Reserved On : 25/04/2025
Pronounced On : 02/05/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 53 of 2023

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In R/SECOND APPEAL NO. 53 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE MAULIK J.SHELAT

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Approved for Reporting	Yes	No
	✓	

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HEMIBEN LIMBABHAI PIPARIYA & ANR.
Versus
RASILABEN LIMBABHAI PIPARIYA & ORS.

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Appearance:
DR.ABHISST K THAKER(7010) for the Appellant(s) No. 1,2
MS RADHA A THAKER(11299) for the Appellant(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE MAULIK J.SHELAT**

CAV JUDGMENT

1. The present Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), against the judgment and decree dated 05.11.2022 passed by 12th Additional District Judge, Rajkot in Regular Civil Appeal no.51 of 2023 thereby, dismissed aforesaid appeal

and whereby, confirmed the judgement and decree dated 08.04.2013 passed by Principal Civil Judge, Paddhari in Regular Civil Suit No. 144/2010 (Old No. 481/2007). So, present second appeal filed against concurrent finding recorded by courts below against appellants.

2. As and when necessary, the parties will be referred to as per their original position before the Appellate Court.

Short Facts of Appeal

3. The appellants instituted Regular Civil Suit No.144 of 2010 (Old Regular Civil Suit no.481 of 2007) before Civil Judge, Paddhari against respondents. The appellants-plaintiffs are wife and sons of original defendant no.1 -Limbhai Juthabhai Pipariya respectively, who died during the pendency of the suit, whereby, his legal heirs are brought on record and joined as the respondent Nos.1 to 4 herein, whereas defendant no.5 herein is original defendant no.2, who is nephew - family relative of defendant no.1 - late Limbhai Juthabhai Pipariya and purchased suit lands from original defendant No.1.

4. The suit was filed for seeking cancellation of sale deeds and for declaration of share in ancestral property (suit lands) and permanent injunction. It appears that during his lifetime, defendant no.1 had sold the suit land in favour of defendant no.2 on 12.12.1994 by way of registered sale deed and later on, sold another piece of land in favour of defendant no.2 on 07.05.2007 by way of registered sale deed. Both the sale deeds were challenged by plaintiffs by way of filing the suit.

5. The defendant no.1 appears to have received the suit lands from his father, namely, Juthabhai Chakubhai Pipariya, who has acquired the suit land by way of purchasing it from its original owner. It further appears that during lifetime of Juthabhai Chakubhai Pipariya - father of defendant no.1, divided his lands amongst his three sons, out of which defendant No.1 had received the suit lands in such division, which is sought to be claimed as an ancestral property by plaintiffs.

6. This division of lands was taken place in the year 1983

(prior to born of plaintiff No.2-son) and since then, defendant no.1 was claimed to be owner of suit land having mutated in his sole name in revenue record i.e. Revenue Entry No. 1282 mutated on 16/04/1983. Whereas, plaintiff No.2 born in year 1987 and as such both sale deeds were executed in the year, 1994 and 2007 respectively, which came to be questioned by plaintiffs in the year 2010.

7. The suit was contested by defendants contending, inter alia, that on division of suit land by father of defendant no.1 in his lifetime, the suit lands became the self-acquired property of defendant no.1 wherein plaintiffs cannot claim any right, title and interest in suit lands.

8. The defendants have also challenged the suit on the ground of law of limitation, not joining necessary and proper party and having no locus of plaintiffs to challenge the sale deeds.

9. The Trial Court has framed in all ten issues but answered issues No. 1 to 3 against plaintiffs having not believed that the

suit land was ancestral property when received by defendant No.1 consequently sale deeds in question can not be cancelled and accordingly held that defendant No.2 has purchased the suit lands on payment of consideration to defendant No.1. Nonetheless, issue of limitation and non-joinder of necessary party are concerned, the Trial Court has answered against defendants.

10. Nevertheless, when Trial Court has not accepted the case of plaintiffs that the suit land was an ancestral or coparcenary property as alleged by plaintiffs, ultimately, dismissed the suit. The plaintiffs, having dissatisfied by dismissal of their suit, preferred aforesaid regular appeal under Section 96 of CPC before the Appellate Court, wherein Appellate Court had framed necessary points for its determination and finally concluded that there is no merit in the appeal and thus, dismissed the appeal.

