GUJARAT HIGH COURT

Vidyaben

Vs.

Jagdishchandra Nandshankar Bhatt

First Appeal No. 584 of 1970 Ahmadabad in C. S. No. 522 of 1969.

(A.A. Dave, J.)

20.07.1972

JUDGMENT

A.A. Dave, J.

1. This appeal is directed against the judgement and decree of the learned Judge, City Civil Court, 7th Court, Ahmadabad declaring that the deceased Nandshanker Vishvanath Bhatt had left the suit immovable property viz. Shanker Niwas as the Joint Hindu family property in his hands and that the plaintiff and defendants Nos. 1 to 5 were each entitled to claim 1/18 share from out of 1/3 share of the deceased in the aforesaid joint family property, and that over and above his 1/18 share, defendant No. 1 was also entitled to have remaining 2/3 share in the suit immovable property as surviving coparcener on the death of the deceased.

2. The facts giving rise to this appeal briefly stated are as under :-

The present appellant Vidyaben is the widow of Nandshanker Vishvanath Bhatt. She was the second wife of the said. Nandshanker Bhatt and defendants Nos. 4 and 5 are the two daughters born of that marriage. Defendant No. 1 is the son of Nandshanker Bhatt and defendants Nos. 2 and 3 are the daughters of the deceased born by his pre-deceased first wife. Nandshanker died on 16-1-1960 at Ahmadabad leaving behind him surviving the plaintiff and all the defendants. He left the immovable property known as Shanker Niwas as described in para 3 of the plaint and also some cash as averred by the plaintiff. According to the plaintiff, all the property left by Nandshanker Bhatt was his self acquired property and all the parties to the suit had 1/6 share therein as his heirs. On that basis, she claimed partition of her share and physical possession thereof. Defendants Nos. 1, 2 and 3 resisted the plaintiffs suit by written statement Ex. 9. They contended that the plaintiff had no right to file a suit in respect of the suit property; that the suit property was not separate and self acquired property of the deceased; that it was acquired by the deceased from the funds of the joint family and therefore, defendant No. 1 who was the son of

the deceased was a coparcener along with him and after his death, he became the sole owner of the suit property by survivorship. In the alternative, it was urged by them that even if the suit property was found to be separate or self acquired property of the deceased, the plaintiff had no right to claim partition of the said immovable property under Section 23 of the Hindu Succession Act 1956 hereinafter referred to as the Act because it was a dwelling house in possession of the members of the family and there was no necessity to partition the same. They also disputed the plaintiffs claim to allow and reserve Rs. 5000/- for the education, maintenance and marriage expenses of defendants Nos. 4 and 5 who were minors on the date of the suit. On the pleadings of the parties, the learned Judge framed several issues at Ex. 14. The learned Judge held that the suit property was not the self acquired property of the deceased Nandshanker but it was a joint family property in the hands of the deceased and that the plaintiff and each of the defendants would be entitled to 1/6 share in the 1/3 share of the deceased in the suit property. The court negatived the right of the plaintiff to claim partition with regard to the remaining property and held that the remaining share viz, 2/3 of the joint family property would so to defendant No. 1 by survivorship being the son and sole surviving coparcener. He, therefore, passed a preliminary decree accordingly. Against the said judgement and decree of the learned Judge below, the original plaintiff Vidyaben has preferred the present appeal to this court.

3. Miss V.P. Shah, learned Advocate for the appellant submitted that the lower court was clearly in error in coming to the conclusion that the suit immovable property was not the self acquired property of Nandshanker and that it was acquired out of the joint family funds. In the alternative, she urged that even assuming that the suit property was the joint family property in the hands of Nandshanker, the plaintiff would be entitled to 1/3 share therein in her own right as a widow of the deceased Nandshanker and also 1/6 in the 1/3 interest of her husband therein. According to her, the plaintiff as well as all the defendants would have 1/6 share in the interest of the deceased Nandshanker in the joint family property.

