

(2014) 12 BOM CK 0174

In the Bombay High Court

Case No : Second Appeal Nos. 119 and 405/2013

Santosh Popat Chavan

APPELLANT

Vs

Sulochana Rajiv

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 141, 15(3), 39(e)

Evidence Act, 1872 — Section 107, 108

Hindu Succession Act, 1956 — Section 14, 14(1), 14[1], 3(3), 6

Citation : (2016) 1 ABR 379 : (2016) AIR (Bom) 29 : (2015) 5 ALLMR 604

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : C.G. Gavnekar, Advocates for the Appellant; Rajiv Patil, Senior Advocate, Omkar Warange, Nikhli Pujari, Advocates, P.N. Joshi, Amicus Curiae, Pratik Rahade and Ruturaj Bankar, Advocates for the Respondent

Judgement

A.B. Chaudhari, J.—Since these two appeals involve common legal question of importance, they have been taken together for hearing and final disposal with consent of the counsel for the rival parties and in accordance with order dated 15.09.2014 in Second Appeal No. 405/2013.

2. Mr. P.N. Joshi, learned counsel was requested to act as Amicus Curiae when order was made on 15.09.2014. Thereafter, on the request from this Court, Mr. Anil V. Anturkar, Mr. Rajiv Patil, Senior Advocates and Mr. C.G. Gavnekar, Advocates also participated in the hearing for assisting this Court.

FACTS:

Second Appeal No. 119/2013

3. The plaintiff-respondent herein, Sulochana wd/o Rajiv @ Raju Chavan filed Regular Civil Suit No. 1773/2006 in the court of Civil Judge Senior Division, Pune for partition, perpetual injunction against the brothers and sister of her deceased husband. Briefly stated, her case was that her husband Rajiv was brother of

defendants Santosh, Mohan, Madhukar and their sister Mrs. Nanda and had a share in the suit property being ancestral property. On 28.05.1997, Rajiv @ Raju, husband of the plaintiff, left the house situated at Sarve Nagar, Pune and never returned. She reported the matter to police, who took missing entry no. 116/1997. Despite thorough search, Raju could not be found out. Since more than 10 years had already passed from the date Rajiv went missing, she was entitled to claim share in the undivided suit property and, therefore, she filed suit for partition and separate possession. The plaintiff had also filed Regular Civil Suit No. 1780/2006 for a decree of declaration about the civil death of husband and she got the said declaration on 31.07.2007. Simultaneously, she had also filed the instant suit for partition.

4. Having obtained the said decree for declaration of civil death of her husband, she filed the decree in the suit for partition being Reg. C.S. No. 1773/2006. The partition suit was resisted by respondents on the ground that the plaintiff had no right to file the civil suit for claiming any share. That the plaintiff had no cause of action to file the suit for partition or to claim any share in the property of her absconding husband. That all the brothers, including the deceased Raju had agreed to sell the suit property to one Hari Binawat by executing agreement of sale dated 19.01.2000 of which the respondents had received earnest money. The appellant, therefore, stated that the suit was, therefore, required to be dismissed.

5. The lower appellate court-District Judge, Pune, while deciding the two appeals, upheld the judgment of the trial court, insofar as the right to ask for partition by the plaintiff is concerned but modified the decree to some extent by relying upon the judgment in the case of Ms. Vaishali Satish Ganorkar and Another Vs. Mr. Satish Kesharao Ganorkar and Others, in which it was held that the date of opening of succession was relevant date and if succession had opened prior to the Amendment Act of 2005, the amended Act would have no application. The lower appellate court also held that the appellant-defendant no. 4-Mrs. Nanda, who was daughter of Dnyanoba, had already married and was residing separate from 26.10.1991 and, therefore, she was not coparcener as per the prevailing law and, therefore, she could claim share with her brothers only in the share of her father.

Being aggrieved by judgment of the two courts below, the unsuccessful defendants have filed this Second Appeal.

Second Appeal No. 405/2013

6. The plaintiff-Smt. Chanda Hanmant Karne, an issueless widow of Hanumant filed Regular Civil Suit No. 8/2007 in the court of Civil Judge Junior Division, Phaltan for partition and separate possession in respect of the ancestral suit property. It was her case that the defendant no. 1 was her father-in-law while other defendants were his children. The deceased Hanumant has expired on 31.10.2003 and she was thus alone, living with the joint family of the

defendants, working with the defendants but then before 7-8 months of filing of the suit, she was driven out of the house at Sonwadi by brothers of her husband. Hence, she filed the suit for partition and possession as the defendants denied to give any share to her in the suit property.

7. The suit was resisted by the defendants on the ground that the same was not maintainable as there was no enabling provision for a widow to file the suit under the Hindu Succession Act, 1956, (For short the "Act of 1956"). In fact, such a provision existed in Section 3(3) of the Hindu Woman's Right to Property Act, 1937 (For short the "Act of 1937"). The suit was resisted on the ground that the property was self acquired and not the joint family property and was not liable to be partitioned. The trial court decreed the suit in part and the lower appellate court confirmed the decree passed by the trial court and also modified the decree to the extent of shares of the parties to the suit. Hence, this second appeal.

