

Satrughan Isser

Vs

Smt. Subujpari & Others

Civil Appeal No. 939 of 1963

(K. N. Wanchoo, J. C. Shah R. S. Bachawat JJ)

04.08.1966

JUDGMENT

SHAH, J.

Musamat Chando Kuer, widow of Babuji, instituted a suit on April 23, 1949 in the Court of the Subordinate Judge, Darbhanga, against the collaterals of her husband for a decree for partition and separate possession of a half share in the properties described in Schedules A to E and a fourth share in Sch. F annexed to the plaint. It was the case of Chando Kuer that her husband Babuji separated in 1934 from the coparcenary of which he was a member, and on his death on October 28, 1937 his share in the family property devolved upon her, but the defendants failed and neglected to divide the estate and deliver to her the share inherited by her. The suit was resisted by the collaterals of Babuji. Chando Kuer died on March 9, 1951, and her daughters, Subujpari and Sujan Devi (hereinafter collectively called 'the appellants') were brought on the record of the suit as her heirs and legal representatives.

Being of the opinion that the plea of separation of Babuji from the coparcenary in 1934 was not established, and that the interest of Babuji in the coparcenary property devolved upon the surviving coparceners, the Trial Court dismissed the suit. In appeal, the High Court of Judicature at Patna, granted a decree for possession of a share in the property as at the date of the suit. They held that on the death of Babuji on October 28, 1937, Chando Kuer by virtue of the Hindu Women's Rights to Property Act, 18 of 1937, acquired in the property of the coparcenary the same interest which Babuji had, and by the institution of the suit for partition that interest became defined, and on her death it devolved upon the appellants as heirs to the estate of Babuji. With certificate granted by the High Court, Satrughan the son of Ghiran has appealed to this Court.

Under the Mitakshara school of Hindu law, on the death of a coparcener his individual interest in the coparcenary property devolves by survivorship upon the remaining coparceners, and his widow if any is entitled to maintenance only out of the property. But the Parliament enacted Act 18 of 1937 which sought to invest the widow in a family governed by the Mitakshara law with the same interest which her husband had in the family estate at the time of his death, and also with the right to obtain by partition separate possession of her interest. Section 3 of Act 18 of 1937 as amended by Act 11 of 1938 (insofar as it is material in this appeal) is :

"3. (1)

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu

joint family property, his widow shall, subject to the provisions of sub-section (3), have the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4)

This Act did not operate to regulate succession to agricultural lands in the Provinces, but the Province of Bihar enacted Act VI of 1942 extending the operation of Act 18 of 1937 to agricultural lands in Bihar with retrospective effect from April 14, 1937.

The Act seeks to make fundamental changes in the concept of a coparcenary and the rights of members of the family in coparcenary property. The Hindu law, as laboriously developed by the Anglo-Indian Courts in the light of certain basic concepts expounded by the ancient law givers, had acquired a degree of consistency and symmetry. The Act in investing the widow of a member of a coparcenary with the interest which the member had at the time of his death has introduced changes which are alien to the structure of a coparcenary. The interest of the widow arises not by inheritance nor by survivorship, but by statutory substitution : Lakshmi Perumallu v. Krishnavenamma ([1965] 1 S.C.R. 26.). Her interest in the property is the limited interest known as a Hindu woman's estate : but the Act gives her the same power to claim partition as a male owner has. The Act is however silent about the mode of devolution of the property obtained on partition, on termination of her estate, about the rights of the surviving coparceners qua the interest of the surviving coparceners, and about several other matters. To resolve the problem raised before us, we may in the first instance refer to the principal characteristics of a Hindu coparcenary and of the limited estate held by Hindu females known as a Hindu woman's estate.

A Hindu coparcenary under the Mitakshara school consists of males alone : it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners. While it remains joint, no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners : it is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are : that the interest of coparceners devolves by survivorship and not by inheritance; and that the male issue of a coparcener acquires an interest in the coparcenary property by birth, not as representing his father but in his own independent right acquired by birth.

Property inherited by a Hindu female who has entered the gotra of the deceased owner by marriage acquires according to all schools of Hindu law a widow's estate or a Hindu woman's estate. In that estate her right is of an owner and not that of a tenant-for-life : the property is vested in her and she represents it completely : so long as she is alive no one has any vested interest in the property held by her. Her rights of alienation are however restricted : she may alienate the corpus of the property only for purposes of legal necessity or benefit of the estate. The limited estate of a Hindu female postulates ownership in the property held by her subject to restrictions on her power of alienation and devolution of that property on extinction of the estate of the female on the heirs of the last full owner.

By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener : though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the Coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property : *Lakshmi Perumallu v. Krishnavenamma* ([1965] 1. S.C.R. 26.). The interest acquired by her under s. 3(2) is subject to the restrictions on alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property. But if she claims partition, she is served from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by s. 3(2) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve upon her husband's heirs. To assume as has been done in some decided cases that the right of the coparceners to take her interest on determination of the widow's interest survives even after the interest has become definite, because of a claim for partition, is to denude the right to claim partition of all reality.

