Nand Kishore and Others Vs. Smt. Rukmani Devi and Others

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Court : Rajasthan

Decided On : Jan-19-2012

Judge : The Honourable Ms. Justice Bela M. Trivedi

Appeal No. : S.B. Civil First Appeal No. 202 of 1973 & 56 of 1974

Appellant : Nand Kishore and Others

Respondent : Smt. Rukmani Devi and Others

Judgement :

1. Both these appeals have come up for the re-consideration in view of the judgment and order dated 21.10.05 passed by the Division Bench in the DB Civil Special Appeal No. 20/86.

2. The factual matrix of these appeals is narrated as under :-

2.(i) The appellants of the S.B. Civil First Appeal No. 56/74 Smt. Rukmani Devi and Sampat Devi,(original plaintiffs) filed a civil suit being No. 70/73 (14/68) against Shri Nand Kishore and others, the respondents in the said Appeal, (original defendants) in the Court of Addl. District Judge, Court No.1, Jaipur (hereinafter referred to as “the trial court”)seeking partition of the properties mentioned in para 4 of the plaint and seeking declaration that the plaintiffs were entitled to the one-fourth share in the said properties, and seeking further prayer that the plaintiffs be put in separate possession of their share in the said properties. It appears that the said plaint was subsequently amended by the

plaintiffs for seeking one-fifth share in the said properties. The properties mentioned in para 4 of the plaint were (a) one building, known as G.N. Bhawar Lal Photographer building, situated on the southern side of the Mirza Ismail Road, Jaipur, worth Rs. 2,50,000/-, (b) one house, facing towards west situated in the lane facing towards south, in Gali Selan, Chowkri Purani Basti, worth Rs. 20,000/-, (c) one house, situated in front of the above mentioned house on the southern side of the Gali Selan, Chowkri Purani Basti worth Rs. 5,000/- and (d) one plot of land, ad-measuring 10 feet x 18 feet situated on the eastern side of the building at M.I. Road, worth Rs. 25,000/-.

2.(ii) So far as the relationship between the parties was concerned, the pedigree was given in the plaint itself, from which it appears that the deceased Bhanwar Lal had two sons named, Nand Kishore (defendant No.1) and Ram Kishore (who had pre-deceased the said Bhanwar Lal on 8.10.62), and three daughters named, Munni Devi (defendant No.2), Prem Devi (defendant No.3) and Chhota Bai (who had pre-deceased the said Bhanwar Lal). The plaintiff No.1 Rukmani Devi happened to be the wife and the plaintiff No.2 Sampat Devi happened to be the daughter of the said deceased son Ram Kishore. The defendant No.4 Miss Gyanwati and defendant No.5 Miss Chunni Bai happened to be the daughters of the said Chhota Bai (pre-deceased daughter of Bhanwar Lal.

2.(iii) As per the case of the plaintiffs the said Bhanwar Lal had constituted the Joint Hindu Family, governed by the Hindu Law of Mitakshara, with his sons. The said Bhanwar Lal had inherited the suit properties from his father Govind Narain. As per the further case of the plaintiffs, after the death of his younger son Shri Ram Kishore on 8.10.62, the plaintiffs i.e. the widow and the daughter of said Ram Kishore, continued to live jointly with the said Bhanwar Lal and his elder son Nand Kishore. The said Bhanwar Lal died intestate on 22nd February, 1968, leaving behind the four immovable properties, as mentioned in para 4 of the plaint. After the death of said Bhanwar Lal, his son i.e. the defendant No. 1 Nand Kishore, being the senior member of family, was supervising the family affairs and recovering the rents etc., of the joint family properties, which were described in para 4 of the plaint. It was further case of the plaintiffs that since the defendant No.1 was neither maintaining proper accounts nor paying to the plaintiffs their

share in the rent amount collected by him, they had lost confidence in the defendant No.1 and, therefore, had filed the suit for partition as prayed for in the plaint.

