Prema vs Nanje Gowda & Ors on 10 May, 2011

Equivalent citations: AIR 2011 SUPREME COURT 2077, 2011 AIR SCW 3443, 2011 AIR CC 2050 (SC), 2011 (4) AIR JHAR R 308, 2011 (3) AIR KANT HCR 740, AIR 2011 SC (CIVIL) 1512, 2011 (6) SCC 462, (2011) 6 MAD LJ 769, (2011) 4 ANDHLD 177, (2011) 2 HINDULR 1, (2011) 5 KANT LJ 84, (2011) 3 RAJ LW 2699, (2011) 6 SCALE 28, (2011) 3 KCCR 1677, (2011) 4 CIVLJ 275, (2012) 113 CUT LT 198, (2011) 2 ORISSA LR 116, (2011) 1 CLR 1187 (SC), (2011) 3 ICC 347, (2011) 2 WLC(SC)CVL 192, (2011) 2 ALL RENTCAS 439, (2012) 1 CAL HN 129

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Bench: K.S. Panicker Radhakrishnan, G.S. Singhvi

REPO

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2481 OF 2005

Prema .....Appe

Versus

Nanje Gowda and others .....Resp

J U D G M E N T

G.S. Singhvi, J.

1. The question which arises for consideration in this appeal is whether the appellant, who failed in her challenge to the preliminary decree passed in a suit for partition filed by respondent No.1 can seek enhancement of her share in the joint family property in the final decree proceedings in terms of Section 6A inserted in the Hindu Succession Act, 1956 (for short, "the Act") by the Hindu Succession (Karnataka Amendment) Act, 1990, which received Presidential assent on 28.7.1994 and was published in the Karnataka Gazette dated 30.7.1994.

2. The suit for partition and separate possession of his share filed by respondent No.1, which came to be registered as O.S. No.425 of 1989, was decreed by Munsiff, Srirangapatna (hereinafter described as, `the trial Court') vide judgment dated 11.8.1992. The trial Court held that plaintiff-respondent No.1 and defendant No.3 are entitled to 2/7th share and defendant Nos.1, 4, 5 and 6 are entitled to 1/28th share each.

3. Regular Appeal No.69 of 1992 jointly filed by the appellant, who was defendant No.6 in the suit and defendant Nos.1, 4 and 5 was dismissed by Civil Judge (Senior Division), Srirangapatna (hereinafter described as `the lower appellate Court') vide judgment dated 20.3.1998. Regular Second Appeal No.624 of 1998 filed by defendant Nos.1, 4 and 5 was dismissed by the High Court vide order dated 1.10.1999 on the ground that the same was barred by limitation.

4. In the meanwhile, respondent No.1 instituted final decree proceedings (FDP No.5 of 1999). On being noticed by the trial Court, the appellant filed an application under Sections 151, 152 and 153 of the Code of Civil Procedure (CPC) for amendment of the preliminary decree and for grant of a declaration that in terms of Section 6A inserted in the Act by the State Amendment, she was entitled to 2/7th share in the suit property. The appellant averred that she had married one Shri M.B. Srinivasaiah on 9.8.1994, i.e. after coming into force of the State Amendment and, as such, she is entitled to higher share in the joint family property. Respondent No.1 contested the application by asserting that with the dismissal of Regular Second Appeal No. 624 of 1998, the preliminary decree passed in O.S. No.425 of 1989 will be deemed to have become final and in the final decree proceedings the appellant cannot claim higher share by relying upon Section 6A which came into force in 1994. He denied the appellant's assertion about her marriage on 9.8.1994. In the alternative, he pleaded that even if the marriage certificate produced by the appellant is treated as genuine, she cannot claim higher share by relying upon the State Amendment.

