CASE NO.:
Appeal (civil) 4171 of 2006

PETITIONER:
Anar Devi and Ors

RESPONDENT:
Parmeshwari Devi and Ors

DATE OF JUDGMENT: 18/09/2006

BENCH:
B.N. AGRAWAL & P.P. NAOLEKAR

JUDGMENT:
JUDGMENT
O R D E R

(ARISING OUT OF S.L.P. (C) NO. 15677 OF 2004)
WITH
CIVIL APPEAL NO. 4172 OF 2006
(ARISING OUT OF S.L.P. (C) NO. 19015 OF 2004)

C.A. No. 4171 of 2006 @ S.L.P. (C) No. 15677of 2004:

Heard learned counsel for the parties.

Leave granted.

A suit was filed before the Sub-Divisional Officer by the respondents for partition of suit properties claiming two-third share therein. In the plaint, it was plaintiffs' clear-cut case that the partition suit was filed for partition of notional share of
Nagar Mal. Undisputedly, the suit properties were ancestral one in the hands of Nagar Mal, who adopted one Nemi Chand as his son, and after adoption both of them constituted a Mitakshara coparcenary under Hindu Law. Further it was undisputed that Nagar Mal died in the year 1989 intestate in the state of jointness with his adopted son leaving behind him, his adopted son Nemi Chand and the plaintiffs, who were his two daughters.

The trial court by misconstruing the provisions of law, passed an ex-parte decree for partition of one-third share of each one of the plaintiffs instead of one-sixth share. Against the decree of trial Court, when the matter was taken in appeal, the appellate authority reversed the same after recording a finding that the property was ancestral one, but remitted the matter as the decree was passed ex-parte. Against the order of remand, the matter was taken to the Board of Revenue, which reversed the order of remand and restored the decree passed by trial Court after recording a finding that each of the plaintiffs was entitled to one-third share in the suit properties. The said judgment has been confirmed in writ by a learned single Judge of the High Court and the same has been upheld in appeal by the Division Bench. Hence, this appeal by special leave.

In order to appreciate the point involved in the present case it would be useful to refer to the provisions of Section 6 of the Hindu Succession Act, 1956 (in short "the Act"), as it stood prior to its amendment by Hindu Succession (Amendment) Act, 2005, and the same run thus:

"S. 6 - Devolution of interest in coparcenary property \026 When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left surviving him 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 Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. \026 For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. \026 Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

Reference in this connection may be made to a passage from the most authoritative Treatise of Mulla, Principles on Hindu Law, Seventeenth Edition, page 250 wherein while interpreting Explanation I to Section 6 of the Act, the learned author stated that "Explanation I defines the expression 'the interest of the deceased in Mitakshara coparcenary property' and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed and effect must be given to the inevitable corollaries of that state of affairs."
The learned author further stated that "the operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had in fact been a regular partition and severance of status among all the surviving coparceners."
According to the learned author, at page 253, the undivided interest "of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition."
In the case of State of Bombay vs. Pandurang Vinayak Chaphalkar & Others; 1953 (4) SCR 773, this Court, after referring to, with approval, the oft-quoted dictum of Lord Asquith in East End Dwelling Co. Ltd. vs. Finsbury Borough Council (1952) Appeal Cases 109, has laid down the manner in which statutory fiction shall be construed and at pages 778 and 779 observed thus:-

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. [Vide Lord Justice James in Ex parte Walton : In re Levy [17 Ch. D. 746, at p. 756]]. If the purpose of the statutory fiction mentioned in section 15 is kept in view, then it follows that the purpose of that fiction would be completely defeated if the notification was construed in the literal manner in which it has been construed by the High Court. In East End Dwellings Co. Ltd. v. Finsbury Borough Council [[1952] A.C. 109], Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, made reference to the same principle and observed as follows :-

"If you are bidden to treat an imaginary state of affairs
as real, you must surely, unless prohibited from doing
so, also imagine as real the consequences and
incidents which, if the putative state of affairs had in
fact existed, must inevitably have flowed from or
accompanied it. ....The statute says that you must
imagine a certain state of affairs; it does not say that
having done so, you must cause or permit your
imagination to boggle when it comes to the inevitable
corollaries of that state of affairs."
The corollary thus of declaring the provisions of section 25 of the
Bombay General Clauses Act applicable to the repeal of the
ordinance and of deeming that ordinance an enactment is that
wherever the word "ordinance" occurs in the notification, that word
has to be read as an enactment."

In the case of Gurupad Khandappa Magdum vs. Hirabai Khandappa
Magdum, AIR 1978 SC 1239 at page 1243 it has been laid down by this Court as
under:
"What is therefore 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 shares 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\005\005 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."

Thus we hold that according to Section 6 of the Act when a coparcener dies
leaving behind any female relative specified in Class I of the Schedule to the Act or
male relative specified in that class claiming through such female relative, his
undivided interest in the Mitakshara coparcenary property would not devolve upon the
surviving coparcener, by survivorship but upon his heirs by intestate succession.
Explanation 1 to Section 6 of the Act provides a mechanism under which undivided
interest of a deceased coparcener can be ascertained and, i.e., 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 the property had taken place
immediately before his death, irrespective of whether he was entitled to claim partition
or not. It means for the purposes of finding out undivided interest of a deceased
coparcener, a notional partition has to be assumed immediately before his death and
the same shall devolve upon his heirs by succession which would obviously include
the surviving coparcener who, apart from the devolution of the undivided interest of
the deceased upon him by succession, would also be entitled to claim his undivided
interest in the coparcenary property which he could have got in notional partition.
In the case on hand, notional partition of the suit properties between Nagarmal
and his adopted son Nemi Chand has to be assumed immediately before the death of
Nagarmal and that being so Nagar Mal's undivided interest in the suit property, which
was half, devolved on his death upon his three children, i.e., the adopted son Nemi
Chand and the two daughters who are plaintiffs in equal proportion. Nemi Chand, the
adopted son, would get half of the entire property which right he acquired on the date
of adoption and one third of the remaining half which devolved upon him by
succession as stated above. This being the position, each of the two plaintiffs was not
entitled to one-third share in the suit property, but one-sixth and the remaining
properties would go to the adopted son, Nemi Chand.

Undisputedly, the suit properties in the hands of Nagar Mal were ancestral one
in which his son Nemi Chand got interest equal to Nagar Mal after his adoption and
from the date of adoption, a coparcenary was constituted between the father and the
adopted son. Upon the death of Nagar Mal, the property being ancestral, the half

undivided interest of Nagar Mal therein devolved by rule of succession upon his three heirs, including Nemi Chand. This being the position each of the daughters would be entitled to one-sixth share in the suit properties and the remaining would go to the heirs of Nemi Chand, since deceased.

Accordingly, the appeal is allowed, impugned judgments are set aside and suit for partition is decreed to the extent of one-sixth share of each of the two plaintiffs and

the defendants, i.e., heirs of Nemi Chand shall be entitled to the remaining suit properties. Let a preliminary decree be, accordingly, drawn up and steps for preparation of final decree be taken by appointment of a pleader commissioner.

No costs.

C.A. No. 4172 of 2006 @ S.L.P. (C) No. 19015 of 2004:

Heard learned counsel for the parties.

Leave granted.

In view of the order in C.A. No. 4171 of 2006 above, the appeal is allowed, the impugned judgment is set aside and writ petition filed before the High Court is dismissed.

No costs.

JUDIS