11. The plaintiffs, having aggrieved by dismissal of their appeal, have chosen to file present Second Appeal questioning

the judgment and decree passed by Appellate Court.

12. The plaintiffs, in the present Second Appeal, have sought to raise the following substantial questions of law which, according to the appellants, are germane and required to be framed and decided by this Court at page O of memo of Second Appeal, which read as under:-

> *"(1) Whether the trial Court and thereafter the Appellant Court have committed a grave legal error in law by coming to the conclusion that the Plaintiff no.2 is not a coparcener by birth in view of Section 8 of the Hindu Succession Act?*
>
> *(2) Whether the Appellate Court was in error of law while coming to the conclusion that the suit was barred by law of limitation?*
>
> *(3) Whether the appellate Court has been in error of law in holding that the suit is not maintainable in view of non joinder of parties?*
>
> *(4) Whether the Courts below are legally wrong in coming to the conclusion that merely because the immovable property is purchased by the ancestor can it not be treated as ancestral by the 3rd generation in view of Hindu Succession Act?*
>
> *(5) Whether the discretion exercised by the appellate Court is sound and judicious in the circumstances of the case?*
>
> *(6) Whether the Courts below correctly applied the law correctly in respect to sale of ancestral property by registered sale deed without the consent of coparcener and if not then are such sale deeds/deed of conveyance maintainable in law or void ab initio and liable to be cancelled?"*

SUBMISSION OF APPELLANTS – PLAINTIFFS

13. Learned advocate Mr. Meet B. Jani for learned advocate Mr. Dr. Abhisst K. Thaker would submit that Courts below

have miserably failed to appreciate that when defendant No.1 has received suit lands from his father on 06.04.1983 and having used for benefit of his family, thereby, it becomes coparcenary property.

13.1 Learned advocate Mr. Jani would submit that both Courts below have miserably failed to appreciate Section 6 of Hindu Succession Act and thereby, erroneously observed that the suit land is not an ancestral or coparcenary property.

13.2 Learned advocate Mr. Jani would submit that plaintiff no.2 who happens to be son of defendant no.1 born in the year 1987. By his birth, he would have right, title and interest in such coparcenary property, thereby, defendant no.1 could not have sold it in favour of defendant no.2.

13.3 Learned advocate Mr. Jani would further submit that the Appellate Court has erroneously observed that the suit is barred by law of limitation in as much as in absence of any cross-appeal or objection filed by respondents and held that suit barred by limitation.

13.4 Learned advocate Mr. Jani would further submit that the suit was governed by Article 60 of Limitation Act as plaintiff no.2 was minor when the sale deed executed by defendant no.1 but having attained majority, within three years of his majority, plaintiff no.2 has filed the suit along with his mother which was not time barred.

13.5 Learned advocate Mr. Jani would further submit that the Appellate Court has also erroneously observed that in absence of joining necessary parties that other legal heirs of defendant no.1, the suit was not maintainable. He would submit that when daughters of defendant No.1 were joined being legal heirs of deceased defendant No.1, suit could not be dismissed on ground of none joining necessary party.

13.6 It is submitted that in absence of any challenge by the respondents, the Appellate Court was not required to touch upon such issue of non-joinder of parties having decided and held in favour of plaintiffs by the Trial Court.

13.7 To buttress his argument, learned advocate Mr. Jani

has relied upon following decisions of Hon'ble Supreme Court of India.

(i) M. Yogendra and Others vs. Leelamma N. Others reported in (2009) 15 SCC 184 (para 28 to 30)

(ii) Rohit Chauhan vs. Surinder Singh and others reported in (2013) (9) SCC 419 (para 11, 12 and 14).

13.8 Making the above submissions, learned advocate Mr. Jani would request this Court to allow the present appeal. No other and further submissions are made.

14. Heard learned advocate for the appellants at length and examined in detail the issues germen in present second appeal.

ANALYSIS OF SUBMISSION.

