Narashimaha Murthy vs Smt. Susheelabai & Ors on 17 April, 1996

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Author: K. Ramaswamy

Bench: K. Ramaswamy, Kuldip Singh, M.M. Punchhi

PETITIONER:
NARASHIMAHA MURTHY

Vs.

RESPONDENT:
SMT. SUSHEELABAI & ORS.

DATE OF JUDGMENT: 17/04/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
KULDIP SINGH (J)
PUNCHHI, M.M.

CITATION:
1996 AIR 1826 1996 SCC (3) 644
JT 1996 (4) 300 1996 SCALE (3)625

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K.RAMASWAMY,J.

One Narasoji Rao, died intestate leaving behind him the appellant, the only son and the respondents, three daughters, after action at the latters' behest for partition was laid. The courts below granted preliminary decree for partition in equal shares of the schedule A properties which include "the dwelling house of Narasoji Rao". The appellant canvassed its illegality and impartibility of the dwelling house, by operation of Section 23 of the Hindu Succession Act 1956, (for short, the `Act') which was met with dismissal in limine by the High Court in S.A. No.1045/91 dated February 21, 1992. Thus this appeal by special leave. the decree for partition of dwelling house has its support from the ratio of Kariyavva v. Hanumantappa mallurappa,[1984 Kar.L. J. 2731].

The only question argued before us is: whether the dwelling house is partible, when Narasoji Rao left behind his only son and three daughters? That the house is a dwelling house is not in dispute. So the need to go into the meaning of the words "dwelling house" is obviated. There is a cleavage of judicial opinion among High Courts on their interpretation of Section 23 of the Act which provides thus:

> "23.Special provision respecting dwelling houses. Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the made heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.
>
> Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The object and reasons to enact S.23 have been stated thus:-

> "This clause restricts the right of a female heir to claim partition of the family dwelling house so long as the male heirs do not choose to effect partition of the same but expressly recognises her right to reside in such house."

The Orissa, Karnatakas Bombay and Gujarat High Courts have adopted literal meaning holding that the dwelling house is partible whereas the Calcutta, Madras and Allahabad High Courts have taken contra view. We are called upon to resolve the conflicting opinions. The purpose of the law is to met out justice; in other words, to prevent injustice or miscarriage of justice. In our view, the interpretation should be consistent with justice, equity and good conscience. Section 8 of the Act provides general rules of succession in the case of males, When a male Hindu dies intestate, the property shall devolve, firstly, upon the heirs, being the relatives specified in class-I of the Schedule..... On the death of a Hindu, the succession to his property is open. In its partitions, S.23 makes a special provision respecting partibility of the dwelling house. When a Hindu intestate,

whether male or female, has left surviving him or both male and female heirs specified in Class-I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in the Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female Class-I heir, like unmarried or widow or deserted or separated daughter of the deceased, shall have the right of residence therein, When the deceased Hindu left behind him/hers, only one male heir and one or more female heirs, the question emerges: whether the dwelling house is partible? By operation of non obstante clause, the dwelling house gets excluded from the operation of the general law of succession envisaged in the Act and a special rule of succession has been engrafted in S.23. The claim for partition by female heir shall not arise 'until the male heirs choose to divide their respective shares therein". In other words, the right of the female heir for partition of the dwelling house is postponed till the happening of a contingent event, i.e the decision by the male heirs to partition the dwelling house in occupation of the family. The literal construction of the above quotation connotes the existence of more than one male heir and so long as their volition to remain in possession and enjoyment of the dwelling house subsists or they do not decide to partition it or part with possession, the female Class-I heirs are kept at a bay to claim partition except to the right of residence in the enumerated events.

In Arun Kumar Sanyal v. Jnanendra Nath Sanyal [AIR 1975 Calcutta 232], the intestate Hindu left behind him one male heir and one female heir. The daughter transferred her share in the dwelling house to a stranger who laid the suit for partition. The Calcutta High Court held that S.23 makes it clear that the legislature does not approve of division of a dwelling house at the behest of a female heir against the 'will' of the male member. The object is to prevent fragmentation or disintegration of the family dwelling house at the instance of the female heir to the hardship and difficulties to which male heir may be put to. The bar is removed only on the happening of the contingency, namely, when the male heir chooses to divide the dwelling house. It may be that there is one male heir and one female heir and there may not be any chance of that contingency to happen, but that will be no ground to say that the Section 23 is inapplicable. The bar is not a personal bar and it does not come to an end when the female heir loses her interest in the dwelling house by transferring the same to another. The case of a transferee of a female heir is completely different and cannot be equated with that of the son of a pre-deceased daughter The above ratio was followed by other Division Benches of that court in Surya Kumar Das v. Smt. Maya Dutta [AIR 1982 Calcutta 221] and Smt. Usha Mazumdar and Ors. v. Smt. Smriti Basu [AIR 1988 Calcutta 115]. In Mookkammal v. Chitravadivammal [AIR 1980 Madras 243], the Madras High Court held that S.23 is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset between a female member and male member. Therefore, the dwelling house is not liable to partition. But if the sole male member chooses to sell his share in the dwelling house introducing a stranger, the female heir can file a suit for partition and possession of her share in the property. In Janabi Ammal v. T.S.A. Palani hudaliar [AIR 1981 Madras 62], one Swaminatha Mudiliar died intestate owning extensive properties, leaving behind the Alaintiff and other three daughters and two sons. The daughters laid suit for partition of properties including the dwelling house. Subsequently, one of the sons died and the sole son was in possession of the dwelling house. When the question of the applicability of S.23 had come up for consideration the Division Bench held thus:

> "The above section is a special provision dealing with the partition of a dwelling house and the right of the male and female heirs of the intestate therein. There can be no doubt that a female heir specified in Class I of the Schedule to the Act inherits a share in dwelling house absolutely. But, S.23 postulates the right of such a female heir to claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. The object behind this section seems to be to prevent fragmentation or disintegration of a family dwelling house at the instance of a female heir or heirs, to the prejudice of the male heirs. This is based on the principles embodied in S.44 of the Transfer of Property Act. The contrary view will cause gross injustice to the single male heir and the object of the section will be nullified. The hardship to the female heir of postponement of partition is relatively less."

In Ponnuswamy v. Meenakshi Ammal and Ors., [1989 (2) M.L.J. 506], another Division Bench reiterated the same view. In Purnawari v. Sukhadevi, [AIR 1986 Allahabad 139], the Court took the same view.

In Vanitaben Bhaisharker Pandya v. Divaliben Premji & Ors. [1979 (2) G.L.R. 148], the Division Bench held that for the application of S.23, the whole house must be the dwelling house wholly occupied by the members of the family. In that case the house consisted of residential portion in the occupation of the family and the shop was let out. So, S.23 was held to be not applicable.

In Hemalata Devi v. Umasankari Moharana, [AIR 1975 Orissa 208], the Division Bench held that if there are more than one main heirs, there would be the possibility of anyone of such heirs asking for a partition of the dwelling house and the female heir in such a case cannot claim her share. But where there is a single male heir, there is no possibility of that male heir claiming any partition against another male heir. Thus where there is a single male heir and others are female heirs, the female heirs are entitled to claim partition. Their right to claim partition of the dwelling house is not excluded by S.23 of the Act. In Kariyavva's case (supra) only son and daughter were the class-I heirs of the intestate deceased father. The Bench, while agreeing with the ratio in Orissa case, held that when there is only one male heir quite obviously the conditions envisaged by the special provision cannot be satisfied. The succession cannot be kept in abeyance as indeed, first, the intestate Hindu cannot be said to have left surviving him or her both male and female heirs and, secondly,the contingency of the male heirs chosing to divide their respective shares therein,does not adim of being fulfilled Section 23 gets attracted only where an intestate Hindu leaves surviving both male and female heirs. The second part deals with a position which becomes relevant only when the section itself is attracted. The Court further observed thus:

> "Under the Act, a female heir succeeds to the estate of a Hindu dying intestate. That succession cannot be held in abeyance, Under certain circumstances, the right to a share vesting in an heir is rendered an imperfect right in the sense the remedy of reducing it inessence by actual physical partition is postponed till the happening of another event. The conditions that make the right imperfect are referred to in the first part of S.23. i.e. "that a Hindu intestate has left both male and female heirs and his property includes a dwelling house wholly occupied by the member of his family."

> The non-obstanti clause operates only upon the existence of these conditions. The other event which renders the right, again, a perfect right is the event by which the male heirs choose to divide their respective shares therein. This would suggest that Section is attracted only if the conditions contemplated in the first part of the Section comes into existence."

If there is only one male heirs the circumstances envisaged in the first part of the section do not come into existence and the section does not come into operation at all. The provisions of this section cannot be applied to a case where there is a single male heir without rewriting the section and reading into it quite a few alterations of language, structure and syntax. The expressions "heir" and "male" heirs choose to divide their respective shares" would then become wholly opposite in meaning. Both the literal construction and the intendment would suggest that the postponement of partition is conditional upon there being a plurality of male heirs and not otherwise. Therefore, the postponement of the right of female heirs to claim partition respecting the family dwelling house was only where there was a plurality of male heirs a situation which, in turn, renders the satisfaction or the next condition, namely, that they choose to divide their respective shares therein, a possibility and a reality. Any other construction would lead to this that while the section on its plain language, prescribes a condition which admits of being fulfilled, we would by construction,introduce into the section a condition which does not admit of fulfillment at all. In Anant v. Janaki Bai [AIR 1984 Bombay 319], the Bombay High Court also took the same view.

