Kamalammal And Ors. vs Venkatalakshmi Ammal And Anr. on 23 September, 1964

Equivalent citations: AIR1965SC1349, AIR 1965 SUPREME COURT 1349

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Bench: K. Subba Rao, N. Rajagopala Ayyangar

JUDGMENT

N. Rajagopala Ayyangar, J.

1. This appeal by special leave raises for consideration an interesting but, by no means, easy question of Hindu Law as regards the rights of a disqualified heir and in particular whether a disqualified heir who, in this case, was congenitally a deaf-mute becomes by birth a coparcener with his father, so that the ancestral family properties vest in him as sole surviving coparcener, on the death of his father without other male issue.

2. The facts of the case are not very material but are being set out merely to appreciate how the question arose. One Pappachari died in 1928, leaving behind him his widow--Sornammal, four daughters and a deaf-mute son Moogi Puttuswami. This son married Kamalammal who is the third defendant in the suit out of which the appeal arises. Puttuswami died in 1949 leaving behind him his widow Kamalammal and a miner daughter--Subbulakshmi, the fourth defendant in the suit. It is now common ground that the properties which are now in dispute between the widow of Pappachari who brought the suit and the wife and daughter of Puttuswami who contested their claim, were ancestral in the hands of Pappachari. Soon after the death of Pappachari his widow--Sornammal took possession of all the properties left by him and dealt with the suit property by first executing a lease in favour of one Ramakrishnachari (the second defendant). Later, Ramakrishnachari appears to have claimed that the document executed by Sornammal in his favour was in reality a usufructuary mortgage. This claim was acquiesced in by Sornammal and she offered to redeem the mortgage and required the second defendant to deliver possession of the property to her offering to pay the mortgage money claimed.

3. While this controversy was going on Puttuswami died, as stated earlier, in 1949 and thereafter his widow Kamalammal executed a usufructuary mortgage in favour of the second defendant of all the suit properties with a direction that he should discharge the earlier usufructuary mortgage. In this state of affairs Sornammal filed a suit--O.S. 248 of 1950 in the Court of the District Munsiff, Krishnagiri for a declaration of her title to the suit properties, contesting in this respect the right of Kamalammal and her minor daughter to the suit property and for possession of the property after redemption. Sornammal died pending the suit and her eldest daughter--Venkatalakshmi was

impleaded as her legal representative. The mortgagees resisted the claim for redemption made by Sornammal by putting forward the mortgage executed in their favour by Kamalammal and thus the real issue between the parties was as to who had the title to the property, Sornammal as the widow of Pappachari or Kamalammal as the heir of Puttuswami, the latter on the foot of the entire property having survived to him on the death of Pappachari.

4. The learned trial Judge decreed the suit of the plaintiff holding that, on the authorities which he discussed and the law which he considered, Puttuswami who was admittedly disqualified to inherit was in the same position as if he did not exist and that in consequence on the death of Pappachari, without male heirs the suit property was inherited by Sornammal--his widow as his sole heir and that on her death the same devolved on her daughters. The result of this line of reasoning was that neither Puttuswami nor his widow and daughter had any rights to the property and consequently the plaintiff was held entitled to possession of property after redemption of the usufructuary mortgage which she had executed. From this decision an appeal was taken by the mortgagees.

The learned District Judge held that the question of law was concluded in favour of the appellants by the decision of a Full Bench of the Madras High Court to which we shall refer later and allowing the appeal, dismissed the suit. A second appeal was preferred to the High Court by Venkatalakshmi--daughter of Sornammal. The learned Single Judge who heard the appeal referred to the Hindu law texts bearing on the point, made extracts from certain decisions and in effect refusing to follow the decision of the Full Bench of the Madras High Court, allowed the appeal and restored the decree for redemption passed by the trial Court, with the modification that the widow and daughter of Puttuswami were declared entitled to maintenance out of the properties and were granted a charge for the same. An application made to him under Clause 15 of the Letters Patent for leave to appeal from his judgment was dismissed. This Court, however, on being moved by Kamalammal and her daughter as well as by the mortgagees granted special leave and that is how this appeal is now before us.

5. Shortly stated, the question raised for consideration is this. What are the rights of a disqualified heir under the Hindu law ? It is common ground that a person who is born deaf and dumb is disqualified from inheriting and Puttuswami was one such. It is also clear law that though he himself cannot inherit, his lawful issue is entitled to do so. The question for decision in the appeal is whether the disqualification to inherit imposed by the texts of the Hindu law necessarily involves the position that he has no rights at all in coparcenery property and particularly whether, even if he is excluded from claiming a partition of such property during the lifetime of the other coparceners, he is disentitled to take it as a sole surviving coparcener. The question thus propounded is ultimately dependent upon the proper construction of certain texts of the Hindu law and on the interpretation which these texts have received at the hands of the Courts.

