NOTES AND COMMENTS

JUDICIAL RE-SCRIPTING OF LEGISLATION GOVERNING DEVOLUTION OF COPARCENARY PROPERTY AND SUCCESSION UNDER HINDU LAW

Abstract

The concept of a Hindu joint family is unique to Hindus. It is legally recognised and what is interesting to note is that the express retention of both Hindu joint family and Mitakshara coparcenary are not supplemented by any statutory explanation/clarification of their meaning or definitions. This is also true, that these concepts form a part of a broader study and cannot be understood in isolation. Statutory modifications have added to the complications, and, therefore, devolution of coparcenary property that was entirely independent of and different from inheritance of separate property under the classical law, has seen major legislative inroads and distortions in its integral incidents and devolution presently. One of such modification is the concept of notional partition that helps conversion of an undivided interest of a deceased coparcener in Mitakshara coparcenary into his separate share, which then goes through intestate succession. This drastically affects the doctrine of survivorship, and has been very aptly explained and provided in section 6 of the Hindu Succession Act, 1956 (HSA) as it stood prior to the amendment in 2005. Since it involves detailed understanding of the Hindu law, judicial pronouncements are very helpful in bringing clarity. Regrettably, glaring judicial mistakes that too by the highest court of the land are extremely unfortunate, whereby, the apex court treated the ancestral property belonging to the entire family as the property of just one person and deprived the legitimate shareholder of his rightful share in the property.

I Introduction

IT HAS been more than six decades that the law governing intestate succession was modified and given statutory shape for majority of Hindus *via* the Hindu Succession Act (HSA). This enactment was intended primarily to amend and codify the law governing intestate succession among Hindus, enumerated in detail schemes of succession for both male and female intestates and also provided for devolution of an undivided share in a Mitakshara coparcenary and the extent of testamentary capacity of a Hindu. According to section 30 of the Act, a Hindu is competent to entirely dispose of his property under a testamentary disposition, which includes his or her undivided share in Mitakshara coparcenary. By retaining and recognising the concept of Mitakshara coparcenary in the statute books under sections 6 and 30, the classical concept of Hindu joint family, coparcenary, categorisation of

properties into separate and coparcenary, position, powers and duties of *karta*, alienation of joint family properties and partition *etc.*, have been granted statutory recognition. This retention of Hindu joint family and Mitakshara coparcenary has also seen significant legislative inroads in the classical concepts. In 1956, the application of doctrine of survivorship, one of the primary features of Mitakshara coparcenary was retained generally under section 6, but was abolished in case the deceased coparcener left behind him any of the eight class-I heirs or the son of a predeceased daughter. It invented the concept of a statutory partition,[1] the effect of which was a legal presumption of enforcing a partition immediately preceding the death of the deceased coparcener.

The aim of this statutory/notional partition was to demarcate the share of the deceased, which would then go not by survivorship to the surviving coparcener as was the law prior to the enactment of the HSA but would be inherited by his class-I heirs that included females. The primary objective of introduction of this fictional or notional or statutory partition was to give some share out of the ancestral property to the daughters and other female members, that was till then denied to them. It was, therefore, a step forward in creating some space or participation in ownership of coparcenary property by daughters though indirectly and meager substantively in comparison to what their male counterpart s entitlement was. Procedurally and practically, application of section 8 to the share calculated by application of section 6 has given rise to a lot of litigation. This area, which necessitates the understanding of both the classical concepts of coparcenary and modalities of partition and then the application of the rules of intestate succession, has often been subject to judicial deliberations and has bared its technicalities, unfortunately in certain cases leading to incorrect pronouncements.