In Mulla's Hindu Law (16th Edn.), revised by Justice S.T. Desai, it is stated thus :

> "The right of a female heir specified in Class I of the Schedule to demand actual partition of the family dwelling house is deferred and kept in abeyance until the male heirs specified in Class I decide to partition it, that is to divide it by metes and bounds or realise its sale proceeds.
>
> Reference may be made to the undermentioned decision of the Allahabad High Court, Purnawasi v. Smt. Sukha Devi, under agreement has been expressed with these views. Question may perhaps arise whether the Special restriction enacted in this section on the right of a female heir to demand actual partition of the family dwelling house applies when there is only one male heir of the intestate under Class I of the Schedule. The words 'until the male heirs choose to divide their respective shares therein' may suggest that there must be at least two such male heirs if the restriction is to operate. The object of the special provision is to prevent female heirs and particularly a daughter of the intestate from creating a situation in which partition of the family house may entail a forced sale of it or otherwise cause hardship to the son or sons of the intestate where it may not be possible for the son or sons to buy off the share of the female heir who insists on actual partition of it. It is submitted that there is nothing repugnant in the subject or context to prevent the operation of the rule laid down in section 1 of the General Clauses Act to the effect that the plural shall include the singular and the restriction will apply even where there is only one male heir who does not choose to divide his respective share in the

> dwelling houses It would seem that the right of female heir to demand partition may be deferred and remain in abeyance under this section till the lifetime of the male heirs enumerated in Class I of the Schedule or the last survivor of them unless a partition of the dwelling house is sought by any one of then before such time. The restriction will cease to operate on the death of the last of such male heirs of the intestate or where there are only one male heir and one female heir and the male heir chooses to sell his moiety in the dwelling house."

In Raghavachariar's Hindu Law (8th Edn.) revised by Prof. Venkataraman, it is stated thus:

> "The provision that in the case of a dwelling house left by the intestate his or her female heirs can claim partition thereof only if the male heir choose to divide their respective shares therein is a salutary provision designed to avoid confusion shown into the family by the female members such as the daughters and daughter's daughters whose moorings are elsewhere on account of their marriage, seeking to take away their shares and throw the male members into the streets. The disability of female heir to claim a partition when the male members are not willing to effect a partition is an echo of the law that prevailed prior to this Act under the Mitakshara under which no female is entitled to a share on a partition could claim a partition except when the male members of the family effect a partition. The restriction has been imposed to prevent the fragmentation of the dwelling house at the instance of female heirs."

When succession of a Hindu intestate is open, his/her Class-I heirs specified in the Schedule is entitled at a partition to their respective shares. The succession cannot be postponed. However, exception has been engrafted by S.23 respecting tradition of preserving family dwelling house to effectuate family unity and prevent its fragmentation or disintegration by dividing it by metes and bounds. The prohibition gets lifted when male heirs have chosen to partition it. The words specified in Class-I of the Schedule and S.23, are used in a descriptive sense to economise the word denoting the legislative animation. The expression "dwelling house' though not defined in the Act, the context would indicate that it is referable to the dwelling house in which the intestate Hindu was living at the time of his/her death; he/she intended that his/her children would continue to normally occupy and enjoy it. He or she regarded it as his or her permanent abode. On his or her death, the members of the family can be said to have continued toÿpreserve the same to perpetuate his/her memory. Obviously S.23 is an exception to the general rule of succession and has been engrafted for that purpose. Where there are only one male heir and one or more female heirs are left surviving behind the Hindu intestate, the members of the family would continue to remain in occupation and in enjoyment of it as dwelling house. Due to marriage, the daughter would leave the parental house and get transplanted into matrimonial home. The proviso to S.23 visualizes certain contingencies and made provision for right of residence to Class-I female heirs. In the event of the male member (s) chose(s) to separate or cease (s) to reside or instead introduce a stranger into family house, then the female heir gets the right to a share in the dwelling house as well. The reverence to preserve the ancestral house in the memory of the father or mother is not the exclusive preserve of the son alone. Daughter too would be anxious and more reverential to preserve the dwelling house to perpetuate

the parental memory.