5. By an order dated 10.7.2000, the trial Court dismissed the appellant's application primarily on the ground that Section 6A of the Act is not retrospective. In the opinion of the trial Court, the amendment made in the Act can be applied only to those cases in which partition of the joint family properties is effected after 30.7.1994, but the same cannot be relied upon for amending the decree, which has become final. The trial Court observed that even if the daughter remains unmarried, she cannot be treated as coparcener because after partition, there remains no joint family property. The trial Court also held that the application filed by the appellant was barred by time.

6. The appellant's challenge to the aforesaid order was negatived by the learned Single Judge, who held that with the dismissal of the second appeal, the preliminary decree passed by the trial Court had become final and during the pendency of the second appeal filed by defendant Nos. 1, 4 and 5,

the appellant had not prayed for enhancement of her share in the joint family property in terms of Section 6A, which was inserted by the State Amendment. The learned Single Judge relied upon the judgments of this Court in Venkata Reddy v. Pethi Reddy AIR 1963 SC 992, Gyarsi Bai v. Dhansukh Lal AIR 1965 SC 1055 and Mool Chand v. Deputy Director, Consolidation (1995) 5 SCC 631 and held that the application filed by the appellant could not be entertained in the final decree proceedings instituted by respondent No.1. The learned Single Judge distinguished the judgment in S. Sai Reddy v. S. Narayana Reddy (1991) 3 SCC 647, upon which reliance was placed by the appellant by observing that the two-Judge Bench had not referred to the earlier judgments of the larger Benches.

7. Shri S.N. Bhat, learned counsel for the appellant argued that even though the appellant did not seek modification of the preliminary decree by joining other defendants who had filed Regular Second Appeal No. 624/1998, the application filed by her could not have been dismissed as not maintainable because till then the joint family property had not been partitioned. He submitted that in a partition suit, the preliminary decree passed by the competent Court does not become effective till the suit property is actually divided in accordance with law and the same can be modified for good and sufficient reasons. Learned counsel submitted that by virtue of Section 6A, the appellant had become entitle to higher share in the joint family property and the trial Court and the High Court committed serious error by negating her claim on a wrong assumption that the benefit of amendment cannot be availed by the appellant in the final decree proceedings. In support of his arguments, Shri Bhat relied upon the judgments of this Court in Phoolchand v. Gopal Lal AIR 1967 SC 1470 and S. Sai Reddy v. S. Narayana Reddy (supra).

8. Mrs. K. Sarada Devi, learned counsel for the respondents argued that the trial Court and the High Court did not commit any error by rejecting the appellant's claim for higher share because with the passing of decree for partition and separate possession, the suit property lost its character as joint family property and the appellant was not entitled to claim anything from the shares already allotted to other members of the erstwhile joint family property.

9. In the pre-Independence era, social reformers like Raja Ram Mohan Roy, Lokmanya Tilak, Mahatma Phule and Mahatma Gandhi took up the cause of women and relentlessly worked for promotion of female education, re-marriage of widows and elimination of child marriage. The concept of widow's estate was also developed during that period which led to enactment of Hindu Women's Right to Property Act, 1937. The framers of the Constitution were great visionaries. They not only placed justice and equality at the highest pedestal, but also incorporated several provisions for ensuring that the people are not subjected to discrimination on the ground of caste, colour, religion or sex. Article 14 of the Constitution declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 lays down that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and no citizen shall be subjected to any disability, liability, restriction or condition on grounds of religion, race, caste, sex, place of birth or any of them in the matter of access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds dedicated to the use of the general public. Clause (3) of Article 15 contains an enabling provision and lays down that nothing in that article shall prevent the State from making any special

provision for women and children. Similar provisions have been made in Article 16 in the matter of public employment.

