

(1972) 09 KAR CK 0003
In the Karnataka High Court
Case No : First Appeal No. 50 of 1965

Shivadeviamma by Lrs. and Others

APPELLANT

Vs

Sumanji and Others

RESPONDENT

Date of Decision : 15-09-1972

Acts Referred:

Hindu Succession Act, 1956 — Section 14 (1), 4

Madras Aliyasanthana Act, 1949 — Section 36 (3), 36 (4), 36 (5)

Citation : AIR 1973 Kar 299 : AIR 1972 Kar 299 : (1973) 1 MysLJ 401

Hon'ble Judges : Narayana Pai, C.J.; Jagannatha Shetty, J.; Ahmed Ali Khan, J

Bench : Full Bench

Advocate : B.P. Holla, for the Appellant; K.R. Karanth and K.R.D. Karanth, for the Respondent

Judgement

Narayana Pai, C.J.—This reference is by a Division Bench of this Court which heard RFA 50 of 1965 arising out of a suit for partition of the properties of a Hindu family in the district of South Kanara governed by Aliyasanthana Law. The facts and circumstances leading to the reference are briefly as follows:

The parties to the suit are descendants of one Cheluvamma and are related to each other as indicated by the genealogical tree given below:

CHELUVAMMA _____ |
_____ | | Marudevi Amrithavathi Sarasamma
Manjamma Ammanni _____ | _____ d/
o Rajamathi | | | _____ | _____ Namanna Rathi Bohojappa
Anantha | | Hegde Devi Hegde Nathi Premavathi (Deft. 2) Sumanaji (Pltf. 1)
(Deft. 1) | | Marudevi _____ | _____ (Deft. 3) | |
Amrithavathi (Pltf. 2) Vinayachandra (Pltf. 3)

2. The three plaintiffs and the three defendants were the only members of the family surviving and alive at the time of the institution of the suit. On 3-3-1959, Rathi Devi, the deceased elder sister of defendant 1 Bhojappa Hegde executed a

registered will (Ext. B2) bequeathing her interest in favour of Bhojappa Hegde. Three days later i. e. on 6-3-1959, Rathi Devi issued a notice by registered post (Ext. B-64) to the same defendant 1 as the eldest member of the family claiming her share in the kutumba properties. The said notice indisputably brought about a severance of status so far as Rathi Devi is concerned and it is common ground that she therefore died as a divided member of the kutumba.

3. One of the questions argued before the Division Bench was whether the will of Rathi Devi (Ext. B-2) was legally valid or became totally ineffective so far as her interest in the kutumba property is concerned. The principal argument on behalf of the appellants by Mr. Holla before the Division Bench was that the share of interest in kutumba property which Rathi Devi must be deemed to have acquired in consequence of her notice (Ext. B-64) dated 6-3-1959 became an absolute interest by virtue of the provisions of Section 14 of the Hindu Succession Act, 1956 and that therefore, it was capable of being validly disposed of testamentary by Rathi Devi.

4. It was noticed by the Bench that the contention so put forward by Mr. Holla was directly opposed to a previous decision of another Division Bench of this Court in the case of *Amba Shedthi v. Paddakke Shedthi*, (1969) 2 Mys LJ 377.

5. It is however said in the order of reference that the several arguments or considerations bearing upon the question put forward before it have not been examined or pronounced upon in the previous decision in *Amba Shedthi's* case (1969) 2 Mys U 377. The Division Bench therefore felt that the question as to the validity of the Will, though already decided one way by the previous ruling in *Amba Shedthi's* case (1969) 2 Mys LJ 377 requires re-consideration or further consideration by a larger Bench. The Division Bench has therefore, formulated and referred for the opinion of the Full Bench the following three questions:--

1. Does Section 14(1) of the Hindu Succession Act, 1956 apply to the case of life interest acquired before or after the commencement of the said Act, under Sections 35 and 36 of the Madras Aliyasanthana Act, 1949 (Madras Act No. IX of 1949) by a female who has completed fifty years of age (a nissanthathi kavaru) and possessed by her and does such female hold such property absolutely and not as a holder of a life interest?