Section 23 thus limits the right of the Class-I female heirs of a Hindu who died intestate while both male and female heirs are entitled to a share in the property left by the Hindu owner including the dwelling house. The marginal note itself indicates that Section 23 is a special provision: in other words, it is an exception to the general partition. So long as the male heir(s) chose not to partition the dwelling house, the female class-I heir(s) has been denied the right to claim its partition subject to a further exception, namely, the right to residence therein by the female class-I heir(s) under specified circumstances. In other words, the male heir (s) becomes entitled to perpetuate the memory of the deceased-Hindu who died while remaining to live in the dwelling house during his or her life. Thereby the dwelling house remains indivisible. The male heir(s) thereby evinces animus possedendi. But the moment the sale heir(s) chooses to let out the dwelling house to a stranger/third party, as a tenant or a licensee, he or they exhibit (s) animus dessidendi and the dwelling house thereby becomes partible. Here the conduct of the male heir(s) is the cause and the entitlement of the female Class-I heir(s) is the effect and the latter's claim for partition gets ripened into right as she/they is/are to sue for partition of the dwelling house, whether or not the proviso comes into play. Here the female heir(s) becomes entitled to not only mere partition of the dwelling house but also her right to residence after partition.

It is, therefore, clear that though the right to succession devolves upon the female heir under S.8, being Class-I heir to the Hindu intestate, in respect of the dwelling house, her right to seek partition has been interdicted and deferred only so long as the male heir(s) decide to remain occupied therein as undivided or continue to have it as a dwelling house. Though the words 'the male heirs choose to divide their respective shares', suggest that at least two such male heirs must exist and decide not to partition the dwelling house in which event the right of the female heir is postponed and kept in abeyance until the male heir or heirs of the Hindu intestate decide to partition it, it does not necessarily lead to the only inevitable conclusion that the operation of S.23 must stand excluded in the case of the Hindu intestate leaving behind him/her surviving only son and daughter. Take the present policy of family. planning to have only two children and invariably preferring to have a son and daughter. More than one son may not exist. The restriction is contingent and conditional and will cease to operate on the death of the sole male heir or the last of such male heirs of the intestate or if he or they choose (s) to partition and sell(s) his/their shares to a stranger or to let out to others. Take a case of a Hindu male or female owning a flat in metropolis or major cities like Bombay etc. with two room tenengent left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both son and daughter and to be sold out. In that event the son and his family will be thrown on streets and the daughter would coolly walk away with her share to her matrimonial hone causing great injustice to the son and rendering them homeless/shelterless. With passage of time, the female members having lost the moorings in the parental family after marriage may choose to seek partition though not voluntarily but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of intestate father or mother. But the son with his share of money may be Incapable to purchase a dwelling house for his family and the decree for partition would make them shelterless. Take yet another instance, where two-room tenement flat was left by deceased father or mother apart from other properties. There is no love lost between brother and sister. The latter demands her pound of flesh at an unacceptable

price and the male heir would be unable to buy off her share forcing the brother to sell the dwelling flat or its lease-hold right or interest to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry causing greatest humiliation and justice.

Take an instance of a mansion. The entire mansion may not be in use as a dwelling unit by the male heirs though the father kept it. as a dwelling unit. To the extent necessary for the use by the male member as a dwelling house it can be preserved and the rest could be partitioned and the fomer may be allotted to the son while working out the equities in the partition. Take another illustration where in addition to the dwelling house other properties are available for partition which may be allotted to the share of the sister or sisters, while the dwelling house at the option of the son may be allotted towards his share. In these events, the need to postpone succession may not arise.

Educational, job or avocational opportunities necessitate migration and settlement in another State or abroad which are a common feature. Grace to give when he is in affluent position and allows female he to wholly occupy and enjoy parental home apart, in working out equities, instead of fragmentation of it by metes and bounds, the house may be allotted to the share of the female heir so that she would perpetuate the money of the parental abode. Take yet another instance where son due to being in service is transferred to another place or places and consequently he has to leave his dwelling house and join at the place or places of his posting. Instead of keeping the house locked, he may lease it out or grant leave or licence to a tenant. The cessation of possession and enjoyment of the dwelling house is not due to his own volition but due to compulsion to eke out livelihood and this cause should not give rise to a cause of action to a sister to file the suit for partition.

Suppose 'A' and 'B' are brother and sister. 'A' is a Judge of the High Court. He on elevation to the Supreme Court shifted his residence to Delhi. Instead of keeping his house vacant he lets out the house to a tenant. Does it mean that 'A' had ceased to have intention to be in possession of the house entitling 'S' to file a suit for partition. 'A' has intention to retain possession but due to exigency of office he holds, he temporarily ceases to - have occupation, but his intention to return to his house and occupy the same on superannuation still subsists and on return he would be entitled to residence.

