A PAVITRI DEVI AND ANR.

v.

DARBARI SINGH AND ORS.

SEPTEMBER 7, 1993

B [KULDIP SINGH AND K. RAMASWAMY, JJ.]

Hindu Succession Act, 1956: Section 30—Testamentary Succession—Mitakshara Coparcenary—Suit for Partition—Held, deceased upon making a demand for partition stood divided from other members of copar-
C *cenary and became entitled to dispose of his undivided share and interest by testamentary disposition—Testamentary disposition means disposition of the property which would take effect after the death instead of eo-instantine on execution of document—Gift by a coparcener of his undivided interest is invalid.*

D *Section 6—Mitakshara Coparcenary—Devolution of interest—Suit for partition by coparcener—Plaintiff died pending litigation—Plaintiff's daughter being class-I heir succeeds to estate by intestate succession.*

Code of Civil Procedure, 1908: Order 22, Rule 3—Suit for partition of
E *Mitakshara Coparcenary—Plaintiff died pending litigation—Daughter of deceased being class I heir, entitled to represent the estate.*

Words & Phrases: "Testamentary disposition"—Meaning of.

The Appellant's father filed a suit for partition against his brothers
F **and their legal heirs claiming his share in the co-parcenary properties. The suit was dismissed by the trial court. While the appeal was pending before the High Court the plaintiff died. The appellant claiming herself and her son to be the legal heirs of the plaintiff, filed an application for substitution. She claimed herself to be the daughter of the deceased. It was also**
G **claimed that her father, through a registrered gift deed, gave her the entire share that would accrue to him in the joint family property, and was put in possession.**

The appellant court directed the trial court to ascertain and submit a report in respect of the date of death of the plaintiff and the appellants'
H **entitlement to the proporty. The trial court found that the plaintiff died**

on May 6, 1981 and not on June 8, 1981 and hence the appeal stood abated. A
It also found the appellant was not his daughter.

On receiving the report, the High Court held that since the plaintiff died on June 8, 1981, the application for substitution was within limitation. However, it accepted the finding of the trial court that the appellant was not the heir of the deceased. The High Court also held that the gift deed B
executed was doubtful, and dismissed the appeal.

In the appeal by special leave, the appellants contended that under Section 30 of the Hindu Succession Act, 1956 the deceased had power to dispose of his undivided share in the joint family property by testamentary C
disposition including by way of gift to his daughter; that the deceased could bequeath his interest in the property by way of a gift and, therefore, the appellant became the successor in interest by devolution under Order 22 Rule 10 of the Civil Procedure Code, 1908 and entitled to be brought on record as a legal representative of her father to continue the appeal; that the appellant being the daughter of the deceased plaintiff equally could be D
brought on record as a daughter, being a class I heir under Order 22 Rule 3 of the Civil Procedure Code 1908.

Setting aside the order of the High Court and remitting the case to it, this Court

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HELD : 1.1. The deceased upon making a demand for partition, laid a suit in that behalf claiming a specific share in the Mitakshara Coparcenary. Hence he stood divided from other members of the coparcenary and even though partition by metes and bounds had not taken place on the date of his death, he was a dividing member of the joint family. By F
operation of Section 30 he was entitled to dispose of his undivided share and interest in the coparcenary by testamentary disposition. [168-D-E]

Jalaja Shedthi v. *Lokshmi Shedthi,* [1973] 1 SCR 707, followed

Phoolchand v. *Gopal Lal,* [1967] 3 SCR 153; *Baba* v. *Thimma,* (1884) G
7 Mad. 357; *Soorjeemoney Dossee* v. *Deenobundo Mullick,* (1857) 6 Moore's Indian Appeals 523 at 553; *Tagore* v. *Tagore,* (1872) Indian Appeals (Suppl.) 47 and *Subbaramani* v. *Ramanamma,* (1920) I.L.R. 43 Mad. 420, referred to.

