
(1996) 03 AP CK 0058
In the Andhra Pradesh High Court
Case No : C.C.C. Appeal No. 3 of 1989

Sri Srinivas Kumar Mowle

APPELLANT

Vs

Chandra Shekhar Mowle and Others

RESPONDENT

Date of Decision : 25-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, 151
Hindu Succession Act, 1956 — Section 26

Citation : (1996) 3 ALT 659

Hon'ble Judges : S.V. Maruthi, J

Bench : Single Bench

Advocate : Vilas V. Afzul Purkar, for the Appellant; M.M. Ali Baig, for Respondent No. 1, S. Krishna, for Respondent Nos. 2, 9 and 10, C. Subba Rao, for Respondent No. 3, C. Ravindra Nath and Arun Naik for Respondent No. 6, C. Poornaiah and V.L.N.G.K. Murthy, for the Respondent

Final Decision : Dismissed

Judgement

S.V. Maruthi, J.—This appeal arises out of a judgment in O.S.No. 287/78. The second defendant in the suit is the appellant. The plaintiff filed the suit for partition of A and B schedule properties and for allotment of 1/8th share.

2. The brief averments in the plaint are that Late Prabhakara Rao Moule was the original owner of the properties mentioned in the plaint schedule. He left behind him the first defendant his widow, defendants 2 to 4 his sons and defendants 5 to 7 his daughters. Prabhakar Rao Moule died on 8-2-75. According to Hindu Law, the plaintiff and defendants 1 to 7 are entitled to get 1/8th share each in the schedule properties both movable and immovable properties left by Late Prabhakar Rao Moule. The plaintiff and defendants 1 to 7 are in possession of the entire suit properties both movable and immovable. In spite of repeated requests, defendants 1 to 7 refused to effect partition of the entire estate of Late Prabhakar Rao Moule. Therefore, the suit for partition.

3. The first defendant filed a written statement contending that she is the second

wife of Late Prabhakar Rao Moule and she is entitled to 1/3rd share in the properties belonging to the deceased Prabhakar Rao Moule. She also stated that she requires at least Rs. 300/- per month for maintenance and defendants 2 to 4 are responsible to pay the said amount. She denied that the plaintiff is entitled to 1/8th share and stated that the plaintiff is entitled to 1/12th share in the properties.

4. The second defendant filed a written statement admitting the relationship between the plaintiff and Prabhakar Rao Moule. However, he stated that the first defendant is not the widow of Prabhakar Rao Moule and she was only a cook. He further stated that the 4th defendant changed his religion and became Muslim. Therefore, he is not entitled to claim any share in the Joint family property. Defendants 5 and 7 are daughters of late Prabhakar Rao and the real sisters of the plaintiff and this defendant. The plaintiff deleted the name of the 5th defendant from the array of defendants. Deleting the name of the 5th defendant from the array of the defendants will affect the suit and the plaint is bad for non-joinder of necessary party. The presence of Defendant No. 5 is necessary in order to enable the Court effectively and completely to adjudicate upon and to settle all the questions involved in the suit. The 6th defendant is not the daughter of Prabhakar Rao Moule and therefore, she is not entitled to a share in the property. Defendants 1, 2 (sic), 4 and 6 are not entitled to inherit the joint family property left by Prabhakar Rao Moule. The third defendant is also not entitled to any share in the joint family property due to his conduct. He stated that there is no gold jewellery even to the extent of needle's head. The gun has been deposited with the International Arms and Armoury, M.G.Road, Secunderabad as per law. He being the Karta of the family is in possession of A "schedule property and he was managing the property even during the life time of late Prabhakar Rao Moule. He received A-schedule property from the execution proceedings (E.P.No. 16 of 1977) on the file of the first Additional Judge, City Civil Court, Hyderabad between Dinshawji Italia v. Prabhakar Rao Moule. To save the property from the said attachment, he paid a sum of Rs.40,000/- towards the full and final settlement of the said decree and thus he saved the property from being auctioned. He also spent more than Rs. 20,000/- for filing an appeal in the Supreme Court against D.D. Italia. He borrowed an amount of Rs. 60,000/- from financiers and Banks towards the satisfaction of the decrees and he is paying the same with heavy interest.