6. Broadly stated, under the texts of the Hindu law which we shall refer presently, as interpreted by the courts, there are several bodily defects like impotence, blindness, idiocy, leprosy, insanity etc. which are stated to have the effect of disqualifying a person from inheritance. It is unnecessary to refer to these in extenso, but it is sufficient for our purpose to mention that among them one born deaf and dumb where the defect is incurable, is one such. However, by statute--the Hindu

Inheritance (Removal of Disabilities) Act, 1928 (Central Act XII of 1928) --this was altered for its Section 2 enacted :

> "Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by Hindu law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect."

This Act received the assent of the Governor-General on September 20, 1928 but its Section 3 made the Act prospective and preserved rights which had accrued and liabilities which had been incurred before the commencement of the Act. Pappachari died in 1928 but before the Act came into force and hence the provisions of this enactment would not help the appellant and remove the disqualification, if any, imposed upon the deaf and dumb Puttuswami. We are mentioning this in order to show that it is most unlikely that the point now arising for consideration would ever come before the Courts because of the operation of the statute which has been in force for over 35 years.

7. Before proceeding to consider the decision bearing on the point, it would be useful to set out the principal texts on a construction of which the decisions proceed. Of the Smriti writer it is sufficient to refer to Vishnu:

> Outcast eunuchs, persons incurably diseased or deficient in organs of sense or action, such as blind, deaf, dumb, or insane persons or lepers, do not receive a share; they should be maintained by those who take the inheritance and their legitimate sons receive a share-- Ch. XV, Sections 32-35."
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> We shall now set out the relevant passage in the Mitakshara, for there the text of Yajnavalya Smriti which is commented on is also extracted. At the outset, we might point out that the portion dealing with exclusion from inheritance occurs in Ch. II, Section 10 which deals with obstructed heritage or Sapratibandha Daya: The first placitum in this chapter reads:
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> "The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the reunited parcener."

Yajnavalkya is then quoted:

> "An impotent person, etc and others similarly disqualified must be maintained excluding them, however, from participation. But their blameless sons, whether legitimate or the offspring of a kinsman, are entitled to inherit. Their daughters should be maintained until they are provided with husbands. Their childless wives conducting themselves aright should be maintained until they are provided with husbands."

In placitum 3 the commentator quotes the following from Manu:

> "Impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf as well as madmen, idiots, the dumb, and those who have lost a sense."

and in placitum 5 he proceeds to say:

> "Those persons are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only; and the penalty of degradation is incurred, if they be not maintained."

Placitum 6 reads:

> "They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs, is not deprived of his allotment."

and placitum 8:

> "The masculine gender is not here used restrictively in speaking of an outcast and the rest. It must be, therefore, understood, that the wife, the daughter, the mother, or any other female, being disqualified from any of the defects which have been specified, is likewise excluded from participation."

In placitum 9 he concludes by stating:

> "The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds:
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> But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects."

8. Another Commentary usually regarded as authoritative in Dravida--the southern part of the Madras Presidency is Sarasvati Vilasa. Here the matter is dealt with in placita 148 to 159 but it is sufficient to extract a few of them Placitum 148:

> "Manu also describes those who are ineligible for heritage:
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> 'Impotent persons and outcasts do not take shares; so also those who are born blind, and those who are born deaf, madmen, idiots, and the dumb, and those who are memberless.' Placitum 149:
>
> "The meaning of this is:
>
> 'Impotent persons and outcasts do not take shares;"

The two thus mentioned are to be nourished and cherished by their brothers who are eligible for the heritage, or by those who take the estate, or by those who take the women.

'Those who are born blind, and those who are born deaf;' the pair thus mentioned, though a share certainly belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable.

By the use of the word so', the inner meaning is, that deformed persons, if they are eligible for marriage, are share-takers, and are to be nourished and cherished.

'Madmen, idiots, and the dumb;' by being mentioned in a group, these also are to be nourished and cherished, but they are not share-takers. 'Even if they are eligible for marriage,' is to be supplied. 'Whosoever are memberless' this is inclusive of women also. Amongst memberless women, a fellowwife, a daughter, a sister, etc., are to be protected and amongst men, a brother, his son, the paternal uncle, the maternal uncle, etc."