2. Are provisions of Section 36 (3), (4) and (5) of Madras Aliyasanthana Act, 1949 (Madras Act IX of 1949) inconsistent with Section 14(1) of the Hindu Succession Act, 1956, in so far as they relate to females governed by Aliyasanthana Law and do those provisions cease to apply to such females even though they may have completed fifty years of age by virtue of Section 4 of the Hindu Succession Act, 1956?

3. Has a female, governed by Aliyasanthana law who has completed fifty years of age, the power to bequeath under a Will her divided interest in the property acquired by her at a partition u/s 35 of the Madras Aliyasanthana Act, 1949, (Madras Act IX of 1949)?

6. The parties in this case are governed by the Madras Aliyasanthana Act, 1949 (Madras Act No. IX of 1949) as in force in the State of Mysore after the re-organization of States before its amendment by the Madras Aliyasanthana (Mysore Amendment) Act, 1961, (Mysore Act No. 1 of 1962). The said Act will hereinafter be referred to as the "Aliyasanthana Act."

7. The salient features of the customary Aliyasanthana Law and of the said law as it stood codified in the Aliyasanthana Act and the nature and extent of the effect of the Hindu Succession Act, 1956 on the Aliyasanthana Act were discussed and examined at length in the opinion of a Full Bench of this Court in the case of Sundara v. Girija 1962 Mys LJ 1 : AIR 1962 Mys 72(FB). The discussion and the enunciation of the principle contained in the said opinion of the previous Full Bench are of considerable assistance in answering the questions now before us.

8. Under the customary Aliyasanthana Law, a kutumba is in the nature of a family corporation all members of which, male or female, acquired by birth equal rights in the property of the kutumba; on the death of any member, his or her interest in the kutumba property devolved on the other members by survivorship; the devolution of property was through female line and therefore, a female and not a male was the starting point of a stock of descent; no individual member could ask for partition and partition could have been effected only with the consent or concurrence of all the adult members of the kutumba.

9. The Aliyasanthana Act for the first time gave a right of partition. In Chapter VI thereof, there are two sections -- Sections 35 and 36 -- which read:

"35. (1) Right of Kavam to claim partition -- Any Kavaru represented by the majority of its major members may claim to take its share of all the properties of the kutumba over which the kutumba has power of disposal and separate from the kutumba;

Provided that--

(i) where a kavaru consists of only two persons, such a claim may be made by either of them;

(ii) no kavaru shall make such a claim during the lifetime of any ancestress common to such kavaru and to any other kavaru or kavarus of the kutumba, who has not completed fifty years of age, unless--

(a) she has signified her consent in writing, or

(b) two-thirds of the major members of the kavaru join in making the claim for partition;

(iii) The common ancestress may on her own volition claim a partition.

(2) The share obtained by the kavaru shall be taken by it with all the incidents of kutumba property.

Explanation.-- For the purposes of this Chapter--

(a) a male member of a kutumba, or a female member thereof who has no living descendant in the female line, shall be deemed to be a kavaru if he or she has no living female ascendant who is a member of the kutumba;

(b) such male member, or such female member if she has completed the age of fifty years, shall be deemed to be a nissanthathi kavaru.

36. (1) Ascertainment of shares at partition.-- Any kavaru entitled to partition u/s 35 shall be allotted a share of the kutumba properties in accordance with the provisions of Sub-section (2).

(2) (a) If on the date on which a partition is claimed, any of the members of the kutumba who are nearest in degree to their common ancestress is removed four degrees or more from such ancestress, then, the division shall be effected in the following manner:--

(i) In three-fourths of the kutumba properties, the kavaru shall be allotted such share as would fall to it, if a division thereof were made per capita among all the members of the kutumba then living.

(ii) In the other one-fourth of the kutumba properties, the kavaru shall be allotted such share as would fall to it, if a division thereof were made among the kavarus per stirpes.

(b) In other cases, the division shall be effected in the following manner:--

(i) In one-half of the kutumba properties, the kavaru shall be allotted such share as would fall to it if a division thereof were made per capita among all the members of the kutumba then living.

