
(1990) 11 MAD CK 0072
In the Madras High Court

Sundarambal and Others

APPELLANT

Vs

Deivanaayagam and Others

RESPONDENT

Date of Decision : 13-11-1990

Acts Referred:

Hindu Succession Act, 1956 — Section 6

Citation : (1991) 1 LW 97 : (1991) 2 MLJ 199

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—Plaintiffs in O.S. No. 192 of 1977 on the file of the District Munsif, Cuddalore, are the appellants in both the appeals. They filed the suit for declaration of the 1st plaintiffs title to A schedule property and for recovery of possession of the same besides partition and separate possession of 4/6th share in B schedule properties. The trial Court granted a decree declaring the first plaintiffs title to the A schedule properties and holding that the plaintiffs were entitled to 4/18th share in B schedule properties except in item No. 6 and directing a division thereof. There was an appeal by defendants 1 and 2 in the Court of Subordinate Judge, Cuddalore, in A.S. No. 142 of 1979 and another appeal by defendants 3, 4 and 6 in A.S. No. 143 of 1979. The Subordinate Judge allowed AS. No. 142 of 1979 in part and held that the first plaintiff was entitled only to 1/3rd share in the A schedule property and recovery of possession thereof. He dismissed the said appeal in other respects. The learned Subordinate Judge allowed Appeal No. 143 of 1979 and modified the decree of the lower court granting equity claimed by defendants 3, 4 and" 6 in the properties purchased by them.

2. Though the plaintiffs could have filed one second appeal and questioned the judgment of the lower appellate court, the plaintiffs have chosen to file two second appeals. As they relate to the same subject matter, they were heard together and a common judgment is being delivered now.

3. The first question relates to the share of the plaintiffs in A Schedule

properties. Before proceeding further, I must set out the relationship of parties. The first plaintiff is the second wife of one Velayutha Padayachi and plaintiffs 2 to 4 are her daughters. Defendants 1 and 2 are the sons of Velayutha Padayachi through his first wife. Defendants 3 to 6 are alienees of some of the suit properties from defendants 1 and 2.

4. The case of the plaintiffs is that the A schedule property belonged to Velayutha Padayachi absolutely and exclusively and he has settled the same on the plaintiffs by a registered deed dated 27.8.1955 marked as Ex. A-1. The contention of the defendants is that A schedule property was joint family property and the settlement deed was null and void. While the trial Court accepted the case of the plaintiffs, the lower appellate court has accepted the case of defendants, and granted a decree for 1/3rd share which according to the lower appellate court belonged to Velayutha Padayachi.

5. The evidence relating to A Schedule properties let in, by the plaintiffs comprised of the oral evidence of P.Ws. 1 and 2 and Exs. A-1 to A-3. Ex. A-1 is the registered settlement deed in which there is a clear recital that the property belonged absolutely and exclusively to the settlor Velayutha Padayachi. Nothing is suggested on the side of the defendants as to why Velayutha Padayachi should insert a false recital in Ex. A-1 and treat the property as his exclusive, property as against his sons. The recital in the document which was executed about 21 years prior to the death of Velayutha Padayachi will have great weight in the matter of consideration of the character of the properties.

6. Ex. A-2 is the notice issued by the first plaintiff to defendants 1 and 2 on 12.8.1974, claiming exclusive right to A Schedule property as the settlee under Ex. A-1. A reply notice was issued by defendants 1 and 2 under Ex. A-3 dated 17.9.1974. There is no claim in Ex. A-3 that the A schedule properties were joint family properties and that the settlement in favour of the first plaintiff was not valid. On the other hand, the express recital in paragraph 1 of Ex. A-3 is as follows:

It is true that your client is a legally wedded wife of my clients' father Velayutha Padayachi and also admits the settlement deed mentioned in your notice with regard to the properties mentioned in A schedule.

In the second paragraph of Ex. A-3, it is stated that as per the settlement deed, the first plaintiff did not have absolute right over the properties mentioned in A schedule, but She had only a life estate and that after her death, the properties would go to defendants 1 and 2. Thus in Ex. A-3, there is a clear admission that the settlement deed in favour of the plaintiffs was valid. The defendants cannot take a directly contrary stand in the written statement and contend that A schedule properties were joint family properties and that the settlement deed was not valid. The learned appellate Judge has not chosen to consider the effect of the recitals in Ex. A-3 though he has made a reference to the document and the admission of the defendants to the factum of the first plaintiff being the

legally wedded wife and the settlement deed. The judgment of the learned appellate Judge is clearly vitiated by his failure to give effect to Ex. A-3.