Counsel for the appellant contended that the right vested in the surviving coparceners to take the interest vested in the widow enures so long as the widow does not, by suit or by private arrangement reduce her interest in the property of the coparcenary to exclusive possession. He submitted that the expression "partition" in s. 3(3) means not merely severance of status, but division of interest by metes and bounds followed by assumption of exclusive possession by the widow. There is no warrant for this submission. The widow acquires by statute the same right to claim partition which a male owner has, and as pointed out by the Judicial Committee of the Privy Council in *Giria Bai v. Sadashiv Dhundiraj and Others* (L.R. 43 I.A. 151.) :

"In Hindu law, "partition" does not mean division of property into specific shares; it covers, ..... both division of title and division of property. In the Mitakshara, Vijnaneswara defines the word "vibhaga", which is usually rendered into English by the word "partition", as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viromitrodaya* the meaning of this passage : he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's translation, ch. i., s. 36); "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary

right into specific shares".

This right to claim partition which a male owner may exercise is conferred upon a Hindu widow by s. 3(3). On the making of a claim for partition the interest of the widow gets defined. The right which the widow may claim is not different from the right which her husband could claim if he had been alive, therefore the right of the coparceners to take the joint property by survivorship on the death of a coparcener does not survive a demand for partition by the widow in the coparcenary.

The interest which a widow acquires under s. 3(2) of Act 18 of 1937 has no analogy with the interest which a female member of a Hindu joint family acquires in the property of the joint family allotted to her on partition between her sons or grandsons. It is true, as observed in *Pratapmull Agarwalla v. Dhanabati Bibi and Others* (L.R. 63 I.A. 33.) that under Mitakshara law when the family estate in a Hindu joint family is divided a wife or mother is entitled to a share, but is not recognized as the owner of such share until the division of the property is actually made, as she has no pre-existing rights in the estate save a right of maintenance. If she dies before the property is divided, her share in the property falls back into the property from which it was carved out. But a Hindu widow acquires under s. 3(2), even before division of the property, an interest in property and that interest gets defined as soon as an unequivocal demand for partition is made by her.

The dictum of the Madras High Court in *Movva Subba Rao and Another v. Movva Krishna Prasadam and Anr.* (I.L.R. 1954 Mad. 257.) that the widow's interest is a personal interest and comes to an end on her death cannot be regarded as a correct statement of the law. The view expressed by the Nagpur High Court in *Shamrao Bhagwantrao v. Kashibai and others* (A.I.R. 1956 Nag. 110.) that "the right of a widow to obtain her share in the joint family property (even after a suit for partition is filed by the widow) under the Hindu Women's Right to Property Act is a special one. It comes to an end with the widow, when her death occurs during the pendency of a suit (filed by her). The cause of action is not extended to her legal representatives" and the observations made by the Madhya Pradesh High Court in *Bhagabai v. Bhaiyalal Others* (I.L.R. 1957 M.P. 114.) that "the property obtained by a widow of a deceased coparcener after a suit for partition does not become the separate property of her deceased husband and on her death the property reverts to the coparcenary", proceed upon an assumption which is inconsistent with well settled rules of Hindu Law according to the Mitakshara school. The assumption that though the right vested in the widow by the Act is a right of property which may on demand for partition become separated from the coparcenary property, it is still liable to revert to the coparcenary on the determination of the widow's estate, does not give full effect to the statutory conferment upon the widow of "the same right of claiming partition as a male owner."

The following observations made by Subba Rao., J., in delivering the judgment of the Full Bench in *Parappagari Parappa alias Hanumanthappa and Another v. Parappagari Nagamma and Others*, (I.L.R. [1954] Mad. 183.) in our judgment, correctly set out the effect of the Act on the question under the review :

"She could ask for partition and separate possession of her husband's share. In case she asked for partition, her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to the other members of the joint Hindu family :"

On the finding recorded by the Trial Court which was not challenged in appeal before the High Court, Babuji did not separate in 1934 from the other coparceners. But he died in October 1937 and by the operation of Act 18 of 1937 as modified by Bihar Act 6 of 1942 Chando Kuer was invested with her husband's interest in the coparcenary property agricultural as well as non-agricultural. When she instituted a suit for partition that interest became defined, and vested in her free from all claims or rights of the coparceners of her husband. The right of the coparceners to take that interest by survivorship on Chando Kuer's death was then extinguished. On her death, even though the interest was not separated by metes and bounds, and was not in her exclusive possession it still devolved upon the nearest heirs of her husband, her daughters. The suit was therefore rightly decreed by the High Court.

The appeal fails and is dismissed with costs.

R.K.P.S.

Appeal dismissed.

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