A M. YOGENDRA & ORS.

v.

LEELAMMA N. & ORS.

(Civil Appeal Nos. 4818-4819 of 2009)

JULY 29, 2009

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[S.B. SINHA AND DEEPAK VERMA, JJ.]

HINDU SUCCESSION ACT, 1956:

C *ss. 6 and 8 – Coparcenery property in the hands of sole coparcener – On his death, shares claimed by his daughters, children of deceased daughter and the son born out of the second marriage – Held: The son would inherit the properties not as coparcener – Therefore, s. 8 would apply and not s.6* D *– Hindu Marriage Act, 1955 – ss.5 and 16 – Evidence Act, 1872 – s.50*

Evidence Act, 1872 – s. 50 – Opinion of relationship – Factum of marriage – Held: Evidence of relatives was admissible not only from the point of view that they were the E *persons who could depose about the conduct of parties but they were also witnesses to various documents executed by the wife.*

The predecessor-in-interest of the parties, namely, F **'K', a coparcener along with his brother, on a partition which took place in 1941, was allotted the suit property. He married twice. From the first wife, namely, 'P', he had three daughters, and from the second wife, namely, 'Y', whom he was stated to have married in 1960, he had a** G **son by name 'D'. 'K' died in the year 1969. In the year 1998 one of his daughters from the first wife also died. Two partition suits were filed – one by the children of K's deceased daughter, the appellants, claiming 1/3rd share and denying the second marriage of 'K', and the other suit**

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was filed by the two surviving daughters from the first wife and the son 'D' from second wife. The trial court held that mother of 'D' was validly and legally married to 'K' and on that premise held that 'K' and 'D' formed a coparcenery and the appellants being the heirs and legal representatives of the daughter of 'K' inherited 1/10th share in the properties left by him. The High Court upheld the judgment.

In the instant appeals it was contended for the appellants that 'Y' not being validly married to 'K', her son 'D' did not inherit any share in the property; and that since 'D' was born after coming into force of the Hindu Succession Act, 1956, he was not a coparcener and, therefore, s.8 of the Act would apply and not s.6.

Allowing the appeals, the Court

HELD: 1.1. Evidence in different forms may be adduced before the court; information evidence may be one of them. But for the purpose of arriving at a conclusion as to whether a valid marriage has been performed or not, the court would be entitled to consider the circumstances thereof. There may be a case where witnesses to the marriage are not available. There may also be a case where documentary evidence to prove marriage is not available. It is in such a situation, those who had the occasion to see the conduct of the parties may testify with regard to the information they have, from probably the conduct of the persons concerned. Section 50 of the Evidence Act in that sense is an exception to the other provisions of the Act. [Para 10 and 11] [47-D-G]

Badri Prasad v. Dy. Director of Consolidation & Ors. AIR 1978 SC 1557; *Tulsa & Ors. v. Durghatiya & Ors.* (2008) 1 SCALE 434, relied on.

A **1.2. In the instant case, the evidences of two daughters of 'K' were admissible evidence not only from the point of view that they were the persons who could depose about the conduct of 'K' and 'Y', but they were also witnesses to various documents executed by 'Y'.**
B **The High Court has itself noticed the applicability of s.50 of the Evidence Act. In that view of the matter, the finding that 'K' married 'Y' need not be interfered with. [Para 11 and 12] [47-G-H; 48-A, D]**

2.1. It is now well-settled that the property in the
C **hands of sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. [Para 16] [50-B]**

Commissioner of Wealth Tax, Kanpur And Others v.
D *Chander Sen And Others* **(1986) 3 SCC 567;** *Sheela Devi & Ors. V. Lal Chand & Anr.* **2006 (10) SCALE 75;** *Bhanwar Singh v. Puran & Ors.* **2008 (2) SCALE 355, relied on**

Eramma vs. Veerupana & Ors. **AIR 1966 SC 1879,**
E **referred to**

2.2. Section 5 of the Hindu Marriage Act, 1955 prohibits a marriage where either party thereto has a spouse living at the time of marriage. Marriage between 'K' and 'Y' took place in 1960 and, as such, the said
F **marriage was clearly hit by s. 5 of the Hindu Marriage Act. 'D', therefore, would inherit the properties not as a coparcener. [Para 13] [48-E-G]**