4. Mr. G.N. Desai, learned Advocate for the respondents Nos. 1 to 3 hotly contested this position. He submitted that under the general Mitakshara Hindu law, a widow was not as of right entitled to claim partition. According to him, for the first time, the right to claim partition was given to a widow under the Hindu Women's Rights to Property Act. 1937 and as the said Act was repealed by Section 31 of the Hindu Succession Act, 1056, she could not claim partition of the joint family property and she would be entitled only to be maintained out of the said property as long as the property remained joint in the hands of the coparceners. But in case of partition between the coparceners, one would be entitled to a share therein, Mr. Desai invited my attention to the evidence on record which clearly disclosed that the suit house was acquired by the deceased Nandshanker out of the joint family property and therefore, he urged that the learned Judge was right in negativing the plaintiffs contention that the property was self acquired property of Nandshanker Bhatt Mr. Desai submitted that under the proviso and the explanation to Section 6 of the Act, in order to ascertain the share of the deceased coparcener in the joint family property only notional division was envisaged and no actual partition was deemed or was to be effected.

He therefore, urged that the only purpose of this Section is to ascertain the share of the deceased in the joint family property for the purpose of being distributed amongst his various heirs. But that would not mean that the joint family status would come to an end merely because the share of the deceased was ascertained on the basis of notional partition. He submitted that the view taken by the Bombay High Court in this respect was not correct. He, therefore, supported the judgement of the lower court.

5. Before discussing the legal aspect, it will be worthwhile to refer to the evidence of the parties in order to find out the nature of the property left by the deceased Nandshanker Bhatt. It is not disputed before me that Nandshanker Bhatt left only the immovable property known as Shanker Niwas situated in the city of Ahmadabad. It is also not disputed before me that the first floor of that property is occupied by the members of the family while the ground floor is let to tenants. It is also not disputed be fore me that there are three different out-houses attached to this property which are also tenanted. Except the bare word of the plaintiff that the suit property was the self acquired property of her husband, there is no evidence worth the name to show that the said property was built by her husband out of his own earnings. Deceased Nandshanker belonged to Kaira. In all, there were three properties in Kaira consisting of a bungalow and two houses. In cross-examination, the plaintiff had to admit that the third house was the property of her father-in-law. The evidence shows that the father of the deceased Nandshanker was the Diwan in Sachin State. Deceased Nandshanker most of the time had resided at Bombay and Ahmadabad for his services. It is hardly likely that Nandshanker could have built any property with his acquired money at Kaira. No documentary evidence has been produced by the plaintiff in support of her say that the suit property was purchased or built by her husband. She had to admit that her husband had sold the bungalow at Kaira in the year 1954 or 1955 and 4-5 years thereafter, he had built a bungalow at Ahmadabad. According to her, her husband had spent about Rs. 15000/- for the purchase of land on which the bungalow was constructed and he had spent about Rs. 14000/- for the construction of the first floor and about Rs. 4000/- to 5000/- for the out houses. She has not been able to show that all these amounts were the self acquired monies of her husband. It is an admitted position that the bungalow as well as two houses situated at Kaira had been sold by Nandshanker. The plaintiff has been unable to account for the sale proceeds of these three properties. Soon after the sale of these properties, the deceased had purchased the land and thereafter began to construct the bungalow at Ahmadabad. It is therefore, clear that there was joint family nucleus from which the deceased was able to construct this building. It cannot, therefore, be said that the deceased had built the house with his own money. Once it is established that there was sufficient joint family nucleus in the hands of the deceased, even though prima facie the burden was on the defendants to establish that the property which was built by the deceased was joint family property, the said burden shifted on the plaintiff. In the instant case it was established that there was some nucleus from which the construction could be made. The plaintiff has been unable to rebut this presumption. She has been unable to lead any evidence showing that the moneys realised by her husband out of the sale proceeds were utilised towards the maintenance of the family members, and that the bungalow was constructed out of

