a Division Bench. The appeal came to be heard by Patel and Bal JJ. of whom Patel J. was a party to the earlier decision which had construed these sections as we have done in this case. While deciding Rangubai's case and interpreting sections 4 and 6, speaking for the Court Patel J. observed:

For the purposes of Explanation 1 to the proviso of section 6 of the Hindu Succession Act, 1956, when the interest of the deceased coparcener is to be determined, the Court should first determine what is the property available for partition and then partition the coparcenary property setting aside the share of the widow to which she is entitled in her own right and divide the share of the deceased coparcener amongst the heirs. The decree must make proper provisions for the maintenance and marriage expenses of the daughters and award the widow her due share in the coparcenary property and divide the property of her husband amongst the heirs.

In every fairness to Mr. Kanade appearing for the plaintiffs, we must say that he did not even for a moment rely upon these observations. Nor did he remotely suggest that this authority being of a Division Bench, would be binding upon us.

42. We may point out that in the first place, the parties to the litigation in the reported case were the mother and her adopted son. The only issue raised was about the quantum of share. No point of making any provision for maintenance and marriage expenses of any unmarried daughter or female heir had arisen in that case. While considering the question of notional partition envisaged by section 6, these observations appear to have been made and they seem to be a reproduction of section 304 of Sir Dinshah Mulla's Hindu Law referred to and reproduced above. But that is not the ratio of this ruling, nor have their Lordships discussed these provisions appearing in section 304 anywhere. With respect, we may mention that they being obiter, would not be binding on this Court. Therefore, we do not feel any necessity of making any reference to the Full Bench.

43. Before parting with this case, we must make a reference to one more aspect which would cover the field of proper approach to such cases if at all they arise. Such a question of making provision for the marriage expenses of unmarried daughters or sisters were to arise, the question would be as has been done by the learned trial Judge in this case, whether the Court would be justified in allotting a fraction of the property out and out. In this case, the learned trial Judge, we may point out, has allotted to plaintiff No. 2 permanently Survey No. 166 admeasuring 1 acre and 21 gunthas assessed at Rs. 2.35 having advantage of a well. The legal concept is to make adequate provision and not to imbalance the share so as to make them inequitable. The proper approach, assuming such a claim is to be decreed, should be the one adopted in the case of Naramsetti Venkatappala Narasimhulu and Others Vs. Naramsetti Someswara Rao and Another, . It has been ruled in this case that the proper way for providing for the expenses of the marriage of a daughter is to fix the amount and to declare a charge for a proportionate share of such amount on the properties allotted to the sons under the partition decree, and not to direct a payment of the same out of the family assets. Such a course, we think, would be more reasonable and in keeping with the spirit of the statutes if they are interpreted in the manner suggested by Mr. Kanade for the plaintiffs. The learned Judge in the instant case

should have on taking evidence and having due regard to the status and means of the parties, fixed the amount and kept a charge proportionately on the shares of the mother and two brothers. The decree as it stands, seems to be harsh. But as we are disallowing this part of the claim, the question strictly speaking does not arise.

44. In the result, we partly allow this appeal and modify the trial Court's decree by deleting para. "A" of the decretal order which keeps out survey No. 166 of Anjanwati out of partition and allots the same exclusively to plaintiff No. 2. Instead, we direct that this survey number also be divided along with other lands amongst all the parties, according to the shares declared by the lower Court and in the manner directed by the decree. The rest of the decree is confirmed.

45. No order as to costs of this appeal.