THIMMAIAH AND ORS. A

v.

NINGAMMA AND ANR.

AUGUST 25, 2000

[A.P. MISRA AND RUMA PAL, JJ.] B

Hindu Law—Succession—Devolution of coparcenery property—Son filing suit for partition of estate of deceased father (Karta) comprising ancestral and coparcenery properties—Wife and unmarried daughter of Karta resisting suit claiming deceased Karta had gifted items of ancestral property to wife and C *self-acquired properties to unmarried daughter by separate gift deeds, the latter with consent of son—Trial court and appellate court finding lack of consent and further that coparcenery properties could not have been given to daughter by way of gift—High Court negativing claim of wife but holding that gift to unmarried daughter was validly made with consent of son—High Court* D *not coming to conclusion that gift to unmarried daughter was either within reasonable limits or in fulfilment of any recognised pious purpose—Held, on facts, gift of coparcenery property to unmarried daughter was legally impermissible.*

Unmarried daughter of deceased Karta claiming gift of coparcenery E *properties to her with consent of coparcener son—Other coparceners not consenting to gift—Held, in the circumstances, the gift to the daughter was invalid—Hindu Law—Succession.*

Hindu Succession Act, 1956, ss.6 proviso, Explanation I—Mysore Hindu Law Women's Rights Act, 1933, ss.8(1)(a), (d) and 8(2)(c) (Mysore Act)—High F *Court holding unmarried daughter entitled to 1/9th share in Mitakshara coparcenery property—Whether Mysore Act applied—Held, no, since interest of deceased coparcener could not pass by survivorship and Mysore Act was superseded by s.6 of the 1956 Act; however, unmarried daughter would get 1/4th share of her brother in terms of s.8(2)(c) of the Mysore Act in addition to* G *her share under s.6 of the 1956 Act as heir of male dying intestate.*

Code of Civil Procedure 1908, s.100—Scope of interference by High Court in Second Appeal on questions of fact—Held, High Court not entitled to reassess evidence and arrive at a different conclusion—Practice and Procedure.

H

A Soon after H's death his son T filed a suit for partition by metes and bounds of 12 properties described in the Schedule to the plaint and for separate possession of 7/12th share in such properties. The case in the plaint was that items 1 and 2 of the schedule properties were ancestral and all the remaining properties belonged to the coparcenery. The further case
B in the plaint was that H had illegally sought to gift away items 1 and 2 a deed dated 17.11.1967 to his surviving second wife N and items 3 to 6 by deed dated 9.6.1971 to his unmarried daughter D through N. T claimed that the gifts were void.

T's siblings who were named as defendants 3, 4 and 5 in the suit
C supported T and claimed 1/4th share in all the 12 properties. N and D conceded that items 1 and 2 were ancestral properties but claimed that items 3 to 6 were the self-acquired properties of H. They claimed that both the deeds were settlement deeds. The first made provision for the maintenance of N out of items 1 and 2 and after her death, the properties were to
D revert to H. By the second deed, items 3 to 6 had been settled on D with the consent of T who had apart from putting a left thumb impression had also signed the document.

The trial court found the gifts to be void not only because of lack of consent but also because H was incompetent to gift items 3 to 6 to D. The
E gift of coparcenery property had not been made to D for any pious purpose. The first appellate court concurred with the finding and conclusion of the trial court.

In a second appeal by N and D, the High Court held that D was entitled to 1/9th share in the coparcenery property under s.8 of the Mysore
F Hindu Law Women's Rights Act 1933 (Mysore Act) but negatived the claim of N not only under the Mysore Act but also under the deed dated 17.11.1967. Further the High Court held that items 3 to 6 having been gifted to D with the consent of T was valid and, therefore, not available for partition. T appealed to this Court.

G Allowing the appeal in part, the Court

Held : 1.1. H could not have donated items of coparcenery property to D and the deed of gift dated 9.6.1971 was impermissible under Hindu Law. The High Court had not come to any conclusion as to whether gift of
H coparcenery items by H to D was within reasonable limits or in fulfilment

of an antenupital promise made on occasion of settlement of the terms of D's marriage. [661-E; D] A

Ammathayee alias, Perumalakkal v. *Kumaresan alias Balakrishnan,* AIR (1967) SC 569, referred to.