II Devolution of coparcenary property: Critique of *Uttam* v. *Saubhag Singh*

In an important judgment *Uttam* v. *Saubhag Singh*[2] involving the issue of devolution of a share in the coparcenary property and demarcation of share of a coparcener, the court held that upon the demise of the *karta* of the Hindu joint family, the entire property held by him for the family would go by intestate succession and consequently, the grandson would have no right

1 Often termed by the judiciary as presumptive or notional partition.

2 (2016) 4 SCC 68.

in the joint family property. Here the family comprised of the senior most male A, his wife, W and four of his sons, S_1, S_2, S_3 and S_4. A in his hands had joint family property belonging to this family. He died in 1973 and the family continued with the same status without effecting any formal partition. In 1977, a son, SS was born to S_1. SS in 1998 filed a suit for partition, claiming his share in this joint family property as a coparcener. He claimed $1/8^{th}$ share in it. The trial court held that the property was ancestral in character, there was no partition till the date of filing of the suit, and, therefore, the plaintiff was entitled to a share in it. However, the appellate court held that upon the death of A, as he died post 1956, *i.e.*, after the coming into force of the HSA, and as the widow of A was alive, then despite the fact that the property being ancestral in nature, the same would go as per the provisions of section 8 to the heirs of A and once it goes by intestacy, the rules of devolution of property on the coparceners would not apply. At the time of the death of A, since SS was not born, the property would be inherited (would not go by survivorship) by his father (S_1) in his capacity as As class-I heir. The share so obtained by S_1 would constitute his separate property and thus no one else including his son born to him four years later would have any share in it. The claim of SS was, thus dismissed by the appellate court. The high court again termed property held by A on behalf of his family as ancestral but as his property and held that a grandson has no right in the property of his grandfather and when the same is inherited by his father, he cannot claim any partition of it. It further said that upon the death of A, in 1973, the property devolved on his four sons and the same was taken by them as class-I heirs. SS had no right by birth in such properties and, therefore, he is not entitled to any share. The matter reached the apex court. The apex court held that once A died, it is section 8 of the HSA that would apply to his share , but amazingly, treating the entire ancestral property belonging to the whole of the joint family as his share (exclusive) , it concluded that this complete property would be inherited by his sons and his widow, the character of the property would change from coparcenary to separate property and consequently, the grandson would have no right over the property.

The present judgment, respectfully submitted, is flawed right from the level of the appellate court and in its entirety. It is alarming to see a total distortion of section 6 of the HSA, in its interpretation by the three appellate courts, and a complete sidelining of the classical concepts of coparcenary and Hindu joint family and their modified retention by the present legislature. Right from appellate court, that failed to take cognizance of section 6 of the HSA to the higher courts, the mistake is apparent. All these courts treated

ancestral property held by the senior-most male member as belonging exclusively to him. The whole of the ancestral/Hindu joint family property does not change its character from that of the joint family property to separate property automatically upon the death of one joint family or undivided member, be it the father or any other coparcener. It is only his individual/ small share in the whole of the joint family/ancestral property that is susceptible to conversion. The term joint says it all. The share is joint with others. Therefore, from such joint share, his own share is taken out, and the rest of the property continues to belong to other members.

In the present case the court concluded that, A died leaving behind property. The character of the property was ancestral, which is also termed as coparcenary or joint family property. Upon his death, the apex court held that as per section 6 of the Hindu Succession Act, 1956, a notional partition would be effected and the property would be distributed in accordance with the principles of intestate succession provided under sections 8-13. Further, quoting *Chander Sen's* judgment,[3] the court also held that the shares so inherited by the father (S_1) under section 8 would constitute his separate property and the grandson (SS), therefore, would have no right in the property as the whole of the property would convert from the joint family property to separate property in the hands of the father and no son could have a share or a right by birth in the separate property of the father.

The major points as appear from the facts of the present case, the relevant law and the interpretation that should have been taken into consideration by the apex court are as follows:

1. a) Under Hindu law, a Hindu male can own two categories of properties simultaneously. *One*, his separate or exclusive property that upon his demise goes by intestate succession upon his heirs under section 8 of the HSA and in which the grandson has no right if the son is present. This property so inherited in the hands of the son is also the son's separate property.

   b) *Second*, is a share in an undivided Mitakshara coparcenary, which is also called ancestral property or joint family property. This undivided share in Mitakshara coparcenary goes by survivorship to the surviving coparceners upon his death and not as per the succession principles.[4]

---

3 *Commissioner Wealth Tax* v. *Chander Sen,* AIR 1986 SC 1753.