1.2. Testametary disposition means disposition of the property which H

A would take effect after the death, instead of eo-instantine on the execution of the document. [167-C]

Webster : *Comprehensive Dictionary,* International edition p. 1298; P. Ramahatha Aiyar : *Law Lexicon* Reprint Edition, 1987 p. 1271 and Black's *Law Dictionary,* 6th Edition 1991 of 1475, referred to.

B

1.3. A gift by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. A disposition *intra vi vos* by gift of coparcenary property except either with consent of other coparceners or between coparceners or in exceptional circumstances, is void. [170-E]

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Maine's *Hindu Law* p. 685; N.R. Raghavachariar's *Hindu Law* p. 236 referred to.

Ramalinga v. *Narayana,* (1922) 49 Indian Appeals, 168 at 173; *Lakshman Dada Naick* v. *Ramachandra,* (1881) 7 Indian Appeals; 181 D (P.C.); *Appanpatra* v. *Srinivasa,* (1917) I.L.R. 40 Mad. 1122; *Dwarampudi Nagarathamba* v. *Kunuku Ramayya & Anr.,* (1968) 1 SCR 43; *Venkata Subbammana* v. *Rathnamma,* AIR (1987) SC 1757 and *Mukund Singh* v. *Wazir Singh,* [1972] 4 SCC 178, followed.

E 2.1. Gift is not a testamentary succession under section 30 of the Hindu Succession Act. Hence, the appellant donee acquires no interest by devolution to represent the interest of the deceased plaintiff under Order 22 Rule 10 of C.P.C. [170-F, G]

3.1. In the instant case, evidence establishes that the appellant is the F daughter of the deceased. Voluminous oral evidence of 11 witnesses was adduced to prove paternity of the appellant that the plaintiff was her father. No attention was bestowed by the High Court to subject that evidence to close scrutiny. There was no good ground to reject the oral evidence. Besides the plaintiff himself described in 1963 the geneology attached to the palint that the appellant was his daughter and her son as his grandson. In the gift G deed also he reiterated that she was his daughter. [172-C-D]

4. A private document produced from the custody of private party though of 30 years old, cannot have the same weight as a public document and cannot be used as evidence to deny the paternity of the child, when H voluminous oral evidence speaks to the contrary. [172-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1592 of 1993. A

From the Judgment and order 11.2.1984 of the Patna High Court in appeal from original decree No. 582/68.

Ranjit Kumar for the appellants. B

The Judgment of the Court was delivered by

K. RAMASWAMY. J. 1. One Brahmadeo Singh son of Tuso Singh filed partition Title Suit No. 13 of 1963 against his brothers and their heirs claiming 1/6th share in the coparcenary properties mentioned in schedules C attached to the plaint. The trial court dismissed the suit. While the F.A. No. 582/68 was pending in the High Court of Patna, he died on June 8, 1981. The appellant, Pavitri Devi, filed an application for substitution of her and her son as legal representatives. Her claim has been founded on two grounds, namely as the daughter of Brahmadeo Singh as well as the D registered gift deed Ex. 2 dated August 5, 1980 executed by her father giving his entire share in the joint family property and put them in possession of 9.96 acres of land. When the factum of the date of death and her entitlement as an heir were put in issue by the contesting respondents before the appellate court, the trial court was directed to record the evidence and to submit its report thereon. The trial court on recording E voluminous evidence found that Brahmadeo Singh died on May 6, 1981 and not on June 8, 1981, and consequently the appeal stood abated. The trial court also found that the appellant is not his daughter. The High Court held that "for the evidence it is clear that Brahmadeo Singh died on June 8, 1981" and the application for substitution was within limitation. However, F it held that the appellant is not his heir and the gift deed executed by Brahmadeo Singh was doubtful. Accordingly the appeal was dismissed by decree and judgment dated Feb. 11, 1984. Thus this appeal by special leave.