ARGUMENTS:

8. Mr. C.G. Gavnekar, and Mr. Satish Raut, learned counsel for the appellants in both these second appeals, made the following submissions:

(i) In the case of Ananda Krishna Tate since deceased by Legal Heirs vs. Draupadibai Krishna Tate and others; 2010 (1) BCJ 714, a learned Single Judge of this Court has taken a view that a Hindu woman (mother, in that case) has no right to file the suit for partition under the provisions of the Act of 1956, which was earlier available as per Section 3(3) of the Act of 1937. In the absence of any other coparcener in the joint family demanding partition of the joint family property, the suit on her own was not maintainable. None of the courts below have noticed the said judgment of the learned Single Judge and, therefore, the suits ought to have been dismissed as admittedly none of the coparceners in the family had demanded any partition and the widows in both these second appeals went ahead and filed suits in the absence of any enabling provision for doing so.

(ii) In Second Appeal No. 119/2013, plaintiff-Sulochana filed a suit for partition in the year 2006 when there was no declaration about civil death of her husband from any competent court, for which she had already filed the suit No. 1780/2006. She has got the declaration only on 31.07.2007 and, therefore the suit filed for partition in the year 2006 was premature and untenable in law, therefore there was no cause of action for filing the suit.

(iii) The judgment rendered by the learned Single in the case of Ananda's case (supra) is the correct view of the matter in that the Parliament was fully aware about the then existing provision of Section 3(3) of the Act of 1937 but still decided not to make a provision of such a nature in the Act of 1956 though the Act of 1937 was repealed. The Act of 1956 would have provided remedy to a widow, mother or woman alike the one provided by Section 3(3) of the Act of 1937 enabling the widow, mother or a woman to file a suit on her own without another coparcener demanding the partition of the property.

(iv) The personal laws of Hindus cannot be tested on the anvil of Article 14 or any other Constitutional provisions since the personal laws of Hindus are not subject to or are out of the preview of Constitutional provisions including fundamental rights.

(v) The concept of coparcener and the joint family as per the ancient Hindu law is distinct and clear and only male could become the coparcener of the family and females were never recognized as coparceners in the family. It is a different matter that the daughters have been given similar status like the sons, of late either by the State Legislature or by the Parliament in the year 2005. But then the status given to the daughters as coparceners or right by birth, cannot be extended to other categories of women including a widow or mother since Parliament did not think so while amending the Hindu Succession Act.

(vi) Under the Hindu Law, the logic was that a woman comes after marriage from a family which is stranger and in case her husband dies, the woman could not be allowed to destroy the jointness of the family or create dispute about the property unless and until the other coparcener in the family ask for partition. This being the personal law of Hindus, the question of allowing a woman to lodge a suit for claiming right by way of partition would not arise.

(vii) The right that was given under the Act of 1937 to a woman was only for a "limited estate" and could seek nothing more than the limited estate; and after her death reversion would take place and this limited right given to the woman under section 3(3) of the Act was also fluctuating and would come to an end after her death. It is thus for the survival of the woman, limited right was given by Section 3(3) of the Act of 1937 and not for creating any perpetual right in the property even of her deceased husband.

(viii) Section 14, that was introduced in the Act of 1956 merely gives a right to a woman in respect of the property, which she had been in possession in lieu of maintenance as absolute right but then mere grant of absolute right by virtue of Section 14(1) would not partake the character of the woman asking for a partition in the joint family property since these are separate issues.

(ix) The judgment rendered by the learned Single Judge in Ananda's case is not per incuriam and if at all a contrary view is to be taken, reference should be made for constitution of larger Bench or the issue should not be touched.

(x) Article 14 of the Constitution of India, even otherwise, will have no application since every female being the daughter of her father would obviously get share in her father's property, in her relationship as sister with her brothers, in accordance with the amending law providing the status of coparcener to a daughter and, therefore, the question of discrimination does not arise. Mr. Gavnekar, therefore, submitted that the appeal should be allowed holding that the suit filed by the widow was not tenable.

(xi) Mr. Gavnekar then contended that the husband of the plaintiff-Sulochana w/o

Rajendra @ Raju Chavan went missing from 28.05.1997 and seven years would expire on 28.05.2004 and the suit that was filed for declaration about the civil death of her husband was decreed on 31.07.2007 but the suit was filed before the said declaration was obtained by the widow in the year 2006 and, therefore, there was no cause of action for the widow namely; Sulochana to file suit. Hence, the suit should not have been entertained on that count also.