(ii) In the other half of the kutumba properties, the kavaru shall be allotted such share as would fall to it if a division thereof were made per stirpes among the kavaru.

(c) In a spiritual division under Clause (a) (ii) or (b) (ii), the common ancestress if alive shall be entitled to the same share as a child of hers.

(d) Where the kavaru seeking a partition is not a main kavaru of the kutumba, the share of the main kavam shall first be ascertained in accordance with the provisions of the foregoing clauses, and the share so ascertained shall thereafter be divided and subdivided according to the provisions of Clause (b) until the kavaru seeking partition is reached.

(e) The provisions of Clauses (a) to (d) shall apply only to partitions claimed before the expiry of a period of fifteen years from the commencement of this Act.

(f) In a partition of a kutumba claimed after the expiry of the period aforesaid, a kavaru shall be allotted such share as would fall to it if a division of the kutumba properties were made per stirpes among all the kavarus.

(g) In a partition under clause (f), where the kavaru seeking partition is not a main kavaru of the kutumba, the share of the main kavaru shall first be ascertained in accordance with that clause and the share so ascertained shall thereafter be divided and sub-divided in the same manner until the kavaru seeking partition is reached.

(h) The share of a kavaru at a partition shall be ascertained as on the date on which it makes a claim for partition:

Explanation -- For the purpose of this sub-section, the date on which a partition is claimed shall be-

(a) where the claim is made by a suit for partition, the date of the institution of the suit (whether the suit is prosecuted or not); and

(b) where the claim is made otherwise than by a suit, the date on which such claim is made.

(3) If at the time of the partition, any kavaru taking a share in a nissanthathi kavaru, shall have only a life interest in the properties allotted to it, if the kutumba from which it separates has at least one female member who has not completed the age of fifty years, or where a kutumba breaks up into a number of kavarus at the partition, if at least one of such kavarus is a santhathi kavaru and if there is no such female member or santhathi kavaru, the kavaru shall have an absolute interest in the properties allotted to it.

(4) In the case referred to in Sub-section (3), the life interest of the nissanthathi kavaru in the properties allotted to it at the partition shall become absolute, if the kutumba concerned ceased to have among its members a female who has not completed the age of fifty years or if all the kavarus into which the kutumba broke up, whether at the same or at a subsequent partition, become nissanthathi kavarus.

(5) The properties allotted to a nissanthathi kavaru at a partition and in which it had only a life interest at the time of the death of the last of its members, shall devolve upon the kutumba, or where the kutumba has broken up at the same or at a subsequent partition, into a number of kavarus, upon the nearest santhathi kavaru or kavarus.

(6) A registered family settlement (by whatever name called) or an award, to which all the major members of a kutumba are parties and under which the whole of the kutumba properties have been or were intended to be distributed, or purport to have been distributed, among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity, shall be deemed to be a partition of the kutumba properties notwithstanding any terms to the contrary in such settlement or award."

To complete the picture, it is also necessary to copy the definition of a kavaru nissanthathi kavaru and santhathi kavaru given in clauses (b) (i) (ii), (f) and (h)

of Section 3 of the Aliyasanthana Act;

"(b) (i) "Kavaru" used in relation to a female, means the group of persons consisting of that female, her children and all her descendants in the female line;

(ii) "Kavaru" used in relation to a male, means the kavaru of the mother of that male.

(f) "Nissanthathi kavaru" means a kavaru which is not a santhathi kavaru;

(h) "santhathi kavaru" means a kavaru of which at least one member is a female who has not completed the age of fifty years;"

10. It will be seen that unlike in the case of an ordinary Hindu family governed by Mithakshara school, no individual member can claim partition even under the Aliyasanthana Act which permits only a kavaru to claim partition. As males and females have equal rights in the joint family property, there is no such thing in Aliyasanthana Law as the subordinate position of a maintenance holder assigned to a woman in a Mitakshara joint family. As the devolution of property is in the female line and therefore, the female alone is the starting point of the stock of descent, neither a male or female beyond the child bearing age can be the starting point of descent. Hence the necessity of defining and limiting the rights of a nissanthathi kavaru.