4 The law as applicable prior to 2005.

In this property, the son, grandson and great grandson have a right by birth, as also a right to demand partition and no female had a right by birth in it till 2005.

c) The rule stated in b), above, is the general rule but has one exception, which is that prior to 2005, where the deceased who dies as an undivided member of Mitakshara coparcenary having a share in ancestral or coparcenary property, but leaves behind him a class-I female heir or a male heir claiming through a female, out of the total ancestral property his share is to be calculated by effecting a partition, and his share so calculated after affecting a partition, constitutes his separate property. This separate property goes again under the intestate succession or inheritance principles. This is actually a small share out of the whole of the joint family or ancestral property as by affecting partition, other coparceners also get their respective shares. Even if the deceased happens to be the *karta* of the joint family, he holds the property during his lifetime for the entire family and not for himself alone, so his share is to be calculated after effecting partition. However, for others the character of the property continues to be ancestral or joint family property *vis a vis* their male descendants but it is only for the deceased that the character of the property changes from joint family to separate property.

2. A, who died in 1973, left behind property that was ancestral in character. Thus, he being the senior-most male member, was the *karta* of the Hindu joint family and not the sole owner of the property that the joint family possessed. It is evident from the facts, that the courts consistently have held that the property in the hands of A was the ancestral property and not his self-acquired or separate property. Ancestral property in the hands of the father having four sons does not give him an exclusive ownership as the father holds the property for not only himself but on behalf of and along with all the coparceners, in this case his sons. If any of the sons had a son, that son who would have stood as grandson in relation to A, in his own right would also be a member of this coparcenary and entitled, thus, to a share in the property held by A.

3. The four sons had an existing share in this property, in fact the share of each son would be equal to the share of A. If they wanted they could have ascertained and obtained their respective shares by asking for partition, during the life time of A or at any time after that as well, but if they did not ask for it, it does not mean that their right/share in

the joint family property came to an end or would be automatically extinguished.

4. The share of each son in the ancestral property was again not their exclusive share but they held it as the *karta* of their respective smaller families if any, and in case none of them was married or had a son, the character of their shares was again ancestral property. As and when a coparcener gets married and gets a son, the son would by birth acquire a share in the coparcenary property held by the father, irrespective of whether at the time of partition, through which he got the property or the share, such son was born or not.

5. Upon the death of A, a notional partition would be effected to determine or ascertain what exactly was the share of A in this joint family property that he held on behalf of all the coparceners. This notional or statutory partition in light of *Gurupad* v *Hirabai* [5] has to be a real partition and, therefore, if any female was entitled to get a share at the time of partition, she would be so given such share. Thus, the property to begin with had to be divided into six parts. One each would go to A, his wife W, and four of his sons. The share of each of them out of joint family property, therefore, would be one sixth of the total property. This would be in compliance with the application of section 6 of the HSA. In the present case the share of A that would go as per section 8 would be only till the extent of $1/6^{th}$ and not the totality of the property, as the rest of 5/6 would belong to his widow and each of his four sons. This one sixth of A would now go through intestacy and would be inherited by W and four of his sons in equal shares as all of them would be his class-I heirs. This would be $1/30^{th}$ of the total property. The conversion of the undivided share into separate property would be only with respect to the share of A and his wife and not of the total property.

6. Total family members:

   A, W, S_1, S_2, S_3 and S_4

   Shares of each at the time of effecting notional partition:

   A = 1/6

   W = 1/6

---

5 AIR 1978 SC 1239.

S_1 = 1/6

S_2 = 1/6

S_3 = 1/6 and

S_4 = 1/6

What is to be noted here is that while the character of property in the hands of W and for A would be separate property, the character of property in hands of each of the sons, *i.e.*, S_1 to S_4 would be termed as separate *vis -a- vis* each of the brothers, but would continue to be ancestral or joint family property *vis -a- vis* their own sons. It is because coparcenary and ownership of coparcenary property extends till four continuous generations of male descendants from the *karta* or the senior most male member of the family. After the notional partition, each of the four sons would be the senior most male members of their respective independent joint families and their 1/ 6^{th} share does not belong exclusively to them but to their respective families as a whole. If any one of them was either unmarried or did not have a son, he gets the title of a sole surviving coparcener with respect to this property. The moment the son is conceived and is born alive, such son would acquire a right by birth in this property that is held by the father. Such a son has a legitimate right to ask for partition out of the $1/6^{th}$ share.