10. With a view to achieve the goal of equality enshrined in Articles 14 and 15(1) of the Constitution and to eliminate discrimination against daughters, who were deprived of their right to participate in the coparcenary property, the Karnataka legislature amended the Act and inserted Sections 6A to 6C for ensuring that the unmarried daughters get equal share in the coparcenary property. This is evident from the preamble and Sections 1 and 2 of the Karnataka Act No.23 of 1994, the relevant portions of which are reproduced below:

> "KARNATAKA ACT No. 23 OF 1994 THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990 An Act to amend the Hindu Succession Act, 1956 in its application to the State of Karnataka;
>
> WHEREAS the Constitution of India has proclaimed equality before law as a fundamental right;
>
> And whereas the exclusion of the daughter from participation in co-parcenary ownership merely by reason of her sex is contrary thereto;
>
> And whereas the beneful system of dowry has to be eradicated by positive measure which will simultaneously ameliorate the condition of women in the Hindu society;
>
> Be it enacted by the Karnataka State Legislature in the Forty- first year of the Republic of India as follows:
>
> 1. Short title and commencement. - (1) This Act may be called the Hindu Succession (Karnataka Amendment) Act, 1990.

(2) It shall come into force at once.

2. Insertion of new sections in Central Act XXX of 1956. - In the Hindu Succession Act, 1956 (Central Act XXX of 1956) after Section 6, the following sections shall be inserted, namely:-

> 6A. Equal rights to daughter in co-parcenary property. - Notwithstanding anything contained in Section 6 of this Act,-
>
> (a) in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son;
>
> (b) at a partition in such Joint Hindu Family the co-

parcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son;

Provided that the share which a predeceased son or a predeceased daughter would have got at the partition if he or she had been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter;

Provided further that the share allotable to the predeceased child of the predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of such predeceased daughter, as the case may be: -

> (c) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (a) 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, as property capable of being disposed of by her by will or other testamentary disposition;
>
> (d) nothing in clause (b) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Karnataka Amendment) Act, 1990."

11. Similar provisions were inserted in the Act by the legislatures of the States of Andhra Pradesh, Maharashtra and Tamil Nadu. The scope of Section 29A which was inserted in the Act by Andhra Pradesh Act No.13 of 1986 and which is pari materia to Section 6A of the Karnataka Act No.23 of 1994 was considered by the learned Single Judge of the Andhra Pradesh High Court in S. Narayana Reddy v. S. Sai Reddy, AIR 1990 Andhra Pradesh 263. The facts of that case were that the preliminary decree passed by the trial Court in a partition suit was confirmed by the High Court with a direction that while passing final decree, the trial Court shall make appropriate provision for maintenance and marriage expenses of defendant Nos.5 to 9 and maintenance of the third defendant shall be borne equally by each of the plaintiff, first defendant and fourth defendant out of the joint family properties. After insertion of Section 29A in the Act by Andhra Pradesh Act No.13 of 1986, the first defendant claimed that defendant Nos.6 to 9 being unmarried daughters are entitled to shares at par with their brothers because the properties had not been divided by then. The trial Court rejected the claim of the first defendant by observing that with the dismissal of the appeal by the High Court, the preliminary decree had become final and the appellant was not entitled to indirectly challenge the same. The learned Single Judge referred to Section 29A, the judgments of Mysore High Court in R. Gurubasaviah Rumale Karibasappa and others AIR 1955 Mysore 6, Parshuram Rajaram Tiwari v. Hirabai Rajaram Tiwari, AIR 1957 Bombay 59 and Jadunath Roy and others v. Parameswar Mullick and others AIR 1940 PC 11 and held that if after passing of preliminary decree in a partition suit but before passing of final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment, the Court is duty bound to decide the matter and pass final decree keeping in view the change scenario.

