CASE NO.:
Appeal (civil) 817 of 2002

PETITIONER:
P.S. Sairam & Anr.

RESPONDENT:
P.S. Rama Rao Pisey & Ors.

DATE OF JUDGMENT: 04/02/2004

BENCH:
Y.K. SABHARWAL & B.N. AGRAWAL

JUDGMENT:
JUDGMENT

B.N. AGRAWAL, J.

In this appeal by special leave, appellants, who were defendant nos. 1(e) and 2, have assailed the judgment rendered by Karnataka High Court in appeals whereby it has been directed that plaintiff is entitled to 11/30th share in the properties described as item Nos. 1,2 and 3 in the Schedule appended to the plaint and thereby modifying the decree of the trial court which directed that the plaintiff shall be entitled to 1/8th share in the said properties.

Plaintiff filed a suit for partition claiming 1/7th share in the properties described as item Nos. 1 to 4 in the Schedule and for rendition of accounts in relation to joint family business carried on by defendant no. 1 in the name and style of M/s Pissey and Sons and his case, in short, was that one P.Eswar Rao had three marriages and from the second marriage, he had two sons, namely, P.E.Sadasiva Rao (defendant No.1) and P.E.Panduranga Rao. From other two marriages also, P.Eswar Rao had children and he acquired various properties during his life time which were his self acquisitions but the same were put in common hotchpotch. On 29th November, 1947, P.Eswar Rao executed a deed of family arrangement whereby properties bearing holding No. 35 in Commercial Street in the city of Bangalore (described as item no. 1 in the Schedule) and holding No. 262 situate in Cavalry Road within the same city were jointly allotted to P.E.Sadasiva Rao (defendant No.1) and his brother P.E.Panduranga Rao. Subsequently, a suit was filed by P.E.Panduranga Rao in which a compromise was arrived at and item No. 1 property was allotted to defendant No.1 whereas the other property was allotted to P.E.Panduranga Rao under a compromise decree dated 22nd January, 1963 passed in OS No. 56 of 1961. P.E.Sadasiva Rao had two marriages. From his first wife -Godavari Bai, he had a son P.S.Ramarao Pissey, who is the plaintiff, besides four daughters viz., P.Asha Devi [defendant no. 1(a)], P.Jayalakshmi [defendant no. 1(b)], P.S. Lalitha [defendant no. 1(c)] and P.S.Shantha [defendant no. 1(d)]. From second wife-Sumitra Bai [defendant no. 1(e)], P.E.Sadasiva Rao had a son, namely, P.S. Sai Ram [defendant no. 2] besides three daughters, namely, Rekha [defendant no. 1(f)], Mala [defendant no. 1(g) and Prabha [defendant no. 1(h)]. Defendant No.1 started a joint family business of textiles and tailoring in a portion of item No.1 property and out of the income of the said business, he acquired item Nos. 2,3 and 4 properties. Further case of the plaintiff was that even though the suit properties belonged to joint family of defendant No.1 and his two sons, namely, the plaintiff and defendant No.2, defendant No.1 executed a deed of settlement on 23rd February, 1978 whereunder he settled item no. 1 property in favour of defendant No. 2. Thereafter, defendant No.2 obtained a Will executed by defendant No.1 on 29th January, 1993 bequeathing thereunder item No.3 property in favour of defendant nos. 1(e) and 2 which was fabricated one. As the parties were having difficulty in joint enjoyment of the properties, the same necessitated filing of the present suit.

In the said suit, the defendants filed written statement contesting the case

of the plaintiff. According to them, item No.1 property was self acquisition of P.Eswar Rao and, consequently, of defendant no. 1, who, after raising funds from the market, started his separate business of tailoring in the said property with which the joint family had absolutely no connection whatsoever, more so when the joint family was neither possessed of any fund nor any fund was at all invested in the said business by it at any point of time. According to them, out of the income from the said business, defendant No.1 acquired other properties which are described as item Nos. 2,3 and 4 in the Schedule and, therefore, the same are also his self acquisitions, consequently, he had every right to deal with it. Accordingly, deed of settlement dated 23rd February, 1978 and the Will dated 29th January, 1993 executed by defendant no. 1 were genuine and valid and, consequently, the plaintiff was not entitled to claim any share in the suit properties. It may be stated that during pendency of suit, defendant No.1 died in February, 1994 and as his first wife predeceased him, four daughters from her were impleaded as defendant Nos. 1(a) to 1(d), second wife as defendant No.1(e) and three daughters from her as defendant Nos. 1(f) to 1(h).