11. So much for joint family. So far as separate property is concerned, as the Aliyasanthana Law made no difference between a male and a female, the limited estate of a Hindu woman so familiar in Mitakshara Law is wholly unknown to the Aliyasanthana Law.

12. What is stated above is a summary of the principles enunciated in the judgment of the previous Full Bench in Sundara Adapa's case 1962 Mys LJ 1 : AIR 1962 Mys 72 (FB).

13. It is now necessary to state that the principal fact which was the occasion for reference to a Full Bench and the discussion of principle by the Full Bench was that a male member of an aliyasanthana family who as defendant 1 in a partition suit had been granted certain share in the preliminary decree had made a Will in respect thereof bequeathing the same to his wife and children. He constituted a nissanthathi kavaru within the meaning of the explanation to Section 35 of the Aliyasanthana Act.

14. The questions referred to the last Full Bench were-

(1) Whether, by virtue of the Explanation to Sub-section (1) of Section 30 of the Hindu Succession Act, 1956 the interest of the first defendant in the share taken by him as the sole member of a nissanthathi kavaru, became capable of being disposed of by will?

and

(2) Whether sub-sections (3), (4) and (5) of Section 36 of the Aliyasanthana Act

are inconsistent with the Explanation to Sub-section (1) of Section 30 of the Hindu Succession Act, 1956, and do they by the operation of Sub-section (1) (b) of Section 4 of the Hindu Succession Act, cease to apply?

15. Before proceeding to summarise the opinion of the previous Full Bench on the question and the effect of Hindu Succession Act on the Aliyasanthana Act, it is necessary to quote Section 6, Section 7(2) and Section 30 of the Hindu Succession Act.

"6. Devolution of interest in coparcenary property -- 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 purpose 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 2: Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

7 (1)

(2) When a Hindu to whom the Aliyasanthana Law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a kutumba or kavaru, as the case may be, his or her interest in the property shall devolve, by testamentary or intestate succession, as the case may be under this Act and not according to the Aliyasanthana Law.

Explanation: For the purposes of this sub-section, the interest of a Hindu in "he property of a kutumba or kavaru shall be deemed to be the share in the property of the kutumba or kavaru, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the kutumba or kavaru, as the case may be, then living. whether he or she was entitled to claim such partition or not under the Aliyasanthana Law and such share shall be deemed to have been allotted to him or her absolutely.

(3)

30. Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru, shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section."

(Note: Sub-section (2) of Section 30 was omitted by Amending Act 78 of 1956; but that does not affect our discussion).

16. The opinion of the Full Bench in Sundara Adapa's case 1962 Mys LJ 1 : AIR 1962 Mys 72 (FB) was that the Hindu Succession Act did not expressly repeal any part of the Aliyasanthana Act nor did it provide either for the management of kutumba properties or partition of the same. After pointing out that what is made be questionable by virtue of the explanation to Section 30 of the Hindu Succession Act is the share as quantified by a theoretical partition postulated in the explanation to Section 7(2) of the same Act which is quite different from the share ascertained under a partition under Sections 35 and 36 of the Aliyasanthana Act and pointing out that the same constitutes the limited purpose of the Hindu Succession Act and discussing various arguments and cases cited before it, the Full Bench opines:

" As seen earlier, these two sets of provisions deal with different topics--one deals with the interest in a coparcenary property whereas the other deals with partition of the kutumba properties and devolution of the property allotted at a partition both these pieces of legislation deal with separate and distinct matters though of a cognate and allied character...."

The ultimate opinion of the Full Bench was that there was no inconsistency between subsections (3), (4) and (5) of Section 36 of the Aliyasanthana Act on the one hand and Section 30 of the Hindu Succession Act on the other and that therefore, the operation of the former is not put an end to by Section 4(1)(b) of the Hindu Succession Act.