15. At the outset, it is required to be noted here that the Trial Court as well as Appellate Court after examined oral and documentary evidence have concluded one fact that the suit lands were not an ancestral land received by defendant no.1 in his lifetime from his father, thereby, the suit as well as the

appeal of plaintiffs were dismissed. As such, the present Second Appeal is filed against such concurrent findings of Courts below. The appellants failed to show any perversity in recording such finding by Courts below and not able to prove that there was an erroneous finding of fact recorded by Courts below while arriving at conclusion that suit lands were not an ancestral land as alleged by plaintiffs.

16. It is well settled legal position of law that this Court while adjudicating Second Appeal, so filed under Section 100 of CPC, have limited jurisdiction and its scope and ambit is well defined by various pronouncements of Hon'ble Supreme Court of India, wherein, it has been so held that except in a case where any substantial question of law is made out in appeal, no Second Appeal can be entertained by High Court. Further, in absence of any perversity, erroneous and arbitrary finding of fact so recorded by Courts below, this Court can not disturbed such finding of fact in second appeal exercising its power under section 100 of CPC.

17. It is now a well-settled legal position that when the appeal lacks any substantial question of law, the same is not required to be entertained like a first appeal. It is also a well-settled legal position that a substantial question of law means a question which is substantial in nature, which has never been decided by any court of law, including the Hon'ble Apex Court of India, and also such an issue goes to the root of the matter whereby any fundamental error is committed by the trial court or appellate court while adjudicating the matter.

18. At this stage, it is profitable to rely upon the Constitution Bench decision of the Hon'ble Supreme Court of India on such an issue in the case of **Sir Chunilal V. Mehta And Sons Limited Versus Century Spinning And Manufacturing Company Limited**, reported in AIR 1962 SC 1314 : 1962 (0) AIJEL-SC 5258, where in para 3 and para 6, it has been held that:-

> ***"3.*** *The next question is whether the interpretation of a document of the kind referred to above raises a substantial question of law. For, Art. 133(1) provides that where the judgment, decree or final order appealed, from affirms the decision of the court immediately below in any case other than a case referred to in sub-cl. (c) an appeal shall be to this Court if the High Court certifies that the appeal involves some substantial question of law. To the same*

effect are the provisions of sec. 110 of the Code of Civil Procedure. In the old Judicial Commissioner's Court of Oudh the view was taken that a substantial question of law meant a question of general importance. Following that view its successor, the Chief Court of oudh, refused to grant a certificate to one Raghunath Prasad Singh whose appeal it had dismissed. The appellant, therefore, moved the Privy Council for special leave on the ground that the appeal raised a substantial question of law. The Privy Council granted special leave to the appellant and while granting it made the following observation in their judgment:

> *"Admittedly here the decision of the Court affirmed the decision of the Court immediately below and, therefore, the whole question turns upon whether there is a substantial question of law. There seems to have been some doubt, at any rate in the old court of Oudh, to which the present court succeeded as to whether a substantial question of law meant a question of general importance. Their Lordships think it is quite clear-and indeed it was conceded by Mr. De Gruyther-that that is not the meaning but that "substantial question of law" is substantial question of law as between the parties in the case involved."*

Then their Lordships observed that as the case had occupied the High Court for a very long time and on which a very elaborate Judgement was delivered the appeal on its face raised as between the parties a substantial question of law. This case is reported in 54 Ind App 126 : AIR 1927 PC 110. What is a substantial question of law as between the parties would certainly depend upon the facts and circumstances of every case. Thus, for instance, if a question of law had been settled by the highest court of the country the question of law however important or difficult it may have been regarded in the past and however much it may affect any of the parties would cease to be a substantial question of law. Nor, again, would a question of law which is palpably absurd be a substantial question of law as between the parties. The Bombay High Court, however, in their earlier decision already adverted to have not properly appreciated the test laid down by the Privy Council for ascertaining what is a substantial question of law. Apparently the Judgement of the Privy Council was brought to their notice for, though they do not make a direct reference to it, they have observed as follows :

> *"**The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance.***

> ***It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated, is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well established principle of law and that principle is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court****."*