2.(iv) The said suit filed by the appellants (original plaintiffs) was resisted by the respondent NO.1 (original defendant No.1) Nand Kishore contending interalia that on 8.6.65 a family settlement was arrived at during the life time of the said Bhanwar Lal, in order to permanently settle the family disputes and that the said settlement was reduced into writing and signed by the said Bhanwar Lal and other members of the family. It was further contended that as per the said settlement, the property described in para 4(c) of the plaint was given to the plaintiffs and the property described in para 4(b) was given to the defendant No.1. As regards the property described in para 4(a), it was decided that out of the rent collected from the said property, the same shall be used for the payment of the taxes, repairs etc., and that the defendant No.1 shall pay Rs. 200/- to the plaintiff No.1 out of the said rent. It was also contended by the defendant No.1 that there was no separate property as described in para 4(d) of the plaint but the same was part of the property mentioned in para 4(a) only and that the said property described in para 4(a) of the plaint was the self acquired property of the said Bhanwar Lal and, therefore, he had exclusive right to dispose of the same. In short, it was contended by the defendant No.1 that in view of the family settlement dated 8.6.65, the properties were already partitioned and the said settlement was also accepted and acted upon by the plaintiffs and, therefore, there was no question of partitioning any properties.

2.(v) The trial court from the pleadings of the parties framed four issues and after appreciating the evidence on record vide the impugned judgment dated 20.11.73, held interalia that the family settlement dated 8.6.65 at Ex. A/1 was arrived at between the parties and also acted upon in respect of the properties mentioned in para 4(b) and 4(c), however, no partition had taken place in respect of the properties described in para 4(a) and 4(d) of the plaint and that both the plaintiffs jointly had 1/5th share in the said properties, and that the defendants Nand Kishore, Munni Devi, Premwati Devi each had 1/5th share and that and Gyanwati Devi and Chunnibai jointly had 1/5th share in the said properties. The trial court

accordingly passed the preliminary decree, granting the parties liberty to apply for the appointment of a commissioner for actual division of the properties by metes and bounds.

2.(vi) Being aggrieved by the said judgment and decree passed by the trial court, three appeals were filed. The SBCFA No. 202/73 was filed by Shri Nand Kishore (original defendant No.1) praying interalia that suit for partition ought to have been dismissed by the trial court. The SBCFA No. 56/74 was filed by Smt. Rukmani Devi and Sampat Devi (original plaintiffs) praying interalia that the decree passed by the trial court be modified and further be held that the plaintiffs had 6/15th share in all the properties mentioned in para 4 of the plaint. The SBCFA No. 185/74 was filed by Miss Chunni Bai and Gyanwati (original defendant Nos. 4 and 5) praying interalia that they were entitled to the 1/5th share in the properties described in paras 4(b) and 4(c) of the plaint as well. All the three appeals were heard and decided by the learned Single Judge by common judgment and order dated 27.1.86, whereby the learned Single Judge allowed the First Appeal No. 202/73 and dismissed the First Appeal Nos. 56/74 and 185/74. The learned Single Judge disposed of the said appeals by holding that the family settlement dated 8.6.65 did not require registration as contemplated under Section 17 of the Registration Act and the same having already been acted upon, nothing remained to be partitioned by the court.

2.(vii) The said judgment of the learned Single Judge having been challenged by the original plaintiffs i.e. Smt. Rukmani Devi and Sampat Devi, before the Division Bench, by filing DB Civil Special Appeal No. 20/86, the Division Bench vide the judgment dated 21.10.05 held that the registration of the family settlement was necessary in view of the law laid down by the Apex Court in case Kale and Ors. Vs. Deputy Director of Consolidation and Ors., AIR 1976 SC 807. The Division Bench, therefore, allowed the said appeal and remitted the matter to this court to decide the issues involved in the first appeals afresh, by further observing that the family settlement shall however be ignored while considering the rights of the parties.

3. In view of the above factual matrix submissions have been made by the learned Senior Counsel Mr. R.P. Singh appearing for Smt. Rukmani Devi and Sampat Devi, (who were the original plaintiffs and are the appellants in First Appeal No. 56/74, and the respondents in First Appeal No. 202/73), whereas the submissions have been made by the learned counsel Mr. O.P. Sharma for the original defendant No.1 Nand Kishore, and after his death, for his legal representatives, (who are the appellants in First Appeal No. 202/73 and the respondents in First Appeal No. 56/74). It has been stated by the learned counsels for the parties that the third appeal i.e. the First Appeal No. 185/74 filed by Ms. Chunnibai and another (original defendant Nos. 4 and 5) was already dismissed for default and the same has not been restored so far. The said appeal, therefore, stands dismissed as on today.