17. It is no doubt true that the occasion for the discussion was that apparent or suggested conflict between Sub-sections (3), (4) and (5) of Section 36 of the Aliyasanthana Act on the one hand and Sections 7(2) and 30 of the Hindu Succession Act on the other. The general effect of the discussion, in our opinion, is that the field occupied by Chapter VI of the Aliyasanthana Act dealing with partition is different from the field occupied by the Hindu Succession Act. The former deals with partition and latter with succession. To the extent the Hindu

Succession Act provides for devolution either by testamentary or intestate succession of the undivided interest of a person in kutumba or kavaru property, the principle of survivorship governing a kutumba or kavaru properly is done away with. In all other respects, the scheme under the Aliyasanthana Act dealing with partitions, quantification of shares at a partition and devolution of the properties allotted to shares is left untouched. The result of the opinion was that defendant 1 in that case who was a single male constituting a nissanthathi kavaru and who as such kavaru had obtained a share at a partition did not have the capacity to make a Will in respect of his divided share.

18. We may also, at this stage, refer to a decision reported in *Laxmi v. Parameshwari Hengsu* (1968) 2 Mys LJ 454 : AIR 1969 Mys 175 in which it was held that on the death of two males out of three males constituting a nissanthathi kavaru, the undivided interest of the said two predeceased males would devolve by intestate or testamentary succession by virtue of Section 7(2) read with Section 30 of the Hindu Succession Act as interpreted by the Full Bench in *Sundara Adapa's* case 1962 Mys LJ 1 : AIR 1962 Mys 72 (FB).

19. The total effect of the discussion in the previous Full Bench case and in (1968) 2 Mys LJ 454 : AIR 1969 Mys 175 is that it is the undivided interest of a member of an Aliyasanthana kutumba or kavaru --whether male or female which devolves as absolute property by intestate or testamentary succession, but not the divided interest of a single member of a nissanthathi kavaru.

20. But Mr. Holla has argued that the last Full Bench dealt with only a male constituting or being the sole survivorship representative of a nissanthathi kavaru but did not deal with a female and that the previous Full Bench did not deal with Section 14 of the Hindu Succession Act. He also cites the following passage of the Full Bench and argues that there is something in the observations contained therein which may be of assistance to his present contention. The passage is:

"In the case of a share under the Aliyasanthana Act the kavaru takes its share on the basis of half per capita, half per stirpes, u/s 7(2) the share is determined on per capita basis. Quite clearly the object of bounty u/s 7(2) read with Section 30 is the donee under the will of a deceased coparcener. The fact that divided members also do not get corresponding benefits under the "Act" is no relevant test. If Parliament wanted to enlarge the interest of divided male members nothing would have been easier than to enact a provision on the lines of Section 14(1) of the "Act", provided Parliament had competence to do so. Further, the Explanation to Section 30(1) speaks of: "The interest of a male Hindu" in his "kutumba" or "kavaru" properly. The definite article "the" evidently refers to the interest specified or quantified in some other provision of the "Act"; it could not refer to the unascertained interest of a coparcener in a kutumba. Obviously, "The interest" referred to is the interest quantified u/s 7 of the "Act" to which reference will be made in greater detail at a later stage".

Mr. Holla, argues that the observation has reference only to male members and holds that they are not entitled to any enlargement of their limited interest in the absence of a provision on the lines of Section 14 of the Hindu Succession Act which applies only to females.

21. We find it difficult to read so much in the observation. The passage really means that "the undivided interest which descends by succession as if it were absolute property is the interest as quantified by the explanation to Section 7(2) of the Hindu Succession Act which is an interest deemed to have been obtained at a deemed partition per capita and not a share allotted at a partition under Ss. 35 and 36 of the Aliyasanthana Act which is half-per-capita and half-per-stirpes. The share at the deemed partition under Explanation to Section 7(2) of the Hindu Succession Act is by the very explanation deemed to have been allotted absolutely. But the property allotted at a partition under the Aliyasanthana Act continues to be impressed with the character of kutumba property. Both Section 7(2) and the explanation to Section 30 of the Hindu Succession Act apply uniformly to both males and females who are members of a kutumba or kavaru. Hence the basis of the distinction made by the Full Bench is not sex but the character of the share or the character of the interest in share. This must be read along with the clear opinion expressed by the Full Bench that the Hindu Succession Act, subject only to the exception created by Section 7(2) and Section 30 thereof, does not purport to deal with partitions quantification of shares at a partition and the devolution of properties allotted to sharers under Sections 35 and 36 of the Aliyasanthana Act. The Full Bench, it should be repeated, expressly stated that Sections 7(2) and 30 of the Hindu Succession Act dealt exclusively with undivided interests of individual members in a kulumba or kavaru property and not the divided interest of an individual or share allotted to an individual at a partition. When there are more members than one in a kavaru which has obtained a share at a partition, the divided interest of each who dies leaving one or more survivors is governed by Sections 7(2) and 30 of the Hindu Succession Act; but when we reach the last surviving member, his interest can only be divided interest because an undivided interest can be postulated only in cases where property is held by more persons than one and not when a single individual happens to be the sole holder of the property.