One of the points which the learned judges of the Bombay High Court had to consider in this case was whether the question of the construction to be placed upon a decree was a substantial question of law. The learned Judges said in their Judgement that the decree was undoubtedly of a complicated character but even so they refused to grant a certificate u/s. 110 of the Code of Civil Procedure for appeal to the Federal Court because the construction which the Court was called upon to place on the decree did not raise a substantial question of law. They have observed that even though a decree may be of a complicated character what the Court has to do is to look at its various provisions and draw its inference therefrom. ***Thus according to the learned Judges merely because the inference to be drawn is from a complicated decree no substantial question of law would arise. Apparently in coming to this conclusion they omitted to attach sufficient weight to the view of the Privy Council that a question of law is "a substantial question of law" when it affects the rights of the parties to the proceeding.*** *Further the learned Judges seem to have taken the view that there should be a doubt in the mind of the Court as to the principle of law involved and unless there is such doubt in its mind the question of law decided by it cannot be said to be "a substantial question of law" so as to entitle a party to a certificate under S. 110 of the Code of Civil Procedure. It is true that they have not said in so many words that such a doubt must be entertained by the Court itself but that is what we understand their Judgement to mean and in particular the last sentence in the portion of their Judgement which we have quoted above.*

6. *We are in general agreement with the view taken by the*

Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. ***The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and, substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally, settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law****."*

(Emphasis supplied)

19. Keeping in mind the aforesaid principles laid down by the Honourable Supreme Court of India in relation to scope and power of this Court while exercising its power under Section 100 of the CPC, when this Court has examined both the impugned judgments and decrees as well as the copy of the plaint, no error can be found by this Court in the impugned judgment and decree passed by the appellate court as well as the trial court. The substantial question of law proposed by the appellants cannot be considered as a substantial question of law in light of the aforesaid pronouncement of the Hon'ble Supreme Court of India in the

case of **Sir Chunilal V.Mehta And Sons Limited (supra)** as well as for the following reasons:-

20. As both the Courts below have concurrently held that the suit lands were not an ancestral property, the plaintiffs were not given any right to claim any declaration and share in such suit lands.

21. The facts, so observed hereinabove, are not in dispute that the suit lands were purchased by grandfather of plaintiff and father of defendant no.1 respectively and in view of that fact, as per settled legal principle of law, in a case of Hindu, the suit lands cannot be considered as an ancestral property.

22. Be that as it may, when during lifetime of grandfather of plaintiff and father of defendant no.1 respectively, who divided his properties amongst his three sons including defendant no.1, property received by defendant no.1 would be his sole ownership.

23. It appears that grandfather and father of plaintiffs and defendant No.1 respectively i.e. Juthabhai Chakubhai Pipariya,

was alive when the appeal was heard albeit, he was not made party to the suit as observed by the Appellate Court in para-26 of impugned judgment. Thus, the plaintiffs, in absence of any evidence to show, that grandfather of plaintiff no.2 had any intention while partitioning his property and given to defendant no.1 for the benefit of his family including any male coparcener born in the family of defendant no.1, the Courts below have not committed any error of law by holding that suit lands were not ancestral or coparcenary property, when received by defendant No.1.

24. Furthermore, plaintiffs could not bring on record of the suit and failed to prove that defendant No.1 had at given point of time, throwing suit lands into the common hotchpot thereby, had an intention of its used by other family members. Thus, by all means, plaintiffs have not able to prove that suit lands were either ancestral property and or coparcenary as the case may be. So, as such considering facts of the present case, S.6 of Hindu Succession Act 1956 (hereinafter referred to

as "the Act 1956") would not be applicable so argued by learned advocate Mr. Jani.

25. Nonetheless, rule of succession defined in Section 8 of Act, 1956 would suggests that the son would not be entitled to have any share in the property of his grandfather if his father is alive when grandfather died and in that case, the rule of succession as defined in Section 8 of Act, 1956 would play pivotal role when son received property from his father. In aforesaid situation, son cannot as a matter of right, claim such property received by his father from grandfather by claiming it to be HUF or coparcenary property as the case may be.