5. There are E.P.No. 45/74 on the file of IV Addl. Judge, City Civil Court, Hyderabad and E.P.No. 22/74 and E.P.No. 23/74 on the file of II Addl. Judge, City Civil Court, Hyderabad towards the debts of late Prabhakar Rao Moule. He is facing the said execution proceedings. He has also filed suits against the defaulting tenants for the recovery of arrears of rent. The plaintiff is supporting the defaulting tenants in the Court of law. The plaintiff appeared in most of the cases as a witness for the defaulting tenants, namely, Vaidyanathan and Harnam Singh. Sri A. Jaiwant R.j, Advocate who is now appearing for the plaintiff is also appearing for the defaulting tenants. He further stated that on 29-6-1976 the

second defendant sustained a fracture of the right knee and left hand and he was admitted in Hyderabad Nursing Home. The second defendant was in the Nursing Home till November, 1976. During the said period, the plaintiff broke open the locks of the H.No. 3-4-846, Barkatpura, Hyderabad and took away the vessels furniture, etc. This defendant lodged a complaint before the police on 21-9-1976. A case was registered as Crime No. 292/76 at Kachiguda Police Station. Thereafter on 29-12-1976, the plaintiff approached this defendant and assured him that he will always behave as his younger brother and an agreement between the plaintiff and this defendant and the third defendant was executed on 28th day of December, 1976. Under the agreement, the plaintiff and the third defendant agreed that this defendant will act as Karta of the Joint family till the disputes are settled and partition takes place. The plaintiff is in possession of the movables worth more than Rs. 1,00,000/- which is more than his share and therefore, he is not entitled for partition and the suit is liable to be dismissed.

6. The third defendant filed a written statement alleging that the second defendant is in possession of the movables left by the deceased, namely, (1) Remington Type writer, (2) Gold jewellery about 15 tolas, (3) Silver articles about 25 tolas, (4) wrist watch and 5. Time piece and these movables have to be brought into the hotch pot for equal distribution among the parties. The second defendant is liable to account for the amount withdrawn by him from the Court of X Asst. Judge, City Civil Court, Hyderabad which amount was deposited by the tenant. He is liable to render accounts of the rents collected and being collected by him from the tenants. He claimed 1/8th share in the property.

7. The 4th defendant filed a written statement claiming 1/8th share in the entire property of Prabhakar Rao Moule.

8. The 6th defendant filed a written statement stating that she is the eldest daughter of late Prabhakar Rao Moule, that there are more than 50 tolas of Gold ornaments and about 100 tolas of silver articles which are in possession of the second defendant and that she being the eldest daughter is entitled to equal share in the properties of Prabhakar Rao Moule.

9. The 7th defendant filed a written statement. The averments are more or less similar to the written statements filed by defendants 1,3,4 and 6.

10. On the basis of the above pleadings the 4th Addl. Judge, City Civil Court framed the following issues which are relevant amongst the others:

1. Whether D-1 is the widow of late Prabhakar Rao Moule and if so, whether she is entitled for her share in partition of the suit properties?

2. Whether D-4 is entitled to claim his share in the joint family property, even after his changing the religion ?

3. Whether D-6 is entitled to claim a share in the partition suit ?

4. Whether D-2 is entitled to receive Rs. 40,000/- (about the payment of

decretal amount in E.P. No. 16/77) and Rs. 20,000/- towards the expenses of appeal filed in the Supreme Court ?