4. It was sought to be submitted by the learned counsel Mr. O.P. Sharma for the respondents in First Appeal No. 56/74 that the Division Bench had misinterpreted the ratio of the judgment laid down by the Apex Court in the case of Kale (supra) and, therefore, he had already moved a review petition, which was dismissed for default and thereafter restored, and now the same was pending before the Division Bench. At this juncture it is to be noted that except the oral submission of Mr. O.P. Sharma, there is nothing on record that such a review petition is pending before the Division Bench. Though, these appeals are pending, after the remand by the D.B., since 2005, no effort appears to have been made to get the said review petition disposed of. Be that as it may, the fact remains that the said judgment dated 21.10.05 passed by the Division Bench has neither been challenged before the higher forum, nor has been reviewed by the Division Bench so far, and, therefore, the observations made by the Division Bench to the effect that the family settlement in question required registration, and the directions given by the Division Bench to this court to ignore the said family settlement while deciding the rights of the parties afresh, are binding to this court.

5. It is further to be noted that the learned counsel Mr. R.P. Singh had at the outset fairly submitted that though the appellants-plaintiffs had prayed for their 6/15th share in the suit properties, they would have 1/5th share only in the suit properties, in view of the latest decisions of the Hon'ble Supreme Court in case of Ganduri

Koteshwaramma and Anr. Vs. Chakiriyanadi and Anr (2011) 9 SCC 788 and in case of Prema Vs. Nanje Gowda and Ors. (2011) 6 SCC 462, and in view of Section 6 of the Hindu Succession Act, 1956 (as amended by 2005 Act). He further submitted that since the family settlement dated 8.6.65 was reduced into writing for the first time and since the rights of the parties were created from the said document for the first time, the said family settlement required registration under Section 17 of the Registration Act, and that having not been registered, the Division Bench has rightly observed to ignore the same while deciding the rights of the parties. According to Mr. Singh all the four properties being the joint family properties, the plaintiffs had 1/5th share in the same and the learned Trial Judge had materially erred in law in passing the preliminary decree only in respect of the two properties described in para 4(a) and 4(d) of the plaint. Mr. Singh has also urged to award mesne profits in view of the application filed by the appellants-plaintiffs under Section 151 of CPC, pending these appeals.

6. However, the learned counsel Mr. O.P. Sharma for the concerned respondents (original defendant No. 1 Nand Kishore and now for his heirs), taking the court to the evidence recorded by the trial court, as also the documentary evidence more particularly the family settlement Ex. A/1, submitted that the plaintiff No. 1 Rukmani Devi was given the property mentioned in para 4(c) of the plaint for her residence after the death of her husband Ram Kishore in the year 1962 and the defendant No.1 Nand Kishore was staying in the property mentioned in para 4(b) of the plaint prior to the said family settlement dated 8.6.65. Hence, the family settlement which had already taken place earlier, was reduced into writing on 8.6.65. Relying upon the observations made by the Apex Court in the said case of Kale (supra), Mr. Sharma submitted that the registration would be necessary only if the terms of the family arrangement were reduced into writing but the same would not be necessary if a mere memorandum was prepared after the family arrangement which had already been made earlier. According to the Mr. Sharma even if the said family settlement Ex. A/1 is to be ignored in view of the observations made by the Division Bench, from the evidence adduced by the parties before the trial court, it was clearly established that the partition of properties as per the family arrangement had already taken place and that having been acted upon prior to 1965, the plaintiffs were estopped from filing suit for

partition as nothing remained to be partitioned, as rightly held by the learned Single Judge earlier in the judgment dated 27.1.86, while disposing of the three first appeals. He has relied upon the decisions of the Apex Court in case of Narendra Kante Vs. Anuradha Kante and Ors. (2010) 2 SCC, 77, Syndicate Bank Vs. Estate Officer and Manager, APIIC Ltd. and Anr. (2007)8 SCC 361 and on the decision of this court in case of Gulab Chand Vs. L.Rs. Of Ganpat Lal 1995(1) WLC (Raj.)258. Mr. Sharma also submitted that in absence of any specific prayer in the plaint, the plaintiffs were not entitled to the mesne profits, as now is being urged in the present appeals. In this regard Mr. Sharma has relied upon the decisions of the Apex Court in case of Mohd. Amin and Ors. Vs. Vakil Ahmad and Ors AIR 1952 SC 358 and in case of R.S. Maddanappa Vs. Chandramma and Anr. AIR 1965 SC 1812.