9. Per contra, Mr. Joshi, learned Amicus Curiae appointed by this Court, submitted that Parliament amended the Hindu Succession Act providing status as coparcener to a daughter on the ground that there should be upliftment of a woman, in accordance with the constitutional provisions. There is no reason why a widow or a mother who is also a woman like a daughter, should be deprived of the remedy of obtaining her right to get property from the share of her husband. Mr. Joshi, therefore, submitted that such a right must be given to the woman or widow or mother, enabling her to file a suit as her right to get share in the suit property due to her husband cannot be defeated merely because the other coparceners did not demand partition. Mr. Joshi, however, contended that the issue is, therefore, clearly not within the domain of the courts of law and hence in the absence of necessary amendment to the Hind Succession Act, the remedy for a widow cannot be made available. Referring to Section 4(1)(a) of the Act, Mr. Joshi, then contended that the laws inconsistent have no effect. He also referred to Section 23 of the Act in relation to the dwelling house and omission thereof by amendment by Parliament.

10. Mr. Patil, learned Senior Advocate for the respondents, relying on decision in the case of V. Tulasamma and Others Vs. Sesha Reddy (Dead) by Lrs., , contended that right to a widow should not be frustrated by holding that she had no remedy in law.

11. Mr. Anturkar, learned Senior Advocate appearing as Amicus Curiae for assisting the court on the request of the Court, made the following submissions.

(i) The judgment rendered by the learned Single Judge in the case of Ananda is clearly per incuriam and must be held so. The reference to the larger Bench should not be made since the judgment is per incuriam.

(ii) There is no need to hold that there should be amendment to the Hindu Succession Act for providing remedy to a widow, mother or woman for recovering the property as a member of the joint family, after his death. Undoubtedly, the right to property to a widow is provided after death of her husband equally with his other brothers and, therefore, it cannot be said that the said right should not be allowed to be exercised by allowing a widow to file a suit on her own since in that case, the right would get automatically frustrated which was never the intention of the Legislature that is to provide right but not the remedy for recovery of such property.

(iii) The doctrine of ubi jus ibi remedium must be pressed into service to hold that the widow/woman has right to file suit for partition in order to recover the

property due to her husband in joint family notwithstanding the fact that the other coparceners in the joint family do not desire to have the partition. The reason is that such a widow has an independent right given by law through her husband to have a share in the property of the joint family of her husband.

(iv) The right to have a share in the property through her husband provided to a widow cannot be made nugatory by projecting an artificial distinction that the Act of 1956 does not provide enabling provision to a widow, mother or a woman to file suit on her own or independently in the court of law seeking partition of the share of her deceased husband.

(v) Mr. Anturkar, learned Senior Advocate, vehemently contended that there is no prohibition in the Hindu Succession Act, 1956 prohibiting a claim of widow or mother of filing the suit independently on her own for share in the property of her husband. No such prohibition can be read in the Act of 1956 merely because similar provision of Section 3(3) in the Act of 1937 was not brought in the Act of 1956.

(vi) The judgment in the case of Ananda is per incuriam since for the said proposition, the learned Single Judge also relied on the decision in the case of Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, when the ratio decidendi in the case of Gurupad is not what the learned single Judge has understood and held. The case of Gurupad (supra) was the one of notional partition or interpretation of provision under section 6 of the Hindu Succession Act and the said decision is not on the point where a widow could independently file suit for partition of the property. The learned Single Judge in Ananda's case, therefore, was wrong in holding that it was so held in Gurupad's case that the widow does not have right to file suit independently or for her own for partition or unless such partition is demanded by other coparcener in the family. The very foundation of reliance placed by the learned Single Judge in Ananda's case is, therefore, faulty and the said judgment should be held to be per incuriam.

He cited decision in the case of Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., , particularly paragraph no. 39 on this aspect.

(vii) Mr. Anturkar then contended that the question of making any recommendation to the Law Commission for seeking any amendment to provide remedy to file suit does not arise because that is not necessary. On the contrary, according to him, the right to get share in the property of her husband is provided by law by the Act of 1956 and, therefore, in the absence of any prohibition in the Act of 1956 to file suit on her own, it will have to be held that an ordinary civil remedy is available to her under ordinary civil jurisdiction.

(viii) Distinguishing the scheme of Section 3(3) of the Act of 1937, Mr. Anturkar, submitted that the said provision was inserted because the woman did not have any right to have any property even for her maintenance and was left to starve whereas under the Act of 1956 she gets the share of her deceased husband in entirety as a class-I heir. This being the clear distinction, there is no propriety or

reason to give any importance to the fact that similar provision like Section 3(3) of the Act of 1937, was not brought into the Act of 1956. Section 3(3) provides for limited estate, which would revert back after her death but then under the Act of 1956 that is not the position.

(ix) Mr. Anturkar, then referred to the history of Hindu personal law right from 1929 and the Constitutional provisions including various judgments of the apex Court and the obligation of the State to provide laws for uplifting the status of women.