1.2. Merely getting the consent of T would not do. Consent had to be obtained from all the persons who could claim a share in the deceased coparceners' interest. The appellants 2, 3 and 4 were class I heirs of H and had not consented to the gift. The High Court's finding on the validity of the gift deed dated 9.6.71 was unsustainable. [662-F] B

Guramma v. *Mallappa,* AIR (1964) SC 510, referred to. C

2.1. s.8(1)(d) of the Mysore Act had been superseded by the proviso to s.6 of the 1956 Act. Reading the two provisions together, where female members sought to be protected under s.8 of the Mysore Act are in fact Class I heirs of a deceased coparcener, his interest in the joint family property could not pass by survivorship at all. The question of it passing subject to the rights of any class of females under s.8(1)(d) of the Mysore Act did not also arise. [665-F-G] D

Gurupad Khandappa Magdum v. *Hirabai Khandappa Magdum,* [1978] 3 SCR 671, distinguished. E

State of Maharashtra v. *Narayana Rao,* [1985] 3 SCR 358, referred to.

2.2. If there were an actual partition of the coparcenery properties between H and T, under s.8(1)(a) of the Mysore Act, T would get 1/2 share. N and the appellants 2, 3 and 4 would not get any share in the coparcenery property at all. But D as the unmarried daughter would get a share calculated in terms of s.8(2)(c) of the Mysore Act, namely, 1/4th of the share of her brother T in addition to her share as the heir of H. All the appellants as well as both the respondents were each entitled to an equal share in H's interest as heirs on intestacy. [667-A-B] F G

3. The High Court was not entitled to reassess the evidence and arrive at different conclusion. Besides the onus was on the respondents to prove the fact of T's consent. When items 3 to 6 were being claimed by the respondents to be the self-acquired property of H, it could hardly be contended in the same breath that T had consented to the gift of items 3 to H

A **6 on the basis that it was coparcenery property and that T was the only other coparcener. [660-E]**

Ladli Parshad Jaswal **v.** *The Karnal Distillery Co. Ltd. Karnal,* **AIR (1963), referred to.**

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1062 of 1992.

From the Judgment and Order dated 1.8.91 of the Karnataka High Court in R.S.A. No. 116 of 1981.

C Ms. Lalita Kaushik for the Appellants.

Rajesh Mahale and K.C. Sudarshan for the Respondents.

The Judgment of the Court was delivered by

D **RUMA PAL, J.** The issue to be decided in this appeal is the share of each of the parties in coparcenary properties. Hiri Thimmaiah (referred to briefly as 'Hiri') was the Karta of the coparcenary. He had two wives Sidamma and Ningamma. The appellants are the children of Hiri's first wife, Sidamma. The respondent No. 1 is the second wife and the respondent No. 2 is her
E daughter.

Hiri died in 1971. Soon after his death, in 1972, the appellant No. 1 filed a suit for partition by metes and bounds of 12 properties described in the Schedule to the plaint and for separate possession of 7/12th share in such properties. The case in the plaint was that items 1 and 2 of the schedule
F properties were ancestral and all the remaining properties belonged to the coparcenery. The further case in the plaint was that Hiri had illegally sought to gift away item No. 1 and 2 by deed dated 17.11.67 to the respondent No. 1 and items 3 to 6 by deed dated 9.6.71 to the respondent No. 2. The appellant No. 1 claimed a declaration that the gifts were void.

G The appellants 2, 3 and 4 were named as defendants 3, 4 and 5 in the suit. They filed a written statement substantially supporting the case of the appellant No. 1 and claiming 1/4th share in all the 12 properties.

In their written statement, the respondents (who were the defendants 1
H and 2 in the suit) conceded that items 1 and 2 were ancestral properties but

claimed that items 3 to 6 were the self-acquired properties of Hiri. They claimed that both the deeds were settlement deeds. The first settlement deed dated 17.11.67 made provision for the maintenance of respondent No. 1 out of items 1 and 2 and after her death, the properties were to revert back to Hiri. By the second deed dated 9.6.71, items 3 to 6 had been settled on the second respondent with the consent of appellant No. 1 who had not only put his left thumb impression on the deed but had also signed the document as a consenting party.

Issues were framed on the basis of the pleadings. Witnesses were examined in support of the contesting parties. The Trial Court negatived the claim put forward by the respondents that the two deeds were deeds of settlement. It was held that items 3 to 6 were not the self-acquired properties of Hiri but belonged to the coparcenary and that the two deeds were deeds of gift and were void. In coming to this conclusion, the Trial Court noted the contention of the appellant No. 1 that fraud had been committed on him and that he had not fixed his left thumb impression by way of his consent to the document dated 9.6.71 and said:

> "It has to be noted that there is material in the evidence of D.W- 2 the uncle of the plaintiff, to show that on the very same day of the execution of the document in question, the father of the plaintiff executed another document in favour of his brother D.W-2 as per Ex.P-24 and in the course of obtaining consent of the plaintiff to that document, Ex.P-24, the signature of the plaintiff is by deceitful means obtained on Ex.D-2 also."