7. The share of A, *i.e.*, $1/6^{th}$ calculated out of the total joint family property after effecting a notional partition is his separate property and would now be available for succession in accordance with section 8, to the class-I heirs and the share of each would be as follows:

W= 1/6 x1/5=1/30

S_1 = 1/6 x1/5=1/30

S_2= 1/6 x1/5=1/30

S_3= 1/6 x1/5=1/30

S_4= 1/6 x1/5=1/30

8. The total share of each of the family members would be as follows:

W= 1/6+1/30

S_1= 1/6+1/30

S_2= 1/6+1/30

S_3= 1/6+1/30

S_4= 1/6+1/30

9. As far as the right of coparceners of the families of each of the sons is concerned, they can ask for partition and demarcation of their shares out of only the 1/6th property that their respective fathers received on notional partition but not out of the 1/30th that they received through intestate succession. This is in accordance with the principle that property received by coparcener on partition, real or notional is always coparcenary property *vis-a-vis* their sons and property inherited through intestacy constitutes the separate property in the hands of the heir. This becomes the exclusive property and no one including the son has any claim over it. Therefore, the plaintiff in this case, termed SS, had acquired a right by birth in the 1/6th of the property held by his father as the *karta* of the joint family of which he was a member. It is irrespective of the fact whether he was born at the time when his father acquired this property or not. His share in absence of any other member of his family would be equal to the share of his father and would be calculated as 1/12th in absence of his mother but would be 1/18th if the mother is also alive, as at the time of a partition between a father and a son, father s wife is also entitled to get a share, which is equal to the share of the son.

It is noteworthy that the legislature while enacting section 6, in the HSA had expressly retained the concept of Mitakshara coparcenary. The modification/change that was effected was in its devolution but only in situations where the undivided coparcener left behind him, a class-I female heir.

The proviso to section 6 says:

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 shall devolve by testamentary or intestate succession as the case may be, under this Act, and not by survivorship.

The interest of the deceased referred to in the proviso only would therefore be converted into separate property to go under intestate or testamentary succession as the case may be and the remaining property minus the interest of the deceased would continue to bear the character of the joint family property. Since the family was undivided and besides the deceased other persons also had a share in it, explanation-I was added to provide a mechanism to calculate

the interest of the deceased. If the entire ancestral property held by the deceased as the *karta* of the family was to go by intestacy, section 6, explanation would be meaningless or superfluous.

Section 6 applies only where the property is ancestral or joint family property and where the deceased was an undivided member, and dies leaving behind an undivided share in a Mitakshara coparcenary. In fact, this is the first qualification for section 6 to be applied. Both expressions, *i.e.,* undivided status of the deceased and the devolution of share in the first instance upon the surviving members of the coparcenary indicate the presence of other members in the family. It clearly shows that the deceased was a member of Mitakshara coparcenary, he had an interest in the Mitakshara coparcenary at the time of his death, and this interest was undivided and that there were other members of the coparcenary present.

Explanation I, that speaks of modalities of effecting a partition again contains, the phrase if a partition had taken place immediately before his death . It is important that a partition can be effected only in presence of at least two coparceners, both of whom had a share in the coparcenary property. If the property is owned by only one person, *i.e.,* a sole surviving coparcener, there would be no question of its division or partition. Therefore, to bring into application section 6, there must be ancestral property, and more than one coparcener having a share in it, and that no partition should have been effected prior to the demise of the deceased. By no stretch of imagination, the entire property can be treated as belonging to the deceased alone. Because in that case, the necessity of application of section 6 would not arise at all, and if the property was ancestral with a number of coparceners having a share in it, to treat the property as belonging to the senior most male is like depriving or forfeiting the share of other coparceners. It must be remembered that not only the ancestral property is held by coparceners jointly but coparcenary extends till four continuous generations of male members.