7. Though it was vehemently submitted by the learned counsel Mr. Sharma for the concerned respondents that the family settlement Ex. A/1 was already acted upon by the parties and it was only a memorandum of settlement which had already taken place prior to 8.6.65, and did not require registration, the said submission cannot be considered by this court now in view of the specific finding given by the Division Bench in the D.B. Appeal being No. 20/86 to the effect that the document family settlement Ex. A/1 required registration and in view of the specific direction given by the Division Bench while remitting the matter to this court, to ignore the said family settlement while considering the rights of the parties.

8. The next question, therefore, that falls for consideration before this court is as to whether any oral partition or family settlement had taken place prior to or after the execution of the said family settlement Ex. A/1 or not. In this regard if the pleadings of the parties are seen, it appears that the plaintiffs had come out with a specific case that no partition of the joint family properties mentioned in para 4 of the plaint had taken place. The defendant No.1 Nand Kishore who was the only contesting defendant in the suit had also not stated in his written statement as to whether any partition of the properties in question had taken place prior or after 8.6.65. What was pleaded by the said defendant was that a family settlement was arrived at with the consent of all the family members to put an end to the family disputes and that the partition in terms of the family settlement dated 8.6.65 had

already taken place. So far as the oral evidence adduced by the parties is concerned, the P.W.1, Rukmani Devi (widow of Ram Kishore) stated in her evidence that no partition had taken place after the death of Shri Govind Narain and that no family settlement dated 8.6.65 was executed or signed by her. In her cross-examination also no such question was put as to whether any oral family settlement or partition had taken place before 8.6.65. The P.W.2, Sampat Devi (daughter of Ram Kishore) had also stated almost the same version as P.W.1. The P.W. 3 Om Prakash, who had allegedly put his signature as witness below the said family settlement Ex. A/1 had also stated that no such family settlement was executed or signed in his presence. The plaintiffs had also examined P.W. 4 Rewati Raman, P.W. 5 Rameshwar and P.W.6 Madan Lal, who happened to be either the relatives or the acquaintance of the family of Bhanwar Lal. They had stated that no partition of the properties had taken place nor any family settlement of the properties of Bhanwar Lal had taken place.

9. So far as the oral evidence adduced by the defendant No.1 is concerned, he had examined himself as D.W.`1 and he had stated interalia that his father Bhanwar Lal had executed a family settlement in the year 1965 which was at Ex. A/1 and that the same was signed by the family members including the plaintiff Smt. Rukmani Devi and Sampat Devi. The said defendant also in his evidence had not stated as to whether any partition or family settlement had taken place prior or after the said family settlement at Ex. A/1. On the contrary he had admitted in his cross-examination that the property situated at M.I. Road was not partitioned. The D.W. 2 Lalit Kishore Sharma had stated in his evidence that the document Ex. A/1 was written in his hand-writings and was signed by the parties. The D.W. 3 Ram Narain and D.W. 4 Krishan Chandra @ Ladu Ram had supported the version of the defendant Nand Kishore that the family settlement Ex. A/1 had taken place in their presence, of course D.W. 4 in his cross-examination had admitted that the property situated at M.I. Road was not partitioned by the said settlement.

10. In view of the above discussed evidence adduced by the parties it emerges that it was not disputed by the defendant Nand Kishore that the four properties mentioned in para 4 of the plaint were joint family properties and that no partition of the said properties by metes and bounds had taken place during the life time of

the said Bhanwar Lal, as admittedly the partition of the properties situated at M.I. Road (described in para 4(a) and 4(d) of the plaint) had not taken place. Since the Division Bench while remitting the matter has specifically given direction not to take into consideration the said family settlement Ex. A/1, and since the defendants had failed to plead and prove that the partition of the said disputed properties of deceased Bhanwar Lal had taken place during his life time, it is required to be held that the properties mentioned in para 4 of the plaint, which were joint family properties, were never partitioned by metes and bounds during the life time of the said Bhanwar Lal.

11. Now for determining the respective shares of the parties in the said properties, beneficial reference of the provisions contained in Section 6 of the Hindu Succession Act, as it stood prior to and after the amendment of 2005 is required to be made :-

“Section 6 as it stood prior to the Amendment of 2005.