Suppose 'A' is the father, 'B' is the son and 'C' is the daughter. They reside at 'H' place. 'A' is the Judge of the High Court, 'B' practices in the Supreme Court and 'C' practices at 'H'. 'B' on account of his practice ceases to have intention to reside at 'H' place and on demise of 'A', 'C' may be given the house for her residence to perpetuate the memory of the parental abode or else it is liable to partition at an action of 'C'. Take another instance where 'A' is a Clerk in a Bank. As per the policy of the management on promotion to officer cadre, he shall be compulsorily transferred at least for three years outside the State. Suppose if he joins in the other State and if S.23 is applied the moment he ceases to occupy the house. it becomes liable to partition at a suit by his sister though he returns on completing three years to his home State. To avoid such a hardship, either he has to forego his future promotions in career and remain as a Clerk or face the peril of losing his right in his father's abode.

Take another illustration, where the sole male heir with a view to prevent a female heir of her right to residence in the dwelling house lets it out and occupies another tenanted premises for himself and for the members of his family. Female held cannot be expected to fight a litigation against the tenant; instead she/they are entitled to file a suit for general partition impleading tenant it not already made party for partition of the dwelling house let out at the general partition and seek for allotment of her share therein for her residence and the tenant in that event would be entitled to residence only to that part of the premises allotted towards the share af his landlord, though the tenancy was for the entire building. The conduct of letting by the male heir leads to the fragmentation of the dwelling house and he cannot have a cause to complain of the female heir's claim for partition nor he has a right to resist her demand for partition to workout her share in the dwelling house.

The above consideration would indicate that the legislature intended that during the life-time of the surviving male heir(s) of the deceased Hindu intestate, he/they should live in the parental dwelling house as partition thereof at the behest of the female heir would render the male heir homeless/shelterless. Obviously, to prevent such hardship and unjust situations special provision was made in S.23 of impartibilty of the dwelling house. Section 44 of the Transfer of Property Act and also S.4(1) of the Partition Act appear to prevent such fragmentation of the ancestral dwelling house. Singular includes plural under S.13(2) of the General Clauses Act and may be applied to S.23 as it is not inconsistent with the context or subject. Even without resorting to it or having its aid for interpretation by applying common sense, equity, justice and good conscience, injustice would be mitigated. After all, as said earlier, the to prevent brooding sense of injustice. It is not the words of the law but the spirit and internal sense of it that takes the law meaningful, The letter of the law is the body but the sense and reason of the law is the soul. Therefore pragmatic approach would further the ends of justice and relieve the male or female hair From hardship and prevent unfair advantage to each other. It would therefore, be just and proper for the Court to adopt common sense approach keeping at the back of its mind, justice, equity and good conscious and consider the facts and circumstances of the case on hand. The right of residence to the male member in the dwelling house of the Hindu intestate should be respected and the dwelling house may be kept impartible during the life purpose of law is to prevent brooding sense time of the sole male heir of the Hindu intestate or until he chooses to divide and gives a share to his sister or sisters or alienate his share to a stranger or lets it out to others, etc. Until then, the right of the female heir or heirs under S.8 is deferred and kept in abeyance. So, instead of adopting grammatical approach to construe S.23, se are of the considered view that the approach of the Calcutta and its companion Courts is consistent with justice, equity and good conscience and we approve of it. We accordingly hold that S.23 applies and prohibits partition of dwelling house of the deceased Hindu male or female intestate, who left surviving sole male heir and female heir/heirs and the right to claim partition by female heir is kept in abeyance and deferred during the life of the mate heir or till he partitions or ceases to occupy and enjoy it or lets it out or till at a partition action, equities are worked out.

Admittedly the suit was filed in 1980 when the High Court had not ruled on 5.23. The Schedule 'A' dwelling house was leased out to the 7th defendant. the appellant pleaded in the written statement that he had spent around Rs.1,24,000/- and odd on the marriage of the plaintiff- respondent. The property was, thereby not partible. The Munsif found that Schedule 'A' property is the ancestral

dwelling house and that the Schedule 'B' site is the self- acquired property of the father which was affirmed by the appellate Court. It would thus be clear that the appellant had not pleaded that the letting of the Schedule 'A' dwelling house was on any extenuating circumstances and it was not a voluntary one. In other words, it is clear that the appellant had inducted strangers into the dwelling house and had lost his animus possedendi. Accordingly S.23 became inapplicable to the facts of this case. In that view, though for different reasons, the appeal needs no interference which is accordingly dismissed. No costs.

Narashimaha Murthy V. Smt. Susheelabai & Ors.

J U D G M E N T Punchhi,J The special and multiangular provision, Section 23 of the Hindu Succession Act, 1956, emits two legal questions of importance for determination, in this appeal by special leave, against the order of the Karnataka High Court dated 21-2-1992 in R.S.A. No.1045 of 1991, affirming in limine the appellate order of the CITY Judge, Ramanagaram dated 22 October 1990 in R.A. No. 31 of 1985 namely:

> (i) What is a 'dwelling-house' on which the provision confers the cloak of impartibility? and
>
> (ii) Where a Hindu intestate leaves surviving him or her a single male heir and one or more female heir or heirs, specified in Class I of the Schedule, is the provision attracted?

