2024 INSC 485

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3780-3781 OF 2020

SHASHIDHAR AND OTHERS …APPELLANT(S)

VERSUS

ASHWINI UMA MATHAD AND ANOTHER …RESPONDENT(S)

J U D G M E N T

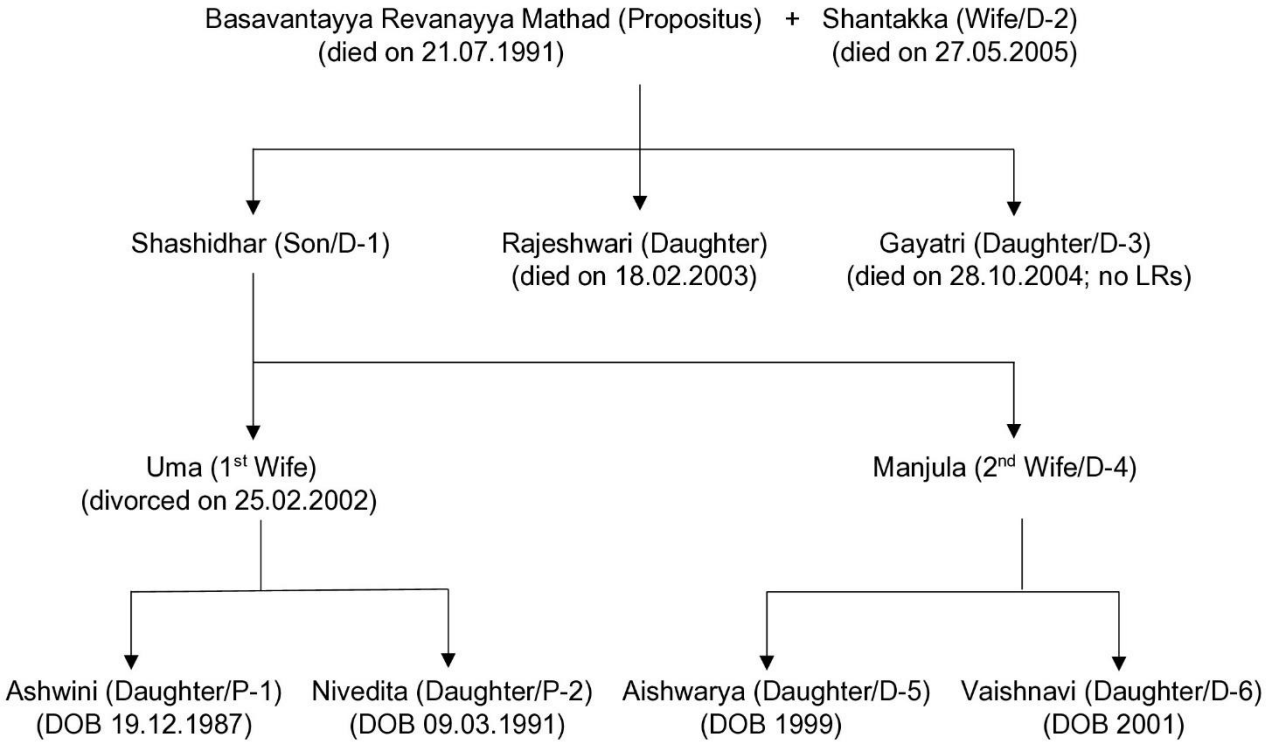
S.V.N. BHATTI, J.

1. These Civil Appeals are filed against the judgment dated 16.10.2019 in R.F.A. No.3052 of 2010 and Cross-objection No. 103 of 2011, on the file of the High Court of Karnataka, Dharwad Bench.