5. Whether D-2 is entitled to receive the expenses of the suit filed against the tenant of the suit house ?

6. What is the effect of the agreement dated 28-12-76 executed by the plaintiff in favour of D-2.

11. The plaintiff in support of her (sic. his) case examined two witnesses whereas the defendants examined 7 witnesses. On behalf of the plaintiffs Exs. A-1 to A-9 were marked and Exs.B-1 to B-13 were marked on behalf of the defendants. The Court marked Exs.C-1 to C-3. On the basis of the evidence, the learned Judge passed a preliminary decree for partition. The learned Judge directed that the plaintiff-A schedule property shall be divided between the plaintiff and D-1 to D-7 into eight equal shares by metes and bounds according to good and bad qualities and each share shall be delivered to the plaintiff and D-1 to D-7. In case at the time of final decree, it is found that plaintiff-A schedule is indivisible, necessary steps shall be taken under Partition Act and sale proceeds shall be divided equally between the plaintiff and D-1 to D-7. The gold items listed in Ex.B-3 shall be considered for purpose of arriving at the value of quantum of gold and in case of any difficulty in securing these items, necessary equities shall be worked out between the plaintiff and D-1 to D-7. He also found on issue No. 1 that the first defendant is the legally wedded wife of Late Prabhakar Rao Moule and D-4 and D-6 are entitled to claim their share in the joint family property and that second defendant is not entitled to receive the amount spent i.e. Rs. 40,000/- in paying decretal amount in E.P. No. 16/77 and Rs. 20,000/- towards the expenses for filing the appeal in the Supreme Court. He also held that the second defendant is not entitled to receive the expenditure incurred for purpose of filing the suits against the tenants. He found that the agreement under Ex.B-8 dated 28-12-76 is not binding on the other defendants. As regards the gold jewellery he found that the second defendant received the jewellery as per the list contained in Ex.B-3 from the Court and he continued to be in possession and therefore, he is liable to account for the value of this jewellery as per the list contained in Ex.B-3. Against which the present appeal is filed.

12. Before considering the issues raised in this appeal, it is necessary to consider a preliminary objection raised by the counsel for the appellant. It is contended that the 5th defendant who was one of the daughters of late Prabhakar Rao Moule though impleaded in the first instance later was deleted from the array of defendants. The 5th defendant being a necessary party to enable the Court effectively and completely to adjudicate upon and to settle all the questions involved in the suit, the deletion of the name of the 5th defendant will affect the suit and the plaint is bad for non-joinder of necessary party. Though such a plea was raised in the written statement, the learned Judge has not decided the issue. In support of the contention the learned counsel for the appellant relied on Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, ; Neelakantha

Pillai Ramachandran Nair Vs. Ayyappan Pillai Kumara Pillai, and Pasumarthi Subbaraya Sastri Vs. Mukkamala Seetha Ramaswami, and submitted that in view of non-joinder of a necessary party, the suit automatically gets dismissed. The counsel for the respondents submitted that though the 5th defendant was a party before the trial Court the suit was dismissed for non-payment of batta. However, while decreeing the suit the Court allotted a share to the 5th defendant. Further the legal representatives of the 5th defendant who passed away during the pendency of the appeal filed a petition under Order-I Rule-10 C.P.C. requesting the Court to implead them as parties to the appeal. In a suit for partition, a party can be impleaded at any stage as long as it does not affect the preliminary decree passed by the Court requiring reallocation of the shares. In this case, since the learned Judge allotted a share to the 5th defendant, the legal representatives of the 5th defendant are entitled to come on record and the suit is not liable to be dismissed. In support of their contention, the learned counsel relied on the following judgments in Bhagwan Swaroop and Others Vs. Mool Chand and Others, and B. Venkataperayya v. G. Adilakshmi 1971 (1) An.W.R. 94.

13. The question therefore, is whether the suit is liable to be dismissed in the absence of the 5th defendant who was a necessary party and whether in the appeal the legal representatives of the 5th defendant can be impleaded as parties under Order-I Rule-10 C.P.C.