During trial, both the parties led evidence in support of their respective cases and upon conclusion of trial, the learned Civil Judge recorded findings that property described as item No.1 in the Schedule was a joint family property, business started therein by defendant No.1 was joint family business and as out of its income, item Nos. 2,3 and 4 properties were acquired, it also became the joint family property. The deed of family settlement dated 23rd February, 1978 was held to be invalid. It was further held that the defendants failed to prove due execution of the Will. The court held that Section 6A of Hindu Succession (Karnataka Amendment) Act, 1990 [hereinafter referred to as 'the Karnataka Amendment',] which conferred equal right to a daughter in co-parcenary property, was applicable in the present case, but defendant Nos. 1(a) and 1(b), two of the daughters of defendant No.1 from his first wife, were not entitled to any share in the suit properties, they having married before the coming into force of the Karnataka Amendment. In view of the aforesaid findings, the trial court decreed suit for partition in relation to item Nos. 1, 2 and 3 properties in which it was directed that plaintiff was entitled to 1/8th share. No decree for partition was passed in relation to item No. 4 property as the same was not available for partition in view of the fact that prior to the date of filing of the suit, it had already been sold by defendant No.1 to one Smt. Adilaxmi, who was not made party to the suit. It was further directed that plaintiff was entitled to a decree for rendition of accounts in relation to business and the amount shall be ascertained at the time of passing of final decree.

Challenging the decree of trial court, two appeals were preferred, one by the plaintiff and another by defendant No.2 and his mother-defendant No.1(e) before the High Court of Karnataka. The High Court confirmed the findings of the trial court on all the issues, excepting applicability of Section 6A of the Karnataka Amendment in relation to which it has been categorically held that it shall have no application in the case in hand and accordingly daughters of defendant no. 1 could not claim right in coparcenery property as a coparcener and in view of this, the judgment and decree of the trial court granting 1/8th share to the plaintiff in the properties described as item Nos. 1 to 3 in the Schedule have been modified and it has been held that the plaintiff and defendant No.2 will be entitled to 11/30th share each in the properties described as item Nos. 1 to 3 in the Schedule and each of the seven daughters and widow of defendant no. 1 shall be entitled to 1/30th share therein. Hence, this appeal by special leave.

Mr. U.U.Lalit, learned counsel, in support of the appeal submitted that the High Court was not justified in affirming findings of the trial court that the business which defendant No.1 was carrying on was not his separate business but the same belonged to joint family. It was further submitted that as the business was separate one of defendant no. 1, item Nos. 2,3 and 4 properties acquired out of income of the said business, became his separate properties in which the plaintiff had no right to claim partition. Further, it was submitted that the finding that the defendants failed to prove due execution of the Will is vitiated as the same was arrived at without properly considering the evidence adduced on behalf of the parties and consequently, the plaintiff was not entitled to any share

in item No.3 property. Lastly, it was submitted that upon the death of defendant No.1, the plaintiff was entitled to only 11/40th share in item No. 1 property in terms of Section 6 of the Hindu Succession Act, 1956 (hereinafter referred to as 'the Act') and 1/10th share in item no. 2 property, but the High Court committed an error in holding that he was entitled to 11/30th share. On the other hand, learned counsel appearing on behalf of the plaintiff/respondent submitted that the courts below were justified in holding that the business belonged to joint family and the properties acquired out of its income became joint family properties and the plaintiff was entitled to claim partition therein. So far as the Will is concerned, it was submitted that the two courts below recorded the finding after duly considering the evidence adduced on behalf of the parties and no interference is called for. Lastly, it was submitted that the High Court was not justified in reversing decision of the trial court regarding applicability of Karnataka Amendment holding the same to be not applicable and thereby reducing share of the plaintiff and his sisters in the suit properties.