(x) Lastly, Mr. Anturkar, submitted that it would be wholly unjust to hold that the widow has right to share in her husband's joint family property but will have no right to get the same by filing the suit for partition against the members of the joint family and, therefore, according to him, this Court should take a pragmatic view of the matter.

CONSIDERATION:

12. I have heard learned counsel for the rival parties as well as learned Amicus Curiae Mr. P.N. Joshi, Mr. Anil Anturkar on a few dates. I have carefully heard Mr. Gavnekar, Mr. Patil, learned counsel for appellants. I have perused the entire record. Upon hearing learned counsel for the rival parties, following substantial questions of law arise for determination.

(i) Whether the suit filed by plaintiff-Sulochana in the year 2006 for partition namely; Regular Civil Suit No. 1773/2006 was premature, the same having been filed without she having declaration about the Civil death of her husband Rajiv and, therefore, the suit did not have any cause of action and was liable to be dismissed?

Answer:-No.

(ii) Whether the widow-Sulochana, plaintiff in Regular Civil Suit No. 1773/2006, Smt. Chanda in Regular Civil Suit No. 8/2007, could file the suit for partition and separate possession in respect of the claim for share of their respective husbands in the suit property held by defendants in the wake of decision in the case of Ananda (supra) and if yes, whether consequentially decision in the case of Ananda is per incuriam?

Answer:-Yes.

(iii) Whether the widow can file a suit on her own for claiming the share of her husband in the ancestral property of joint family of her husband in the absence of other coparcener in the family deciding to partition the joint family property?

Answer:-Yes.

As to question nos. 2 & 3:

13. In the case of Ananda, the learned Single Judge of this Court was required to decide, "Whether a mother has right to institute a suit for partition and separate

possession and to set aside alienation made by the sons?" In that case, the facts were that Draupadibai, mother of Ananda instituted a suit for partition and separate possession and also prayed for setting aside alienation made by her sons. The property was admittedly the ancestral property. The learned Single Judge held thus,

"9.Neither a wife nor a mother has a right to file a suit for setting aside alienation since she does not have right by birth in the co-parcenary property at all. Right to her to have a share in the joint family property accrues to her only when the coparceners decide to partition the joint family property otherwise she is bound to be joint with her sons. This suit at the instance of mother is, therefore, not maintainable for setting aside alienation."

It was further held in para 10 as under:

"10. This takes me to consider the third substantial question of law. A male member of the Hindu Joint Family is a coparcener under the Hind Law. Although by recent amendment to the Hindu Succession Act by Government of Maharashtra a female is also to be treated as co-parcener, We are required to take into the position of 1978, when suit was filed. In 1978, however only a male member of the joint family was treated as a coparcener. Under Shastric Hindu Law a female did not have a right to claim partition of joint family property. I may quote here the commentary of Mulla's Hindu Law in 20th Edition, Para 315:-

"A mother cannot compel a partition so long as the sons remain united. However, if a partition takes place between the sons, she is entitled [except in Southern India (Madras state)] to a share equal to that of a son in the coparcenary property. She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of more or more of them.

Where unmarried son sued his two brothers for partition, but died during the pendency of the suit and the mother was brought in as the legal representative, she was held entitled only to his share and not a mother's share"

It is therefore clear that mother did not have a right under old Hindu Law to compel a partition."

In the same judgment, in para 13 it is held as under:

"Subsection (3) of Section 3 no doubt gave a right to the woman to seek partition. However, this Act has been repealed by Hindu Succession Act 1956. Krishna died in 1959. Therefore the plaintiff cannot take advantage of Section 3 of the Hindu Women's Right to Property Act. If the provisions of Hindu Succession Act 1956 are read, it would be clear that there is no provision similar to subsection (3) of Section 3 of the Hindu Women's Right to Property Act. The legislature in its wisdom has not thought it fit to continue this right in a woman. It was contended that section 14 of Hindu Succession Act makes a woman full owner of the property and therefore it must be assumed that a woman has a right to seek partition. This argument has no force. What Section 14 did was to

confer upon a woman to own absolutely a property in possession which she got against her right of maintenance or for preexisting right. Section 14 has no application."

The learned Judge then relied on the following observations of the apex Court in the case of Gurupad Khandappa Magdum (supra) for supporting the conclusion arrived at in the case of Ananda's case.

"The Plaintiff not being a co-parcener was not entitled to demand partition." If these observations are considered, to my mind, the Plaintiff did not have a right to claim partition of the joint family property at all. I have not referred to the judgment of this Court in AIR 1975 Bombay 257 since the very same judgment is referred to in Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, . The suit itself was misconceived."

14. From the perusal of the reasons recorded by the learned Single Judge, it is clear that the reliance was placed on the decision in the case of Gurupad's case (supra). Reading of the decision in the case of Gurupad and as argued by Mr. Anturkar, learned Amicus Curiae, it appears that the ratio decidendi of the said decision was interpretation of proviso and explanation-I to Section 6 of the Hindu Succession Act and the mode of determination, in particular, with reference to the notional partition in the family. The question, "whether a widow would have right to file the suit after coming into force of the Act of 1956" did not even fall for consideration of the apex Court and, therefore, in my opinion, that was not the ratio decidendi of the case.