22. Coming now to Mr. Holla's argument as to the scope of Section 14 of the Hindu Succession Act, there are certain propositions as to which there could be no dispute whatever. It undoubtedly applies to a Hindu woman governed by the ordinary Hindu Law including the Mitakshara Law. As observed by the Supreme Court in the case of Eramma Vs. Verrupanna and Others, :

"..... The object of the section is to extinguish the estate called "limited estate" or "widow's estate" in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder....."

The same case points out that, there must be some right which could get enlarged u/s 14 of the Hindu Succession Act, but that if the female gets no right whatever, Section 14 of the Hindu Succession Act confers no new right upon her. It is therefore necessary that there is some vestige of preexisting legal right before it can get enlarged.

23. It is no doubt true that the words "acquired" and "possessed" must receive the widest connotation as pointed out by the Supreme Court in *Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others*, and in *Seth Badri Prasad Vs. Srimati Kanso Devi*, But, however wide the amplitude of the said terms. it is quite essential as pointed out in *Eramma Vs. Verrupanna and Others*, that there must be some vestige of interest before it can become enlarged. Likewise, where properties are given to a Hindu woman in recognition of a pre-existing right either to maintenance or to a share or otherwise, the execution of a document in respect of it does not take the matter beyond the scope of Section 14(1) of the Hindu Succession Act (Vide: *Mallawwa v. Kallappa* (1966) 2 Mys LJ 633 and *Hanmangouda v. Hanamangouda*, (1972) 1 Mys LJ 315 : AIR 1972 Mys 286; *Gadam Reddayya Vs. Varapula Venkataraju and Another*, and *Sumeshwar Mishra and Others Vs. Swami Nath Tiwari and Others*, .

24. But the question is whether there is any scope for an aliyasanthana female to invoke Section 14 of the Hindu Succession Act?

25. Now, so far as separate property is concerned, (i.e., property other than joint family property or any part thereof or share therein) an aliyasanthana female always had full and absolute rights in respect of it. So far as any other Hindu woman is concerned, she had such right only in respect of the property technically called, "stridhana". Hence whereas an ordinary Hindu woman may stand in need of the protection of Section 14 of the Hindu Succession Act, an aliyasanthana woman does not require the assistance of the said section so far as separate property is concerned.

26. In joint family property an ordinary Hindu woman had no property right at all. She was only a maintenance holder. Even when the Hindu Women's Rights to Property Act, 1937 was passed and a Hindu widow in a Dayabhaga family was made an intestate heir or her husband's interest taking a share equal to that of a son and the Hindu widow in a Mitakshara coparcenary was given the same interest as her husband held in coparcenary property, the interest devolving on the widow was declared to be a limited interest known as a Hindu Woman's estate. She therefore, has necessarily to invoke Section 14 of the Hindu Succession Act for converting her limited interest into a full interest. But an aliyasanthana woman had in a kutumba or kavaru property equal rights with males and by virtue of Section 7(2) and Section 30 of the Hindu Succession Act her undivided interest is made to devolve as if it were the absolute property by intestate or testamentary succession.

27. Hence, in the circumstances mentioned above, no occasion can ever arise for

an aliyasanthana female to invoke the provisions of Section 14 of the Hindu Succession Act to acquire any benefit, which she did not already possess under the customary Aliyasanthana Law or in addition to what she acquired by virtue of Section 7(2) and Section 30 of the Hindu Succession Act.