It would be worthwhile to reproduce hereafter the provision engaging attention as also the relevant part of the Schedule:

> "23. SPECIAL PROVISIONS RESPECTING DWELLING-HOUSES - Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:
>
> Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling- house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

THE SCHEDULE HEIRS IN CLASS I "Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son"

> Some facts may now be noted.

The appellant. Narashimaha Murthy and his father Narasoji Rao owned a joint family house, Schedule A property. Besides that Narasoji Rao owned some self acquired property, Schedule B property. He died somewhere in the year 1968 leaving behind his son, the appellant, Nagubai his widow, and five daughters. Twelve years after the death of Narasoji Rao, one of his daughters, Smt. Susheelabai, Plaintiff- respondent herein filed a suit for partition for obtaining one seventh share in the properties of Narasoji Rao impleading her brother, the appellant, her mother and four sisters as defendants. The seventh defendant impleaded was the tenant of Schedule A property occupying it on a monthly rent of Rs.75/- The mother Nagubai died during the pendency of the suit, which made the plaintiff increase her claim to one-sixth share in the properties. The suit was resisted by the appellant on grounds inter-alia that the plaintiff-respondent could not seek partition of Schedule A property, it being a joint dwelling-house, as understood under section 23 of the Hindu Succession Act, 1956, which provision was otherwise not attracted, when there was only one male heir amongst the heirs surviving. It was otherwise not in dispute that the house in question stood rented out to the seventh defendant but for the rate of rent. The Trial Court rejecting the defence of the appellant, determined the share of the plaintiff-respondent in Schedule A property as 1/12 (the intestate having half share in the house and the other half being that of the son) and in Schedule B property as 1/6th. In accordance therewith the plaintiff- respondent was granted a preliminary decree for partition on October 31, 1985. A separate enquiry was kept by the Trial Court for determining the mesne profits from the date of the suit till the date of actual handing over of possession. The first as well as the second appeal of the appellant to challenge the judgment and decree of the Trial Court having been dismissed, has given him cause to bring the dispute to this Court for resolution.

The admitted fact-situation now is that the house in question is in the actual physical possession of the tenant and none of the heirs of Narasoji Rao, male or female, are in possession thereof. It has now to be determined whether the suit of the plaintiff-respondent could successfully be resisted by the appellant in the light of the afore-posed questions, on the anvil of Section 23 of the Hindu Succession Act.

The expression "dwelling-house" has not been explained elsewhere than in the Section 23 itself. There is no specific definition of the expression in the Act as such. Because of that, various commentators of the subject have foreseen that the courts were likely to face a problem in defining it. According to Webster Comprehensive Dictionary, the expression "dwelling-house" means a house built for habitations a domicile. In law it may embrace the dwelling itself and such buildings as are used in connection with it. According to Black's Law Dictionary (sixth edition), under statute prohibiting breaking and entering a "dwelling- house", the test for determining if a building is such a house is whether it is used regularly as a place to sleep. In Stroud's judicial Dictionary (fifth edition), the expression "dwelling-house" has been described as a house with the super-added requirement that it is dwelt in or the dwellers in which are absent only temporarily, having animus revertendi and the

> legal ability to return Ford v. Barnes, [55 L.J.Q.B.34]. It is described that the word "inhabitant"

would seem to bring about more fully the meaning of the word "dwelling-house". In Words and Phrases (Third Edition)] a quotation is available from Lewin v. End [1906 AC 299 at 304] attributed to Lord Atkinson in whose words a "dwelling- house" as understood by him was "a house in which people live or which is physically capable of being used for human habitation". Another quotation from R. v. Allison [1843 (2) LTOS 288 at 289] is available of Maule, J. saying that a house, as soon as built and fitted for residence, does not become a dwelling-house until some person dwells in it. In T.P. Mukherjee's The Law Lexicon (Volume I) 1989, it is stated at page 565 that a dwelling-house, as the words imply, projects the meaning that the house or a portion thereof is an abode of his, available to him at all times without any let or hindrance by others. Further thereat is stated that a dwelling place is one where a person inhabits and in law should be his domus mansionalis. In Aiyar's Judicial Dictionary (11th Edition), an old decision of the Allahabad High Court in Fatime Begum v. Sakina Begum [1 All 51] has been mentioned in which it has been held that the words "dwelling or "residence" are synonymous with domicile or home and mean that place where a person has his fixed permanent home to which whenever he is absent, he has the intention of returning. An extraction from Commissioner of Income Tax v. K.S. Ratanaswamy [1980 (2) SCC 548 at 553] is also quotable saying that primarily the expression "dwelling place" means "residence", "abode" or "home" where an individual is supposed usually to live and sleep and in the context of a taxing provision which lays down a technical test of territorial connection amounting to residence, the concept of an "abode" or "home" would be implicit in it. In other words, a dwelling place must be a house or portion thereof which could be regarded as an abode or home of the assessee in taxable territories.