The learned Single Judge then referred to the judgment of this Court in Phoolchand v. Gopal Lal (supra) and observed:

> "19. Since the parties have invoked the jurisdiction of the Civil Court to decide their rights in a partition suit, their rights can be considered at any stage till the passing of the final decree. Till the final decree as stated above is passed in a partition suit, it is well settled that the suit is said to be pending, till the final decree is signed by the Judge after engrossing the same on the stamps. In view of the insertion of S. 29-A in the Hindu Succession Act by Act (13 of 1986) the statute conferred a right on the daughters and they become coparceners in their own right in the same manner as sons and have the same rights in the coparcenary property. In this case, admittedly the daughters are already on record and, therefore, they are entitled to claim a right and request the Court to pass a final decree by taking into account the altered situation.....
>
> 20. As pointed out by the Supreme Court in Phoolchand's case, (AIR 1967 SC 1470) (supra) there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree particularly in partition suits where shares specified in the preliminary decree have to be adjusted so long as a final decree has not been passed in that suit. On facts in this case, a preliminary decree has been passed giving 1/3rd share to the plaintiff. The shares of the other persons also have to be ascertained and the rights of the unmarried daughters have been recognised in the preliminary decree. There is a statutory change by the introduction of Section 29A of the Hindu Succession Act which came into force on 5th September, 1985 and the preliminary decree has been passed on 26th December, 1973, but no final decree has been passed. The plaintiff himself filed an application for passing a final decree and the trial court is bound to implement the statutory rights conferred on the daughters and it ought to have allowed the petition in accordance with law."

(emphasis supplied)

12. While dismissing the appeal preferred against the judgment of the High Court, this Court observed as under:

> ".....The crucial question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about

> the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. .... Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment....."

(emphasis supplied)

13. In the present case, the preliminary decree was passed on 11.8.1992. The first appeal was dismissed on 20.3.1998 and the second appeal was dismissed on 1.10.1999 as barred by limitation. By the preliminary decree, shares of the parties were determined but the actual partition/division had not taken place. Therefore, the proceedings of the suit instituted by respondent No.1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned and in view of the law laid down in Phoolchand v. Gopal Lal (supra) and S. Sai Reddy v. S. Narayana Reddy (supra), it was open to the appellant to claim enhancement of her share in the joint family properties because she had not married till the enforcement of the Karnataka Act No.23 of 1994. Section 6A of the Karnataka Act No.23 of 1994 is identical to Section 29A of the Andhra Pradesh Act. Therefore, there is no reason why ratio of the judgment in S. Sai Reddy v. S. Narayana Reddy (supra) should not be applied for deciding the appellant's claim for grant of share at par with male members of the joint family. In our considered view, the trial Court and the learned Single Judge were clearly in error when they held that the appellant was not entitled to the benefit of the Karnataka Act No.23 of 1994 because she had not filed an application for enforcing the right accruing to her under Section 6A during the pendency of the first and the second appeals or that she had not challenged the preliminary decree by joining defendant Nos.1, 4 and 5 in filing the second appeal.

14. We may add that by virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the

surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order. In this case, the Act was amended by the State legislature and Sections 6A to 6C were inserted for achieving the goal of equality set out in the Preamble of the Constitution. In terms of Section 2 of the Karnataka Act No.23 of 1994, Section 6A came into force on 30.7.1994, i.e. the date on which the amendment was published. As on that day, the final decree proceedings were pending. Therefore, the appellant had every right to seek enlargement of her share by pointing out that the discrimination practiced against the unmarried daughter had been removed by the legislative intervention and there is no reason why the Court should hesitate in giving effect to an amendment made by the State legislature in exercise of the power vested in it under Article 15(3) of the Constitution.

15. The issue which remains to be considered is whether the learned Single Judge of the High Court was justified in refusing to follow the law laid down in S. Sai Reddy v. S. Narayana Reddy (supra) on the ground that the same was based on the judgment of three-Judge Bench in Phoolchand v. Gopal Lal (supra) and a contrary view had been expressed by the larger Bench in Venkata Reddy v. Pethi Reddy (supra).