26. Further, as per S. 4 of the Act, 1956, thereby provisions of Act, 1956 would override any texts, rule or interpretation of Hindu law, any custom or usage prevailed before commencement of Act 1956, shall cease to have its effect. Moreover, as per S. 30 of Act, 1956, any Hindu by way will or other testamentary disposition any property, which is capable of being so disposed of by him/her, in accordance

with the provisions of the Indian Succession Act, 1925 or like. For ready perusal, I would like to reproduce Section 4, 8 and 30 as well as Class-I legal heirs so defined in the Act 1956, which reads as under:-

> ***"Section 4 of the Act, 1956***
>
> *4. Over-riding effect of Act. — (1) Save as otherwise expressly provided in this Act,—*
>
> *(a) any text, rules or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;*
>
> *(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.*
>
> *(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.*
>
> ***Section 8 of the Act, 1956***
>
> *8. Distribution of property among heirs in Class I of the Schedule.—*
>
> *The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:--*
>
> *(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;*
>
> *(b) secondly, if there is no heir of class I, then upon the heirs,*

being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

30. Testamentary succession of the Act, 1956

**** Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [2][disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.*

Explanation.—The interest of a male Hindu in a Mitakshara coparcenaryproperty or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this [section.]

THE SCHEDULE

(See section 8)

HEIRS IN CLASS I AND CLASS II

Class I Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son 1 [son of a predeceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son]."

27. As such issue germen in case on hand is no longer

remain res integra having already decided by Honourable Supreme Court of India in its various pronouncements. It would worth to note one of the decisions i.e., ***Commissioner Of Wealth-Tax, Kanpur versus Chander Sen reported in AIR 1987 SC 1752 : 1986 (3) SCC 567***, wherein in it has been held as under:-

> *"[10] **The question here, is, whether the income or asset which a son inherits from his father when separated by partition the same should be assessed as income of the Hindu undivided family of son or his individual income.** There is no dispute among the commentators on Hindu Law nor in the decisions of the Court that under the Hindu Law as it is, the son would inherit the same as karta of his own family. But the question, is, what is the effect of S. 8 of the Hindu Succession Act, 1956? The Hindu Succession Act, 1956 lays down the general rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. Class I of the Schedule reads as follows :*
>
> > *"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 pre-deceased son; son of a predeceased son of a pre-deceased son; daughter of a predeceased son of a pre-deceased son; widow of a pre-deceased son of a predeceased son."*
>
> ***[11]** The heirs-mentioned in Class I of the Schedule are son, daughter etc. including the son of a predeceased son but does not include specifically the grandson, being a son of a son living. **Therefore, the short question, is, when the son as heir of Class I of the Schedule inherits the property, does he do so in his individual capacity or does he do so***

as karta of his own undivided family*?*

[14] It is clear that under the Hindu law, the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. ***But the question is; is the position affected by S. 8 of the Succession Act, 1956 and if so, how****? The basic argument is that S. 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. It is this position which has mainly induced the Allahabad High Court in the two judgments, we have noticed, to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually.* ***Under S. 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta. of his own family. On the other hand, the Gujarat High Court has taken the contrary view****.*

[21] *It is necessary to bear in mind the preamble to the Hindu Succession Act, 1956. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.*

[22] In view of the preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family*. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to he excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and*

> *not to the pre-existing Hindu law.* ***It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.***
>
> ***[23]*** *Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu Law, 15th Edn. dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as Mayne's on Hindu Law, 12th Edn., pp. 918-19.*
>
> ***[24]*** *The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to "amend" the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored.*
>
> ***[25]*** *In the aforesaid light the views expressed by the Allahabad High Court, the Madras High Court, Madhya Pradesh High Court and the Andhra Pradesh High Court, appear to us to be correct. With respect we are unable to agree with the views of the Gujarat High Court noted hereinbefore."*
>
> (Emphasis supplied)

28. The Appellate Court, also having touched upon the point as to whether disputed land is an ancestral property and whether the plaintiffs have any right, title and interest in it had referred one recent decision of Honourable Supreme Court of India in a case of ***Govindbhai Chhotabhai Patel & Ors Versus Patel Ramanbhai Mathurbhai reported in (2020) 16 SCC***

255, whereby, it has been held that plaintiffs have no right, title and interest in suit lands.