his own self acquired money. In the absence of any independent evidence oral or documentary except the bare word of the plaintiff in support of her say that the suit property was self acquired property of her husband, it cannot be said that the learned Judge was in error in coming to the conclusion that Nandshanker had constructed the suit property out of the joint family funds in his hands. Defendant No. 1 who was aged 33 at the time of his deposition, stated that the grandfather had two houses and one bungalow at Kaira. His father, that is deceased Nandshanker sold these two houses in about 1937 and the bungalow in 1956. His father had a house at Dariapur in Ahmadabad which was purchased by him in 1939 from the money left by his grandfather. He sold that house in 1945. In cross-examination, he stated that he did not know the total price which his father realized from the sale of the two houses and the bungalow at Kaira or the house at Dariapur, Ahmadabad. He also did not know the salary his grand-father was getting while he was the Diwan of Sachin. In this connection it may be noted that defendant No. 1 must have been a minor at the time his grand-father was serving as Diwan of Sachin State. Moreover, he could not have any personal knowledge about his salary. Similarly, he could not have any knowledge about the exact amount realized by his father, from the sale of the three properties left by his grandfather at Kaira. But that does not mean that defendant No. 1's statement that his grandfather had left the three properties at Kaira was not true. If these three properties were acquired by the deceased Nandshanker with his own money, the plaintiff would have been able to lead some evidence either by reference to a sale deed or by some extracts of Government record showing that the property stood in the name of her husband only. No such evidence was led by the plaintiff. Under the circumstances, in my opinion the learned Judge was right in holding that the property built by Nandshanker was the joint family property in his hands and that it was not his self acquired property.

6. The next important question which would arise for my consideration is whether it would be open to the plaintiff to claim partition of the joint family property. Her suit was on the basis that the suit property was the self acquired property and on that basis, she had claimed 1/6 interest therein not only for herself but for each of the defendants. Mr. Desai, therefore, urged that once the basis of the suit is knocked down and if the property is held to be the joint family property, could the plaintiff claim partition and possession of her share in the suit property? According to Mr. Desai, she could not claim any partition of her share in the joint family property but she would only be entitled to a share as an heir in the interest of her deceased husband in the joint family property, at the most. According to him, Section 6 of the Act did not envisage any partition between the members of the family. It merely pertained to devolution of the interest of the deceased in the joint family property and had nothing to do with the partition of the share of other coparceners therein. Mr. Desai submitted that the plaintiff was not a coparcener in her own right in the sense that she did not possess any interest by birth in the joint family property. She, therefore, could not claim any partition of the suit property and she would be entitled to a share therein only, if there was partition between her husband and other coparceners. In the instant case, as the husband had died without effecting the partition, his interest in the property would devolve on his heirs by succession. But so far as the remaining property is concerned that would

go by survivorship because the joint family status cannot be severed by devolution of the share of the deceased in the joint family property on his heirs. In order to appreciate this point, it will be worthwhile to refer to Section 6 of the Act. It says-

> "When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act."

But there is a proviso which qualifies this proposition of law. This proviso states –

> "Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession; as the case may be, under this Act and not by survivorship."
> Explanation (1) states -
> "For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

The effect of this proviso read with the said explanation is that if the deceased left amongst his heirs, females specified in class I of the schedule or a male relative specified in that class who claims through such female relative the interest of the deceased shall not devolve by survivorship but shall devolve by testamentary or intestate succession and in order to ascertain the share of the deceased in the coparcenary property, it will have to be taken into consideration what share could have gone to him if there was partition prior to his death. In the instant case, the joint coparcenary consisted of only Nandshanker Bhatt and his son, defendant No. 1. If there was partition between Nandshanker and defendant No. 1 during the lifetime of Nandshanker, the present plaintiff being the wife of Nandshanker would have been entitled to a share in the said partition. Therefore, if there was partition during the lifetime of Nandshanker each of them would get 1/3 share therein. Thus, as stated in explanation 1 the share of the deceased Nandshanker in the joint family property would be 1/3 and no more. Mr. Desai, learned Advocate 'for respondents Nos. 1 to 3 accepted this position. His say, however, is that after this 1/3 share is divided amongst the heirs of the deceased, the remaining 2/3 would go by survivorship to defendant No. 1 who was his son and the plaintiff being the widow had no right to claim any partition therein. She would merely be entitled to maintenance in lieu of her interest in the suit property. He conceded that if there was partition between the defendant No. 1 and his sons who may subsequently be born to defendant No. 1 and if the plaintiff was alive then, she would be entitled to a share therein but she herself cannot claim any partition of the joint family

property in view of the fact that the Hindu Women's Rights to Property Act, 1937 was repealed by Section 31 of the Hindu Succession Act, 1956.