16. In Phoolchand v. Gopal Lal (supra), this Court considered the question whether the preliminary decree passed in a partition suit is conclusive for all purposes and the Court before whom final decree proceedings are pending cannot take note the changes which may have occurred after passing of the preliminary decree. The facts of that case were that appellant-Phoolchand had filed a suit in 1937 for partition of his 1/5th share in the plaint schedule properties. Sohanlal (father of the appellant), Gopal Lal (brother of the appellant), Rajmal (minor adopted son of Gokalchand (deceased), who was another brother of the appellant) and Smt. Gulab Bai (mother of the appellant) impleaded as defendants along with two other persons. The suit was contested up to Mahkma Khas of the former State of Jaipur and a preliminary decree for partition was passed on 1.8.1942 specifying the shares of the appellant and four defendants. Before a final decree could be passed, Sohanlal and his wife Smt Gulab Bai died. Gopal Lal claimed that his father Sohanlal had executed a Will in his favour on 2.6.1940 and bequeathed all his property to him. Appellant-Phoolchand challenged the genuineness of the Will. He also claimed that Smt Gulab Bai had executed a sale deed dated 19.10.1947 in his favour, which was duly registered on 10.1.1948. Gopal Lal challenged the sale deed by contending that Gulab Bai had executed the sale deed because she was a limited owner of the share in the ancestral property. The trial Court held that the Will allegedly executed by Sohan Lal in favour of Gopal Lal had not been proved but the sale deed executed by Gulab Bai in favour of Phoolchand was valid. As a sequel to these findings, the trial Court redistributed the shares indicated in the preliminary decree. As a result, Phoolchand's share was increased from one-fifth to one-half and Gopal Lal's share was increased from one-fifth to one-fourth and that of Rajmal from one-fifth to one-fourth. The High Court allowed the appeal filed by Gopal Lal and held that Gulab Bai was not entitled to sell her share in favour of appellant-Phoolchand. The High Court also held that the Will executed by Sohan Lal in favour of Gopal Lal was genuine. One of the points considered

by this Court was whether there could be more than one preliminary decree. This Court referred to the judgments of various High Courts, which took the view that in a partition suit, the High Court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed and then proceeded to observe:

> "We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed... ....."

(emphasis supplied)

17. In Venkata Reddy v. Pethi Reddy (supra), the Constitution Bench was called upon to consider the question as to what meaning should be given to the expression `final decision' occurring in the first proviso to Section 28A of the Provincial Insolvency Act, 1920. The facts of that case were that Venkata Reddy, the father of the appellants, was adjudicated an insolvent by the Sub-Court, Salem in I.P. No. 73 of 1935. At that time only appellants Nos.1 and 2 were born while the third appellant was born later. The father's one-third share was put up for auction by the Official Receiver and was purchased by one Karuppan Pillai for Rs 80/-. The Official Receiver then put up for auction the two-third share belonging to appellant Nos.1 and 2 on 27.7.1936 which was purchased by the same person for Rs 341/-. He sold the entire property to the respondent Pethi Reddy on 25.5.1939 for Rs 300/-. The appellants instituted a suit on 1.2.1943 for the partition of the joint family property to which suit they made Pethi Reddy a party and claimed thereunder two-third share in the property purchased by him. In that suit, it was contended on behalf of the respondent that on their father's insolvency the share of the appellants in the joint family property also vested in the Official Receiver and that he had the power to sell it. The contention was negatived by the trial Court which passed preliminary decree for partition in favour of the appellants. The decree was affirmed in appeal by

the District Judge and eventually by the High Court in second appeal, except with a slight variation regarding the amount of mesne profits. On 18.1.1946, the appellants made an application for a final decree which was granted ex parte on 17.8.1946. However, the decree was set aside at the instance of the respondent. By relying upon Section 28A of the Provincial Insolvency Act, it was contended by the respondent that the appellants were not entitled to the allotment of their two-third share in the property purchased by him inasmuch as that share had vested in the Official Receiver. The District Munsiff rejected the contention of the respondent and restored the ex parte decree. The appeal preferred by the respondent was dismissed by Principal Subordinate Judge, Salem. However, the second appeal filed by him was allowed by the High Court and the application filed by the appellants for passing final decree was dismissed. The Constitution Bench referred to Section 28A of the Provincial Insolvency Act, which was as under:

> "The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge:
>
> Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or Receiver or the Collector acting under Section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent court:
>
> Provided further that the property of the insolvent shall not be deemed by any reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after July 28, 1942 and before the commencement of the Provincial Insolvency (Amendment) Act, 1948."