Placitum 159:

> "Yajnavalkya says here:
>
> 'Let the impotent, the outcast, his son, the lame, the insane, the idiot, the blind, the incurably diseased, and the rest, be maintained; they are not share-takers',"

9. We shall reserve our comments on these texts till after we make reference to the leading decisions which have considered this or the related problems. We need only add that there is no text of any Smriti or of any Commentary on them which directly deals with the problem now before us.

10. The first of the leading cases which considered the texts in relation to exclusion from inheritance in extenso and explained then import' was a decision of a Full Bench of live Judges of the Madras High Court in Krishna v. Sami, ILR 9 Mad 64 (FB). This case is of considerable importance for two reasons. In the first place, all subsequent decisions rendered by the several High Courts have consistently treated it as properly interpreting the texts and thus the conclusions reached in it and the reasoning on which the same was based have moulded the law in this country for these about 80 years. The second circumstance which invests it with great weight is that Muttusami Ayyar, J., whose erudition in Sanskrit is well-known, was one of the members of the Bench, the judgment itself having been delivered by Sir Charles Turner, C. J. The exact point which was decided in ILR 9 Mad 64 (FB), is well brought out in the headnote which may be quoted in full :

> "Under the Hindu law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather.

> In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being devested on the recovery of the disqualified, or the birth of a qualified heir"

11. The point urged before the Court and which necessitated the elaborate examination of the texts and the determination of the basis on which the principles were rested was as regards the scope of the rule of Hindu law which affirmed that an estate once vested would not be divested by the emergence of a nearer heir. It was argued that on the application of this principle, the birth of a son to a disqualified son after the death of the grand-father did not affect the right of the other sons to their shares in the ancestral property which survived to them on the death of the grandfather. This was negatived and the learned Judges held that the son of the disqualified person was a coparcener in every sense who obtained a right by birth, and on whose birth the shares of the other coparceners would undergo a diminution. This conclusion they reached after an erudite and critical examination of the relevant texts including Yajnavalkya Smriti, the Mitakshara and the Sarasvati Vilasa. The learned Judges pointed out that though the Mitakshara denied the disqualified heir rights of participation--in the sense of the right to seek a partition, however, confined even this disqualification to the "disqualified heirs" only and did not imply the disinherison of their legitimate sons or the offspring of the wife of a kinsman who were entitled to allotment, if free from defects. There are two matters to which it is necessary to advert in this decision. In the first place, speaking of the position of the disqualified heirs they pointed out: "The Hindu law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during disqualification and a restoration to their rights when that disqualification ceased."

This would clearly indicate that the right to maintenance was related to their interest in the family property, for immediately the disqualification ceased, they became full-fledged members entitled to full participation and to demand partition. The other matter is that in support of their decision they quoted placitum 149 of Sarasvati Vilasa where the author says that even to the defective "a share belongs to them" and that is given as the reason for the injunction that "they are to be nourished and cherished". Besides, the learned Judges relied also on the last words of the same placitum where it is stated that the disqualified--in a joint family are "share-takers" though they do not, as stated by Vishnu "receive a share". We shall have occasion later to point out the importance of the reliance on these passages of Sarasvati Vilasa, ILR 9 Mad 64 (FB), thus established that a disqualified heir under the Hindu law was capable of transmitting rights to joint-family property to his issue so much so that on the birth of a son to a disqualified heir that son became a coparcener entitled to a share along with the other coparceners, and that in this respect it mattered little that the disqualified person was not a full-fledged coparcener. Muthusami Gurukkal v. Meenammal, ILR 48 Mad 464: (AIR 1920 Mad 652 (2)), was the next important case which also arose in Madras where a closely related question came up for consideration. One Gangadhara was entitled to an Archaka office. He was born sane but became insane after his son--Subbayya --attained majority. When the father was insane, Subbayya was performing the Archaka service. The son died in 1874 but Gangadhara continued to be insane till his death which was in 1880. Subbayya's widow died in 1911 and Gangadhara's widow died in 1912. The suit out of which the appeal before the High Court arose was