14. In Kanakarathanammal's case (1 supra) the question that arose for consideration was whether in the absence of the brothers, a suit for recovery of property from the beneficiaries is maintainable. The facts in brief are that one Kanakarathanammal filed a suit for recovery of possession against the persons who claimed the properties under a will executed by the father of Kanakarathanammal. Kanakarathanammal claimed the property as belonging to her mother, and entitled to them exclusively under Sub-clause (i) of Clause (1) of Section 12 of the Mysore Hindu Law Women's Rights Act, 1933. The Court held that the property belonged to the mother of Kanakarathanammal and therefore, Kanakarathanammal is entitled to the property under the Act and that her father is not entitled to will away the property in favour of the beneficiaries under the will. It was also held that she is one of the three heirs on whom the suit property devolves by succession u/s 12 of the Act. The brothers of Kanakarathanammal are co-heirs along with Kanakarathanammal and, therefore they are necessary parties. Once, Kanakarathanammal and her two brothers are co-heirs with her in respect of the properties left intestate by their mother, the suit filed by Kanakarathanammal partakes of the character of a suit for partition and in such a suit Kanakarathanammal alone would not be entitled to claim any relief against the beneficiaries under the Will. It was observed that the estate can be represented only when all the three heirs are before the Court. "If Kanakarathanammal persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake." The Supreme Court while holding as above referred to a judgment of the Privy Council in Naba Kumar Hazra v.

Radhashyam Mahish (AIR 1932 P.C. 229).

15. In *Baman Chandra Acharya and Others Vs. Balaram Acharya and Others*, the Orissa High Court held that in a suit for partition co-sharers are necessary parties, an application for their addition cannot be allowed after the preliminary decree is passed except in certain exceptional circumstances such as pleading of transferees subsequent to the preliminary decree or death of parties whose rights were carved out in the preliminary decree. It has followed the judgment of the Supreme Court in *Venkata Reddy v. Pethi Reddy* (AIR 1963 S.C.902) wherein it was held that a preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must in so far as the matters dealt with by it are concerned be regarded as conclusive. It was also observed that no doubt, in suits which contemplate the making of two decrees, a preliminary decree and a final decree, the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. Similar is the view expressed by Kerala High Court (*supra*-2) wherein it was observed that:

"The impleadment of additional parties subsequent to the passing of the preliminary decree is permissible only if none of the questions already settled by the preliminary decree would have to be reopened by the Court as a consequence of such impleadment; the addition of parties can be allowed at that stage only on condition that the further proceedings to be taken in the suit will be only on the basis of the preliminary decree already passed, and none of the questions settled by the preliminary decree will be allowed to be reagitated on the ground that the person newly impleaded was not before the Court at the time of passing of the preliminary decree. As to whether or not the impleadment of a new party should be allowed on the aforesaid condition in the circumstances of a particular case will have to be considered by the Court on the merits of each case as and when the said question arises."

In *Subbaraya v. Seetha Ramaswamy* (3 *supra*) it was held that non-joinder of a necessary party or failure to implead defendant a necessary party in spite of such objection being taken at the very outset, results in the dismissal of suit

16. From the decisions referred to above it follows that in the absence of necessary party the suit deserves in its dismissal and that the addition of necessary party at any stage of the suit is permissible normally in cases where none of the questions settled by the preliminary decree will be allowed to be reagitated on the ground that the person newly impleaded was not before the Court; and in the case of the death of parties whose rights were already carved out in the preliminary decree and in the case of transferee subsequent to the preliminary decree.

17. As against the above in *Bhagawan Swaroop v. Moolchand* (4 *supra*) the Supreme Court took the view that addition of parties under Order 1 Rule 10 C.P.C is permissible in order to facilitate justice and further its ends. It is necessary to

refer to the facts in detail in this case.