However, the Trial Judge did not hold that the deeds were void only because of the lack of the consent of appellant No. 1. Relying on the decision of this Court in *Ammathayee alias Perumalakkal and Anr.* v. *Kumaresan alias Balakrishnan and Others*, AIR (1967) SC 569 the Trial Judge held that Hiri was incompetent to gift items 3 to 6 to the respondent No. 2 irrespective of the consent of the appellant No. 1. According to the Trial Judge immovable ancestral properties could only be gifted within reasonable limits for pious purposes such as the marriage of an unmarried daughter. The Trial Court found that a considerable portion of the coparcenary properties had been gifted by Hiri to the respondent No. 2 and that it could not be said that the gift had been made in favour of the second respondent in fulfilment of any pious purpose as she was well below the marriageable age when the gift was made.

A The appellant No. 1's suit was accordingly decreed on 8th August, 1977 as prayed for by the respondent No. 1 and a preliminary decree for partition was passed.

The respondents preferred an appeal before the District Judge. The First Appellate Court dismissed the appeal and upheld the findings of the trial Court B that the properties were coparcenery and could not have been affected by the two impugned deeds executed by Hiri in favour of the respondents. On the question of consent, the District Judge said:

> "Plaintiff has taken the stand that his L.T.M. is taken to Ex.D-1 at C Ex.D.1 (e) by practising fraud on him when he had gone to the Sub-Registrar's Office at the time of execution of another document by his father regarding sale of a site. Even if it can be held on the basis of the evidence of D.Ws. 1 and 2 that plaintiff has attested Ex.D-1 by putting his L.T.M. at Ex.D-1 (e), I find it difficult to uphold the validity D of Ex.D-1 as there is no recital in the body writing of Ex.D-1 that the properties were gifted by H. Thimmaiah in favour of the 2nd defendant with the specific consent of the plaintiff. Therefore, the mere attestation of Ex.D-1 by the plaintiff by putting his L.T.M. would not validate the gift of considerable portion of family properties made under Ex.D-1."

E

A second appeal was preferred by the respondents before the High Court. There it was urged by the respondents for the first time that by virtue of the Mysore Hindu Law Women's Rights Act, 1993 (hereafter referred to as the 'Mysore Act'), the respondent No. 1 was entitled to a widow's share and the F respondent No. 2 to an unmarried daughter's share in addition to their rights on intestacy as heirs of Hiri under the Hindu Succession Act, 1956 as well as under the two deeds dated 17.11.67 and 9.6.71. The High Court held that the respondent No.2 was entitled to 1/9th share in the coparcenary property under Section 8 of the Mysore Act but negatived the claim of the respondent No. 1 not only under the Mysore Act but also under the deed dated 17.11.67. As far G as the deed dated 9.6.71 was concerned, it was held by the High Court that items 3 to 6 had been gifted to the respondent No. 2 with the consent of the appellant No. 1 and was, therefore, valid. The High Court held that the conclusion arrived at by the Trial Court and the First Appellate Court that the appellant No. 1 had not consented to the gift, was not based on any acceptable H evidence. According to the High Court, items 3 to 6 were, therefore, not

available for partition and the parties' entitlement in the remaining properties were:

Appellant No. 1 (son)	4/9+4/54	= 28/54
Appellant No. 2 (married daughter)		= 4/54
Appellant No. 3 (married daughter)		= 4/54
Appellant No. 4 (married daughter)		= 4/54
Respondent No. 1 (widow)		= 4/54
Respondent No. 2 (unmarried daughter)	1/9+4/54	= 10/54

The judgment delivered on 1st August 1991 by the learned Single Judge of the High Court has been impugned before this Court on the ground that the High Court on second appeal should not have interfered with concurrent findings of fact on the appellants' lack of consent and should not have applied the provisions of the Mysore Act which, according to the appellants, had been excluded by the provisions of Section 4 of the Hindu Succession Act, 1956.