brought by a reversioner of Subbayya against the daughter and daughter's son of Gangadhara. The defence to the suit was that Gangadhara was the last holder of the office and as such only his widow and daughter were entitled to the Archaka right. On the other hand, the contention urged on behalf of the plaintiff was that on Gangadhara's becoming insane Subbayya became entitled to the Archaka right and that as at the date of Subbayya s death in 1874, Gangadhara was insane, there could be no question of survivorship. The learned trial Judge as well as the first appellate Court dismissed the suit holding that as Gangadhara survived his son, he obtained a right to the office by survivorship and that on his death his widow and daughter became entitled to that right. The learned Judges concurred in this view, though the appeal itself was remanded for investigating the plea of an acquisition of title by prescription by Subbayya and his widow which had been raised by the plaintiff. This case, however, might not directly bear upon the point now under consideration because it would be seen that Gangadhara's disqualification was one which supervened and the decision proceeded on the theory that a supervening disqualification did not put an end to the right to a share which had inhered in him before the disqualification attached to him. In other words, Gangadhara had obtained a right by birth, though by reason of his subsequent insanity his right to active participation was kept in abeyance. When his son died the share which he was prevented from enjoying by reason of his disqualification, be came his both in title as well as in enjoyment. Though this decision is capable of being distinguished from these cases of a congenital disqualification, because in them it might be said no right or scintilla of right arose on birth for even at that point of time there was the disqualification, it is still useful for establishing the position that a disqualified heir is not to be treated as if he did not exist at all. It night be pointed out that Seshagiri Ayyar, J., who spoke for the Court placed considerable reliance on the authority of Sarasvati Vilasa which he treated as a treatise which was of binding authority in Southern India.

12. So far as the effect of a supervening disqualification is concerned an identical conclusion has been reached by the other High Courts and among them it is sufficient to refer to Moolchand v. Chahta Devi , Vithaldas Govindram v. Vadilal Chaganlal, AIR 1936 Bom 191 and Mt. Dilraj Kuar v. Rikheswar Ram Dube, ILR 13 Pat 712: (AIR 1934 Pat 373), and, in tact, there is no decision which casts any doubt on the correctness of ILR 43 Mad 464: (AIR 1920 Mad 652 (2)). We would add that the decision was expressly approved by the Federal Court in Kumari Ratnesvari v. Bhagwati Saran Singh, 1949 FCR 715: (AIR 1950 FC 142).

13. The question of the correctness of ILR 9 Mad 64 (FB), was canvassed before the Full Bench of Madras High Court in Amirthammal v. Vallimayil Ammal, ILR 1942 Mad 807: (AIR 1942 Mad 693) (FB). Certain decisions of the Madras High Court appeared to proceed on a line of reasoning which ran counter to ILR 9 Mad 64 (FB) and, therefore, the matter was referred to a Full Bench. In Amirthammal's case, ILR 1942 Mad 807: (AIR 1942 Mad 693) (FB), the question for decision related to the validity of a will executed by one Veerakumara who died in 1912 by which he bequeathed all his property, which was ancestral, in favour of his widow who died in 1917. Veerakumara had a son--Chellakrishna who was a congenital idiot who survived him but he married Amirthammal--the appellant before the High Court and by her he had two sons and a daughter. Both these sons were born after the death of Veerakumara in 1912 but both of them had died by 1917. If Chellakrishna was, in law, a coparcener with his father, the latter could not validly bequeath the property held by him to his widow and those who claimed under the will had to be non-suited,

and that indeed was the claim made by Chellakrishna's widow. The District Munsiff who tried the suit held that the will was valid and the Subordinate Judge on appeal agreed with him and both of them found that Chellakrishna was a congenital idiot. The question which thus arose before the Court was whether Chellakrishna was a coparcener on the reasoning found in the judgment of the Court in ILR 9 Mad 64 (FB), and whether he was capable of transmitting heritable blood. Leach, C. J. who delivered the opinion of the Court founded himself wholly on the interpretation of the texts which was adopted in ILR 9 Mad 64 (FB) and stated that unless ILR 9 Mad 64 (FB) was overruled or could be treated as obsolete, the appellant was entitled to succeed. It is convenient, at this stage, to set out the reasoning upon which the learned Chief Justice based his judgment besides treating ILR 9 Mad 64 (FB) as a binding authority which had necessarily to be followed. He observed:

> "It is a fundamental rule of Hindu Law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary. In Commissioner of Income-tax, Punjab v. Krishna Kishore , the Privy Council expressly recognised that under Hindu law, where the estate is impartible and the holder is joint with his kinsmen, it is the undivided family and not the holder who is the owner of the estate. Only the senior member has the right of enjoyment of the properties forming the family estate, unless there be a custom giving the junior members a subsidiary right of maintenance out of them. I can see no difference in principle here and this provides an additional reason for reading the words 'excluding them from participation' used in the quotation from Yajnavalkya in placitum 1 of Section X, Chapter II of the Mitakshara as meaning exclusion from enjoyment of the share while the affliction continues. The main reason is what is stated in the subsequent placita and in Sarasvati Vilasa."