18. A suit for partition and possession of undivided share was filed by the appellants against defendant No. 1 Sh. Ganesh Narain Mathur and defendant No. 2 Sh. Moolchand. A preliminary decree declaring the share of plaintiffs and defendants 1 and 2 was passed, against which the appeal was filed in the High Court of Rajasthan at Jaipur. During the pendency of the appeal the appellant Maharaj Swaroop died and his heirs as Legal Representatives were substituted. In this appeal, Ganesh Narain Mathur the original defendant No. 1 was impleaded as respondent No. 1. He died on 10th February, 1977. On 30th August, 1981 the second respondent i.e. original defendant No. 2 filed an application that original respondent No. 1 Ganesh Narain Mathur having expired on 10th February, 1977 and his heirs and legal representatives having not been substituted, the appeal abates as a whole. It was contended that the appellants were aware of the death of Ganesh Narain Mathur as they have participated in the funeral of Ganesh Narain Mathur and since they have not taken steps to bring on record the legal representatives of Ganesh Narain Mathur the appeal stands abated. At this stage, the appellants Maharaj Swaroop and others filed a petition under Order 22 Rule 4 CPC for substitution of the Legal Representatives of Ganesh Narayan Mathur. Meanwhile an application under Order 1 Rule 10 CPC was filed by one Prabhu Narain claiming as the son of deceased respondent No. 1 i.e. Ganesh Narain Mathur. The matter went up to Supreme Court as the High Court held the appeal as abated as the Legal Representatives were not brought on record within the period prescribed under the law. Under these circumstances, it was observed that:

"there is some force in the contention that when a specific provision is made as provided in Order 22 Rule 4, a resort to the general provision like Order 1 Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, this Court observed that a Code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up."

It is further observed that:

"In a suit for partition, the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties..... heirs of deceased respondent No. 1 then moved an application for being brought on record. If the application had been granted the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect a hyper-technical approach which if carried to end may result in miscarriage of justice."

Holding as above, the application filed by the respondent claiming to be the son of Ganesh Narain Mathur was allowed. It is true that Mr. Justice Amarendra Nath Sen was of a different view on the legal issue. However, having regard to the

peculiar facts and circumstances of the case, the learned Judge agreed with the conclusion arrived at by Justice D.A. Desai. The learned Judge observed that:

"with the passing of the preliminary decree shares of the parties are declared and rights of the parties pending the passing of the final decree are to an extent determined. As a result of the passing of the final decree certain rights do accrue to the parties subject to the result of the appeal filed.

The application made by the heirs of the deceased for substitution under Order 1 Rule 10 of the CPC is indeed misconceived and has been rightly held to be so by the High Court.....I have my doubts as to whether it is proper for this Court to interfere with such order passed by the High Court.

My learned brother is, however, of the view that in the facts and circumstances of this case, the orders of the High Court refusing to set aside the abatement and to bring the legal representatives on record should be set aside and the appeal should be heard on merits by the High Court.....Hearing of the appeal on merits, in the instant case, cannot cause any irreparable prejudice to the parties though there can be no doubt that partition proceedings will have to be unnecessarily prolonged."

In 1971 (1) An.W.R.5 (supra) a Single Judge of this Court observed that:

"Rules 3 and 4 of Order 22 of CPC do not specify as to who should file application for bringing the legal representatives of the deceased plaintiff or defendant on record..... Notwithstanding the fact that a plaintiff or appellant omits or fails to implead the proposed legal representatives as parties, the legal representatives are not barred from coming on record by themselves if they want to contest the suit or appeal on behalf of the deceased party."

It was also held that in a suit for partition the cause of action survives to the plaintiff to file a fresh suit for partition and thus:

"Indisputably the proposed defendants can be brought on record under Order 1 Rule 10 CPC as they are necessary and proper parties without whose presence there can be no effective and complete adjudication of the questions at issue".....