15. The ratio of the decision in the case of Gurupad's case, in my humble opinion and with due respect to the learned Single Judge, was not correctly appreciated. Here, it will be relevant to see the observations of the Hon"ble Supreme Court in the case of Commissioner of Income Tax (supra) wherein, in paragraph 39 it is observed thus:

"39. Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India this Court cautioned:

"It is not proper to regard a word, a clause or a sentence occurring in a

judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

16. My above observations are also fortified by observations in paragraph 10 of State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh and Others, ; wherein the Hon"ble apex Court, after having considered the case of Gurupad (supra), observed thus:

"10. We have carefully considered the above decision and we feel that this case has to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that."

Even in Gurupad's case, the apex Court clearly expressed in paragraph 14 as under:

"14.By restricting the operation of the fiction created by Explanation I in the manner suggested by the appellant, we shall be taking a retrograde step, putting back as it were the clock of social reform which has enabled the Hindu Woman to acquire an equal status with males in matters of property. Even assuming that two interpretations of Explanation I are reasonably possible, we must prefer that interpretation which will further the intention of the legislature and remedy the injustice from which the Hindu women have suffered over the years."

17. The observation relied upon by the learned single Judge, quoted above from the Gurupad's decision, may not even amount to obiter dicta. It is true that under the Shastric Hindu law, a female did not have a right to claim partition of a joint Hindu family property and would be entitled to a share equal to that of a son only on partition between the sons. It is also true that Section 3(3) of the Act of 1937 was enacted to give a right to a widow or a woman for demanding partition but the same was for a limited estate. However, with the advent of Act of 1956, which materially altered the Hindu Personal Law with regard to the succession, the widow has been placed as a Class-I heir of her husband in the Schedule. In other words, by virtue of a widow being a Class-I heir in the Schedule, under Act of 1956, she would be entitled to succeed to the entire share of her deceased husband in the joint property or ancestral property of the family with the same magnitude of estate, which her husband would have got had he been alive. In other words, her right to get an estate after the death of

her husband like that of other coparceners in the family has been fully recognized and accepted by the Act of 1956. The concept of limited right or the concept of reversion after her death also stood abolished upon enactment of the Act of 1956 and as a result, she can deal with the property of her husband without any threat of reversion of her estate to the family of her husband. The right, that was given by Section 3(3) of the Act of 1937, however, was of limited extent, in that, after her death, the property would revert back to the family of her husband.

18. To trace the relevant history, it would be appropriate to quote the following observations in paragraphs 15 and 17 in *Thota Sesharathamma and Another Vs. Thota Manikyamma (Dead) by Lrs. and Others*, in which the Supreme Court gave the historical background. Paragraphs 15 and 17 read thus:

"15. Sir Henry Maine in his "Earlier History of Institutions" at p. 339 stated that, "the degree in which personal immunity and proprietary capacity of women are recognised in a particular state or community is a test of the degree of the advance of its civilisation. It is, therefore, clear that the esteem in which woman is held, the status occupied by her in society and the treatment meted out to her are regarded as index to the degree of civilisation and culture attained in a country. Manu in his Smriti, Chapter III Verses 55 to 57 stated that where women are honoured and adorned there Gods are pleased, but where women are not honoured no sacred fire yields rewards. What is the status held by women in the Hindu society is a matter of history reflected from Vedic culture, Smrities, the Shastric law, the statutory provision and ultimately converged and recognised in the supreme law of the land, i.e. egalitarian socialist Indian Constitution. 16.

17. In Vedic society woman enjoyed equal status economically, socially and culturally with men, vide p. 335, 339 and 409 of *The Position of Woman in Hindu Civilization*, (1955 Edn.) by Altakar. He stated that initiation to education upanayanam was performed in Vedic period to the girls as well as boys. Women studied the Vedas, even composed Vedic rhymes. They participated in public life freely. Vishvavara, Apala, Lopamudra and Shashayasi are only few examples in the initial Vedic period. Thereafter Ghosha, Maitrai and Gargi occupied place for equality in intellectual excellence and equal status with men. Selfishness and male chauvinism made woman to gradually degrade and were given no voice even in the settlement of their marriages or so on. She was denied participation in public affairs. Though Yajnavalkya was a proponent to her economic status but ultimately Manu Smriti took firm hold and in Chapter IX Verse 18, Manu stated that woman had no right to study the Vedas. Thereby, denied the right to education, fundamental human right to acquire knowledge and cultural and intellectual excellence. In Chapter IX Verse 149, he stated that woman must not seek separation from father, husband or son and bonded her for ever. In Chapter IX Verse 45, the husband was declared to be one with the wife that the wife can seek no divorce but allowed immunity to a male to discard an unwanted wife. All through the ages till Hindu Marriage Act was made a male