7. The learned appellate judge has taken the view that the first plaintiff giving evidence as P.W. 1 admitted the fact that her father-in-law owned 10 acres of land and her deceased husband was his only son. The learned Judge proceeds to state that P.W. 1 was not able to say as to how her husband got A schedule properties and the burden was on her to prove that it was the exclusive property of Velayutha Padayachi as she admitted the existence of joint family properties owned by her father-in-law. The reason, to say the least, is wholly untenable if not absurd. Once the truth of the settlement deed is accepted, the recitals therein should be given due weight. When it is declared by Velayutha that the properties covered by the settlement deed were his exclusive properties, the burden is on the defendants to prove that the recital in the settlement deed was a false one and the properties were really ancestral properties or joint family properties. The defendants have failed to produce any relevant evidence to prove the same. The mere existence of some ancestral properties with Velayutha's father would not lead to the conclusion that the A schedule properties were acquired with the income from the ancestral properties or by the sales of ancestral properties. No evidence has been produced by the defendants to show the income from the ancestral properties so as to hold that there was adequate nucleus to enable Velayutha to purchase A schedule properties with the aid of joint family funds. In the absence of any such evidence it has to be held that the A schedule properties were the exclusive properties of Velayutha and the settlement deed in favour of the plaintiffs was valid in law.

8. Consequently, the decree declaring that the first plaintiff is entitled only to 1/3rd share in the A schedule properties is set aside and the decree and the judgment of the trial court with regard to A schedule properties declaring the exclusive right of the plaintiffs are restored.

9. Turning to the B schedule properties which are admittedly joint family properties, the plaintiffs have claimed 4/6th share. The Courts below have rightly held that the plaintiffs will be entitled only to 4/18th share, as u/s 6 of the Hindu Succession Act, the share of Velayutha in the joint family properties has to be ascertained, as if a division took place immediately prior to his death. If that is done Velayutha's share therein was only 1/3rd and all the plaintiffs and defendants 1 and 2 are entitled to a share in the said 1/3rd, each being entitled to 1/6th share thereof. Thus each plaintiff got 1/18th share and all the four of them together got 4/18th share.

10. There is no substance in the contention of learned Counsel for the appellants that the provision for equity in favour of the alienees made by the appellate Judge is erroneous. It is not the case of the appellants that the alienations in favour of defendants 3 to 6 are not supported by any consideration at all. Hence the provision made for equity is certainly valid. The question to be considered at the time of final decree proceedings is whether the properties purchased by

defendants 3 to 6 can be allotted to the shares of defendants 1 and 2 without causing any prejudice to the shares of plaintiffs. If such an allotment cannot be made, certainly the alienees will not be entitled to claim equity. The court will have to find if an allotment can be made on that basis and if so the alienees will be entitled to have such properties allotted to the shares of their alienors.

11. The matter does not stop there. During the pendency of these second appeals, Tamil Nadu Act 1 of 1990 has come to be passed effecting an amendment to the Hindu Succession Act, 1956, in its application to the State of Tamil Nadu. Sections 29-A to 29-C are introduced by the amendment Act. u/s 29-A, the daughter of a coparcener shall become by birth a coparcener in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship. Such of her rights are subject to the liabilities and disabilities in respect of such properties as a son.

12. Relying on the provisions of the Amendment Act, the appellants have filed C.M.P. No. 13561 of 1990 for permission to raise additional grounds in the second Appeal No. 1130 of 1981. The proposed additional ground is that the 4th appellant has become entitled to a larger share in B schedule properties on par with her brothers, respondents 1 and 2, by virtue of Section 29-A of the Hindu Succession Act. As it is a question of law depending only on the existing materials on record, the permission sought by the appellants is granted. The appellants are permitted to argue that the 4th appellant has become entitled to a larger share by virtue of the amendment to the Hindu Succession Act.