It was also observed that:

"the intendment of Order 1, Rule 10, Civil Procedure Code, and that of Order 22, Rules 3 and 4, Civil Procedure Code, being different and distinct and to meet different situations, the omission or failure to bring the proposed legal representatives on record, under Order 22 will not prevent them from being brought on record, under Order 1 Rule 10 Civil Procedure Code, if they happen to be necessary and proper parties to the suit"

From the above, it follows that the rules of procedure are designed to facilitate justice and further its ends; the approach of the Court should be to see that substantial justice is done between the parties and technical rules of procedure

should not be given precedence over, substantial justice in Court. Justice should be according to law and law has to be administered to advance justice. Even in cases relied on by the learned counsel for the appellant, the consistent view is as long as the preliminary decree does not require to be altered or reopened to the detriment of parties whose rights were already determined in the preliminary decree, the Courts can add parties at any stage of the proceedings. Moreover in a suit for partition the position of the plaintiffs and defendants is interchangeable, it is that each adopts the same position with the other parties. Therefore, the judgments referred to by the learned counsel do not lay down any different rule prohibiting the adding of parties at any stage provided it does not alter the preliminary decree already ordered. The failure to bring on record by a party the legal representatives of a deceased party does not prevent the legal representatives of the deceased from getting impleaded at any stage of the proceedings so long as the rights already concluded by the preliminary decree are not to be reopened.

19. In this case, it is no doubt true that the 5th defendant though impleaded, the suit was dismissed against her. A specific plea was raised in the written statement that absence of the 5th defendant was fatal to the suit. However, no steps were taken to pay batta and revive the suit against her. Therefore, the suit was dismissed for non-payment of batta. However, while passing the preliminary decree, the learned Judge allotted a share to the 5th defendant. The judgment of the lower Court is in conflict with the earlier dismissal of suit against the 5th defendant for non-payment of batta. When the appeal was taken up for hearing, the 5th defendant died. Therefore, the legal representatives of the 5th defendant filed a petition under Order 1 Rule 10 CPC to implead them in the appeal claiming the share of the 5th defendant. The Supreme Court in *Kanakarathanammal's* case (1 supra) was considering a case as to the effect of failure to implead a necessary party to the suit and in that context it was held that failure to implead a necessary party to the suit is fatal; and they were not "considering a case, where a petition is filed seeking to come on record as legal representatives of the deceased defendant in whose favour the suit was decreed, Further; in *Kanakarathanammal's* case (1 supra) she persisted on proceeding with the suit on the basis that she was exclusively entitled to the suit property, whereas in the present case the legal representatives i.e. legal representatives themselves of the 5th defendant have filed a petition to come on record to represent the estate or share of the 5th defendant. It is not a case under Order 22 Rules 3 & 4 but a case under Order 1 Rule 1 CPC. The Courts cannot refuse to implead them as parties when it is found that they are necessary and proper parties. The judgment in *Kanakarathanammal's* case (1 supra) is not relevant and distinguishable on facts.

20. Furtherance the suit was decreed and 5th defendant was allotted a share if the petition filed under Order 1 Rule 10 CPC is ordered, it does not bring any change in the preliminary decree already passed. Therefore, as pointed out by the Supreme Court in *Bhagavan Swaroop v. Mookhand* (4 supra) the Laws

procedure should be used for advancing justice and to further its ends. Admittedly the legal representatives of the 5th defendant are entitled to a share in the share of their mother i.e. 5th defendant allotted by the Court. They cannot be deprived of their share in the property by applying technical rules of procedure. Rules of procedure are hand maid of justice and should not be given precedence. It is true mat the suit against the 5th defendant was dismissed for non-payment of batta. However, the learned Judge allotted a share to the 5th defendant while disposing of the suit on merits and there is conflict between the judgment on merits and the dismissal of the suit for non-payment of batta. However the finding on merits will prevail over the dismissal of the suit for non-payment of batta. Therefore, the dismissal of the suit for non-payment of batta against the 5th defendant is set aside as it is in conflict with the preliminary decree. It is no doubt true that the legal representatives of the 5th defendant did not file a petition to set aside the dismissal order. However, in exerdse of the power u/s 151 CPC, the earlier order of dismissal is set aside. In view of the above, the preliminary objection raised by the learned counsel for the appellant is rejected and the legal representatives of the 5th defendant are added as parties to the appeal."