The court itself noted:[6]

---

6 *Supra* note 2, para 21.

> That joint family property which was ancestral property in the hands of Jagannath Singh (deceased) and the other coparceners devolved by succession under s. 8 of the Act.
>
> Admittedly only Jagannath Singh had died, while other coparceners were alive, so if at all the principles of succession were to be applied, they can be applied to the property/share of deceased only and not to the whole of it that had the share of other coparceners as well and who were alive on such date of his demise.

The court relied primarily on two of its earlier pronouncements; *Chander Sen*[7] and *Gurupad*.[8] In *Chander Sen*,[9] the family comprised of the father, his son and the grandson. The father and the son carried their respective business after affecting a partial partition. Upon the death of the father, the son inherited his separate property under section 8 of the HSA and the undivided share under doctrine of survivorship came to him as well. As the *karta* of his joint family comprising now of himself and his two sons, he filed the return of his net income and wealth and showed the joint family income including the one that he had received by way of survivorship but he did not show the property that he had inherited from his father in the joint family assets held by him as the *karta*. This property so inherited from his father, he said, was his separate property and could not be included in the joint family assets. The wealth tax officer did not accept his contention and maintained that the property received from his father under intestate succession would also constitute joint family property in his hands and thus its exclusion from the returns was not justified. The matter went to the level of apex court where after a deliberation on number of cases and the relevant provisions of the law, the court held that post 1956, the property inherited by the son from his father in the capacity of a class-I heir would constitute his separate property and not the joint family property. The decision was later re-affirmed by the apex court in *Commissioner of Income Tax* v. *P L Karuppan Chettiar*.[10]

---

7 *Supra* note 3.

8 *Supra* note 5.

9 *Supra* note 3.

10 1992 (197) ITR 646 SC; 1993 Supp (1) SCC 580; see also *Gaurav Sikri* v. *Kaushalya Sikri,* AIR 2008 Delhi 40; *Makhan Singh* v. *Kulwant Singh,* AIR 2007 SC 1808; *Commissioner of Income Tax* v. *Lun Karan Gopal;* MANU/RH/0063/1992 DB; *Commissioner of Income Tax* v. *Ram Raksal* (1968) 67 ITR 164; *Commissioner Wealth Tax* v. *Mukund Giri* (1983) 144 ITR 18;*Commissioner of Income Tax* v. *Virendra Kumar* 2001 (252) ITR 539 (Delhi).

However, the property that was held as separate property in the hands of the son was the one that he had inherited from his father and not the share in the joint family property that devolved on him under doctrine of survivorship. The issue under *Chander Sen s*,[11] case thus related to the character of the separate property of the father, inherited by his son under the HSA, and it did not relate to an undivided share of the deceased in the coparcenary property. The *ratio*, therefore, was that the separate property of the father inherited by his son under section 8 through intestacy would constitute his separate property and would be taxed as such and the son could show only that portion of the property as the joint family property, holding it as *karta* of his own family for the purposes of levying taxes under the revenue statutes, that were and continued to be joint family properties originally obtained under a partition from his father. The character of the two kinds of properties the assesee held was clearly demarcated; the share that he took on partition of the joint family property continued with the character of the joint family property but the one inherited by him from his father was termed separate. The facts of the present case on the other hand depicted that the entire property to begin with was ancestral in character, but no partition was effected of it. Thus, the application of the *ratio* of *Chander Sen s* case[12] to the distinguishable facts of the present case is not appropriate. Similarly, *Gurupad*,[13] related to the share of the deceased wife out of the undivided interest that the *karta* had in the joint family property and the impact or the effect of the notional partition on the calculation of the share of those women in the Hindu joint family who are entitled to get a share at the time a partition takes place in the joint family, but not otherwise. Here A was the *karta* of a Hindu joint family comprising of his wife, two sons and three daughters. He died in 1960 as an undivided member of this family survived by his wife and these five children. The wife filed a claim for partition and possession of her separate share in the property. As per law, since the deceased had died leaving behind a class-I heir, a notional partition was to be effected. As at the time of effecting a notional partition, it is to be presumed that immediately before the death, the deceased had asked for partition, such partition has to be effected as between

---

11 *Supra* note 3.