13. The contention of learned Counsel for the appellants is that after the amendment to the Hindu Succession Act, the 4th plaintiff who remains unmarried will be entitled to a share equal to that of respondents 1 and 2. In other words, she will be entitled, according to learned Counsel for the appellants, 7/24th share and respondents 1 and 2 will be entitled to 7/24th share each. Learned Counsel places reliance on two judgments of Andhra Pradesh High Court in I. Pulla Reddy v. Sashi Reddy (1987) 2 A.L.T. 210 and S. Narayana Reddy and others Vs. S. Sai Reddy, . In both the cases, the Andhra Pradesh High Court has taken the view that the Andhra amendment would apply to pending proceedings and the daughters would be entitled to claim a larger share because of the amendment. While in the former case, the question arose at the preliminary decree stage, in the latter, the question arose after the preliminary decree became final, in the sense that the proceedings for passing a final decree were only pending and the correctness of the preliminary decree was beyond dispute at that stage. There is no doubt that if the later judgment of the Andhra Pradesh High Court is applied to this case, the 4th plaintiff will be entitled to a higher share as claimed by her now. But I find it difficult to accept the reasoning of the Andhra Pradesh High Court. Before referring to the judgments of the Andhra Pradesh High Court in detail, it is necessary to refer to the provisions contained in the amendment Act and consider them in the light of first principles and

settled principles of Hindu Law.

14. Section 1 of Tamil Nadu Act I of 1990 clearly states that the Amendment Act shall be deemed to have come into force on the 25th day of March, 1989. The Act received the assent of the President on the 15th January, 1990. The date mentioned in Section 1 is the date on which the Bill was introduced in the Assembly. The Legislature intended that the Act is deemed to have come into force on the date on which the Bill was introduced in the Assembly and not on any earlier date. Hence the retrospective effect of the Amendment Act as set out by Seal thereof extends only up to 25th March, 1989 going backwards from the date on which the Act received the assent of the President. The provisions introduced by the Amendment Act have to be considered in the light of the aforesaid provision fixing the date on which the Amendment Act is deemed to have come into force.

15. Section 29-A as introduced by the Amendment reads as follows:

29-A. Notwithstanding anything contained in Section 6 of this Act,-

(i) in a joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu family the coparcenary property shall be divided as to allot to a daughter the same share as is allottable to a son:

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter:

Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child, of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter, as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of Clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) nothing in this Chapter shall apply to a daughter married before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989;

(v) nothing in Clause (ii) shall apply to a partition which had been effected before the date of the commencement of the Hindu Succession (Tamil Nadu

Amendment) Act, 1989.

Under Sub-clause (1), the daughter of a coparcener shall become a coparcener in her own right by birth, thus enabling all daughters of a coparcener who were born even prior to 25th March, 1989 to become coparceners. In other words, if a male Hindu has a daughter born on any date prior to 25th March, 1989, she would also be a coparcener with him in the joint family when the Amendment came into force. But the necessary requisite is, the male Hindu should have been alive on the date of the coming into force of the Amendment Act. The section only makes a daughter a coparcener and not a sister. If a male Hindu had died before 25th March, 1989, leaving coparcenary property, then his daughter cannot claim to be a coparcener in the same manner as a son, as, on the date on which the Act came into force, her father was not alive. She had the status only as a sister vis-a-vis her brother and not a daughter on the date of the coming into force of the Amendment Act. Clause (4) excludes daughters married before the date of commencement of the Amendment Act i.e., 25th March, 1989. Clause (5) protects partitions which had been effected before 25.3.1989. The position u/s 29-A will reduce to this. All daughters of a male coparcener will become coparceners entitled to a share with him, if the coparcener had been alive on 25.3.1989. Even among such daughters if any daughter has been married before 25.3.1989, she will not be entitled to claim a share as a coparcener. If there had been a partition in the family before 25.3.1989, that partition will not be affected by the provisions of the Amendment Act. In that event also, the daughter of a coparcener will not be entitled to claim a share as coparcener from the date of her birth and reopen the partition already effected.