6. Devolution of interest in coparcenary property-When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by the testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.--For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.--Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

"Section 6 as it stands after the amendment of 2005.

6. Devolution of interest in coparcenary property--(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,--

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case ma;y be, under this Act and not by survivorship, and the

coparcenary property shall be deemed to have been divided as if a partition had taken place and,--

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.--For the purposes of this sub-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.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect--

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.--For the purposes of clause (a), the expression “son”, “grandson”, or “great-grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.--For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (19 of 1908) or partition effected by a decree of a court.”

12. At this juncture, the scope and effect of the amended Section 6 as interpreted by the Apex Court would be also very much relevant to be considered. In this regard, the Apex Court in recent case of Ganduri Koteshwaramma and Anr. Vs. Chakiri Yanadi and Anr. (2011) 9 SCC 788 has observed as under :-

“(11). The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from 9.9.2005. The legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from 9.9.2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.

(12). The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before 20.12.2004; and (ii) where testamentary disposition of property has been made before 20-12-2004. Sub-

section (5) of Section 6 leaves no room for doubt as it provides that this section shall not apply to the partition which has been effected before 20-12-2002. For the purposes of new Section 6 it is explained that “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court. In the light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the section, what is relevant is to find out whether the partition has been effected before 20-12-2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on 19.3.1999 and amended on 27.9.2003 deprives the appellants of the benefits of the 2005 Amendment Act although final decree for partition has not yet been passed.

(13). The legal position is settled that partition of a joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before 20-12-2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by Respondent 1 is the determination of shares vide preliminary decree dated 19-3-1999 which came to be amended on 27.9.2003 and the receipt of the report of the Commissioner.

(14). A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passed of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation.”

13. So far as the facts of the present case are concerned, as transpiring from the evidence on record, it was not disputed that Shri Ram Kishore, the son of Bhanwar Lal and the husband of Smt. Rukmani Devi expired on 8.10.62 and that the said Bhanwar Lal expired on 22.2.68. It was also not disputed that Smt. Chhota Bai, the third daughter of said Bhanwar Lal had expired prior to the death of Bhanwar Lal. It was also not disputed that the properties mentioned in para 4 of the plaint were the properties inherited by the said Bhanwar Lal from his father Govind Narain. As regards the said properties, the defendant No.1 Nand Kishore had contended in his written statement to the effect only that the plot mentioned in para 4(d) was part and parcel of the property mentioned in para 4(a) of the plaint. Be that as it may and even if the plot described in para 4(d) is treated as part of property described in para 4(a) only, then also the defendant No.1 Nand Kishore in his deposition had specifically admitted that the said properties were not partitioned during the life time of his father Bhanwar Lal.

14. It is also pertinent to note that in view of the ratio of judgment of the Apex Court in Ganduri Koteshwaramma (supra), for the purpose of new Section 6, “partition” means any partition made by execution by deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court. It is also held in the said decision that the suit for partition is not disposed of by passing of the preliminary decree and that it is by way of final decree only that the the immovable property of a joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed and, therefore, where the partition was not effected and when the final decree was not passed in a suit, the parties would be entitled to the benefits of the 2005 Amendment Act. The said ratio and the legal position is wholly and squarely applicable to the facts of the present case, as inasmuch as no partition of the suit properties had taken place by a deed of partition registered under the Registration Act, 1908 and no final decree in the suit has been drawn so far. Since, the legislature now has conferred substantive rights in favour of the daughters and since the daughters of a coparcener have the same rights and liabilities as that of sons, in the coparceners properties, it is required to be held that the three daughters of the said Bhanwar Lal i.e. Munni Devi, Prem Devi and Chhota Bai had an equal share and right in the suit properties as his sons i.e.

Nand Kishore and Ram Kishore. In other words the said Nand Kishore, Ram Kishore, Munni Devi, Prem Devi and Chhota Bai each had one-fifth share in the suit properties. Since the said Ram Kishore and Chhotabai have expired, the plaintiffs Smt. Rukmani Devi and Sampat Devi being the legal heirs of the said Ram Kishore would have one-fifth share which had fallen into his share. Similarly the defendant No. 4 Gyanwati and defendant No.5 Chunni Bai being the legal heirs of Chhota Bai, also would have one-fifth share which had fallen in the share of Chhota Bai. Since, the original defendant No.1 Nand Kishore also has expired during the pendency of these appeals, his legal heirs would be entitled to the 1/5th share which had fallen to his share.