Samayya, J. who concurred in this decision added his observations, basing himself on an independent examination of the texts. After referring to placitum 148 of Sarasvati Vilasa which the learned Judge referred to as a work of very high authority in Southern India, the learned Judge proceeded to set out the passage from Foulkes translation, already extracted earlier. He further observed :

> "The word 'share-taker' is here obviously used in contrast with 'share-enjoyer' i.e., they are not share-enjoyers because they are excluded from participation. But as the commentator says, a share undoubtedly does exist."

After considering the grammar and the meaning of the Sanskrit words used, the learned Judge concluded :

> "According to this author (the author of Sarasvati Vilasa), therefore, if the persons who are disqualified are capable of contracting a marriage, they are undoubtedly

sharers."

This brings us to the last of the decisions of the Madras High Court, this also being a decision of a Full Bench reported as Kesava v. Govindan, ILR (1946) Mad 452: (AIR 1946 Mad 287). As we have pointed out earlier, this decision, if correct, concludes the case in favour of the appellant. The headnote brings out the point decided in bold relief and it runs:

> "A member of a joint Hindu family who is disqualified from enjoying his share in the family estate by reason of the fact that he is deaf and dumb is entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family."

One Muniyan who had been deaf and dumb from birth settled upon the plaintiff property which had formed the estate of the joint-family of which he was a member. The joint-family consisted of himself and his brother, Manickam, who died in or about the year 1919. On the death of Manickam the sons of Mari, a divided brother of the father of Muniyan and Manickam, took possession of the property as his heirs, Muniyan being excluded by reason of his affliction. The plaintiff sued them in the Court of the District Munsiff for possession. The learned trial Judge held that Muniyan being disqualified, did not obtain any interest in the joint-family property on the death of his brother Manickan and not having any tide to property, could effect no settlement of it upon the plaintiff. From the dismissal of the suit the plaintiff appealed to the Subordinate Judge. The Subordinate Judge considered that the Full Bench decision of the High Court in ILR 1942 Mad 807: (AIR 1942 Mad 693) (FB), to which we have already referred, entitled Muniyan to claim the right to the property by survivorship and consequently decreed the plaintiff's suit. On appeal to the High Court, the learned Single Judge held that Amirthammal's case. ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB), did not decide the precise point and consequently allowed the appeal, but on a certificate under Clause 15 of the Letters Patent an appeal was filed and it was placed for decision before the Full Bench. Leach, C. J. who delivered the judgment of the Court referred to the earlier decisions and summed up the position thus:

> "If a disqualified person is a member of the coparcenary it would be unjust to hold that he is disqualified from enjoying the estate when he happens to be the sole surviving member of the family. There is no text which prevents him from so taking and to hold otherwise would mean that the whole estate would devolve on heirs outside the family, if there were any, and if not it would escheat to the Crown. It is one thing to say that an afflicted member shall not enjoy his share when there are other members of the joint family alive and quite another thing to say that he shall have no right in the estate when he happens to be the surviving member of the family. If he is not competent to manage the estate, the Court can appoint a guardian."

To complete the narrative of the decisions on this point we have to refer to the decision of the Federal Court in 1949 FCR 715, (AIR 1950 FC 142), to which we have already adverted. That case, as the one we have already referred in ILR 43 Mad 464: (AIR 1920 Mad 652 (2)), was concerned with a case of supervening insanity but what is of relevance in the present context is that not merely ILR 43 Mad 464: (AIR 1920 Mad 652 (2)), but ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB), were also

approved.

Kania, C. J. said:

> "In ILR 1942 Mad 807: (AIR 1942 Mad 693) (FB), Full Bench of that Court (Madras High Court) after a review of the texts held that even a congenital idiot has the status of a co-parcener under the Hindu law, notwithstanding that he is excluded from the enjoyment of his share."