Crucial question in the present appeal is as to whether business which was conducted by defendant No.1 was his separate business or it belonged to joint family, consisting of himself and his sons. It is well settled that so far as immovable property is concerned, in case the same stands in the name of individual member, there would be a presumption that the same belongs to joint family, provided it is proved that the joint family had sufficient nucleus at the time of its acquisition, but no such presumption can be applied to business. Reference in this connection may be made to a decision of this Court in the case of G.Narayana Raju v.G.Chamaraju & Others 1968(3) SCR 464 wherein in a suit for partition defence was taken that business of Ambika Stores was separate business of defendant as the business did not grow out of joint family funds or at least by efforts of members of joint family which was accepted by the trial court as well as the High Court. When the matter was brought to this Court in appeal, upholding the judgment of the High Court, the Court observed thus at page 466:-

"It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. "

In the case of M/s Piyare Lal Adishwar Lal v. The Commissioner of Income Tax, Delhi (1960) 3 SCR 669, similar question had arisen before this Court while hearing an appeal arising out of order passed by Punjab High Court on a reference made under Section 66(1) of the Indian Income Tax Act, 1922. In that case, one Adishwar Lal was Treasurer of a bank who had two sons and they were members of Hindu Undivided Family. One of his sons, namely, Sheel Chandra, was employed as Overseer in the bank during the life time of his father and upon father's death, he was appointed as Treasurer in the bank on a monthly salary of Rs. 1,750/-. Sheel Chandra furnished, by way of security to the bank, certain properties belonging to Hindu Undivided Family consisting of himself and his younger brother and in the accounting year 1950-51, he received from the bank a sum of Rs. 23,286/- as a Treasurer. The Income-tax Authorities considered that this sum was not the individual income of Sheel Chandra as salary but was part of income of the Hindu Undivided Family and taxed it as such on account of the fact that he was appointed as a Treasurer because his father was Treasurer in the bank before him and joint family property was furnished by way of security. The Assessing Authority came to the conclusion that as the emoluments could not be said to have been earned without detriment to the family property, the same could be taxed as income in the hands of Hindu Undivided family. The decision of the Assessing Authority was upheld by the Income-tax Appellate Tribunal as well as the High Court on a reference. On appeal being preferred before this Court, the decision was reversed and it was laid down that giving joint family property in security for the good conduct of a member of the family employed on a post was sufficient to make the emoluments of the post to be income in the hands of joint family only if it were shown that the said act was detrimental to the family property. In the said case, as the act of furnishing security was not found to be detrimental to the family property, the

Court held that the income received by Sheel Chandra was not income of the Hindu Undivided Family but was his individual income.

In the case of V.D.Dhanwatey v. The Commissioner of Income Tax, M.P.Nagpur (1968) 2 SCR 62, a Constitution Bench of this Court was also considering an appeal arising out of an order passed by the High Court on a reference. In that case, joint family funds were invested in a partnership business which enabled karta of the joint family to become a partner and when the remuneration was paid to him, it was assessed as income of the joint family and the view taken was upheld by this Court holding that as investment of the joint family funds in the partnership enabled a karta to become a partner and there being real and sufficient connection between that investment and the remuneration paid to the karta, the same has to be treated as income of the joint family. The Constitution Bench noticed the decision of this Court in the case of M/s Piyare Lal Adishwar Lal (supra) and, while approving the ratio of that case observed that as the remuneration earned by the karta was detrimental to the Hindu Joint Family funds, the High Court was justified in answering the reference against the assessee and in favour of the Revenue by holding that remuneration received by the karta was taxable in the hands of Hindu Undivided Family.