28. The only occasion when an appeal to that Section may be made, is or would be, when she gets a share allotted to her at a partition as herself constituting a nissantathi kavaru or she becomes by lapse of time the sole surviving member of nissantathi kavaru which had obtained a share at a partition held under the Aliyasanthana Act and her interest therein has not become absolute u/s 36 (4) of the said Act.

29. Now, if as held by the Full Bench in Sundara Adapa's case 1962 Mys LJ 1 : AIR 1962 Mys 72 FB, the Hindu Succession Act does not deal with partition, quantification of shares for partition and devolution of shares allotted at a partition under the Aliyasanthana Act, but only modifies the rule of devolution by survivorship of kutumba or kavaru property to the extent and in the manner provided in Sections 7(2) and 30 of the Hindu Succession Act, then, it will not be possible to invoke the provisions of Section 14 of the Hindu Succession Act because, it deals with the topic of succession and not of partition.

30. Another and more clinching reason why Section 14 cannot be availed of by an Aliyasanthana woman who is a nissantathi kavaru or the sole survivor of a nissantathi kavaru is that she obtains a share as a kavaru or is the sole surviving member of a kavaru which has obtained a share as a kavaru. The Aliyasanthana Act does not permit individuals to claim shares at a partition. Section 14 of the Hindu Succession Act refers to property possessed by "a female Hindu" which indisputably refers to an individual in her personal capacity.

31. Mr. Holla has however contended that under the explanation to Section 35 of the Aliyasanthana Act, a single female is only deemed to be a kavaru for the purposes of Chapter VI but that by the process of deeming, the identity of the individual is not lost.

32. It may be true that in certain cases deeming or a legal fiction created by such deeming has a limited purpose and is therefore of a limited operation. But one thing that is perfectly clear is that when the law raises a legal fiction for a stated purpose, it must be effective for the operation of the entire purpose and cannot be dispensed with in such a way as to defeat the purpose of the law. Under the provisions of Chapter VI of the Aliyasanthana Act, it is only a kavaru as kavaru which can claim partition and take a share at a partition and the share obtained by the kavaru shall be taken by it with all the incidents of kutumba property, further, when a nissantathi kavaru takes a share, the extent, nature and devolution of the share are provided by the statute itself. If therefore, an individual takes a share as a kavaru, he or she continues to be a kavaru and the share taken by him or her continues to be impressed by the character of kutumba property, one of the incidents of which is the course of devolution of the

share taken by nissanthathi kavaru in the manner provided by the Act.

33. If therefore, an individual having taken a share at a partition under the Aliyasanthana Act as a nissanthathi kavaru is to be regarded as a kavaru only for the purposes of claiming a share and be permitted to discard his or her character as a kavaru and claim to be an individual whose identity has never been lost, then one or the other of the two consequences follows namely, either that the original claiming of the share was itself incompetent and without any right recognised by law or that the subsequent discarding or the legal fiction will result in totally defeating the very purpose of the law. which no law will permit. That part of the law of partition enacted in the Aliyasanthana Act has not been changed or varied or affected by the Hindu Succession Act. In such a situation to insist that an individual is only an individual though called a kavaru would really mean that the individual took a share without any title under law and therefore became a trespasser without title from the very commencement. If he or she purported to take the share as a kavaru in the first instance and at once gave up the character of kavaru the position would be that the original taking was on a false pretence and not the firm legal fiction, because under the Aliyasanthana Act the legal fiction of an individual being deemed to be karavu is not merely for taking a share but for purposes of the entire Chapter VI. Hence to discard the legal fiction is to acquire no title whatever. If there is no title, there is nothing to be enlarged u/s 14 of the Hindu Succession Act.