From the aforequoted statements it is manifest that in the legal world the word "dwelling-house" is neither a term of art nor just a word synonymous with a residential house, be it ancestral, joint family owned or self acquired, as understood in the law applicable to Hindus. In the context of section 23 therefore when the legislature has chosenly employed the word "dwelling-house", it has done so with a purpose, which is to say that on the death of the intestate, a limited status quo should prevail as existing prior to his or her death. His or her abode, shared by him or her, with members of his or her family identifiable from Class I Heirs of the Schedule, should continue to be in enjoyment thereof, not partible at the instance of the female heirs till the male heirs choose to effect partition thereof.

There are twelve Class I heirs in the Schedule. They may be arranged in the following manner:

	MALES	FEMALES OTHER DAUGHTERS	FEMALES WHO ARE DAUGHTERS
		---	---
i)	son	i) mother	i) daughter
ii)	son of predeceased son	ii) widow	ii) daughter of predeceased son
iii)	son of predece-	iii)widow of predeceased son	iii)daughter of predeceased son of

	ased son of pre-deceased son		pre-deceased son
iv)	son of predea-sed daughter	iv)widow of pre-deceased son of predeceased son	iv)daughter of pre-deceased daughter

The order of succession of a male intestate given in Section 9, is that the heirs in Class-I take simultaneously to the exclusion of all other heirs, and the distribution of the property is made in accordance with the provisions of section 10, Rules of succession of a female intestate are available in sections 15 and 16 of the Act and they sometimes vary or overlap upon the rules of succession applicable to the male intestate. But, seemingly, for the purpose of the special provision section 23, male and female heirs specified/identified in Class I of the Schedule, alone have been conferred certain rights irrespective of the operation of differing rules of succession applicable to Hindu male and female intestates. This distinguishing feature has to be borne in mind because the rights whatever they be, are meant only for Class I Heirs of the Schedule. In other words, members of the family of the intestate unless they happen to be heirs specified in Class I of the Schedule have neither been conferred any right to defer partition nor any claim to residence in the dwelling-house. To illustrate the point take the case of a other-in-law living with a male Hindu or for that matter his brother or sister. On his death since his mother-in-law, other or sister are not Class I heirs, they if have neither the right to have the partition among Class I Heirs deferred, nor the right to reside therein. though they may be members of the intestate's family as widely understood in its. concept.

Attention may now be invited to the last sentence in the provision and the proviso, for there lies the clue to get to the heart of the matter. On first impression the provision may appear conflicting with the proviso but on closer examination the conflict disappears. A female heir's right to claim partition of the dwelling-house does not arise until the male heirs chose to divide their respective shares therein, but till that happens the female heir is entitled to the right to reside therein. The female heir already residing in the dwelling-house has a right to its continuance but in case she is not residing, she has a right to enforce her entitlement of residence in a court of taw. The proviso makes it amply clear that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow. On first impression, it appears that when the female heir is the daughter, she is entitled to a right of residence in the dwelling-house so long as she suffers from any one of the four disabilities i.e. (1) being unmarried; (2) being a deserted wife; (3) being a separated wife; and (4) being a widow. It may appear that female heirs other than the daughter are entitled without any qualification to a right of residence, but the daughter only if she suffers from any of the aforementioned disabilities. If this be the interpretation, as some of the commentators on the subject have thought it be, it would lead to an highly unjust result for a married grand-daughter as a Class I heir may get the right of residence in the dwelling-house, and a married daughter may not. This incongruous result could never have been postulated by the legislature. Significantly, the proviso covered the cases of all daughters, which means all kinds of daughters, by employment of the words "where such female heir is a daughter" and not "where such female heir is the daughter". The proviso thus is meant to cover all daughters, the description of which has been given in the