2.3. 'D' was admittedly born after the coming into
G **force of the Hindu Succession Act. However, the Hindu Marriage Act, carved out an exception to the matter of inheritance of children of such marriages by creating a legal fiction u/s 16 of the Hindu Marriage Act. Therefore, as on the date of death of 'K' all his daughters as also**

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'D' will take in equal shares being the relatives specified in Class I of the Schedule appended to the Hindu Succession Act. Therefore, the trial court as also the High Court were not correct in opining that 'D' would be a coparcener and the appellants would inherit only 1/10th share in the said properties . The share of the appellants would be 1/3rd. [Para 13-15 and 19] [49-G-H; 53-D; 48-G]

Case Law Reference:

AIR 1978 SC 1557	**relied on**	**para 9**
(2008) 1 SCALE 434	**relied on**	**para 9**
(1986) 3 SCC 567	**relied on**	**para 16**
2006 (10) SCALE 75	**relied on**	**para 17**
2008 (2) SCALE 355	**relied on**	**para 17**
AIR 1966 SC 1879	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4818-4819 of 2009.

From the Judgment & Order dated 16.11.2007 of the High Court of Karnataka at Bangalore in RFA No. 1403 of 2003 C/w 1404 of 2003.

G.V. Chandrashekhar, N.K. Verma, Anjana Chandrashekar for the Appellants.

S.N. Bhat, B. Subrahmanya Prasad, Ajay Kumar, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Interpretation of the application of the provisions of Section 6 of the Hindu Succession Act, 1956 [hereinafter called

for the sake of brevity as 'the Act'] vis-à-vis Section 6 thereof is in question in this appeal. It arises out of a judgment and order dated 16.11.2007 passed by the High Court Karnataka at Bangalore in RFA No. 1403/2003 and 1404/2003 dismissing the appeals preferred by the appellants herein from a judgment and order dated 14.07.2003 in O.S. No. 305/2000 and O.S. No. 567/2001 passed by the Principal Civil Judge, Senior Division, Mysore between both the parties for a suit of partition. The two aforementioned suits for partition were filed – one by the appellants herein and the other by respondent Nos. 1,2 and 4 herein. One K Doddananjundaiah indisputably is the predecessor- in-interest of the plaintiffs of both the suits. He along with his own brothers rightly formed a coparcenery. In or about 1941, a partition took place in terms whereof the suit properties were allotted to him. He married twice. The name of his first wife although does not appear from the records it is stated at Bar that her name was Puttamma. He, however, married again in the year 1960, one Yashodamma. Through his first wife three daughters were born to him – Parvathamma, Leelamma and Kamalamma. Dinesh, the original respondent No. 4 is said to have been born to K Doddananjundaiah through Yashodamma on or about 16.4.1961. K Doddananjundaiah died on 11.09.1969.

3. Appellants herein filed a suit for partition against Leelamma, Kamalamma and Dinesh for partition claiming 1/3rd share in the suit property. Inter alia, on the premise that some of the joint family properties were not included therein Neelamma, Kamalamma and Dinesh filed another suit for partition. Before the learned trial court, where both the suits were heard together, the appellants herein raised a contention that Yashodamma was not married to K Doddananjundaiah. A specific issue was framed. The learned trial court, however, principally relying on or on the basis of the admission made by Neelamma and Kamalamma that Dinesh was their brother and marriage had taken place between their father and Yashodamma and also some other documents including birth

certificate and a settlement deed came to the conclusion that Yashodamma was validly and legally married to K Doddanandjundaiah.

4. Inter alia, on the premise that K Doddananjundaiah and Dinesh formed a joint coparcenery property, the learned trial judge opined that the appellants herein being the heirs and legal representatives of N. Parvathamma who had expired on 15.09.1998 inherited 1/10th share of the properties left by K Doddananjundaiah. Two appeals were preferred thereagainst by the appellants. The High Court by the reason of the impugned judgment upheld the said judgment and decree passed by the trial court.

5. Before us, Mr. G.V. Chandrashekhar, the learned counsel appearing on behalf of the appellants raised two contentions:-

(i) Yashodamma being not married to K Doddananjundaiah and in any event not validly married, Dinesh did not inherit any share in the properties.