Mahajan, J. expressed himself on this point thus:

> "Most of the High Courts in India on a consideration of the texts of Manu and Mitakshara relating to this matter have expressed the view that the right of a member of a Hindu joint family to share in ancestral property comes into existence at birth and is not lost but is only in abeyance by reason of any disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. If on the death of all other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship."

and proceeded to refer to the decisions in Madras and referred with approval, to the decision of the Full Bench in Amirthammal's case, ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB). Mukherjea, J. spoke to the same effect, though he reserved his opinion as to whether a congenital idiot could be held to be a coparcener under the Mitakshara law. He said:

> "In a recent Full Bench case ILR 1942 Mad 807: (AIR 1942 Mad 693) (FB), of the Madras High Court, the learned Judges on a review of previous authorities have held that even a congenital idiot, who is capable of marrying and begetting children, has the status of a coparcener under the Mitakshara law, although he is excluded from the enjoyment of his share so long as his disability lasts. In support of this view, reliance was placed upon certain texts of Sarasvati Vilasa which is authoritative in the Southern Presidency and where a distinction has been made between disabled persons who can marry and beget children and those who cannot. The class of persons coming under the first category are 'share-takers' and not 'share-enjoyers', while those coming under the second are not 'share-takers' at all."

14. It was not disputed by Mr. Choudhury--learned Counsel for the respondent that if the decision of the Full Bench of the Madras High Court in ILR (1946) Mad 452, (AIR 1946 Mad 287), was correct, the appeal must succeed, for there are no points of distinction on which the claim of the appellants could be defeated. The contention urged, however, was that that decision was wrong and that it proceeded on an incorrect appreciation of the texts of the Hindu law on the concept of coparcenary and the effect of the disqualification prescribed by the texts. In making this submission, Mr. Choudhury was merely restating what the learned Single Judge--Ramaswamy, J. had stated in the judgment now under appeal. The learned Judge, after summarising the previous decisions of the

Madras High Court observed, and that is the basis of his refusal to follow the Full Bench:

> "In two Full Bench decisions the High Court of Madras has purported to extend the principle of these decisions--decisions which held that a qualified son of a disqualified heir is a coparcener with the other members of the family. In one case, it was held that a congenital idiot has in law the status of a coparcener and that he could successfully impeach a bequest made by his father as the sole surviving coparcener in favour of his widow. In the other case, the Full Bench decided that a congenitally deaf and dumb person is, in spite of his disqualification, entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family; ILR 1942 Mad 807: (AIR 1942 Mad 698) (FB), and ILB 1946 Mad 452: (AIR 1946 Mad 287) (FB). The correctness of these decisions is somewhat open to question."

This entire passage is but a reproduction of the comment in Mayne's Hindu Law, 11th Edn. at page 721, though not so stated. The point made by the Editor of Mayne's Hindu Law in support of this last observation questioning the correctness of these decisions is rested on the position that if the disqualification is of a type which is congenital, as in the case of the deaf and the dumb he could never have had any right by birth, which is essential for his being treated as a member of the coparcenary and that if he was, by reason of the texts of the Hindu law, deprived, from the very moment of his birth, of his right to the property he could not obtain fresh rights by reason of the death of the other coparceners. Learned Counsel for the respondent strongly stressed this reasoning and in further support placed before us very learned article in the Madras Law Journal contributed by an eminent Hindu Law lawyer (the late Mr. Venkatasubrahmanya Aiyer)--[(1942) 2 Mad LJ (Jour, portion) 63]--questioning the correctness of the decision of the Full Bench of the Madras High Court in ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB), on this ground. In this connection learned Counsel desired us to treat the article as part of his argument.

15. Now, both in Amirthammal's case, ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB), M well as in ILR (1946) Mad 452: (AIR 1946 Mad 287) (FB), reliance was placed by the learned Judges of the Madras High Court on placita 148 to 152 of Sarasvati Vilasa where a distinction is drawn between a share-enjoyer and a share- taker. The main grounds on which Mr. Venkatasubrahmanya Aiyar challenged the correctness of the decision in Amirthammal's case, ILR (1942) Mad 807: (AIR 1942 Mad 693) (FB), in the article referred to, were (1)That the basis on which the disqualification rests is inconsistent with such afflicted person having any scintilla of interest in the joint family property. If he was right there, the death of the other coparceners, leaving him the sole member of the family could not improve his position.

(2)The distinction between share-takers and share-enjoyers which is adverted to in the Sarasvati Vilasa, is illogical and unsound and does not accord with the Smritis or the authoritative commentaries which expound the law.

(3)The Sarasvati Vilasa is a commentary of doubtful authority and cannot be utilised for laying down propositions or drawing inferences which are not supported by other ancient law books and in particular that there was not in the other Smritis or Commentaries any basis for attributing to the

disqualified coparcener the status of a share-taker as distinguished from a share-enjoyer.