2. Though the respondents have been served before and after the grant of speical leave, none has appeared either in person or through G counsel. Shri Ranjit Kumar, learned counsel for the appellants placing reliance on s.30 of the Hindu Succession Act, 1956 for short 'the Act', contended that Brahmadeo Singh had power to dispose of his undivided share in the joint family property by testamentary disposition including by way of gift to his daughter. The interest held by him in the coparcenary H

A property could be bequeathed by the gift deed. Thereby the appellant became successor in interest of Brahmadeo Singh, her father, by devolution under Order 22 Rule 10 of Code of Civil Procedure, 1908. Undoubtedly, Order 22 Rule 10 is applicable to an assignee or a person acquiring, during pendency of the suit, the interest in the suit property by devolution. so she would be entitled to be brought on record as her father's legal repre-
B sentative to continue the appeal. Equally as a daughter, being Class I heir, she could be brought on record under Order 22 Rule 3 C.P.C. The question is whether the gift over of the interest in the coparcenary property by Brahmadeo Singh is valid in law. Section 30(1) of the Act provides that 'any Hindu may dispose of, by will or other testamentary disposition, any
C property which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus'. The explanation thereto provides that the interest of a male Hindu in a Mitakshara coparcenary property.....shall notwithstanding anything contained in this Act, or
D in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section. Section 6 of the Act provides that 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. If
E the deceased had left behind him a surviving female relative specified in Class I of the Schedule, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

F 3. Webster in *Comprehensive Dictionary* in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by
G P. Ramanatha Aiyar, [reprint edition 1987 at p. 1271] testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's *Law Dictionary* [6th Ed. 1991] defines "testamentary disposition" at page 1475 thus - "the passing of property to another upon
H the death of the owner. A disposition of property by way of a gift, will or

deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of eo-instentine on the execution of the document. A testamentary disposition is generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition and is to be deemed to form part of the will. Will as defined in s.2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation *intra vivos*. While the gift being a disposition in presenti, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt with in accordance with the Indian Succesion Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstenti clause and excludes from the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under s.30 of the Act.

4. It would be clear when we glean through the pre-existing law. In *Jalaja Shedthi* v. *Lakshmi Shedthi,* [1973] 1 SCR 707, relied on by Mr. Ranjit Kumar this court held thus:

"On the demand for partition there is a division in status, and

A though partition by metes and bounds may not have taken place, that family can thereafter never be considered as an undivided family, nor can the interest of a coparcener be considered to be an undivided interest. It is a well established principle in the Hindu Law that a member of a joint Hindu family has a right to intimate his definite and unambiguous intention, to the other members of
B the joint family that he will separate himself from the family and enjoy his share in severalty. Such an unequivocal intention communicated to the others will amount to a division in status and on such division he will have a right to get a *de facto* division of his specific share of the joint family property, in which till then all of
C them had an undivided coparcenary interest, and in which none of them could claim that he had any right to any specific part thereof. Once the decision to divide has been unequivocally expressed and clearly intimated to his co-sharers whether or not the other co-sharers agree, an immediate severance of the joint status is effected
D to which he is admittedly entitled, becomes specified."

5. Having made demand for partition and laid the suit in that behalf claiming a specific share in the Mitakshara Coparcenary, Brahmadeo Singh stood divided in status from other members of the coparcenary, though partition by metes and bounds had not been taken place, on the date of
E his death; he was a dividing member of the joint family. By operation of s.30 he was entitled to dispose of his undivided share and the interest in the coparcenary by testamentary disposition.

6. In *Phoolchand* v. *Gopal Lal,* [1967] 3 SCR 153 this court held that
F after filing the suit there was a division in status among the members of the joint family, even though they had been separated earlier. In that case there was a decree passed. Sohan Lal had bequeathed his share by a will in favour of Gopal Lal. This court held that Sohan Lal being the owner of his share in the undivided coparcenary, was competent to bequeath by will of his undivided share he got out of the joint family property. This bequeast
G was between coparceners.