16. This interpretation is necessitated in view of two circumstances. The first is that the Amendment Act expressly prescribes the date of commencement as 25.3.1989. Thus the Act will have prospective effect from 25.3.1989 and cannot have any retrospective effect prior to that date. The second aspect is, if an unmarried daughter is given a share in the property of a coparcener who died before 25.3.1989, it will lead to an anomalous situation of reducing the share which has already vested in a married daughter or the widow or the mother of the deceased coparcener. This can be explained clearly by giving an illustration. "A", a male Hindu having an interest in coparcenary property dies before 25.3.1989 but after the passing of the Hindu Succession Act, 1956, leaving his mother, wife, a son and a daughter. According to Section 6 of the, Hindu Succession Act, a partition should be deemed to have been effected just prior to the death of "A" for ascertaining the interest of "A" in the coparcenary property. Thus, he would have had a half share, the other half belonging to his son. In that half share of "A" his mother, wife, son and daughter will each get 1/4th. The before, on the death of "A", his mother gets 1/8th, his wife gets 1/8th, his daughter gets 1/8th, and his son gets a total of 5/8th share. If Section 20-A is made applicable to the case, the daughter is to be treated as a coparcener equal to a son and her share will become $\frac{1}{3} + \frac{1}{4}$ th of $\frac{1}{3}$ i.e., $\frac{1}{3} + \frac{1}{12}$ equal to $\frac{5}{12}$ th. The son's share will get reduced to $\frac{5}{12}$ th from $\frac{5}{8}$ th. As a necessary

consequence, the shares of the mother and the widow will get reduced to 1/12th each from 1/8th. There is nothing in the Amendment Act to warrant such reduction of shares already vested.

17. Another illustration may also be given. "A" died after 1956 and before 25.3.1989 leaving two daughters and a son. One of the daughters gets married after the death of "A" but before 25.3.1989. Under the Act as it stood before the amendment, each daughter got 1/6th share in the coparcenary property. If the amendment is applied, the share of the married daughter will get reduced to 1/9th, while the share of the unmarried daughter will increase to 4/9th. The Legislature has not contemplated any such reduction, in the share of the female heirs vested in them already under the provisions of the Hindu Succession Act, 1956, before the passing of the Amendment Act. At any rate, there is nothing in the Amendment Act or in the provisions introduced in the main Act by the Amendment Act to warrant such a conclusion. The object of the Amendment Act is itself to enhance the share of a female heir and raise her status to that of a coparcener. While doing so, the Legislature excluded the daughters who are already married.

18. The position in law that female heirs of a Hindu Mitakshara coparcener referred to in Section 6 of the Act get definite shares on the death of such coparcener vested in them, has been clearly set out by the Supreme Court in Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, . Adverting to the assumption of a partition under Explanation 1 to Section 6 of the Act, the Supreme Court observed thus:

In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to separate the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional that 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 that property had taken place immediately before his death. What is the before required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle : All the consequences which flow from a real partition have to be logically worked out,

which means that the share of the heirs must be ascertained on the basis that they had separated, from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a Concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

The Supreme Court reiterated the same in *Smt. Raj Rani Vs. Chief Settlement Commissioner, Delhi and Others*, .

19. It is impossible to imagine that the State Legislature intended to divest the female heirs in whom definite shares had already vested of a portion thereof and reduce the quantum considerably. The before, the only harmonious interpretation of Section 29-A that will be in consonance with the other provisions of the Act is that the daughter of a coparcener can become a coparcener only if her father is alive on 25.3.1989. She can become a coparcener only with her father and not with her brother if her father had already passed away before the Amendment Act came into force.

20. In the present case, the father of the 4th appellant, namely Velayutha, died in 1976 even before the suit was filed. Hence the 4th appellant cannot claim that she has become a coparcener with her deceased father and entitled to a share equal to that of respondents 1 and 2.

21. I am of the view that Clause (5) of Section 29-A will also stand in the way of the 4th appellant claiming a larger share in the joint family properties in the present case. The preliminary decree has been passed in the suit on 26.2.1979, long before the Amendment Act came into force. The quantum of shares of the parties has been crystalised by the preliminary decree. There is no challenge by anybody against the said part of the preliminary decree. The only challenge by defendants 1 and 2 was with regard to "A" schedule property. The other challenge was by the alienees who claimed only equity and they did not question the shares of the appellants herein. Thus the preliminary decree had become conclusive with regard to shares of the parties herein. Under the preliminary decree, each of the plaintiffs is entitled to 1/18th share in "B" schedule properties. If the present contention of the 4th appellant is accepted, the shares of plaintiffs 1 to 3 who are appellants 1 to 3, will get disturbed. That cannot be done in view of the fact that their shares do not form part of the subject matter of appeal. They are not being questioned in these appeals. Hence there is no way for this Court to reduce the shares of appellants 1, to 3. The 4th plaintiff cannot the before claim a larger share, thus reducing the shares of appellants 1 to 3.