12 *Supra* note 3

13 *Supra* note 5.

him and each of the son. Further, since under Mitakshara law, fathers wifes entitlement is equal to the share of the son, here the property was divided in four equal parts one each going to the wife, each of the son and one fourth was the separate share of the deceased that was now to go as per the rules of inheritance. Out of the 1/4th share of the deceased, the six class-I heirs, *viz.*, his wife, two sons and three daughters were to share equally. The final shares were, 7/24th for the wife and each of the sons and 1/24th for each of the daughters. The main issue before the court was to assess the real purpose of this notional partition, whether it was to be effected for simply calculating the independent share of the deceased out of the total joint family property or it was to be treated as a real partition and all those who were to get a share at the time of an actual partition, such as females, were also to be given their shares, treating this notional or fictional or statutory partition as a real partition. Chandrachud CJI as he then was said that a notional partition for all purposes was to be treated as a real partition and said, the fiction created by explanation-I has to be given its due and full effect .

However, here also the share of the deceased having two sons was calculated after effecting a notional partition as he had left behind him a class-I heir. The totality of the property was not treated as belonging to him alone. His share that came to be 1/4th of the total property went by inheritance or intestate succession. This 1/4th when divided amongst his wife and children constituted their separate property without the grandsons having any share in it. But the 1/4th each taken by the sons at the time of effecting the notional partition continued to bear the character of the joint family property and the grandsons would have a right in it. Applying *Gurupad s*[14] *ratio* to the facts of the present case would show that no notional partition was effected in the present case, which should have been done as only then the share of the deceased that could go under section 8 could be determined. The court did quote this judicial pronouncement, but failed to apply its *ratio* to the facts of the present case.

III Conclusion

There is no conflict between section 6 and section 8 as they govern and apply to different situations. Section 6 applies only to an undivided share in Mitakshara coparcenary and provided modalities for calculating the separate

---

14 *Supra* note 5.

share of an undivided coparcener through the medium of a fictional or notional partition and section 8 applies to separate property. Thus, wherever an undivided coparcener, having an undivided interest in Mitakshara coparcenary dies, section 6, explanation I becomes applicable to the whole of the property. The courts are thus required to calculate the share of deceased out of it and then apply section 8 to this share. Both have to be applied and there is no need for the rules of interpretation to be brought into picture at all.

In such circumstances, *firstly* to treat the property as belonging exclusively to the deceased; *secondly* further holding that the entire property would go by intestacy and consequently and *finally* no one else would have a right to demand a partition from it is a consistent and blatant incorrect approach (ruling) on all the three points. A legitimate shareholder has been deprived of his holding in the coparcenary property and a chance to determine the same despite 18 years long litigation. In view of clear legislative provisions, the decision is extremely unfortunate and bares a lack of understanding of the substantive law relating to concept of coparcenary; of the differentiation between ancestral and separate property; its acquisition and devolution; the concept of notional partition and above all the twisted application of intestate succession principles not to an independent share of the deceased calculated after affecting a notional partition, but to the totality of the ancestral property having many sharers. It is like treating property that belonged to six persons as the exclusive property of just one of them. This incorrect rewriting of the statutory law governing coparcenary property and intestate succession through incorrect interpretation is most unfortunate. The added stark reality remains its adjudication by the highest court of land without any remedial possibilities. A clear illustration of an incorrect or a bad precedent, with an uncertain future correctional eventuality.

Poonam Pradhan Saxena *

* Vice Chancellor, National Law University, Jodhpur.