above table by arrangement. The word "daughter" in the proviso is meant to include daughter of a predeceased son, daughter of a predeceased son of a predeceased son and daughter of a predeceased daughter. The right of residence of the female heirs specified in Class I of the Schedule, in order to be real and enforceable, pre- supposes that their entitlement can not be obstructed by any act of the male heirs or rendered illusory such as in creating third party rights therein in favour of others or in tenanting it, creating statutory rights against dispossession or eviction. What is meant to be covered in Section 23 is a dwelling house or houses, (for the singular would include the plural, as the caption and the section is suggestive to that effect) fully occupied -by the members of the intestates family and not a house or houses let out to tenants, for then it or those would not be dwelling house houses but merely in description as residential houses. The section protects only a dwelling-house, which means a house wholly inhabited by one or more members of the family of the intestate, where some or all of the family members, even if absent for some temporary reason, have the animus revertendi. In our considered view, a tenanted house therefore is not a dwelling-house in the sense in which the word is used in section 23. It may be a dwelling-house in the structural sense but it cannot be said to be a dwelling- house in habitation by the members of the intestate's family. In that twin sense, when the female heirs are entitled to a right of residence therein, which right is enforceable against the male heirs, that right militates against the created or creating of tenancy by the male heir or heirs and deprive them of their right to residence therein as also their right to partition; an incidence normal to the opening of succession. Thus it appears to us that if the male heirs derive the right under the provision to resist partition of the dwelling-house unless they chose to divide their respective 12 shares therein, then correspondingly it is incumbent on the male heirs to keep the property well arranged, inhabited or occupied by themselves keeping the property available for the female heirs to enforce the right of residence therein. But if the latter right is frustrated on creation of third party rights or a contractual or statutory tenancy, there remains no right with the males to resist partition.

Every right has a corresponding duty. This principle vigorously applies in this multiangular provision. A house tenanted brings in strangers and it ceases to be a dwelling- house inhabited by members of the family. The protection of section 23 is thus not available to the males. It is in this light that question no. 1 need be answered to say that 8 dwelling house is that house which is in actual, physical, inhabited possession of one or the other members of the family in stricto sensu, and if some are absent due to exigencies of service or vocations, the dwelling-house remains available for them to re-enter without any obstruction or hindrance and on that premise enabling the female heir to assert a right of entry and residence therein. A tenanted house does not fit into this description. Disabled daughters need instant succour, not litigation. They need doors of the dwelling-house always wide open, not stoney-eyed responses of strangers. The provision silences them in seeking partition, but not their ownership extinct. If marriage has the inescapable consequence of displacement of the daughter from the parental roof, her interests forever cannot be sacrificed on the alter of matrimony. Her distress revertendi is of equal importance standing alongside the qualified defence of impartibility by the male heir as afore-explained. The first question is answered accordingly.

The second question does not present much difficulty. On literal interpretation the provision refers to male heirs in the plural and unless they chose to divide their respective shares in the

dwelling-house, female heirs have no right to claim partition. In that sense there cannot be a division even when there is a single male. It would always be necessary to have more than one male heir. One way to look at it is that if there is one male heir, the section is inapplicable, which means that a single male heir cannot resist female heir's claim to partition. This would obviously bring unjust results, an intendment least conceived of as the underlying idea of maintenance of status quo would go to the winds. This does not seem to have been desired while enacting the special provision. It looks nebulous that if there are two males, partition at the instance of female heir could be resisted, but if there is one male, it would not. The emphasis on the section is to preserve a dwelling-house as long as it is wholly occupied by size or all members of the intestate's family which includes male or males. Understood in this manner, the language in plural with reference to male heirs would have to be read in singular with the and of the provisions of the General Clauses Act. It would thus read to mean that when there is a single male heir, unless he chooses to take out his share from the dwelling-house, the female heirs cannot claim partition against him. It cannot be forgotten that in the Hindu male oriented society, where begetting of a son was a religious obligation, for the fulfillment of which Hindus have even been resorting to adoptions, it could not be visualized that it was intended that the single male heir should be worse off, unless he had a supportive second male as a class I heir. The provision would have to be interpreted in such manner that it carries forward the spirit behind it. The second question would thus have to be answered in favour of the proposition holding that where a Hindu intestate leaves surviving him a single male heir and one or more female heirs specified in Class I of the Schedule, the provisions of section 23 keep attracted to maintain the dwelling-house impartable as in the case of more than one male heir, subject to the right of re-entry and residence of the female heirs so entitled, till such time the single male heir chooses to separate his share; this right of his being personal to him, neither transferable nor heritable.

Now applying the ratio above evolved on the facts of this case, it is evident that when the house in question is tenanted, it is not a dwelling-house in the sense the word is used in section 23 of the Hindu Succession Act and therefore it has no protection of its being impartable. The suit of the plaintiff-respondent could not have been resisted by the defendant-appellant on the basis that it was a family house. Equally the suit could not have been resisted by the defendant-appellant on the ground that being the sole male heir of the intestate, section 23 was inapplicable, because then the suit for partition would otherwise have been maintainable. Had the finding been that the house in question was a dwelling-house the suit could have been resisted by him even as a single male heir on the basis of Section 23 of the Act.

As a result of the above discussion, the preliminary decree for partition in favour of the plaintiff-respondent cannot be upset. The judgments and orders of the courts below would have to be maintained. In partitioning the properties the trial court would bear in mind,as it is bound to, the provisions of the Partition Act. The appeal, in these circumstances, fails but without any order as to costs.