The Court then referred to Objects and Reasons set out in the Bill, which led to the enactment of Section 28A and observed:

> "The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso. This proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent Court....."

The Court then held that the preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but is final in so far as the matters dealt with by it are

concerned. This is evident from the following observations made in the judgment:

> ".....A decision is said to be final when, so far as the court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree -- the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

(emphasis supplied)

18. In Gyarsi Bai v. Dhansukh Lal (supra), the three-Judge Bench considered the nature of the preliminary and final decrees in a mortgage suit and the question whether the mortgagor is entitled to raise the plea in the final decree proceedings which he did not raise during the pendency of the suit up to the stage of preliminary decree. The facts of the case, as contained in the judgment, were that the plaint-schedule properties originally belonged to one Noor Mohammad, his wife and son. On 14.9.1936, they mortgaged the said properties with possession to B.F. Marfatia for a sum Rs. 25,000. On 22.2.1938, the said mortgagors executed a simple mortgage in respect of the same properties to one Novat Mal for Rs. 5000. On 21.12.1942, Radha Kishan, Har Prasad and Pokhi Ram acquired the equity of redemption in the said properties in an auction-sale held in execution of a money decree against the mortgagors. On 14.2.1950 and 13.3.1950, Seth Girdhari Lal, the husband of appellant No.1 herein, purchased the mortgagee rights of Novat Mal and Marfatia respectively. On 1.5.1950, Girdhari Lal was put in possession of the mortgaged properties. On 22.7.1950, respondent Nos.9 to 11 purchased the equity of redemption of the mortgaged properties from Radha Kishan, Har Prasad and Pokhi Ram. On 10.8.1950, Girdhari Lal instituted Civil Suit No. 739 of 1950 in the Court of the Senior Subordinate Judge, Ajmer, for enforcing the said two mortgages. In the suit, he claimed Rs. 48,919-12-6 as the amount due to him under the said two mortgages. On 25.4.1953, the Senior Subordinate Judge, Ajmer, gave a preliminary decree in the suit for the recovery of a sum of Rs. 34,003-1-6 with proportionate costs and future interest; he disallowed

interest from 14.9.1936 to 13.3.1950, on the mortgage of Rs. 25,000. The plaintiff-mortgagee preferred an appeal, being Civil Appeal No.71 of 1953 to the Judicial Commissioner, Ajmer, against the said decree insofar as it disallowed interest to him. The defendants preferred cross-objections in respect of that part of the decree awarding costs against them. On 25.7.1953, the defendants filed an application under Order XXXIV Rule 5(1) of the CPC, seeking permission to deposit the decretal amount in court and praying that possession of the properties may be directed to be delivered to them and also for directing the decree-holder to render accounts of the profits of the mortgaged properties received by him. On 29.7.1953, the respondents deposited Rs. 35,155-2-6 in the trial Court. On 17.8.1953, the decree-holder filed objections to the said deposit on the ground that it was much less than the decretal amount. On 27.8.1953, the trial Court made an order permitting the decree-holder to withdraw the said amount with the reservation that the question as to what was due under the decree would be decided later. On 25.8.1954, both the appeal of the decree-holder and the cross-objections of the defendants were dismissed. On 7.12.1954, the defendants filed an application in the trial Court for the determination of the amount due under the decree and for directing the decree-holder to render accounts of all the realizations from the mortgaged properties. On 14.3.1955, this Court granted special leave to the decree-holder for preferring an appeal against the judgment of the Judicial Commissioner dismissing Civil Appeal No. 71 of 1953. On 15.2.1956, the trial Court dismissed the application filed by the defendants for directions on the ground that the mortgage deed had merged in the preliminary decree and that the said decree contained no directions to the plaintiff to render accounts. On 29.2.1956, the defendants applied to the Judicial Commissioner, Ajmer under Section 152 of the CPC for amending the preliminary decree by including therein a direction against the plaintiff for rendition of account in respect of the profits received by him from the mortgaged properties. On 12.4.1956, the Judicial Commissioner dismissed the said application. On 25.4.1956, the defendants filed a revision petition against the order of the trial Court dated 15.2.1956, in the Court of the Judicial Commissioner, Ajmer. By judgment dated 16.12.1960, this Court modified the preliminary decree and directed the trial Court to pass a fresh final decree. Thereafter, the High Court allowed the revision filed by the defendants and remanded the case to the trial Court with a direction to take into account the receipts from the mortgaged properties and expenses properly incurred for management thereof and to determine what sum remained to be paid to the mortgagees taking into account the judgment of this Court. On appeal, this Court referred to Section 76(h) of the Transfer of Property Act and held that if the mortgagor does not raise a particular plea at the stage of preliminary decree, he would be debarred on the principle of res judicata from raising the same at a later stage and then proceeded to observe:

> "But the same cannot be said of the net receipts realized by the mortgagee subsequent to the preliminary decree. None of the principles relied upon by the learned counsel for the appellants helps him in this regard. It is true that a preliminary decree is final in respect of the matters to be decided before it is made:
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> See Venkata Reddy v. Pethi Reddy AIR 1963 SC 992 and Section 97 of the Code of Civil Procedure. It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights: see Talebali v. Abdul Azia, ILR 57 Cal 1013; (AIR 1929 Cal 689 FB) and Kausalya v.

Kauleshwar, ILR 25 Pat 305: (AIR 1947 Pat 113). It cannot also be disputed that a mortgage merges in the preliminary decree and the rights of the parties are thereafter governed by the said decree: See Kusum Kumari v. Debi Prosad Dhandhania, 63 Ind App 114: (AIR 1936 PC 63). But we do not see any relevancy of the said principles to the problem that arises in this case in regard to the liability of the mortgagee to account for the net receipts under Section 76(h) of the Transfer of Property Act. A preliminary decree is only concerned with disputes germane to the suit up to the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree: they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree."

19. In Mool Chand v. Deputy Director, Consolidation (supra), the Court considered the provisions of the U.P. Consolidation of Holdings Act, 1953 and held that the preliminary decree passed in a suit for partition can be given effect to in proceedings before the consolidation authorities.

20. In our view, neither of the aforesaid three judgments can be read as laying down a proposition of law that in a partition suit, preliminary decree cannot be varied in the final decree proceedings despite amendment of the law governing the parties by which the discrimination practiced against unmarried daughter was removed and the statute was brought in conformity with Articles 14 and 15 of the Constitution. We are further of the view that the ratio of Phoolchand v. Gopal Lal (supra) and S. Sai Reddy v. S. Narayana Reddy (supra) has direct bearing on this case and the trial Court and the High Court committed serious error by dismissing the application filed by the appellant for grant of equal share in the suit property in terms of Section 6A of the Karnataka Act No.23 of 1994.

21. In the result, the appeal is allowed. The impugned judgment as also the order passed by the trial Court are set aside. As a sequel to this, the application filed by the appellant under Sections 151, 152 and 153 CPC is allowed in terms of the prayer made. If the final decree has not been passed so far, then the trial Court shall do so within six months from the date of production/receipt of the copy of this judgment. If the final decree has already been passed, then the trial Court shall amend the same in terms of this judgment and give effect to the right acquired by the appellant under Section 6A of the Karnataka Act No.23 of 1994. The parties are left to bear their own costs.

.....J. [G.S. Singhvi] .....

.....J. [K.S. Panicker Radhakrishnan] New Delhi 10th May, 2011.