was allowed polyandry. In Chapter IX Verse 416, he stated that a wife, a son and a slave are declared to have no property and if they happened to acquire it would belong to male under whom she is in protection. Thus she was denuded of her right to property or incentive to decent and independent living and made her a dependent only to rare children and bear the burdens. When she becomes a widow, she was declared to have only maintenance and if in possession of her husband's property or coparcenary, to be (sic have (a widow's estate with reversionary right to the heirs of last male holder. Fidelity was a condition precedent to receive maintenance. In Chapter IX Verse 299, he prescribed corporeal punishment to a wife who commits faults, should be beaten with a rope or a split bamboo. If she was murdered it was declared to be an Upapattaka that is a minor offence vide Chapter XI Verse 67. I did not adhere to literal translation but attempted to portray their sweep and deep incursion on social order. Thus laid firm foundation to deny a Hindu female of equality of status, opportunity and dignity of person with no independent right to property and made her a subservient, socially, educationally and culturally. Widows were murdered by inhuman Sati and now by bride burnings."

In the same decision, the apex court further stated in paragraph 20 thus:

"20. To enliven and elongate this constitutional goal to render socioeconomic justice, to relieve Hindu female from degradation, disabilities, disadvantages and restrictions under which Hindu females have been languishing over centuries and to integrate them in national and international life, Bharat Ratna Dr. Baba Saheb Ambedkar, the first Law Minister and founding father of the Constitution drafted Hindu Code Bill. The Hindu, Marriage Act, Adoption and Maintenance Act; Minority and Guardianship Act and Succession Act 1956, for short "the Act" became a part of this package. They ensue equal status and socio-economic justice to Hindu female. In a socialist democracy governed by rule of law, law as a social engineering should bring about transformation in the social structure. Whenever a socio-economic legislation or the rule or instruments touching the implementation of welfare measures arise for consideration, this historical evidence furnishes as the foundation and all other relevant material would be kept at the back of the court's mind."

The case of Thota Sesharathamma is a classic example of interpretation of Section 14 of the Hindu Succession Act, 1956. Preamble of the Constitution, which guarantees to all its citizens justice, social, economic and political, read with Article 15(3) and further if Article 39(e) is kept in mind, which finds place due to the advent of the Constitution, the following observations in paragraph 21 of the said judgment, which are relevant, read thus:

"21.when this Court upheld the validity of Section 14(1) on the anvil of Article 15(3) what should be the message thus intended to be conveyed? It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female "citizen by granting full ownership of property to a Hindu female. As a fact Art. 15(3) as a fore runner to

common code does animate "to "make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race cast or region."

19. The Supreme Court, in *C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Others*, , went ahead in laying down the principle for interpretation in the light of Constitution while overruling observations in the case of *Gumpha (Smt) and Others Vs. Jaibai*, and in paragraph 15 held thus:

"15. It is seen that if after the Constitution came into force the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a Trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments or the society. In *S.R. Bommai v. Union of India* this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the Trinity of justices equality and liberty with dignity of person. The basic structure permeates equality to status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights. Right to equality is a fundamental right. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14[1] enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it."

Thus, while interpreting Section 14 of the Hindu Succession Act, the apex Court adopted interpretation thereof under the floodlight of the Constitutional provisions.

20. Now, harking back to the decision in the case of *Atam Prakash Vs. State of Haryana and Others*, , the apex Court had stated thus:

"5. Now, to the question at issue and first, a word about interpretation. Whether it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble to the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation. Preamble embodies and expresses the hopes and aspirations of the people. The Directive Principles set out proximate goals. When we go about the task of examining statutes against the Constitution, it is through these glasses that we must look, "distant vision" or "near vision". The Constitution being sui generis, where Constitutional issues are under consideration, narrow interpretative rules which may have relevance when legislative enactments are interpreted may be misplaced. Originally the Preamble to the Constitution proclaimed the resolution of the people of India to constitute India into "a

Sovereign Democratic Republic" and set forth "Justice, Liberty, Equality and Fraternity", the very rights mentioned in the French Declarations of the Rights of Man as our hopes and aspirations. That was in 1950 when we had just emerged from the colonial-feudal rule. Time passed. The people's hopes and aspirations grew. In 1977 the 42nd amendment proclaimed India as a Socialist Republic. The word "socialist" was introduced into the Preamble to the Constitution. The implication of the introduction of the word "socialist", which has now become the centre of the hopes and aspirations of the people a beacon to guide and inspire all that is enshrined in the articles of the Constitution-is clearly to set up a "vibrant throbbing socialist welfare society" in the place of a "Feudal exploited society". Whatever article of the Constitution it is that we seek to interpret, whatever statute it is whose constitutional validity is sought to be questioned, we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution. A classification which is not in tune with the Constitution is per se unreasonable and cannot be permitted. With these general enunciation we may now examine the questions raised in these writ petitions."