22. Even otherwise, under Clause (5) any partition effected before the date of commencement of the Amendment Act shall not be disturbed because of the amendment. The question is whether it can be said in this case that a partition had been effected by the preliminary decree on 26.2.1979. Under the Hindu Law, a partition is effected once there is a division in status. There is no necessity for effecting a partition by metes and bounds to say that there is a partition of joint family under the Hindu law. On such a division, the coparceners become tenants-in-common with definite shares. In Appovier alias Seetaramier v. Rama Subba Aiyar and Ors. 11 M.I.A. 75 the Privy Council held that the division in status converts a joint tenancy into a tenancy-in-common even if there is no division of the properties actually. The relevant passage reads thus:

It is necessary to bear in mind the two-fold application of the word "division". There may be a division of right, and there may be a division of property; and thus, after the examination of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

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Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the status of the family quoad this property. The produce is no longer to be brought to the common chest, as respecting the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares. Thus using the language of the English law merely by way of illustration the joint tenancy is severed and converted into a tenancy in common. Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

...

It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

23. The principle was reiterated by the Privy Council in Balkishan Das and Ors. v. Ram Narain Sahu and Ors. 30 I.A. 139. The Privy Council extracted the following statement of law found in the judgment of the High Court:

The question is not whether there was a separation by metes and bounds, but a separation in estate and interest; for that would have the same legal effect, so far as altering the status of the family was concerned, as a partition by metes and bounds.

The Privy Council approved of the above statement of law by observing thus:

Their Lordships entirely agree in the last-quoted passage from the judgment of the High Court, and they think it expresses accurately the effect of the decision in *Appovier alias Seetaramier v. Rama Subba Aiyar* 11 M.I.A. 75

24. Again the question arose with reference to an after-born son before the Privy Council in *Bhagwat Ram v. Ramji Ram* (1974) 2 M.L.J. 67 The Privy Council held that the law is well settled that a son begotten as well as born after the partition, where a share has been allotted to the father, is not entitled to have the partition re-opened and to claim a re-distribution of the shares and that he is only entitled to succeed to his father's share and to his separate and self-acquired property to the exclusion of the divided sons. The Privy Council held that the fact that the partition had not been completed by the actual division of the estate by metes and bounds prior to the birth of such after-born son cannot affect the quantum of share to which the other members had already become entitled, in so far as their rights are concerned, partition had already taken place and their shares cannot be diminished by the subsequent birth of a son.

25. That principle will certainly apply to present case. Though the daughter is actually born before 25.3.1989 and on that date cannot be considered to be an after-born coparcener, her position in law will be analogous to that of an after-born son claiming a share in the joint family property after a partition had been effected before the Amendment Act came into force. Hence in this case, a partition having been effected by the preliminary decree in which the shares of the parties are definitely quantified and crystalised, it is not open to the 4th plaintiff to claim the benefits of the Amendment Act 1 of 1990 and contend that she will be entitled to a larger share, as, in my view, she is precluded by Clause (5) of Section 29-A. The words "Partition effected" found in Clause (5) should be understood in the sense in which they are understood in Hindu Law and it should be held in this case that a partition had been effected prior to the coming into force of the Amendment Act.

26. With regard to the effect of a division in status, a Division Bench of this Court had occasion to consider in *Kurapati Radhakrishna v. Kurapati Satyanarayana* I.L.R 1949 Mad. 229 It was held that except in the case of an agreement constituting a re-union, it is not open to a member of a Hindu coparcenary governed by Mitakshara law to revoke or withdraw an unambiguous intention to separate communicated to the other members, after such communication and a suit for partition filed by an adult coparcener, in which the plaint contains a clear and unambiguous expression of an intention that he wishes to treat himself as a divided coparcener from the date of its filing and in which summonses have been

served on the other coparceners, effects a division in status between the plaintiff and the defendants, though the suit is withdrawn subsequently. The Division Bench observed that the expression of an intention to separate by an adult coparcener is not revocable after it is communicated to the other coparceners. This is an *a fortiori* case, as a preliminary decree has been passed by the Court long before the Amendment Act came into force.