2. The Respondents filed O.S. No.73 of 2004 in the Court of the Additional Civil Judge, Hubli, for partition of suit properties and allot half of one-third to each of the Respondents in all the suit properties. The suit properties are stated thus:

Sl. No.	*Sy. No./CTS No. & Ward No.*	*Extent*	*Village*	*Remarks*
1.	*CTS No.290*	*-*	*Mantur*	*Residential*
2.	*CTS No.1108 Ward No.III*[1]	*87 Sq. Yds.*	*Hubli*	*-do-*
3.	*CTS No.92A 5A, Ward No.III*	*616.2/-*	*Hubli*	*-do-*
4.	*CTS No.92A 5A, Ward No.III*	*200.2/-*	*Hosur Hubli*	*-do-*
5.	*Block No.168/4*	*13A-03 Gs.*	*Shiraguppi Bhandlwad Village, Tq.Hubli*	*Agricultural land*

3. The family genealogy of the parties is reproduced hereunder:



[1] Sl. No. 2 depicts one survey number and a small extent of 87. sq. yds. But the parties admit that Sl. No. 2 covers more than one survey number as detailed in the judgment of the Trial Court.

4. The Respondents are the daughters of Appellant No. 1 through his first wife, Uma. It is an admitted case that Appellant No. 1 and the said Uma got divorced, and thereafter, Appellant No. 1 married Appellant No. 2. Appellant Nos. 3 and 4 are the daughters of Appellant Nos. 1 and 2. The case of the Respondents is that the parties to the suit constitute a Hindu coparcenary, and the suit properties are held by the coparcenary. Therefore, the Respondents, being coparceners, are entitled to a share in the suit properties. The demand of the Respondents for the partition of ancestral properties made to Appellant No. 1 either has been postponed or avoided. Therefore, the Respondents, by filing O.S. No.73/2004, claimed half of the one-third share in the suit properties and prayed for passing a preliminary decree to that effect. Defendant No. 1 contested the suit for partition. Among other things, the objections to the claim for partition are that Appellant No. 1, while admitting the paternity of the Respondents, joins the issue of whether the suit properties are ancestral properties and whether the Respondents have a share in it. The Defendant No. 1 admits that Sl. Nos. 1 and 5 alone are ancestral properties. The propositus died on 21.07.1991, leaving Appellant Nos. 1 to 3 and the propositus's daughter, Rajeshwari, as heirs. On the demise of the propositus, the property covered by Sl. Nos. 1 and 5 are notionally partitioned into three shares. Appellant No. 1, his mother and his sister are entitled to one share each. Appellant No. 1, either by gift deed or will executed by his siblings, acquired the share inherited by them from the common propositus. Therefore, the properties/shares acquired by

Appellant No. 1 by way of gift, will, etc., do not belong to or become coparcenary property in which the Respondents can claim a share. In other words, the admissible share is to be worked out in the one-third share inherited by Appellant No. 1 in the notional partition of Sl. Nos. 1 and 5. The property described in Sl. No. 4 in the schedule is the self-acquired property of Appellant No. 2, having received the said property from his sister, Rajeshwari. The property in Sl. No. 2 belongs to the paternal aunt of the propositus, and the paternal aunt gifted the property in favour of the propositus. The propositus, in turn, gifted the property in favour of his daughter, Rajeshwari, who died on 18.02.2003, and before her demise, Rajeshwari bequeathed the property in Sl. No. 2 in favour of Appellant No. 1. The claim of the Respondents for a share in Sl. No. 2, as coparcenary property, is misconceived and untenable.

5. The Trial Court, on a full-fledged trial, decreed the suit in part and granted a preliminary decree as follows:

> *"The suit of plaintiffs is decreed in part with costs.*
> *The plaintiffs are entitled for partition and separate possession of their 1/6th share each in the properties bearing CTS No.290, land block no.168/4, CTS No.92A5A and CTS No.92A5B. So also they are entitled for 1/10th shares each in the properties bearing CTS No.1100 to 1105, 1108, 1098 and 1099.*
> *The partition in the landed properties has to be effected under section 54 of C.P.C. and in other properties the division has to be made through court commissioner.*
> *Draw preliminary decree accordingly".*

6. The judgment and the decree of the Trial Court have been questioned by both sides, thus resulting in the filing of R.F.A. No. 3052 of 2010 at the instance of Appellants herein, and R.F.A Cross-objection No.103 of 2011 at the instance

of the Respondents. The High Court, through the impugned judgment, modified the judgment and decree of the Trial Court as follows:

> *"i) The plaintiffs are entitled to 1/3rd share each in 5/6th share in the suit properties bearing CTS No.290 and Block No.168/4.*
>
> *ii) The plaintiffs are entitled to 1/3rd share each out of 1/3rd share of defendant No.1 in properties bearing CTS Nos.1100, 1101, 1102, 1103, 1104, 1105, 1106, 1098 and 1099.*
>
> *iii) The plaintiffs are also entitled to 1/9th share each in the properties bearing CTS No.92A5A and CTS No.92A5B.*
>
> *iv) The plaintiffs are also held entitled to mesne profits".*

Hence, these Civil Appeals.