21. It is true that before coming into force of the Act of 1937, a Hindu widow did not have any absolute right to the property. Even a mother, who had a right to share in the property could not enforce it by filing a suit for partition and was required to wait till the son or the father decide to effect partition in the family property. The Act of 1937 was brought into force in order to give some enforceable right to widow in the property but then the right was made a limited right that too subject to reversion. In other words, the widow was given a right to file suit to get right in the property but only to the limited extent, that means, after her death, property reverts back to the family and she did not have any exclusive right over the property to deal with the property. However, the Hindu Succession Act was brought into force in the year 1956 and for emancipation of right to the women, the widow was given exclusive right to the property by removing the limited right that was given to her and the widow is a Class-I heir as per schedule to the Hindu Succession Act.

22. Mr. Gavnekar, learned counsel for the appellants, submitted that there is a right given under the Act of 1956 to a widow to the extent of share of her deceased husband. But then that does not necessarily mean that in the absence of any provision under the Act of 1956, enabling her to file the suit in the Court for partition, such a right has also been given. As observed above, the Act of 1956 gave her a right to claim her husband's share from the joint family property. The right to recover the property, due to the death of her husband must be held to be integral part of right to property given to her as per the Act of 1956; otherwise the very intention of the Legislature to give her a right would

become nugatory and useless.

23. I am further fortified by the following view in the case of Chhote Khan, deceased, represented by his son, Chhote Khan, deceased, Represented by his Son, Harmat and Others Vs. Mal Khan and Others, , in paragraph 23, the Supreme Court observed thus:

"23. We agree with the High Court in holding that partition is a right incident to the ownership of property and once the defendants are held. as co-owners, their right to partition cannot be resisted."

24. There is another distinction which stares at the face and is an answer to the argument that the Act of 1956 does not provide for a right to file a suit for partition in the absence of any demand by son or any other coparcener in the joint Hindu family property after death of her husband alike Section 3(3) of the Act of 1937. In my opinion, there is fallacy in the argument in that, Section 3(3) provides for a right to file a suit for partition because there was no right at all in a widow even for her survival to get the property of her husband. In order that she must survive or must have some source of income for maintenance, Section 3(3) was engrafted with a view to have her share but then in terms of the personal law of Hindus, a limited right was given to her. As against it, the Act of 1956 provides for a full right to a widow to the share of her deceased husband without any restriction of putting limited right or for dealing with share of her husband as per her choice. That was the progressive reason for uplifting the woman for which, Act of 1956 was brought.

25. Sui juris/aequali jura:

Sui juris means "one's own right." As discussed earlier, right to share has been given to a widow upon death of her husband as per the Act of 1956, which was as per Section 3(3) of the Act of 1937 of limited nature. Hence, she can act sui juris. Further, the Act of 1956 does not carve out any prohibition on her from filing the suit independently. Hence, sui juris, it must be held that she has a right to file the suit independently.

26. Ubi jus ibi remedium:

Here, in this context, it will be necessary to have a look to the judgment of the apex Court in Smt. Ganga Bai Vs. Vijay Kumar and Others, ; wherein, in paragraph 15, the apex Court held thus:

"15.There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit."

So also, in Dhannalal Vs. Kalawatibai and Others, , the apex Court, while dealing with the principle of ubi jus ibi remedium, in paragraph 21, observed thus:

"21. Reference to, or deriving aid from, certain legal maxims will be useful. Ubi jus ibi remedium there is no wrong without a remedy. Where there is a right there is a forum for its enforcement. According to Broom's Legal Maxims (Tenth Edition, pp. 118-119), the maxim has been considered so valuable that it led to the invention of the form of action called an action on the case. Where no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one. The principle adopted by courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognizable by law be shown to have been inflicted on the plaintiff, in which case, although there be no precedent, the common law will judge according to the law of nature and the public good. If a man has a right, he must, "have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal".

27. In the light of above basic doctrine of jurisprudence, I hold that the right having been given to a widow or mother or women under the Act of 1956, she cannot be told that though she has a right to get share, but she cannot file a suit for recovery of share of her deceased husband as she has no right to file a suit. When a right is given, the remedy has to be there namely; remedy to file a suit for partition, which cannot depend upon the desire or demand of other coparceners in the family to have a partition of the joint family property. I don't think that personal law of Hindus, in this context, can be said to be affected in any manner. Any contrary interpretation would be in violence to the dicta discussed above by me on the subject, and would be a retrograde step.

28. Per incuriam:

A Constitution Bench of the apex Court in the matter of Jaisri Sahu Vs. Rajdewan Dubey and Others, had an occasion to deal with the issue and the subject of exceptions to the general rule of binding precedents, the following exceptions as stated in Halsbury's Laws of England, third edition, Vol. 22, para 1687, pp. 799-800,

"The Court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."