27. The Supreme Court had occasion to consider the effect of a preliminary decree for partition in *Venkata Reddi and Others Vs. Pothi Reddi*, . The relevant passage in the judgment of the Supreme Court reads thus:

A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the CPC as permit its reversal modification or amendment. Similarly, a final decision would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. 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. 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. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the CPC which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

28. If the above dictum of the Supreme Court is applied to the present case it is clear that the preliminary decree has become conclusive in so far as the shares of the parties are concerned. The only questions which are pending in the second appeals relate to the character of "A" schedule properties and equities claimed by the alienees. Hence, I hold that a partition has been effected in this case by the preliminary decree within the meaning of Clause (5) of Section 29-A and it cannot be disturbed by the 4th appellant claiming benefits under Tamil Nadu Act 1 of 1990.

29. The character of partition under Hindu Law is clearly brought out in N.R. Raghavachariar's *Hindu Law - Principles and Precedents - Eighth Edition* - at page 309. The relevant portion reads as follows:

329. What is partition : its distinctive marks - In a Hindu joint family governed

by the mitakshara law there is unity of ownership of the family property and commensality of its enjoyment. Cesser of this unity and commensality means cesser or severance of joint family status or partition irrespective of whether it is accompanied or followed by the division of properties by metes and bounds *Krishnabai v. Appasaheb* AIR 1979 S.C. 1888 According to the true notion of an undivided family in Mitakshara law, no individual member of that family whilst it remains joint and undivided can predicate of the joint and undivided property that he, that particular member has a certain definite share, half, one-third or one-fourth *Appovier alias Seetaramier v. Rama Subba Aiyan* 11 M.I.A. 75, 89 Partition according to that law consists in defining that share, in a numerical division of the property. An actual, division of the Shares by metes and bounds is not necessary *Ibid : Ram Pershad v. Lakhpati* ILR 30 Cal 231 .

In Hindu Law Partition does not mean simply division of property into specific shares. It covers both division of title and division of property. *Vijnaneswara* defines the word "vibhaga" which is usually rendered into English by the word "partition" as the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate (*Mitak.*, i 1-4) *Mitra Misra* explains in the *Viramitrodaya* the meaning of this passage; he shows that the definition of *Vijnaneswara* does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals who claim the heritage jointly. He says "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as the means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares (*Viramitrodaya*, 1-36). Nowhere in the mitakshara is it stated that an agreement between all the coparceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until all of them attained majority, a position which is expressly combated and negatived in the *Viramitrodaya*. In fact later writers leave no room for doubt that separation, "which means the severance of status of jointness, is a matter of individual volition. For example, *Nilakanta*, the author of the *Vyavahara Mayukha* expressly lays down that "even where there is a total absence of common property, partition is effected by The mere declaration, "I am separate from the e" for, partition is a particular condition of the mind, and the declaration is the indication of the same." The following gloss in the *Viramitrodaya* appears to be conclusive on the rule of law under the mitakshara. "Here again" it says "partition at the desire of the sons| which expression includes grandsons and great-grandsons "whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction *Observations of Amir Ali Girija Bai v. Sadashiv* 43 I.A. 151 : 31 M.L.J. 455 : 4 L.W. 114 : AIR 1916 P.C. 104 : 48 C. 1031 : 37 I.C. 321 : 14 A.L.J. 822 : 18 Bom.L.R. 621 : 20 C.W.N. 1085 "Separation from the joint family