7. By the judgment dated 06.12.2012, at the first instance, the High Court modified the judgment dated 10.02.2010 of the Trial Court. The Appellant filed Civil Appeal No. 324 of 2015 in this Court challenging the judgment dated 06.12.2012 of the High Court of Karnataka. By the judgment dated 13.01.2015, this Court allowed the appeal and remanded the matter to the High Court for adjudication of Regular First Appeal and the cross-objections.

8. We have heard the Learned Senior Counsel, Shri Basava Prabhu S. Patil and Shri S. N. Bhatt, for the parties and perused the record.

9. Considering the arguments on both sides, we find it convenient to decide the Civil Appeals on the entitlement to a share in the suit property.

10. Shri Basava Prabhu S. Patil, Learned Senior Counsel for the Appellants, contends that the Respondents are entitled to a share in Sl. Nos. 1 and 5 of the

suit schedule. However, the share claimed by the Respondents is more than what they are entitled to in law. The propositus died in 1991, leaving behind him Appellant No. 1, his wife Shantakka and daughter Gayatri, who are arrayed as Defendant Nos. 2 and 3 in the Suit. The mother and sisters of Appellant No. 1 died between 2003 and 2005. Upon notional partition, the share they derived in the estate of Basavanthaiah was either gifted or bequeathed in favour of Appellant No. 1. There is a need for drawing a subtle distinction between the one-third share Appellant No. 1 succeeded by devolution and the share of the property Appellant No. 1 has derived from his mother and sisters in the family property. Therefore, claiming partition in the property succeeded by Appellant No. 1, either intestate or testate, is illegal. Thus, the judgment of the Appellate Court, to the extent of granting an enhanced share to the Respondents, is illegal. Adverting to suit schedule item-wise, it is argued that Sl. No. 2 was not part of the ancestral property held by the coparcenary headed by the late Basavanthaiah. The propositus got the property by way of a gift from his sister. Therefore, at the first instance, the said property was the separate/self-acquired property of the propositus, who had validly executed deeds in favour of his wife/daughter, who, in turn, has transferred the right to Appellant No. 1. Appellant No. 1, therefore, is the exclusive owner, and in the absence of pleading and proof on Sl. No. 2 as coparcenary, the share claimed is illegal and untenable. The findings of the Appellate Court, to the extent of including Sl. No. 2, for passing a preliminary decree in favour of the Respondents, are liable to

be set aside. It is, at the cost of repetition, narrated that Sl. No. 2, in the table *(supra)*, refers to one survey number. The Counsel appearing for both sides states that the said item has more than one survey number, and there is no dispute between the parties on the number of properties covered by Sl. No. 2. The matter can be proceeded with by accepting the position set out in the judgment of the Trial Court.

11. Sri S.N. Bhatt contends that the Respondents, to the extent required by law, have pleaded and proved that Sl. No. 2 stood mutated in revenue records in the name of the propositus. The propositus was at the helm of affairs, and, therefore, being the *karta* of the family, it cannot be gainsaid that the properties in Sl. No. 2 are self-acquired properties of the propositus.

12. The crux of consideration is Sl. No. 2 is whether the properties, more fully described by the Trial Court, form part of ancestral property held by coparcenary or are, from the beginning, separate and self-acquired property of the propositus and his successors-in-interest by deed of transfer.