The principle has also been explained by the apex Court, relying on the observations in paragraphs 28 to 34 of judgment in M.P. Rural Road Development Authority and Another Vs. L.G. Chaudhary Engineers and Cont., , which read thus:

"28. The principle of per incuriam has been very succinctly formulated by the

Court of Appeal in 18 Young vs. Bristol Aeroplane Company, Limited. Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered "per incuriam". The principles are: (KB p. 729)

"Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam."

29. The decision in Young was subsequently approved by the House of Lords in Young vs. Bristol Aeroplane Company, Limited at page 169 of the report. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by the Lord Greene, the Master of Rolls in the Court of Appeal on the principle of per incuriam (see the speech of Lord Viscount Simon in Bristol Aeroplane Co. Ltd. case, AC at p. 169 of the Report)

30. Those principles have been followed by the Constitution Bench of this Court in The Bengal Immunity Company Limited vs. The State of Bihar (See the discussion in SCR at pp. 622 and 623 of the report)

31. The same principle has been reiterated by Lord Evershed, Master of Rolls, in Morelle Ltd. vs. Wakeling QB 3 at p. 406. The principle has been stated as followed:

"...As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong..... "

32. In the case of State of U.P. vs. Synthetics and Chemicals Ltd., this Court held (SCC p. 162, para 40) the doctrine of "per incuriam" in practice means "per ignoratum" and noted that English Courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in the case of Bristol Aeroplane Co. Ltd. (supra). The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see Synthetics and Chemicals Ltd. case, SCC para 41).

33. In MCA v. Gurnam Kaur, a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in paragraph 11 at page 110 of the report and in explaining the principle of per incuriam the learned Judges held:

"11..... A decision should be treated as given per incuriam when it is given in

ignorance of the terms of a statute or of a rule having the force of a statute..... "

34. In paragraph 12 the learned Judges observed as follows:(Gurnam Kaur case, SCC p. 111)

"12..... One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

29. Looking to the above decisions and the discussions, I think the contentions raised by Mr. Anil Anturkar, learned Senior Advocate, must be accepted that the decision in the case of Ananda (supra), rendered by the learned Single Judge of this Court is per incuriam. All the more so, as stated by the apex Court in the case of Narayan Rao (supra) while analysing the ratio decidendi in the case of Gurupad(supra).

To sum up, question nos. 2 and 3 are, therefore, answered in the affirmative.

As to question no. 1:

30. Question no. 1 now falls for consideration. In Second Appeal No. 119/2013, plaintiff-Sulochana, the widow filed a suit for partition and separate possession vide Reg. C.S. No. 1773/2006. Her husband had gone missing in the year 1997 and the period of seven years for declaration of his civil death was thus completed in the year 2004. However, she had filed suit for declaration about civil death of her husband in 2006 vide Reg. C.S. No. 1780/2006 and actually got declaration on 31.07.2007. The contention raised by Mr. Gavnekar, is that since the declaration about civil death was granted only on 31.07.2007, the suit filed by her for declaration in the year 2006 i.e. Reg. C.S. No. 1773/2006 was without any cause of action and was premature and thus untenable.

31. I have carefully considered the submission made by Mr. Gavnekar, learned counsel for the appellants. Here, it is necessary to look into the provisions of Section 108 of the Evidence Act, which reads thus:

"108. Burden of proving that person is alive who has not been heard of for seven years.--Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

It is not in dispute that the husband of plaintiff-Sulochana went missing in the year 1997 about which report was lodged to the Police Station concerned. It is also not in dispute that the period of seven year was completed in the year 2004. And she filed a suit in the year 2006 for declaration of the civil death of her husband. There is no dispute about the fact that Rajiv, husband of Sulochana

went missing from 1997 and is not traced or heard for about seven years from 1997 nor it is the case of the appellants to the contrary. Section 108 of the Evidence Act does not contemplate any declaration by civil court for civil death of the person. On the contrary, she went to the Court after seven years for a declaration which declaration would obviously operate upon completion of the period of seven years. Therefore, in my opinion, the date of decree of declaration of civil death is absolutely of no relevance. Here, it will be relevant to read observations of the Hon"ble apex Court in para 14 of the judgment in the case of L.I.C. of India Vs. Anuradha, , which are as under:

"On the basis of the above said authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise."

In the light of the above discussion, the answer to question no. 1 must be in the negative, which I do.

Last, but not the least, I must express gratitude to Advocates Mr. Gavnekar, Mr. P.N. Joshi, Mr. Anil Anturkar and Mr. Rajiv Patil, the Senior Advocates, all of them who took pains to assist this Court.

32. The upshot of the above discussion is, the following order is inevitable.

ORDER

- (i) Second Appeal No. 119/2013 and Second Appeal No. 405/2013 are dismissed.
- (ii) No order as to costs.
- (iii) Interim order made by this Court in both these appeals shall continue to operate for another period of ten weeks.