involving the severance of the joint status so far as the separating member is concerned with all the legal consequences resulting there from is quite distinct from the de facto division into specific shares of the property held until then jointly. The first is a matter of individual decision whilst the other is the natural resultant from that decision. Thus an unequivocal and unmistakable manifestation by a member of a joint family by his words or conduct of a fixed and determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place or though there is no separation in food and dwelling *Amritrao v. Mukundrao* 13 L.W. 112 : 1919 P.C. 91 *Yadao v. Ramdeo* 49 C. 1 : 48 I.A. 513 : 42 M.L.J. 219 : 20 A.L.J. 481 : 26 C.W.N. 393 : 24 Bom.L.R. 609 : AIR 1922 P.C. 216 *Syed Kasam v. Jorawar Singh* 43 M.L.J. 676 : 50 C. 84 : 17 L.W. 223 : 49 I.A. 358 : 1922 25 Bom.L.R. 1 : 21 A.L.J. 57 : 27 C.W.N. 179 : AIR 1922 P.C. 353 *Ramalinga Annavi v. Narayana Annavi* 43 M.L.J. 428 : ILR 45 Mad. 489 : 49 I.A. 168 : 1922 M.W.N. 199 : 26 C.W.N. 929 : 20 A.L.J. 839 : 16 L.W. 639 : 24 Bom.L.R. 1209 : AIR 1922 P.C. 201 *Girija Bai v. Sadashiv* 43 I.A. 151 : 31 M.L.J. 455 : 4 L.W. 114 : AIR 1916 P.C. 104 : 48 C. 1031 : 37 I.C. 321 : 14 A.L.J. 822 : 18 Bom.L.R. 621 : 20 C.W.N. 1085 *Suraj Narain v. Iqbal Narain* 24 M.L.J. 345 : 35 A. 80 : 40 I.A. 40 : 15 Bom.L.R. 456 : 17 C.W.N. 333 : 11 A.L.J. 172 : 1913 M.W.N. 183 : 18 I.C. 30, (P.C) *Kawal Nain v. Budh Singh* 33 M.L.J. 42 : ILR 39 All. 496 : 44 I.A. 159 : 15 A.L.J. 581 : 19 Bom.L.R. 642 : 21 C.W.N. 986 : 1917 M.W.N. 514 : 6 L.W. 330 : AIR 1917 P.C. 39 See also *Narayan v. Mahadeorao* 1971 M.P.L.J. 239 *Fatachand Manes v. State of West Bengal* 76 Cal. W.N. 137 *Raghunath Kar and Others Vs. Gajendra Kar and Others*, , *Nabisha Begum Vs. Arumuga Thewar and Others*, , *Wasudeo v. State of Maharashtra* 1975 Mah.L.J. 404 *Asa Nand and Others Vs. Baldev Raj and Another*, , *Tarapada Ray v. State of West Bengal* 82 Cal. W.N. 331 *Parasumanna Lakshmanier Vs. P.L. Krishnamachary and Others*, . It is no requirement of a valid partition that there should be an actual division by metes and bounds *Commissioner of Income Tax, Poona Vs. Shiolingappa Shankarappa Mendse and Bros.*, . Once there is a definite and unmistakable indication of a member to separate, his rights to obtain and possess his share is unimpeachable, and neither the co-sharers can question it nor can the Court to examine his conscience to find out whether his reasons for separation were well founded or sufficient *Girija Bai v. Sadhashiv* 31 M.L.J. 455 : 4 L.W. 114 : A.I.R 1916 P.C. 104 *Of Smt. Lila Wati and Others Vs. Paras Ram and Others*, (where there was partition by mutation of names it is immaterial if the motive is to defeat creditors).

Again it is stated in the same paragraph that

Partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severality...on partition each sharer has a right to a slice of the property, not merely to its money value.

Thus, on a partition by severance in status, the sharers obtain definite rights in

the properties which are quantified and crystalised. It does not matter if the properties are not actually divided and the portion allotted to them are not handed over to them.

30. Now I will advert to the two judgments of the Andhra Pradesh High Court. In *I. Pulla Reddy v. I. Seshi Reddy* (1987) 2 A.L.T. 210 a suit for partition was filed by the son and the daughter of the first defendant. The suit was dismissed by the trial court and the plaintiffs filed an appeal. While the plaintiffs' case was that all the properties were coparcenary properties, the defendants pleaded that there was a prior partition on March 31, 1974 and the plaintiffs were not entitled to maintain the suit for partition. The trial court disbelieved the prior partition set up by the defendants, but dismissed the suit on the ground that it was not in the interest of the minors to effect a partition. The second defendant in the suit was the father of the 1st and 3rd defendants. He died during the pendency of the appeal. His widow and two daughters were impleaded as legal representatives. During the pendency of the appeal, the Andhra Pradesh Hindu Succession Amendment Act came into force and it contains provisions almost ad idem with the provisions now found in the Tamil Nadu Amendment Act. In fact, the Tamil Nadu Amendment Act has taken the clue only from the Andhra Pradesh Act. The question which arose before the Andhra High Court was whether the daughters of the deceased coparcener, namely the 2nd defendant, were entitled to claim a share and whether one of the plaintiffs who was the daughter of the first defendant was entitled to claim a share under the provisions of the Amendment Act. The court held that the Amendment Act would apply to pending proceedings and accordingly granted the prayers made by the parties and passed a preliminary decree for partition. Even according to my interpretation found above, the daughters of the 1st and 2nd defendant in that case are entitled to claim as coparceners just like the sons. That judgment does not help the 4th appellant in this case.