The respondents have relied upon the decision of this Court in *Ladli Parshad Jaiswal* v. *The Karnal Distillery Co., Ltd. Karnal and Others*, AIR (1963) SC 1279 to contend that the High Court was competent to reverse the finding of the lower courts that there was no consent of the appellant No. 1, because the finding was based on no evidence. It is also contended that the provisions of the Mysore Act are ancillary to the provisions of the Hindu Succession Act, 1956 and particularly Sections 6 and 8 of that Act.

In *Jaiswal's* case (supra), this Court has, no doubt, held that:

> "A decision of the First Appellate Court reached after placing the onus wrongfully or based on no evidence, or where there has been substan-

A tial error or defect in the procedure, producing error or defect in the decision of the case on the merits, is not conclusive and a second appeal lies to the High Court against that decision."

But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding B of fact, however, gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie.

Further the decision in *Jaiswal's* case was rendered prior to the amend- C ment of Section 100 by which the provisions of second appeal are more stringent and have been strictly limited to those cases where a `substantial question of law arises' and in no others.

We have already noted the findings of the Trial Court as well as the First Appellate Court on the question of consent. These observations clearly show D that there was some evidence in support of the finding of the lower courts. In the circumstances, the High Court was not entitled to reassess the evidence and arrive at a different conclusion. Besides the onus was on the respondents to prove the fact of the appellant No. 1's consent. When items 3 to 6 were being claimed by the respondents to be the self-acquired property of Hiri, it could E hardly be contended in the same breath that the appellant No. 1 had consented to the gift of items 3 to 6 on the basis that it was coparcenary property and the appellant No. 1 the only other coparcener.

The High Court also erred in its view on the effect of consent on a gift which may otherwise be void. This Court in *Ammathayee alias Perumalakkal* F *and Another* v. *Kumaresan alias Balakrishnan and Others*, AIR (1967) SC 569 summarised the Hindu Law on the question of gifts of ancestral properties in the following words:

> "Hindu law on the question of gifts of ancestral property is well G settled. So far as moveable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral moveable property cannot be upheld as a gift through affection. (See Mulla's Hindu Law, 13th Edn., p.252, para 225). But so far as H immovable ancestral property is concerned, the power of gift is

much more circumscribed than in the case of moveable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for "pious purposes"; (see Mulla's Hindu Law, 13th Edn., para 226, p. 252). Now what is generally understood by "pious purposes" is gift for charitable and/or religious purposes. But this Court has extended the meaning of "pious purposes" to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead.(See *Kamala Devi* v. *Bachu Lal Gupta*, [1957] SCR : AIR (1957) SC 434."

The Karta is competent or has the power to dispose of coparcenary property only if (a) the disposition is of a reasonable portion of the coparcenary property and (b) the disposition is for a recognised "pious purpose". The High Court has not come to any conclusion as to whether the gift of items 3 to 6 by Hiri to the respondent No. 2 was within reasonable limits or in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of the respondent No.2's marriage. It must be taken, therefore, that the findings of the lower courts on both counts were accepted. That being so, Hiri could not have donated items 3 to 6 to respondent No. 2 and the deed of gift dated 9.6.71 was impermissible under Hindu Law. The question is - could such an alienation be made with the consent of the appellant No. 1?

It is arguable that there is a distinction between a void disposition and a voidable one, and that the gift in favour of the respondent No. 2 being void cannot be made even with the consent of the appellant No.1. However, it is not necessary to decide the issue in the view that we have taken in this case.

This Court in *Guramma* v. *Mallappa*, AIR (1964) SC 510 has envisaged three situations of voidable transactions. It was held that a managing member may alienate joint family property in three situations, namely: (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. Where the alienation is not with the consent of all the coparceners, it is voidable at the instance of the coparcener whose consent has not been obtained. Needless to say where there is only a sole surviving coparcener and no other member of the family who has a joint interest in the property, there

A are no fetters on the alienation of the property. Assuming that the principle enunciated in *Guramma* v. *Mallappa* (supra) would apply to void alienations of joint family property, the question of consent of all interested parties would still remain.

The rationale behind the impermissibility of certain dispositions of
B coparcenary properties is the protection of the interest of other coparceners. Where other persons have an interest in coparcenary property, whether inchoate or otherwise, and willingly acquiesce in the depletion of such interest for whatever purpose, such a disposition would be permissible. In this case, apart from the appellant No. 1, if the other heirs of Hiri had such an interest, merely
C getting the consent of the appellant No. 1 would not do.