(ii) In any event, in view of the fact that he was born after coming into force of the Hindu Succession Act, 1956 he was not a coparcener. Section 8 of the Hindu Succession Act shall apply and not Section 6 thereof.

6. Mr. Bhat, the learned counsel appearing on behalf of the respondents on the other hand contended:-

(a) a concurrent finding of fact having been arrived at that Yashodamam was validly married with K Doddananjundaiah particularly having regard to the admission made by Neelamma and Kamalamma to the detriment of their interest, no interference therewith is warranted by this Court in exercise of its jurisdiction under Article 136 of the Constitution of India. The properties at

A the hands of K Doddananjundaiah being a coparcenery property, Dinesh became a coparcener.

(b) on his birth his status continued to be that of a coparcener and the status being that of a co parcener, Section 6 of the 1956 Act shall apply and not Section 8 thereof.

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7. Before the learned trial Judge, the appellants adduced voluminous documents in regard to the factum of marriage by and between K Doddananjundaiah and Yashodamma. One of C the documents upon which reliance was placed by the trial judge was a photograph taken at the time of death whereas P.W. 1 declined to identify the persons in the photograph (Ex. D5) when he was confronted therewith. D.W. 1 - Neelamma not only identified the persons in the photograph as that of her father D and Yashodamma as also Dinesh.

8. The learned trial judge relied on the said documents for the purpose of arriving at a conclusion that Yashodamma was married with K Doddananjundaiah. Another important E document upon which reliance was placed was a deed of settlement dated 16.4.1971 executed by Yashodamma in respect of some of the properties by K Doddananjundaiah in favour of Dinesh. It was a registered document. Yashodamam was appointed as a guardian as Dinesh was minor. Therein also Dinesh was described as son of K Doddananjundaiah. At F that point of time, no challenge was done to the execution of the said document. It is also of some significance to notice that Kamalamma was a witness to the said deed at the time of presentation thereof before the registering authority. In the signed portion of the said documents also relation between the G parties was clearly stated. It was furthermore, recited therein that Kamalamma had been looking after Dinesh at Bangalore and she had been fostering him. Leelamma had also been appointed as guardian for minor Dinesh. The learned trial judge as also the High Court furthermore, relied upon the evidence H of Neelamma and Kamalamma in terms of the provisions of

Section 50 of the Evidence Act. Before the trial court two birth certificates of Dinesh were filed showing the name of father of Dinesh which was shown as Nanjundaiah and in the other which was produced by the respondents as Dodammaiah. The trial court gave sufficient and cogent reasons to arrive at a finding of fact that the death certificate produced by the respondent was the correct one. Apart from it, various other documents were filed to show that there in the names including the school records to show that the name of K Doddananjundaiah appeared as father of Dinesh. The aforementioned finding of fact has not been disturbed by the High Court. The High Court, however, with regard to the document which was marked as Exhibit D-3 being a lagnapatrika opined as under:-

> "At the outset it is worth observing that it is not in dispute that the schedule properties were the ancestral properties of late K. Doddananjundaiah that Puttamma was the wife of K. Doddananjundaiah and through her there were three daughters by name N. Parvatamma, N. Neelamma and N. Kamalamma. The important dispute in this case is whether there is valid marriage between K. Doddananjundaiah and his second wife Yashodamma. Ex. D-3 lagna patrika is one of the documents produced by the defendants to show that there is valid marriag between K. Doddananjundaiah and Yashodamma. This document lagna patrika is not signed by the scribe, the parties to it and the same is dated nil. In this document, the lagna patrika the marriage date is specified as Monday, the 29th March, 1960. On comparison with the calendar for the relevant year the marriage day, 29.03.1960 falls on Tuesday and not on Monday. It is also an admitted fact that Hindus will not celebrate auspicious events like marriage on an inauspicious day like Tuesday. In this document, it is specified that Sunday the 28th February 1960 is the day of performance of certain poojas like devatha karya and the day of marriage. For these reasons, Ex. D-3 the lagna patrika creates a suspicion with regard

A to the marriage between K. Doddananjundaiah and Yashodamma and the same cannot be relied on."