16. Taking up first the question as regards Sarasvati Vilasa being an authority which is of binding force in the Southern School, i.e., "that part of India south of the line drawn from Ganjam and including the whole of the Dravida district and the territory under the Government of Fort St. George" it appears to us that the matter is no longer in doubt. Of the Commentaries which are authorities in that area undoubtedly the foremost is the Mitakshara of Vijnaneswara. That is followed by the Smriti Chandrika and next by the Sarasvati Vilasa. Sarasvati Vilasa is said to be the work of Pratapa Rudra Deva who was a King in Orissa and who reigned in the first quarter of the sixteenth century. It is, however, stated that it was difficult to ascertain whether it was written by the King himself or under his authority. It was referred to in Jijoyiambe Bayi Saiba v. Kainakshi Bayi Saiba, 3 Mad H C 424 (452), where the Madras High Court stated that this work was of an acknowledged authority in South India. In Kattama Nachiar v. Dorasinga Tevar, 6 Mad H C 310 at p. 333, the learned fudges said it was similar to Smriti Chandrika and of some authority in Madras. It was, as already pointed out, referred to as a recognised authority laying down the law in ILR 9 Mad 64 (FB). In Appandai Vathiyar v. Bagubali Mudaliar, ILR 33 Mad 439, White, C. J. and Krishnaswamy Iyer, J. after referring to the Mitakshara and the Smriti Chandrika observed:

> "Sarasvati Vilasa is also a recognised authority in Southern India which must be given effect to."

Similar observations are to be found in Chinnaswami Pillai v. Kunju Pillai, ILR 35 Mad 152. In Mayne's Hindu Law itself (page 48) it is stated:

> "The Sarasvati Vilasa is another work of authority in Southern India. It was written by Prataparudraveda, a King of Orissa. Dr. Jolly, Mr. Foulkes and Mr. Kane place the work in the beginning of the 16th Century. It is referred to in several cases."

and more than one Privy Council decision is referred to as among the cases in which this book is referred to, though it is pointed out that it is not of greater authority than the Mitakshara. It is clear, therefore, that Sarasvati Vilasa cannot be discarded as not an authority on determining the rule of Hindu law in that part of India. The only questions then would be: (1) Did the learned Judges of the Madras High Court properly interpret the relevant placita 148 to 152 of Sarasvati Vilasa, (2) if the learned Judges have properly drawn the distinction between share-taker and share-enjoyer as deducible from the text, is the distinction drawn and the law thus understood contrary to any text of Mitakshara or other books of higher authority than the Sarasvati Vilasa ?

17. Mr. Venkatasubrahmanya Aiyar has, in the article, devoted considerable attention to what he describes as the error committed by the author of the Sarasvati Vilasa in understanding the Smritis and the earlier Commentaries, and in particular on the reasoning employed in the placita we have extracted. We do not propose to examine this criticism for the reason that if Sarasvati Vilasa is an authority in South India, and this is evident from what we have stated earlier, and there is no text of the Mitakshara which directly contradicts the law as there expounded, it would not be proper to discard it on me ground of alleged defects in its reasoning.

18. We have already set out the relevant extracts from Sarasvati Vilasa where a clear distinction is drawn between enjoying a share and taking a share. We would add that such a distinction would square logically with the accepted position that even if at birth there is an affliction which disqualifies, still if the defect is later remedied, he becomes entitled to claim a share. The basic postulate of the Mitakshara being that the right to property is by birth, unites a vestigial right in property is assumed to exist at birth even with a disqualification which disentitles the person from the right to active participation, his right to participation on the removal of the disability cannot be logically explained. If the distinction between share-taker and share-enjoyer be sound, it would convey no meaning if one were to hold that while though the disqualified person be a share-taker, he is still denied the right to the property when there is no other coparcener who could be a share-enjoyer.