7. It is settled law that the Karta or the Manager of the Hindu Joint Family has a right to alienate undivided interest in the Hindu joint family property for valid consideration for family necessity. Karta or coparcener
H has right to alienate his undivided share in coparcenary property and the

purchaser acquires only the equitable right to allotment of his predecessor's share at a partition.? The purchaser is entitled to the allotment of the specific property sold and was put in possession, as far as possible, subject to equities. In *Baba* v. *Thimma,* (1884) 7 357, the Full Bench held that an undivided Hindu father has no right to bequeath coparcenary property.

8. In *Soorjeemoney Dossee* v. *Deenobundo Mullick,* (1857) 6 Moore's Indian Appeals 523 at 553, under Dayabaga law the Judicial Committee held that whatever may have formerly been considered the state of that law as to testamentary power of the Hindus over their property, the power has long been recognised and must be considered as completely established. In *Tagore* v. *Tagore,* (1872) Indian Appeals (Suppl.) 47, the Judicial Committee set the limits thus: the law of will among the Hindus is analogous to law of gifts and even of wills are not universally to be recognised in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred. A bequest by a will made by a Hindu father of his joint family property for the maintenance of his wife was held to be invalid *Subbaramani* v. *Ramanamma,* (1920) I.L.R. 43 Madras 420.

9. At p.685 in paragraph 406 of Mayne's Hindu Law, 13th Edition revised by Justice A. Kuppuswami former Chief Justice of Andhra Pradesh High Court, it is stated thus: "It is now equally well settled in all this states that a gift or device by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. The exceptional cases recognised by the Mitakshara law where it is open to the father or managing member of the family to make a gift of ancestral movable or immovable property have been noticed in paragraph 377, 393 and 394. A coparcener cannot make a gift of his undivided interest in the movable family property either to a stranger or a relative except for the purpose warranted by special texts.

10. In N.R. Raghavachariar's *Hindu Law*, edited by late Prof. S. Venataraman, who himself was an authority on Hindu Law, stated at page 236 that a coparcener cannot transfer his undivided interest without consideration. Such transfer is totally void. At page 237 it was stated that a gift of his interest by a coparcener being void altogether, there is no estoppel or other kinds of personal bar precluding the donor from asserting his rights to recover the transferred property. A gift by a major coparcener in

A favour of the minor coparcener was stated to be valid as an exception to the general principle. A transaction of gift of a joint family property would be void *in toto* and would not bind even the donor.

11. Mayne's *Hindu Law*, in paragraph 379 at p.661 it is stated that the father's power to make gift through affection within reasonable limits B of ancestral movable property has been duly recognised. In *Ramalinga* v. *Narayana,* (1922) 49 Indian Appeal, 168 at 173 the Judicial Committee held that the father has undoubtedly the power under the Hindu law of making, within reasonable limits gift of movable property of Rs. 8,000 to a daughter, but the gift through affection of joint family property as invalid. Right of C the coparceners vests by survivorship at the moment of the trestator's death, and there is accordingly nothing upon which the will can operate, as held in *Lakshman Dada Naick* v. *Pamchandra,* (1881) 7 Indian Appeals 181 (P.C.). A gift made with the consent of the coparceners was held to be valid in *Appanpatra* v. *Srinivasa,* (1917) I.L.R. 40 Madras 1122.