9. Submission of Mr. Chandrashekhar is despite arriving at the said finding which clearly proves that no marriage had B taken place, the High Court committed a serious illegality invoking the provisions of Section 50 of the Indian Evidence Act. It was urged that Section 50 of the Evidence Act would be available to a party when no direct evidence is available to prove or dispute the factum of marriage. In any event, the presumption which may be raised in terms of Section 50 of the C Evidence Act read with 114 thereof is a rebuttal presumption. The learned counsel strongly relied upon, in this regard, a decision of this Court in *Badri Prasad v. Dy. Director of Consolidation & Ors.* [AIR 1978 SC 1557] *Tulsa & Ors. v. Durghatiya & Ors.* (2008) 1 SCALE 434. In *Badri Prasad's* D case (supra) this Court held as under:-

"For around 50 years, a man and a woman as the facts in this case unfold, lived as husband wife. An adventurist challenge to the factum of marriage between E the two, by the petitioner in this special leave petition, has been negatived by the High Court. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who F seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg for the petitioner, that long after the alleged marriage evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses, deserves no consideration. G If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married, few will succeed. The contention deserves to be negatived and we do so without hesitation. The special leave petitions are H

dismissed." A

Almost the same view has been taken by this Court in *Tulsa's* case (Supra) wherein it is stated:

> "14. This court in *Gokalchand v. Parvin Kumari* [AIR 1952 SC 231] observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption ;which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them." B C

We, however, are of the opinion that in this case in view of the concurrent findings of fact arrived at by two courts, proof of marriage of K Doddananjundaiah and Yashodamma has sufficiently been established. D

10. Before the Court, evidence in different forms may be adduced. Information evidence may be one of them. But the purpose of arriving at a conclusion as to whether a valid marriage has been performed or not, the Court would be entitled to consider the circumstances thereof. There may be a case where witnesses to the marriage are not available. There may also be a case where documentary evidence to prove marriage is not available. It is in the aforementioned situation, the information of those persons who had the occasion to see the conduct of the parties they may testify with regard to the information they form probably the conduct of the persons concerned. E F

11. Section 50 of the Evidence Act in that sense is an exception to the other provisions of the Act. Once it is held that the evidence of Neelamma and Kamalamma were admissible evidence not only from the point of view that they were the persons who could depose about the conduct of Dodananjundaiah and Yashodamma. So far as their status is G H

A concerned without keeping in view the close relationship were also witnesses to various documents executed by Yashodamma. The evidence in this behalf in our opinion is admissible. The learned trial judge has noticed and relied upon a large number of documents. It has not been contended before
B us by Mr. Chandrashekhar that those documents were not admissible in evidence. Some of the documents being registered documents would rest their own presumption of correctness. School records could be admissible in evidence in terms of Section 35 of the Indian Evidence Act.

C 12. Only because the High Court could find out certain discrepancies in the lagnapatrika the same in our opinion was not a conclusive proof to reverse the finding of the learned trial court. The High Court has itself noticed that the applicability of the covenants of Section 50 of the Indian Evidence Act having
D regard to the evidence have been brought on record. In that view of the matter, we are of the opinion that the finding that K Doddannanjundaiah married Yashodamma need not be interefered with.

E 13. The question which now survives for our consideration is the provisions of Sections 6 and 8 of the Hindu Succession Act. The said Act was enacted to amend and codify the law to inherent succession among Hindus. Section 5 of the Hindu Marriage Act, 1955 prohibits a marriage where either party
F thereto has a spouse living at the time of marriage. Marriage between K Doddananjundaiah and Yashodamma as noticed from the findings arrived at by the courts below took place sometime in April 1960. If that be so, the said marriage was clearly hit by section 5 of the Hindu Marriage Act. Dinesh,
G therefore, would inherit the properties not as a coparcener. The Hindu Marriage Act, however, carved out an exception to the matter of inheritance of illegitimate children stating:-

"16. Legitimacy of children of void and voidable marriages – (1) Notwithstanding that a marriage is null and
H void under section 11, any child of such marriage who

would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act." A B

By reason of the said provision a legal fiction has been created as it then stood.