19. The next line of approach is whether there is anything in the text of the Smritis or of the Mitakshara which overrides the statement of the Jaw in Sarasvati Vilasa and forbids effect being given to the law as there enunciated. What is relied on in this connection is not so much any text but the principle underlying the theory of coparcenery. It is said that a coparcenary interest arises on birth and if a disqualification attaches not after the right by birth has been obtained but even at the moment of birth preventing, as it were, the right by birth emerging how can the right of survivorship which is dependent on the existence of a right by birth come into being on the death of the other coparceners ? As pointed out earlier, it is this that forms, as it were, the core of the argument against the correctness of the Full Bench decision in ILR (1946) Mad 452: (AIR 1946 Mad 287) (FB), to be found in Mayne's Hindu Law. There is no doubt that this is a powerful argument and if the law had to be determined only on the basis of logic the argument would have got force, subject to what we have pointed out earlier as flowing from the accepted position that on the defect ceasing the right-is enforceable. But Hindu Law has not always been logical. Thus we have the instance in the law relating to impartible estates, of the property being treated as coparcenary property in which the other members of the so-called coparcenary have no right to interdict alienations. It might be said that this was the result of the decisions of the Privy Council in Sartaj Kuari v. Deoraj-kuari, 15 Ind App 51: ILR 10 All 272 (PC), and Venkata Surya v. Court of Wards, 26 Ind App 83: ILR 22 Mad 383 (PC), but that might not wholly suffice to brush them aside. In the next place, the texts including the Smritis--Manu, Narada, Vishnu as well as Mitakshara expressly confer upon the disqualified heir a right to maintenance and brand it as a sin to deny him maintenance during his entire life. That might indicate that it would not be violent inference to hold that the disqualified heir had still some interest, however little ii might be in the property, for surely it is (he proprietary right that gives him the light to maintenance. It might be noticed that under the Hindu law the liability to maintain others arises in a two-fold manner: (a) from the existence of a particular relationship independent of the possession of any property, (b) on possession of property. In the first category fall the cases of the liability to maintain a person's wife, minor sons, and unmarried daughters and aged parents. Here the obligation is personal and is brought into existence by the relationship. In the other category are those where the liability is dependent on the possession of coparcenery property. Assuredly the liability to provide for the maintenance of the disqualified heir under the Hindu law would fall under the latter category also, i.e., it is not confined to the particular relationships which cast the obligation to maintain. Thus a brother would have to be maintained out of the joint property where he is disqualified from claiming partition. No doubt, the texts deny him the right to

partition but that is not the subject-matter of the discussion here. If the right to be maintained is traceable to his right to the property in which he is excluded from participating in full, it would not be a violent inference to hold that he has an incipient and vestigial interest in that property which is not capable of being asserted against other coparceners, but when there is none entitled to enjoy it as coparcener, blossoms into a full right. Next, we have the circumstance that the qualified male issue of a disqualified person is a coparcener and is entitled to take the property by survivorship. The theory, therefore, cannot be that a disqualified heir should be treated as if he did not exist at all.

20. These considerations on the merits apart, there are two other factors to which we are bound to refer. The first is that this decision of the Madras High Court has not been doubted or dissented from in any Court in India these 50 years and more and has determined the rights of parties at least in Madras during this period. Besides, as we have already pointed out, the distinction between share-taker and share-enjoyer which forms one of the lines of reasoning on which the decision in Amirthammal's case, ILR (1942) Mad 807: (AIR 1942. Mad 693 (FB), rests, was approved by several Judges of the Federal Court in 1949 FCR 715: (AIR 1950 FC 142), though the case then before the Court was one of a disqualification arising after the vesting of the property and can, therefore, be distinguished on that ground. Lastly, the law as to disqualified heirs has now been amended and made statutory by the Hindu Inheritance (Removal of Disabilities) Act, 1928 and the precise rule of Hindu law apart from statute is no longer of any practical significance. In these circumstances, we consider that we cannot accede to the submission of the respondent and upset the law as laid down in ILR (1946) Mad 452: (AIR 1946 Mad 287) (FB).

21. Before concluding it is necessary to advert to one feature which would be apparent even from our narrative. There was a decision of the Full Bench which interpreted the texts and laid down the law on the topic and it is somewhat surprising that the learned Single Judge of the Court thought it proper to refuse to be bound by that judgment and proceeded on his own line of reasoning based on authorities several of which were discussed by the Full Bench relying merely on the statement by the Editor of Mayne's Hindu Law that the decision required reconsideration. We cannot but deprecate this practice as it destroys the certainty of the law which the theory of judicial precedent seeks to establish. Not merely convention but rules framed by several High Courts require that where a learned Single Judge or a Division Bench does not agree with a Full Bench decision he or they either make a reference to the Full Bench or place the papers before the Chief Justice for such a reference being made. But that was not, however, what the learned Single Judge did in the present case. He took the unusual step of practically overruling the Full Bench and refusing to be bound by it. In addition he refused leave to appeal under Clause 15 of the Letters Patent, with the result that the appellant was forced to move this Court for special leave.

22. The appeal is accordingly allowed and the judgment of the, High Court reversed and the decree of the Subordinate Judge, Salem restored with costs here and in the High Court.