29. It would be apt to refer and rely upon the relevant observation of Honourable Supreme Court of India in a case of ***Govindbhai (Supra)*** which reads as under:-

> **"5.** The findings recorded by the High Court, inter alia, are that execution *of the gift deed was not specifically denied in the suit filed. Therefore, it is not necessary for the donee to examine one of the attesting witnesses in terms of the proviso to Section 68 of the Evidence Act, 1872 (for short "the Evidence Act"). It is also held that the suit property is not ancestral property. The property was purchased by Ashabhai Patel, father of the donor and it is by virtue of will executed by Ashabhai Patel, property came to be owned by the donor in the year 1952-1953. The High Court, thus, held that the donor was competent to execute the gift deed dated 15-11-1977 as the property was not ancestral in the hands of donor. The relevant findings on such questions which arose for consideration in the second appeal, read as under:*
>
> > *"92. Once again, at the cost of repetition, I state that Section 68 of the Evidence Act has been thoroughly misconstrued by the courts below. The occasion for applying the rule of exclusion from evidence in Section 68 arises when a party seeking to rely upon a document requiring attestation, fails to prove it in a given manner. As observed by me earlier, the party will then not be able to use it as evidence. But this procedural disability against use of a document as evidence cannot by any stretch be regarded as an affirmative finding that the grounds of attack for avoidance of the deed as claimed in the original relief or cancellation subsisted. The plaintiff cannot succeed relying upon the weakness or a flaw in the case set up by the defendant. The law is that the plaintiff can succeed in the suit only on the strength of his own*

case.

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105. The case of the plaintiffs is very specific. According to them, the suit properties were purchased by their grandfather and those properties came to be devolved upon their father by testamentary disposition i.e. on the strength of the will of their grandfather. ***The Hindu law, as it stands today, clearly postulates that if it is a self-acquired property of the father, it falls into the hands of his sons not as coparcenary property, but would devolve on them in their individual capacity. Where the property is a self-acquired property of the father, it falls into the hands of his son in his individual capacity and not as coparcenary property in such case son's son cannot claim right in such property****.*

*****

108. In view of the above, I hold that the suit properties devolved upon the father of the plaintiffs could not be said to be coparcenary property. The properties were purchased by the grandfather of the plaintiffs, as pleaded and admitted by the plaintiffs themselves. Such self-acquired properties of the grandfather came to be devolved upon the father of the plaintiffs by way of a "will" i.e. testamentary disposition. In such circumstances, it could be said that the properties are self-acquired properties of the father of the plaintiffs. The succession would have been in accordance with Section 8 of the Hindu Succession Act. When the properties could be said to be self-acquired properties of the father of the plaintiffs, then the father could have definitely transferred those properties by way of a gift deed.

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114. In view of the above, I hold that the suit properties were self-acquired properties of the father of the plaintiffs, and in such circumstances, it was open for the father of the plaintiffs to execute the gift deed in favour of the defendant."

11. This Court in a three-Judge Bench decision in C.N.

Arunachala Mudaliar [C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar, (1953) 2 SCC 362 : 1954 SCR 243 : AIR 1953 SC 495] considered the question as to whether the properties acquired by Defendant 1 under the will are to be regarded as ancestral or self-acquired property in his hands. It is a case where the plaintiff claimed partition of the property in a suit filed against his father and brother. The stand of the father was that the house properties were the self-acquired properties of his father and he got them under a will executed in the year 1912. It was held that father of a Joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. ***The Court while examining the question as to what kind of interest a son would take in the self-acquired property of his father which he receives by gift or testamentary bequest from him, it was held that Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants. It was held that it was not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. It was further held that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor****.*

16. This Court further held in C.N. Arunachala Mudaliar case [C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar, (1953) 2 SCC 362 : 1954 SCR 243 : AIR 1953 SC 495] that on reading of the will as a whole, the conclusion becomes clear that the testator intended the legatees to take the properties in absolute rights as their own self-acquired property without being fettered in any way by the rights of their sons and grandsons. In other words, he did not intend that the property should be taken by the sons as ancestral property. Consequently, the appeal was allowed and the suit for partition by the son against his father was dismissed.