14. We, therefore, agree with the submission of Shri Chandrashekhar that Dinesh would not be a coparcener with K Doddananjundaiah. Even, otherwise, the provisions of the Hindu Succession Act provides about an easy change from the old Hindu Law. The provisions of the 1956 Act shall prevail over the Hindu Law which were existing prior thereto. Section 8 of the Hindu Succession Act provides for general rules of succession in the case of males. It reads as under:- C D

"8. General rules of succession in the case of males – The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:- E

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; F

(c) if there is no agnate, then upon the cognates of the deceased." G

15. As on the date of death of K Doddananjundaiah through all his daughters as also Dinesh they will take in equal shares being the relatives specified in Clause (i) of the Scheduled appended to the Act. Dinesh was admittedly born after the coming into force of the Hindu Succession Act, 1956. H

16. Mr. Bhat, however, would contend that the properties at the hands of K Doddananjundaiah which were allotted to him in partition which took place between him and his brother in the year 1948 would constitute coparcenary properties at his hands, with respect we cannot persuade ourselves to agree with the said view which has been accepted by the courts below. It is now well-settled in view of several decisions of this Court that the property in the hands of sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenery property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid. This aspect of the matter has been considered by this Court in *Commissioner of Wealth Tax, Kanpur And Others v. Chander Sen And Others* (1986) 3 SCC 567. This Court upon noticing the provisions of the Hindu Succession Act opined as under:-

> "It is clear that under the Hindu law, the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. But the question is: is the position affected by Section 8 of the Hindu Succession Act, 1956 and if so, how? The basic argument is that Section 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. It is this position which

has mainly induced the Allahabad High court in the two judgments, we have noticed, to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. On the other hand, the Gujarat High Court has taken the contrary view."

It was furthermore held :

"18. ..... Section 8 of the Hindu Succession Act, 1956 as noted before, laid down the scheme of succession to the property of a Hindu dying intestate. The Schedule classified the heirs on whom such property should devolve. Those specified in Class I took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as a heir under Class I of the Schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son in his grandfather's property during the lifetime of his father which existed under the Hindu law as in force before the Act, was not saved expressly by the Act, and therefore, the earlier interpretation of Hindu law giving a right by birth in such property "ceased to have effect". The Court further observed that in construing a Codification Act, the law which was in a force earlier should be ignored and the construction should be confined t the language used in the new Act. The High Court felt that so construed, Section 8 of the Hindu Succession Act should be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu dying intestate. Therefore, the property which devolved on a Hindu on the death of his father intestated after the coming into force of the Hindu Succession Act, 1956, did not constitute HUF property consisting of his own branch including his sons.

A It followed the Full Bench decision of the Madras High Court as well as the view of the Allahabad High Court in the two cases noted above including the judgment under appeal."

B 17. The question yet again came up before this Court in *Sheela Devi & Ors. V. Lal Chand & Anr.* 2006 (10) SCALE 75 wherein it was clearly held :

"22. The Act indisputably would prevail over the Hindu Law. We maynotice that the Parliament, with a view to confer
C right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005
D would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, proviso appended to Sub-section (1) of Section 6 of the Act creates an exception. First son of
E Babu Lal, viz., Lal Chand, was, thus, I a coparcener. Section 6 is exception to the general rules. It was, therefore, obligatory on the part of the Plaintiffs-Respondents to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the Second
F son Sohan Lal is concerned, no evidence has been brought on records to show that he was born prior to coming into force of Hindu Succession Act, 1956."

[See also *Bhanwar Singh v. Puran & Ors.* 2008 (2) SCALE 355]

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18. Mr. Bhat, however, placed reliance upon the decision of this Court in *Eramma v. Veerupana And Ors.* reported in AIR 1966 SC 1879 therein Ramaswami J. speaking for the Bench held that Section 8 of the Hindu Succession Act will have
H no retrospective effect. However, in the fact of that case Section

8 of this Act was held to be not applicable as therein the male died before the Act came into force. As would appear from the following:

> "(5) It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement o the Act. It is manifest that the language of S. 8 must be construed in the context of S. 6 of the Act. We accordingly hold that the provisions of S.8 of the Hindu Succession Act are ;not retrospective in operation and where a male Hindu died before the Act came into force i.e. where succession opened before the Act. S.8 of the Act will have no application."

19. For the aforementioned reasons, we are of the opinion that the learned trial judge as also of the High Court were not correct in opining that Dinesh would be a coparcener and the appellants would inherit only 1/10th share in the said properties. The shares of the plaintiffs would be 1/3rd therein.

20. These appeals are allowed but in the circumstances with no costs.

R.P. Appeals allowed.