7. It is true that prior to the coming into force of the Hindu Women's Rights to Property Act, 1937, the wife did not possess any interest in the joint coparcenary property during the lifetime of her husband. However, in case of partition between her husband and his sons, she would be entitled to a share equal to that of her husband or son. But she would not be entitled to claim partition in her own right and even after partition, she would not be the absolute owner of the property which came to her share but she would take a limited interest therein. However, after the Hindu Women's Rights to Property Act, 1937 came into force, a widow was given a share in the joint family property equal to that of the share of her husband or the son and she had a right to claim that share by partition. The other incidence viz. that whatever share she got in the property would be a mere life interest in the estate was not changed. For the first time, therefore, the right to claim partition was given to a widow by this Act. This Act was repealed by Section 31 of the Hindu Succession Act, 1956. Apparently, therefore, a Hindu widow would lose her right to claim her share by partition in the joint family property even though under the general principles of Hindu Law, she was entitled to a, share therein. Section 31 of the Act is repealed by the Act 58 of 1960. But there is nothing in the said Act showing that the Act which was specifically repealed by Section 31 was to be revived. Under Section 7 of the General Clauses Act, in the absence of any specific words, stating that such an Act would be revived the result would be that the Act which was repealed by Section 31 of the Act cannot revive even when Section 31 itself was repealed. For the purpose of this Appeal, therefore, it is assumed that the Hindu Women's Rights to Property Act, 1937 was no longer in force. The pertinent question, therefore, which would now arise for my consideration is whether the plaintiff-widow could claim partition of her share by a suit as provided in the said Act which was now repealed and whether it would be open to her to claim physical possession of her share in the joint family property after the death of her husband. Mr. Desai urged that Section 6 did not envisage any severance of the joint family status. It did not provide for partition of the joint family property. Section 6 merely provided for devolution of the interest of the deceased coparcener in the coparcenary property and for that limited purpose, notional partition of the property was envisaged. But that would not mean that actual partition was visualized by the legislature and that the moment the interest of the deceased in the joint family property was ascertained, the joint family status would automatically come to an end and the widow or any female heir would be entitled to claim partition therein. Mr. Desai in support of his submission referred to the history and growth of the Hindu Law. He urged that when the Hindu Succession Act was on the anvil there was great conflict between the orthodox section of the Hindus and the reformists. Ultimately, a balance was struck by the legislature and Hindu Succession Act saw the light of the day. Under this Act, the notion of the joint family property was not done away with. According to Mr. Desai, if coparcenary existed even after the said Act came into force, all other incidents of coparcenary property would remain intact save those which were specifically amended, modified or repealed by the provisions of this Act. Mr. Desai urged that the legal fiction was created for the limited purpose of ascertaining the share of