21. The main argument of the learned counsel for the appellant is that the first defendant is not the legally wedded wife of late Prabhakar Rao Moule and therefore, she is not entitled to any share in the properties belonging to Prabhakar Rao Moule. I have already pointed out that the learned Judge held that the first defendant is the legally wedded wife of Prabhakar Rao Moule and therefore, she is entitled to a share in the property belonging to Late Prabhakar Rao Moule. In support of this finding the learned Judge relied on the admission made by the second defendant in the cross-examination. The second defendant who was examined as D. W.6, admitted that his father had three wives including the first defendant. Relying on the admission made by D.W.6, the learned Judge held that she is the wedded wife of late Prabhakar Rao Moule and she is entitled to a share in the property. I do not see any reason to interfere with the said finding. Except the second defendant none of the parties to the suit disputed the factum of marriage of the first defendant with late Prabhakar Rao Moule. On the other hand, they all stated that she is the legally wedded wife of Prabhakar Rao Moule and she has immediately married their fattier after the death of the first wife of Prabhakar Rao Moule. Therefore, the finding given by the learned Judge is confirmed.

22. The next argument advanced by the learned counsel is that the fourth defendant who has changed his religion is not entitled to a share in the property. In support of their argument he brought to my notice Section 26 of the Hindu Succession Act, 1956 which reads as follows:

Section 26 Convert"s descendants disqualified:

Where before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or

her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens."

Except this provision no other provision is brought to my notice which disentitles the person who changed his religion to inherit the property of the father. A perusal of Section 26 makes it clear that it only disqualifies the children born to a person who converted into another religion. It protects the children who were Hindus at the time when the succession opens. If on the date of opening of succession a person remains to be Hindu, he is entitled to the rights conferred under the Hindu Succession Act.

23. In the present case, the evidence adduced is that Prabhakar Rao Moule died in the year 1975 and that the fourth defendant married a Muslim lady in the year 1977. D.W.6 did not state in his evidence that D-4 converted his religion prior to the death of his father. Therefore, as on the date when Prabhakar Rao Moule died i.e. in 1975 on which date the succession opened the fourth defendant remained as Hindu and he has not converted himself to Islam religion. Therefore, he is entitled to a share in the property belonging to Prabhakar Rao Moule. I agree with the view expressed by the learned Judge on this issue.

24. The next contention of the learned counsel for the appellant is that the 6th defendant is not the daughter of late Prabhakar Rao Moule but she was brought up by him as his eldest daughter. The learned Judge relying on Ex.B-5 School Leaving Certificate issued by the Education Department dated 25-10-54 wherein the 6th defendant was mentioned as the daughter of Prabhakar Rao Moule, held that the 6th defendant is the daughter of Prabhakar Rao Moule and therefore, she is entitled to a share in the property. None of the parties to the suit, except the second defendant have stated that the sixth defendant is not the daughter of Prabhakar Rao Moule. The finding arrived at by the learned Judge is based on authenticated, admissible and relevant evidence and therefore, I do not see any reason to interfere with the same. The said finding is confirmed.

25. The next argument advanced by the learned counsel for the appellant is that the appellant incurred expenditure for purpose of releasing the Gold jewellery under attachment in the Court and paid about Rs. 40,000/- and he also incurred another amount of Rs. 20,000/- for purpose of prosecuting the matter in the Supreme Court and therefore, he is entitled for reimbursement of the said amount. He also contended that the gold jewellery which he got released from the Court was entrusted by him to the respondent and the respondent is liable to account for the same.

26. The learned Judge held that the Appellant-second defendant has not adduced any evidence in support of his claim that he spent about Rs. 60,000/- for purpose of releasing the gold jewellery which were under attachment in the Court and for the purpose of prosecuting the SLP in the Supreme Court and therefore, he is not entitled for any relief. He also found that the case of the

second defendant, that he entrusted the gold jewellery which he got released from the Court to the plaintiff, is not based on any evidence; and since he took delivery of the gold from the Court on 8-9-77 and since there was no evidence that he has entrusted the gold to the plaintiff, he is liable to account for the same.