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12. In *Dwarampudi Nagaratnamba* v. *Kunuku Ramayya & Anr.,* [1968] 1 SCR 43, this court held that under the Madras School of Mitakshara law by which V was governed, he had no power to make gift of his undivided interest in the coparcenary property to his concubine. But a gift by one coparcerner of his undivided share to another coparcener, to the exclusion E of the others is not invalid *Venkata Subbammana* v. *Rathnammal,* AIR 1987 SC 1757. This court in *Mukund Singh* v. *Wazir Singh,* [1972] 4 SCC 178 held that a gift of coparcener's property by a member is void. In other words it is settled law that a disposition *intra vivos* by gift of coparcenary property except either with the consent of other coparceners or between copar- F ceners or in exceptional circumstances is void. Since the gift being not for consideration is void *in toto* and operates *eo instentine* during the life time of the donor, it is not a testamentary succession under. Section 30 of the Act, therefore, brought about change in law of testamentary disposition of a Hindu Coparcener of his interest in coparcenary property governed by Mitakshara School of Hindu Law worked out in accordance with Section G 55 read with Schedule III of Indian Succession Act or any other law in force to the above extent. The appellant, donee acquires no interest by devolution under the gift to represent the interest of the deceased plaintiff under Order 22 rule 10 of C.P.C. Therefore, though for different reasons, we uphold the finding of the High Court in this behalf that the appellant H is not a successor in interest by devolution by operation of Order 22 Rule

10. Accordingly we reject the claim of the appellant on that premise. A

13. However, she is right in her contention that she is a successor in interest under Order 22 Rule 3 of C.P.C. as is seen by operation of the proviso to section 6 (1) of the Act and explanation I of which reads thus :

> "Explanation 1. - For the purpose 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." B

A reading of s. 6 thereof clearly provides that when a male Hindu dies, after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest by operation of the proviso devolve on his surviving members of the relatives specified in Class I of the Schedule. The interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. In other words interposition of a female class I heir in the family of the deceased coparcener interjects the operation of succession to coparcenary property by survivorship and opens up the intestate or testementary succession under the Act among the heirs in the order specified in the Schedule. For the purpose of this section the interest of a Hindu 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 is, therefore, statutorily assumed that the partition had, in fact, taken place between the deceased and the other coparceners immediately before his death by fiction of law. The inevitable corollary being that Pavitri Devi, female class I heir as per schedule will get her share in the interest which the deceased had in the coparcenary property at the time of his death at a notional partition. C D E F

14. The immediate question is whether the first appellant is the daughter of Brahmadeo Singh. The High Court rejected her claim predominently on two grounds; firstly that there was a discrepancy in the description of the name of her husband and that at the tonsuring ceremony (Mundan) she was described to be the daughter of one Uma Shanker Singh. As regard the first ground is concerned, we find that it is wholly G H

A irrelevant and cuts no ice into her case. With regard to tonsuring ceremony, said to be based on an entry found in a private record said to have been maintained before 30 years by the father of a witness. A private document produced from the custody of a privata party though of 30 years old cannot have the same weight as a public document, nor be relied on to make a child bastard. One finds that such a precarious document cannot be used B to deny the paternity of the child. Voluminous oral evidence of 11 witnesses was adduced to prove paternity of the appellant that her father is Brahmadeo Singh. No adequate attention was bestowed by the High Court to subject that evidence to close scrutiny. No valid grounds were given to reject it. Therefore, without trenching into the field of appreciation, we C have gone through it and we find no good ground to reject the oral evidence. This apart the deceased himself described in 1963 the geonology attached to the plaint that Pavitri Devi is his daughter and her son as grandson. The High Court stated was there was no need to describe in the geonology of the females. Whether there existed the need or not, it now bears great relevance. As a fact, it establishes that he proclaimed that D Pavitri Devi to be his daughter long before his death. In the gift deed also, though we find to be void, he reiterated her to be his daugher. That was almost one year prior to his death. We have no hesitation to hold that the evidence establishes that Pavitri Devi is the daughter of Brahmadeo Singh. She being the Class I heir succeeded to the estate of the deceased by E intestate succession under s.6 and she is entitled to represent the estate in the partition action. Accordingly by operation of s.6 of the Act read with Order 22 Rule 3 C.P.C. she is entitled to represent the estate of the deceased. The application for substitution stands succeeded. She is brought on record as legal representative of the deceased appellant. The order of F the High Court is accordingly set aside. The matter is remitted to the High Court for disposal on merits. The appeal is allowed but with no order as to costs.

R.S.K. Appeal allowed.