The question to be examined in the present case is as to whether mere user of the joint family property (item no. 1 property), as a business premises by defendant No.1, who was karta of the joint family, for running his separate business can be said to be in any manner detrimental to the joint family property? Undisputably, the joint family had not invested a single farthing in the business at any point of time as it was started by defendant No.1 by raising loans from the market. Even according to the plaintiff, only a portion of said property was leased to one Md. Sharif in the year 1948 who vacated it in the year 1952. But it is not known during this period what was the rental of the said portion. There is no evidence to show whether after 1952, the said portion which was vacated by Md. Sharif was let out to anybody or remained vacant. So far as the other portion of the said property is concerned, undisputedly, in one part only, defendant No.1 was carrying on business. Apart from that, the trial court found that defendant No.1 along with his first wife and children from her, including the plaintiff, resided therein till the year 1969 when his first wife died and the plaintiff was also carrying on his separate business in the very same property. It further found that as in the year 1970, the defendant No.1 married Sumitra Bai-defendant No.1(e), differences cropped up between the plaintiff and his father as a result of which defendant No.1 shifted to another house and resided therein with his second wife. These facts amply prove that joint family property was being used as business premises not only by karta but also by junior member of the joint Hindu family. There is no material whatsoever to show that user of the same as business premises by defendant no. 1 was in any manner detrimental to the joint family property. This being the position, we have no option but to hold that the business carried on by defendant No.1 in the property described as item No.1 in the Schedule cannot be treated to be joint family business and the same remained his separate business throughout, especially in view of the fact that there was neither any case nor evidence to show any blending. In view of our conclusion aforementioned that the business was separate one of defendant No.1, properties enumerated as item Nos. 2,3 and 4 in the Schedule acquired out of income of the said business, have got to be treated self acquisitions of defendant No.1.

Turning now to the second submission of learned counsel appearing on behalf of the appellants, it has to be seen as to whether the findings recorded by the two courts below to the effect that item no. 3 property being joint family property, defendant no. 1 \026 Sadasiva Rao had no right to execute the Will in question and defendants failed to prove the due execution of the Will by Sadasiva Rao were vitiated. In view of our conclusion aforesaid that item no. 3 property was self-acquisition of defendant no. 1, we have no difficulty in holding that both the courts below were not justified in coming to the conclusion that defendant no. 1 had no right to execute the Will.

The courts below have recorded finding against the defendants regarding execution of the Will, principally, on two grounds; defendant no. 1, though he was

literate, did not put his signature, but put his Left Thumb Mark [LTM] on the Will in question and out of the three attesting witnesses, only K.S. Panduranga Rao was examined as DW.3 and the other two witnesses, namely, Vittal Rao and Rajanna, were not examined. It is true that Sadasiva Rao was a literate person, but he put his LTM on the Will reason therefor finds mention in the Will, Ext. D.13 itself, wherein it was specifically mentioned that as hands of Sadasiva Rao were shaking due to nervous weakness, he was putting his LTM on the Will. Even on the Vakalatnama (Ext. P.28) defendant no. 1 put his LTM, but did not sign it. DW.3 stated in his evidence that as Sadasiva Rao was diabetic patient and his hands were shivering, he did not sign the Will but put his LTM thereon. The testator, who died during the pendency of the suit, as stated above, was examined as DW.1 and in his evidence he had stated that because of nervous disability he was not in a position to put his signature on the Will. Thus, the reason assigned in the Will for the testator's not signing it and putting his LTM is not only corroborated by the evidence of DWs.1 and 3, but also by the fact that he put his LTM on the Vakalatnama [Ext. P/28] as well. These facts show that the first ground which weighed with the courts below for holding that the defendants failed to prove due execution of the Will was unwarranted.