27. The argument of the learned counsel for the appellant is that the first respondent was in occupation of the house and was collecting the rents and that he (the appellant) spent Rs. 40,000/- for getting the jewellery released from attachment and Rs. 20,000/- for purpose of prosecuting the appeal in the Supreme Court against Dinshawji Italia and therefore, he is entitled for reimbursement of this amount. As regards the right of the appellant for reimbursement of the amount, the burden is on him to establish that he actually spent Rs. 60,000/- from out of his pocket or that he borrowed the same from any Financial Institution or Bank. Except oral evidence, there is no other documentary evidence in support of the claim that he spent Rs. 60,000/-. On the other hand, in his evidence, he stated that he is managing the suit property as "Karma" of their family. He saved the property in the execution proceedings in E.P.No. 16/77 as the property was attached in pursuance of a mortgage and which was about to be sold by the Court. He no doubt said that he paid at that time Rs. 40,000/- towards settlement of decree and saved the property. But he says that his father was alive actually when the same suit was decreed by the High Court and his father preferred an appeal in the Supreme Court. He further says that he filed suits against defaulting tenants namely P. Vaidyanathan, Harinam Singh, K.B.R. Naidu, Premalatha and K.S.R. Desai not only for eviction but for recovery of arrears of rent. He reiterates that he was the Kartha of the family and that after the death of his father, he managed the property as Kartha and he was receiving rents from the tenants. No doubt he also says that in his absence, the plaintiff and other defendants were also collecting rents from the tenants. He gives particulars of rents paid by various tenants. He also initiated various proceedings not only for the recovery of rents but for eviction. Unless the appellant was collecting rents from various tenants, he could not have taken steps to initiate proceedings either for recovery of arrears of rents or for eviction of the tenants. The very fact that he was initiating proceedings against the tenants establishes that he was collecting the rents from various tenants. According to his own admission, he received an amount of Rs. 1,200/- towards rents though immediately he says that he does not remember how much was the total rents received by him. Therefore, from the evidence of the appellant, it is clear that he was managing the property as Kartha and he was receiving the rents which even according to him was Rs. 1,200/- per month. He says that right from 1975 after the death of his father, he was managing the property as Kartha. The suit was filed in 1978. From the evidence it is evident that he was receiving rents from the tenants. There is no documentary evidence as stated by the learned Judge that he spent money for getting the jewellery released from his pocket or that he borrowed the same from any financial institution. On the other hand, there is evidence that he is receiving rents from the tenants. Therefore,

the appellant failed to establish that he spent Rs. 40,000/- & Rs. 20,000/- for purpose of fighting litigation in the High Court and also in Supreme Court. Therefore, he is not entitled for reimbursement of the said amount.

28. The next contention of the learned counsel for the appellant is, after getting the jewellery released from the Court, he entrusted the same to the plaintiff and in support of the entrustment he relied on Ex.B-10. He admitted in his evidence and also in the documentary evidence that he received the jewellery on 8-9-77. He also states that he does not remember that anybody was present when he handed over jewellery to the first respondent. He admits that no witness signed on Ex.B-10 to show that anybody was present at that time. Ex.B-10 does not refer to handing over any articles and specific items of jewellery to the first respondent. The first respondent denied his signature on Ex.B-10. The appellant also admitted that the first respondent was only 23 years when he handed over the jewellery to him. It is something strange to believe the version of the appellant that after collecting jewellery from the Court he handed it over to the first respondent who was only 23 years old. To prove that he handed it over to the plaintiff, he examined his wife as D.W.7 whose evidence does not inspire any confidence. Ex.B-10 creates doubt as to the signature of the first respondent. The contention that there was a compromise between the appellant and the first respondent in view of which he entrusted gold to the first respondent cannot be accepted as it is not only binding on other respondents but also in view of lack of evidence of actual entrustment.

29. Under these circumstances, the appellant failed to establish that he handed over the jewellery collected from the Court to the first respondent. Hence, there is no other alternative except to direct the appellant to account for the same.

30. It follows from the above that the appeal has no merit and it is accordingly dismissed with costs.