34. What is discussed above is sufficient to answer the questions referred to this Full Bench. However, the Division Bench in *Amba Shedthi*, (1969) 2 Mys LJ 377 has observed that the application of Section 14 of the Hindu Succession Act to a female constituting a nissanthathi kavaru would bring about an infringement of Article 14 of the Constitution. Mr. Holla has argued that no such consequence will follow and even if such consequence does follow, the discrimination being in favour of female it would be protected by Clause (3) of Article 15 of the Constitution. As this part of the argument is really unnecessary for answering the questions referred to us, we do not feel called upon to discuss the matter in detail, but, out of respect to the observation in the judgment in *Amba Shedthi*'s case (1969) 2 Mys LJ 377 and the arguments of the Counsel addressed before us, we will very briefly refer to the position.

35. Mr. Holla referred to some cases of the Punjab High Court and one decision of the Supreme Court reported in *Sukhram and Another Vs. Gauri Shankar and Another*, , where an argument that the widow getting a full estate while her husband's male relatives continued to hold joint property or ancestral property under certain restrictions as to alienations would bring about discrimination was rejected. It would be seen that no question of discrimination can at all arise in those cases because the titles are quite different; the title of the males was in respect of joint family property, the alienations in respect of which are subject to restrictions under the ordinary law, whereas the title of the widow of a deceased coparcener is a full title by virtue of the provisions of the statutory law. It is also

well known even under the ordinary Hindu Law that an alienee of joint family property for legal necessity will get an absolute estate in spite of the fact that in respect of the unalienated joint family property, the members of the family will continue to be controlled by the restrictions imposed by law as to alienations, user etc. The clear distinction between the titles of two persons or two groups of persons in itself furnishes a clearly intelligible criterion for classification having a reasonable relationship with the object of the law.

36. In the case of members of a nissanthathi kavaru under the Aliyasanthana Law, the title under which each one of them acquired the property is the same or identical. To make a distinction therefore, when the title is the same, would amount, in our opinion, to unconstitutional discrimination.

37. Regarding Article 15(3) of the Constitution, reliance is placed on the decision of the Supreme Court in Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoy Laljee, and also in Dattatraya Motiram More Vs. State of Bombay, . But the principle as pointed out by the Supreme Court is:

"Article 14 is general and must be read With the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children....."

The special provision, in our opinion, must have some relation to matters or circumstances arising out of or peculiar to sex which constitute the criterion having a reasonable relationship with the object of the law in which case, the fact that the criterion has special relation to sex does not involve infringement of either Clause (1) of Article 15 or the general provisions of Article 14; but if the distinction is solely on the ground of sex, it is doubtful whether such distinction Will not infringe Clause (1) of Article 15 of the Constitution.

38. For the reason already discussed, our answer to the three questions referred to us are:

(1) Section 14(1) of the Hindu Succession Act, 1956 does not apply to the case of life interest acquired before or after the commencement of the said Act under Sections 35 and 36 of the Madras Aliyasanthana Act, 1949, (Madras Act IX of 1949) by a female who has completed fifty years of age (nissanthathi kavaru) and possessed by her; such female holds property acquired by her as a nissanthathi kavaru at a partition under Sections 35 and 36 of the Madras Aliyasanthana Act as a holder of a life interest as indicated in Sub-section (4) of Section 36 thereof which, however, may become absolute in circumstances mentioned in the said subsection.

(2) The provisions of sub-sections (3), (4) and (5) of Section 36 of the Madras Aliyasanthana Act (Madras Act IX of 1949), are not inconsistent with Section 14(1) of the Hindu Succession Act in so far as they relate to females governed by Aliyasanthana Law because, the two provisions deal with two different topics of

legislation and the said provisions of the Madras Aliyasanthana Act do not cease to apply to such females who have completed fifty years of age and are therefore nissanthathi kavarus and have taken a share at a partition under the Aliyasanthana Act as such kavaru, by virtue of Section 4 of the Hindu Succession Act 1956.

(3) A female governed by the Madras Aliyasanthana Act who has completed fifty years of age is not competent by will to bequeath her divided interest in the property acquired by her at a partition, divided interest meaning interest or share acquired by her as solely constituting a nissanthathi kavaru or her interest in the property of nissanthathi kavaru which has obtained a share at a partition under the Aliyasanthana Act at a time when she happens to be the sole surviving member of such nissanthathi kavaru, unless and until the interest has become absolute under Sub-section (4) of Section 36 of the Aliyasanthana Act.