So far as the other ground is concerned, it was stated by DW.3 that on being called by the testator, he went with him to the office of lawyer along with the other two witnesses, namely, Vittal Rao and Rajanna, and there, in his presence and in the presence of other attesting witnesses, contents of the Will were not only read over to the testator, but he himself also had gone through its contents. He further stated that the testator was keeping good health and was mentally sound. The witness then stated that the testator put his LTMs on each and every page of the Will in his presence which were marked as Exts. D.13(a) to D.13(j) and he attested the same and put is signature on the Will which was marked as Ext. D.13(k). He thereafter stated that other two attesting witnesses also put their signatures on the Will and he identified them which were marked as Exts. D.13(l) and D.13(m). DW.3 lastly stated that he was instructed to go to the Sub-Registrar's office two days after the execution of the Will where he presented himself before the Sub-Registrar and there in his presence the testator put his LTM, which was marked as Ext. D.13(n), and he attested the same and his signature was marked as Ext. D.13(p). In our view, there is no infirmity in the evidence of this witness and the courts below were not justified in drawing an inference against the defendants for not examining the other two attesting witnesses. In the case on hand, neither the LTMs of the testator on the Will have been denied nor any case has been made out or evidence led to the effect that LTMs of the testator were taken on blank papers and same were converted into Will. As the plaintiff had filed a suit for partition against his father, who was the testator, there was nothing unnatural in the testator bequeathing item no. 3 property to his second wife, defendant no. 1(e), creating life estate in her favour and thereafter to her son, defendant no. 2. It may be stated that in the Will it has been recited that the testator had already purchased a house in the name of his first wife where his children from her, including the plaintiff, were residing and he gave the said house to his four daughters from the first wife. This shows that conduct of the testator in bequeathing item no. 3 property under the Will in favour of his second wife and his son from her cannot be said to be unnatural. In view of the foregoing discussion, we hold that the defendants succeeded in proving that Sadasiva Rao duly executed the Will in question and, consequently, the plaintiff shall not be entitled to claim any share in the property described as item no. 3 in the Schedule.

Lastly, learned counsel for the appellants submitted that the High Court was not justified in holding that the plaintiff was entitled to 11/30th share in the joint family property as under the provisions of Section 6 of the Act, interest of a male Hindu in the Mitakshara coparcenary property shall not devolve by survivorship upon the surviving members of coparcenary in case he died leaving behind a female relative specified in class I of the Schedule of the Act or a male relative specified therein claiming through such female, in which event the said interest shall be inherited by his heirs. Explanation I to Section 6 lays down that 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 the fact whether he was entitled to claim partition or not. This shows that for determining the interest of a male Hindu, a notional partition has to be assumed and the share in the joint family property, which could have been allocated to him in the notional partition, would devolve upon his heirs. Learned counsel appearing on behalf of the plaintiff-respondent submitted that as daughters of Sadasiva Rao, defendant no. 1, by virtue of coming into force of Section 6A of the Karnataka Amendment became coparceners and acquired right equal to son in the coparcenary property, the High Court was not justified in holding that the Karnataka Amendment shall not be applicable and thereby reducing share of the plaintiff-respondent and his sisters. In our view, in the absence of any appeal against the decision of the High Court reducing the share of the plaintiff and his sisters after holding that the Karnataka Amendment was not applicable, it is not open to the plaintiff to challenge the said decision as by its reversal, the share of plaintiff and his sisters would be enhanced. Therefore, it is not possible for this Court to go into correctness of decision of the High Court regarding applicability of the Karnataka Amendment in this appeal, and, consequently, we refrain ourselves from expressing any opinion thereon. Thus, the shares of the parties in the joint family property have to be determined in accordance with the provisions of Section 6 of the Act. In the present case, if a partition would have taken place, in view of the fact that defendant no. 1 had, besides his second wife, two sons, he would have been allotted 1/4th share in the joint family property and 1/4th share each would have gone to the two sons \026 plaintiff and defendant no. 2, and defendant no. 1(e), who was mother of defendant no. 2. In view of the fact that defendant no. 1 died during the pendency of suit, his 1/4th share, which he would have got in the notional partition, would devolve by inheritance upon his ten heirs, who are plaintiff and defendants. Thus the share of the plaintiff, defendant no. 2 and defendant no. 1(e) in the property described as item no. 1 in the Schedule, which belonged to the joint family, would be 11/40th each and so far as the seven daughters, namely, defendant nos. 1(a) to 1(d) and 1(f) to 1(h) are concerned, each one of them would be entitled to 1/40th share therein. In the separate property described as Item No. 2 in the Schedule, each one of the ten heirs, including the plaintiff, would be entitled to 1/10th share.

In the result, the appeal is allowed in part, impugned judgments and decrees are modified to this extent that the plaintiff shall be entitled to 11/40th share in the property described as item no. 1 and 1/10th share in the property described as item no. 2, but he shall not be entitled to any share in the property described as item no. 3 in the Schedule. In the facts and circumstances of the case, there shall be no order as to costs.