13. We have taken note and examined the stand taken in the plaint and the reply given by the Appellants in the written statement. In our view, the plaint has made a sweeping averment on all the properties described in the suit schedule, including those covered by Sl. No. 2 in the table *(supra*). Assuming that a coparcenary with ancestral property existed between the parties, the properties covered by Sl. No. 2, whether can be included as forming part of the ancestral property is the question. The Respondents desire to extend the flair of ancestral

property to Sl. No. 2. We consider that the plaint averments are inadequate on this behalf. There is no reply or rejoinder to the categorical stand taken by Appellant No. 1 *vis-à-vis* Sl. No. 2 in the table. The flow of title finally into the hands of Appellant No. 1 would clearly show that the properties covered by Sl. No. 2 cannot be treated as coparcenary property. Therefore, in our view, directing division of Sl. No. 2, by preliminary decree, is illegal and unsustainable in fact and law. We are going by the first principle and consideration in a dispute. Therefore, for the above reasons and discussion, we hold that Sl. No. 2, described in detail in the operative portion of the judgment of the Trial Court, is not available for partition and, accordingly, must be excluded from the preliminary decree impugned in the Civil Appeals.

14. The Appellants challenged the inclusion of Sl. Nos. 3 and 4 in the preliminary decree on the grounds that these two serial numbers do not form part of the coparcenary and, therefore, need to be excluded.

15. We refer to the findings recorded by the Trial Court in Paragraph 18, which read as under:

> *"**18.** The defendant no.4 has not produced any registered sale deed of CTS No.92A5B standing in the name of defendant no.1 to show that this property is the self-acquired property of the defendant No.1. Even all the defendants have not produced any sale deed of these two properties either standing in the name of the defendant No.1 or in the name of the defendant no.2. The defendants are claiming exclusive title over these properties and therefore, the title deeds are necessary and those have to be proved in accountancy with law, which are not produced. In Ex.D.8 the name of the defendant No.4 is appearing on the basis of gift deed executed by the defendant no.2 in her favour of the year 2005 during pendency of this suit to the extent of 31 feet and the name of the defendant no.1 is appearing on the basis of the will*

deed executed by Gayatri and Rajeshwari. Similar entries are made in Ex.D.12 CTS No.92A5B. No revenue records have been produced by either of the parties to show that previously these two properties are standing in the name of the defendant No.2 alone. These revenue entries effected during the pendency of the suit will not prove that these two properties are self-acquired properties either of the defendant no.1 or of the defendant no.2. Basing on these entries, the defendant no.2 executed the gift deed at Ex.D.16 on 4.5.2005 in the name of defendant no.4 gifting the property measuring 31 feet x 42 feet in CTS No.92A/5/7. This gift is based on revenue entries and in the absence of absolute title of the defendant no.2 over these properties in cannot be held that the done has acquired the title over the part of the property in CTS No.92A5A and CTS No.92A5B, Absolutely there is no documentary evidence to prove the self-acquisition of these properties by the defendant No.1 or by the defendant No.2".

Paragraphs 22 and 23 of the Trial Court judgement are equally useful and are excerpted hereunder:

"22. The defendant no.4 has taken a plea that the defendant no.2 who was holding CTS No. 92A5A, has gifted her share in favour of the defendant no.4 through gift deed produced at Ex.D.17 dated 4.5.2005. She has also taken a contention that part of CTS.No.92A5A has been gifted to her by the defendant no.2 through gift deed at Ex.D.16.

23. First of all the defendants have failed to prove that CTS No.92A5A shown in Ex.D.16 Gift deed was exclusively belonging to the defendant no.2. Now the court has to see whether the primary evidence at Ex.D.16 and D.17 about the gift made by the defendant no.2 in favour of the defendant no.4 have been proved in accordance with law. The done under these gift deeds that is the defendant no.4 has not entered into witness box. These gift deeds are required compulsory attestation as per section 12 of transfer of property act and therefore to prove these deeds examination of attesting witness as required under section 68 of Evidence Act is must. But the defendants have not examined any of the attesting witnesses to Ex.D.16 and D.17. It is not the case of the defendants that none of the attesting witnesses are available for examination. Even the defendants have not proved that the signatures of attesting witnesses shown in Ex.D.16 and 17 are in their handwriting. So non-examination of attesting witnesses as required under section 68 of evidence act it has to be held that these deeds have not been proved in accordance with law. Therefore, I hold accordingly. No rights have been acquired by the defendant no.4 under Ex.D.16 and D.17 in any of the suit properties".