31. In the other case before the Andhra High Court, namely *S. Narayana Reddy and others Vs. S. Sai Reddy*, an application was filed by the plaintiff for passing a final decree in terms of the preliminary decree. The preliminary decree was passed declaring 1/3rd share of the plaintiff in the suit properties. The first defendant filed an appeal against the preliminary decree and it was confirmed by the High Court. But the High Court directed the trial court to make appropriate provisions for maintenance and marriage expenses of defendants 5 to 9 from out of the joint family properties while passing a final decree. By the time the final decree application was filed, Hindu Succession Act was amended in Andhra Pradesh and the unmarried daughters who were defendants 6 to 9 claimed a share on par with their brothers, on the footing that the properties had not been divided at that time. The trial court held that the preliminary decree having been confirmed by the High Court, it became conclusive and the contention of the unmarried daughters could not be accepted. On revision, the High Court reversed the said conclusion and held that the unmarried daughters would be entitled to a share equal to that of their brothers and allowed the revision. The High Court

held that even after the passing of the preliminary decree subsequent events could be taken note of and reliefs could be granted to the parties without driving them to other proceedings, thus avoiding multiplicity of proceedings. The relevant passage in the judgment of the High Court is as follows:

The law as summarised from the above three judgments is clear and it must be held as a settled proposition that after the passing of the preliminary decree in a partition suit before passing of the final decree if there has been either enlargement or diminution of the shares or rights of the parties have been changed by reason of the rights that have been conferred by the statute or rights of the parties by a second or by subsequent purchase or by assignments of interest by whatever cause, the court before passing its final decree, has to consider and decide the matter and grant a final decree in accordance with such subsequent devolutions to avoid multiplicity of suits and give complete and appropriate relief to all the parties. The mere fact that those parties have been added subsequent to the preliminary decree and their interest has been found to be affected and they were added as necessary parties, it does not mean that the Court has no right to consider their claims. On the other hand, the decision of the Privy Council cited above clearly points out that even in the case of a party who has been brought on record his right has to be adjusted at the time of the final decree.

32. The Court also placed reliance on the observations of the Supreme Court in *Phoolchand and Another Vs. Gopal Lal*, . Ultimately it was observed by the learned Judge that the rights of the parties in a partition suit could be considered at any stage till the passing of the final decree. According to the learned Judge the words "Partition effected" in Section 29-A Clause (4) in the Andhra Act corresponding to Section 29-A(5) in our Act meant that in the case of partition through court, the termination of the suit ultimately by passing the final decree.

33. With respect, I do not agree-with the reasoning of the learned Judge. The learned Judge has overlooked that the terms "partition effected" found in Section 29-A are used in the Hindu Law sense and they should be understood as they were understood in Hindu Law. I have pointed out already, a partition is effected in Hindu Law once there is a division in status. In a case where the preliminary decree has become conclusive and the shares of the parties are crystalised there is no provision or method by which the partition can be reopened and a higher share can be granted to one of the sharers and reduce the shares of the other sharers. In fact, the Legislature has not intended any such effect by the amendment. As construed by me, the Legislature wanted to exclude the partition already effected under which the rights of the parties had been crystalised.

34. Hence the contention put forward by the 4th appellant cannot be accepted and I hold that is not entitled to get the benefit of Section 29-A of the Amendment Act. The 4th appellant will have only 1/18th share as each of the other appellants.

35. In the result, the decree and judgment of the lower appellate court in so far as it relates to "A" Schedule properties are set aside and the decree and judgment of the trial Court in O.S. No. 192 of; 1977 are restored with reference to "A" schedule properties. As regards "B" Schedule properties the decree and judgment of the lower appellate court are confirmed. The second Appeals are allowed with reference to "A" Schedule properties and dismissed with reference to "B" schedule properties. The parties will bear their respective costs. 36.1 place on record my appreciation and gratitude for Mr. G. Mohartied Abdahir who appeared as amicus curiae in this case and helped me considerably.