15. The learned counsel Mr. R.P. Singh had also pressed into service the application filed by the appellants Smt. Rukmani Devi and another, in the First Appeal No. 56/74, under Section 151 of CPC and urged for directing the legal heirs of the deceased Nand Kishore to submit the accounts and pay the maintenance @ Rs. 200/- per month from August, 1986 till the disposal of the appeal by way of mesne profits. The said submission of Mr. R.P. Singh cannot be countenanced for the simple reason that there was no prayer for mesne profits sought in the suit by the plaintiffs. It is needless to say that the prayer for mesne profits is not only required to be pleaded but also proved by the plaintiffs. It is true that pending the suit defendant No.1 Nand Kishore was appointed as the receiver by the trial court and he was directed to receive the rent of the suit premises from the tenants and maintain proper accounts for the same, and also to pay Rs. 200/- per month to Smt. Rukmani Devi, the plaintiff No. 1 as maintenance, however there was no order passed by the trial court while disposing of the suit. It appears that during the pendency of the appeal also the said appellants-plaintiffs had moved an application under Order 40 Rule 1 CPC for removing the said defendant No.1 Nand Kishore as the receiver and seeking direction against him to submit the proper accounts. The learned Single Judge also appears to have passed the orders from time to time in the said appeal, however ultimately the learned Single Judge dismissed the appeal of Smt. Rukmani Devi and allowed the appeal ot Shri Nand Kishore. Even when the said order of the learned Single Judge was challenged before the Division Bench, no order was passed by the Division Bench with regard to the accounts, while finally allowing the said DB Special Appeal vide

order dated 21.10.05. Even as per the contents of the application filed by the appellants Smt. Rukmani Devi and Another under Section 151 of CPC, it transpires that pursuant to the interim orders passed by the learned Single Judge, the said Nand Kishore had submitted the accounts till 30th April, 1984 and had paid the maintenance to the said Smt. Rukmani Devi till August, 1986. The said application also appears to have been filed in July, 2008 i.e. about 3 years after the order dated 21.10.05 passed by the Division Bench, setting aside the order dated 27.1.1986 passed by the learned Single Judge. Under the circumstances the said interim directions given by the learned Single Judge pending appeal to pay Rs. 200/- per month to the plaintiff No.1 Smt. Rukmani Devi was complied with during the pendency of the appeal. Thereafter the Division Bench has not passed any order for the mesne profits or for the maintenance. There being no direction sought before the Division Bench in the DB Special Appeal filed by the said Smt. Rukmani Devi, the question of giving direction to the legal heirs of the said Nand Kishore after his death to pay maintenance to her does not arise. The learned counsel Mr. Singh has also failed to point out any right much less legal right of said Rukmani Devi to seek maintenance from the legal heirs of the said Nand Kishore. Mr. Singh has also failed to point out any legal provision to buttress his submission for awarding mesne profits to her from the said legal heirs of the said Nand Kishore. The court is, therefore, of the opinion that in absence of any pleadings and proof and in absence of any enabling legal provision to award mesne profits in a suit for partition, the appellants-plaintiffs could not be said to be entitled to the mesne profits or the maintenance as prayed for by the learned counsel Mr. Singh.

16. In the aforesaid premises, it is held that the appellants-plaintiffs Smt. Rukmani Devi and Sampat Devi jointly would have 1/5th share and the legal heirs of the original defendant No.1 Nand Kishore also would have 1/5th share; the original defendant No.2 Munni Devi and the defendant No.3 Prem Devi, each would have 1/5th share; and the original defendant No. 4 Gyanwati and defendant No.5 Chunnibai jointly would have 1/5th share in all the properties mentioned in para 4 of the plaint.

17. In that view of the matter, the SBCFA No. 56/74 filed by Smt. Rukmani Devi and Sampat Devi is allowed and SBCFA No. 202/73 filed by Shri Nand Kishore is dismissed. The preliminary decree passed by the trial court stands modified to the aforesaid extent and it is directed that the final decree be drawn accordingly.