16. These findings are findings of fact, and the impugned judgment affirmed these findings. From the evidence adduced by the Appellants, no ground is

made to change the character of these items as self-acquired properties of either Appellant No. 1 or Appellant No. 4. Therefore, the argument fails and is, accordingly, rejected. We have perused the pleadings and the evidence on record. In the case on hand, we deem it inappropriate to examine the extent to which Sl. Nos. 1 and 5 must be included in the share of Appellant No. 1, i.e., whether the share is limited to the share notionally acquired in the partition upon the demise of the propositus or the share succeeded is also included. Appellant No. 1 admitted these items as ancestral properties, and the Respondents claimed a share, treating them as ancestral property.

17. The Appellants argued that in Sl. Nos. 1 and 5, the Respondents are entitled to a share in the property allotted at the first instance in the notional partition to Appellant No. 1. The share enhanced through succession from mother, etc., cannot be included for partition. The argument presents two facets: (i) that the widow or propositus is entitled to a share in the notional partition. (ii) that the share succeeded by Appellant No. 1 cannot be treated as coparcenary property. The Appellants rely on ***Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum & others***[2], ***Additional Commissioner of Income Tax v. M. Karthikeyan***[3] and ***Shyam Narayan Prasad v. Krishna Prasad & others***[4]. The Respondents replying to the said argument rely on ***State of***

[2] (1978) 3 SCC 383.
[3] (1994) Supp (2) SCC 112.
[4] (2018) 7 SCC 646.

Maharashtra v. Narayan Rao Sham Rao Deshmukh & others[5] and argue that the principle laid down in ***Gurupad Khandappa Magdum*** *(supra),* does not apply to the facts of the case and reliance is placed on the following paragraph:

> ***"10.*** *We have carefully considered the above decision and we feel that this case has to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which would have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under Section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs..."*

18. We are not inclined to delve into the question of applicability of the Bombay School of Mitakshara to the instant facts or thereby prolong the period of litigation by remanding the case to the High Court. The core consideration in applying its ratio of the ***Gurupad Khandappa Magdum*** *(supra)* would be the applicability of the Bombay School of Mitakshara to the case of parties. In other words, the question is whether the Bombay School of Mitakshara is attracted to the facts of this case or not. An attempt, though not feeble, has been made by Learned Counsel, Mr. Patil, to convince us that the Bombay School of

[5] (1985) 2 SCC 321.

Mitakshara is attracted to the facts of this case. This argument needs to be appreciated in light of the Respondents' basic objection, i.e., this contention lacks pleadings, evidence and the argument cannot be treated as a straight legal question. Further, the entitlement in a share ascertained after the partition is different from the share determined in a notional partition. The case was remanded once and is now in appeal again before this Court. For good reasons, we prefer to avoid one more remand and extend the life of litigation between the parties. Therefore, the ratio of ***Gurupad Khandappa Magdum*** *(supra)****, M. Karthikeyan*** *(supra)****, Shyam Narayan Prasad*** *(supra)* is not applied to the facts and circumstances of the case on hand. We are convinced that the judgments relied on, *viz.,* ***Gurupad Khandappa Magdum*** *(supra)****, M. Karthikeyan*** *(supra)****, Shyam Narayan Prasad*** *(supra)*, are distinguishable and hence, ought not to be relied on to decide the controversy i.e., the extent of share concerning Sl. Nos. 1 and 5 to the Respondents. The shares allotted by the impugned judgment in Sl. Nos. 1 and 5 in favour of Respondents do not warrant interference.

19. From the above discussion, it is concluded that the inclusion of the properties described in Sl. No. 2 *(supra)* as forming part of the coparcenary is untenable and illegal. The record discloses that these properties are separate and are self-acquired by Appellant No. 1 through succession or transfer from the mother or sister. Therefore, the Appeal is allowed by excluding Sl. No. 2 from partition, and thus, the preliminary decree stands modified to that extent.

In other words, the preliminary decree, in so far as SI. No. 1, 3, 4 and 5, is confirmed.

20. The Appeals are allowed in part as indicated above. The rest of the findings of the Appellate Court are confirmed. There is no order as to costs.

.....J.
[M.M. SUNDRESH]

.....J.
[S.V.N. BHATTI]

NEW DELHI;
JULY 8, 2024.