The impugned deed was executed in 1971, prior to Hiri's death in the same year. By this time, the Hindu Succession Act, 1956 had come into force. The proviso to section 6 of the 1956 Act (considered at greater length later in the judgment) now provides that the deceased's interest in Mitakshara
D coparcenary property does not devolve by survivorship if the deceased leaves surviving him female relatives specified in class I of the Schedule. Consequently, the interest of the surviving coparcener to the deceased's coparcenary share, in such a case, no longer survives and his consent to depletion of his interest in joint family property would not, therefore, make a gift of coparcenary
E property otherwise invalid, valid. Consent in such a case would have to be obtained from all the persons who could claim a share in the deceased coparceners' interest. The appellants 2, 3 and 4 as well as both the respondents are class I heirs of Hiri. It is not the case of the respondents that the appellants 2, 3 and 4 had consented to the gift. We are, therefore, of the opinion that the finding of the High Court on the validity of the deed of gift dated 9.6.71 is
F unsustainable and it is accordingly set aside.

The next question is the applicability of Section 8 (1) (d) of the Mysore Act. It may be stated at the outset that while we affirm the conclusions reached as to the shares of the parties, it appears to us that the High Court has misconG strued the provisions of Section 8 (1) (d). Section 8 reads:

> " *8. Certain females entitled to shares at partition.* - (1) (a) At a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have
H left no male issue shall be entitled to share with him.

(b) At a partition of joint family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.

(c) Sub-sections (a) and (b) shall also apply *mutatis mutandis* to a partition among other coparceners in a joint family.

(d) Where joint family property passes to a single coparcener by survivorship, it shall so pass subject to the right to shares of the classes of females enumerated in the above sub-sections.

(2) Such share shall be fixed as follows: -

(a) in the case of the widow, one-half of what her husband, if he were alive, would receive as his share;

(b) in the case of the mother, one-half of the share of a son if she has a son alive, and, in any other case, one-half of what her husband if he were alive, would receive as his share;

(c) in the case of every unmarried daughter or sister, one-fourth of the share of a brother if she has a brother alive, and, in any other case, one-fourth of what her father, if he were alive, would receive as his share: provided that the share to which a daughter or sister is entitled under this section shall be inclusive of, and not in addition to, the legitimate expenses of her marriage including a reasonable dowry or marriage portion.

(3) In this section, the term "widow" includes, where there are more widows than one of the same person all of them jointly, and the term "mother" includes a step-mother and, where there are both a mother and a step-mother, all of them jointly and the term "son" includes a step-son as also a grandson and a great grandson; and the provisions of this section relating to the mother shall be applicable *mutatis mutandis* to the paternal grandmother and great grandmother.

(4) Fractional shares of the females as fixed above shall relate to the share of the husband, son, father or brother as the case may be and their value shall be ascertained by treating one share as allotted to the male

A and assigning therefrom the proper fractional shares to the female relatives.

(5) Each of the female relatives referred to in sub-section (1) shall be entitled to have her share separated off and placed in her possession.

B *Provisos:* - Provided always as follows:

(i) No female relative shall be entitled to a share in property acquired by a person and referred to in Section 6, so long as he is alive;

C (ii) No female whose husband or father is alive shall be entitled to demand a partition as against such husband or father, as the case may be;

(iii) A female entitled to a share in any property in one capacity of relationship shall not be entitled to claim a further or additional share in the same property in any other capacity.

D

Illustration: A and his son B effect a partition of their family property. A has a mother and two unmarried daughters. Their shares will be as follows: -

E Father	..	..	1
Son	..	..	1
Mother	..	..	1/2
Two daughters	..	..	1/4 each

F The property will be divided in the above proportion, the father getting 1/3, the son 1/3, the mother 1/6 and each daughter 1/12."

Clauses (a), (b), (c) and (d) of sub-section (1) of Section 8 deal with four separate situations. Clause (a) deals with a partition of joint family between a person and his sons. Clause (b) deals with the partition of joint family property G among brothers, clause (c) applies to a partition among other coparceners in a joint family. Clause (d) provides for a situation where joint family property passes to a single coparcener by survivorship. The female members who have been declared to be entitled to shares are the mother of the concerned coparcener, his unmarried daughters and widows and unmarried daughters of pre-deceased H sons and undivided brothers.