20. In view of the undisputed fact, that Ashabhai Patel purchased the property, therefore, he was competent to

> *execute the will in favour of any person. Since the beneficiary of the will was his son and in the absence of any intention in the will, beneficiary would acquire the property as self-acquired property in terms of C.N. Arunachala Mudaliar case [C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar, (1953) 2 SCC 362 : 1954 SCR 243 : AIR 1953 SC 495] .* ***The burden of proof that the property was ancestral was on the plaintiffs alone. It was for them to prove that the will of Ashabhai intended to convey the property for the benefit of the family so as to be treated as ancestral property. In the absence of any such averment or proof, the property in the hands of donor has to be treated as self-acquired property. Once the property in the hands of donor is held to be self-acquired property, he was competent to deal with his property in such a manner he considers as proper including by executing a gift deed in favour of a stranger to the family****."*
>
> (Emphasis supplied)

30. Thus, a conjoint reading of aforesaid provision as well as ratio of decisions so referred herein above of Honourable Supreme Court of India, it would be clear like a day that son received a self-acquired property from his father either by way of testamentary / non testamentary succession or gift, such property received by son would be considered as his self-acquired / own property, wherein his son i.e. grandson of original owner would not have any right, title or interest by way of birth in the family.

31. As defendant No.1 having received suit lands from his

father albeit, during life time of his father/grandfather of plaintiff No.2 would become his self-acquired/own property thereby, he was fully entitled to sell it to anyone as he likes. The plaintiffs especially plaintiff No.2 being son of defendant No.1 had no right, title or interest in suit lands could not have questioned the sale deeds executed by defendant No.1 in favour of defendant No.2. A fortiori, there is no reasons to interfere with the impugned judgement and decree passed by Courts below on the issue of status of suit land possessed by defendant No.1 being not ancestral property.

32. So far as aspect of limitation and non-joining of necessary parties which are, in fact, held against plaintiffs by Appellate Court in absence of any cross-appeal or objection filed by the defendants would not be required to be gone into as plaintiffs have miserably failed to prove that the suit lands are ancestral properties or coparcenary property as alleged.

33. Nonetheless, having so argued such points by learned advocate Mr. Jani for appellants, I would like to say that as

per Order XLI Rule 33 of CPC, the Appellate Court, in absence of any cross-appeal or objection, in an appropriate case, can decide the points which are not properly answered by the Trial Court. It is not the case of appellants here that they were not aware about point for determination framed by Appellate Court while adjudicating their appeal. So, later on, they are not allowed to complaint about adjudication of such points by Appellate Court albeit, against them.

34. Prima facie, No error much less any substantial error found by this Court in as much as, Appellate Court has given cogent and convincing reasons to determine point No. 3 to which this Court is in complete agreement with. So, I would not like to further elaborate the point anymore except observing that when plaintiffs ascertaining their right to get declaration in alleged ancestral property, they were required to join all legal heirs of defendant No.1 independently but could not have been treated on record being joined as legal heirs of deceased defendant No.1.

35. Nonetheless, when this Court is in complete agreement with the findings so recorded by Courts below on main issue germane in the suit/appeal and not found any substantial error of law on finding so recorded by Courts below, would not like to disturb such judgment and decree while exercising its power under Section 100 of CPC.

36. Thus, both the Courts below have correctly appreciated the facts, evidence and applied provisions of Act, 1956 while deciding issues/points germen in the suit/appeal and accordingly, answered issues/points framed by them so far as holding that suit lands were not an ancestral property or coparcenary property and other issues against plaintiffs.

37. In view of the above, the submissions so made by learned advocate Mr. Jani would not stand in light of the aforesaid provision of law as well as ratio of decision of Hon'ble Supreme Court of India in the case of ***Chander Sen (Supra)*** and ***Govindbhai (Supra)*** and as also, the decisions so cited by learned advocate Mr. Jani would also not be

applicable to the facts of the present case in light what has been observed hereinabove, so not deliberated upon further.

CONCLUSION

38. For the forgoing reasons, the Second Appeal having not disclosed any substantial question of law then, must fail. It is hereby DISMISSED, albeit, no order as to costs. As a sequel Civil Application for stay also rejected.

(MAULIK J.SHELAT,J)

MOHD MONIS

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: MOHD MONIS(HC01900), PRIVATE SECRETARY, at High Court of Gujarat on 02/05/2025 12:59:16