At this stage, it would be appropriate to refer in detail to relevant portions of Section 6 of the 1956 Act:

> *"6. Devolution of interest in coparcenary property.* - When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.
>
> Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and *not by survivorship.*
>
> *Explanation 1.* - For the 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* - x x x x x x x x"
>
> (Emphasis supplied)

It is not in dispute that the Mysore Act deals with Hindu Mitakshara coparcenary rights. This is also clear from the definition of 'Hindu' in section 3 (c) of the Mysore Act. Section 4 of the 1956 Act gives overriding effect to the 1956 Act in so far as any law governing Hindus is inconsistent with the provisions of the 1956 Act. Reading the proviso to section 6 of the 1956 Act with section 8 of the Mysore Act, it is clear that where the female members sought to be protected under Section 8 of the Mysore Act are in fact Class I heirs of a deceased coparcener, his interest in the joint family property cannot pass by survivorship at all. Thus the question of it passing subject to the rights of any class of females under Section 8 (1) (d) of the Mysore Act does not also arise. This would mean that Section 8 (1) (d) of the Mysore Act has been superseded by the proviso to Section 6 of the 1956 Act to the extent stated.

The decision in *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum & Ors.*, [1978] 3 SCR 671 is an authority for the proposition that

A where a female is entitled to a share in coparcenary property on partition, then by virtue of Explanation I to Section 6 of 1956 Act, she continues to be so entitled despite the fact that no partition may actually have taken place prior to the coparcener's death. This Court held that Explanation I to Section 6 covered a situation where a Hindu coparcener dies without actual partition having taken place. In such event, the Court will have to assume that a partition B had in fact taken place immediately prior to the death of the coparcener concerned and grant shares on the basis of such notional partition. This Court also held that the share of the female member on such partition was in addition to any share which she may get as an heir of the deceased coparcener. [See also *State of Maharashtra* v. *Narayan Rao*, [1985] 3 SCR 358 : AIR (1985) SC 716, C 721.

Reliance by the respondents on the decision of this Court in *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum and Ors.*, [1978] 3 SCR 671 to contend that the respondents were entitled to shares in the coparcenary property by virtue of Section 8 (1) (d) of the Mysore Act is misplaced because D as already noted Section 8 (1) (d) in terms does not apply in the facts of this case because of the proviso to Section 6 of the 1956 Act.

Under Explanation I to Section 6 of the 1956 Act , the Court will have to ascertain what the shares of the parties would be as if Hiri had sought for partition just before his death. The only other coparcener being the appellant E No.1, the partition would have to be effected according to Section 8 (1) (a) which provides for partition between a coparcener and his son/sons. Under Section 8 (1) (a) the female members who could claim a share in the coparcenary properties would be Hiri's mother, his unmarried daughter (the respondent no.2) and the widow or unmarried daughters of any predeceased sons or F brother. Admittedly, Hiri's mother was not alive in 1971. Nor had Hiri any predeceased son or brother. The sole female member entitled to a share under Section 8 (1) (a) therefore is the respondent No.2. The appellant being the other coparcenar would get 1/2 of the coparcenary properties on partition. In terms of Section 8 (2) (c) of the Mysore Act, his sister, the respondent no.2 would G get 1/2 her brother's share, namely 1/4th of the coparcenary properties. The remaining interest would belong to Hiri. It has not been disputed before us that under Section 8 of the 1956 Act, each of the parties to this appeal is entitled to claim a share in Hiri's interest as his Class I heir. On the basis of the ratio in *Gurupad Khandappa Magdum's* case (supra) , the respondent No.2 would also be entitled to a share in Hiri's interest as an heir on intestacy, under Section H 8 of the 1956 Act.

To sum up: if there were an actual partition of the coparcenary properties between Hiri and his son, under Section 8 (1) (a) of the Mysore Act, his son, the appellant No. 1 would get 1/2 share. His wife, namely the respondent No. 1, and the appellants 2, 3 and 4 would not get any share in the coparcenary property at all. But the respondent No. 2 as the unmarried daughter would get a share calculated in terms of Section 8 (2) (c) of the Mysore Act, namely, 1/4th of the share of her brother, namely, the appellant No. 1 in addition to her share as the heir of Hiri. All the appellants as well as both the respondents are each entitled to an equal share in Hiri's interest as heirs on intestacy. The High Court has, therefore, correctly calculated the shares of the parties and we affirm its conclusion in this regard.

A

B

C

The appeal is accordingly partly allowed. We hold that items 3 to 6 of the Schedule to the plaint are available for partition as coparcenary property according to the shares declared by the High Court. There will be no order as to costs.

S.M. Appeal partly, allowed.