the deceased in the joint family property and the said fiction must be limited to the purpose for which it was created and cannot be extended. In support of his say, he referred to several cases to which I need not refer for the simple reason that I accept the proposition that legal fiction must be limited for the purpose for which it was created. However, in my opinion. Section 6 itself by implication gives a right to the female heir mentioned therein to claim partition of the joint family property. As already observed earlier, 'the main section states that when a Hindu dies after commencement of this Act, his interest in the Mitakshara coparcenary property would devolve by survivorship upon the surviving coparceners. So apparently, this section kept intact all the incidents, of the coparcenary property. But if we read the proviso and explanation 1 along with the main section, it will be clear that whenever the deceased left behind him surviving female relative specified in class I of the schedule, the incidents of coparcenary property regarding devolution of the interest of the deceased by survivorship upon the surviving members no longer survived and his interest would devolve by testamentary or intestate succession as the case may be. In my opinion, therefore, the moment the deceased coparcener left behind him his heirs who included female relative specified in class I of the schedule the law governing coparcenary property with regard to devolution of interest would no longer be applicable and the testamentary or intestate succession as provided by this Act would govern the case. I, therefore, do not agree with Mr. Desai that even after the interest of the deceased in the joint family property is carved out, the remaining property would remain joint in the hand of the and the widow would not be entitled to claim partition therein. It is not disputed that a suit for partition could be filed by the female heirs so far as the share of the deceased coparcener in the joint family is concerned. Thus, the plaintiff who is also an heir of the deceased Nandshanker can file a suit as an heir of Nandshanker to get the share in the interest of Nandshanker in the joint family property. If such a suit is filed, one has to find out as to what would be the share of Nandshanker. Explanation 1 says that in such a case, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that could have been allotted to him if the partition of the property had taken place immediately before his death. As already observed above, if the partition had taken place immediately before the death of Nandshanker, the plaintiff would have been entitled to a share equal to that of her husband and the son. If the plaintiff would have been entitled to a are in the joint family property if the partition had taken place during the lifetime of her husband and if before effecting the partition, the husband dies and his interest in the property has to be severed on the legal fiction that his share would be the share which would have been allotted to him on partition just prior to his death I fail to understand why the plaintiff would not be entitled to claim 1/3 share in this suit for partition. In my opinion the moment the interest of the deceased in the joint family property is severed, the joint family status would come to an end and it would be open to the widow to claim partition therein. It is difficult to envisage a position that even though the share of the deceased has to be ascertained on the footing that the wife would get the share if there was partition of the joint family property just prior to the death of her husband, she would not get any share after his death and that the son would take the remaining property by survivorship. The very fact that Section 6 of the Act is qualified by the proviso and explanation, it would indicate that the incidents of coparcenary property regarding devolution of the interest of

the deceased in the coparcenary property would by survivorship no longer be applicable. The proviso clearly states that in a case where there were female heirs specified in class I of the schedule, the property would not devolve by survivorship but would go by testamentary or intestate succession. It means by implication that the joint family status would come to an end. In my opinion, therefore, the plaintiff would be entitled not only to get a share in the interest of her husband in the joint family property but she would also get a share in her own right in the remaining property. I am supported in my view by the case of Rangubai w/o. *Lalji Patil v. Laxman Lalji Patil*[1], wherein it was observed at p. 173 that -

> "Sction 6 recognises the Hindu Law of Survivorship but by the proviso creates an exception and provides for devolution of the interest of the deceased coparcener if he died intestate and left any of the female heirs specified in clause 1 or a male relative specified therein claiming through such female relative. If the explanation had not been there, there would not have been any difficulty in accepting the interpretation suggested in Dinshaw Mulla's Principles of Hindu Law and by other text writers. The difficulty has been created by reason of the explanation which defines the interest of such Hindu Mitakshara coparcener. According to the explanation the interest is - "deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death."

The question is what was intended by the Legislature when it enacted this Explanation. The intention of the Legislature is to be found from the words used giving them their ordinary meaning. The Explanation enacts in effect - that there shall be deemed to have

[1] AIR 1966 Bom 169

been a partition before his death and such property as would have come to his share would be divisible amongst his heirs. It introduces a legal fiction of a partition before his death since without such fictional partition his share cannot be possibly determined. In Section 7 which makes provision for succession to persons governed by Marumakkattayam or Nambudri law by Sub-Section (1) and to persons who are governed by Aliyasantana law by Sub-Section (2) there is an explanation to each which also defines the interest of such coparcener to mean such share in the property that would have fallen to him or her if partition of the property per capita had been made immediately before his or her death and such share is deemed to have been allotted to him or her absolutely. It would therefore appear from the scheme of Sections 6 and 7 that the Legislature intended that it shall be deemed that there was a partition in fact and substance and that such property as would be available to the deceased would be divisible among his heirs.

If this is so, can it then be said that though the Legislature intended that there shall be deemed to be partition of the property and the share of the deceased coparcener shall be deemed to have been separated, the share to which the wife would be entitled should fall in vacuum and no relief can be granted to her ? To put it in other words, where the wife of such coparcener is entitled to a share at such partition, should she not be entitled to claim it and should such share be allowed to be enjoyed by the son or sons ? The Supreme Court in *Commissioner of Income-tax, Delhi v. S.*

Teja Singh[2]*,* had occasion to deal with legal fictions. In paragraph 6 of the judgement T.L. Vankatarama Aiyar, J., speaking on behalf of the court says :-

> "It is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate."

The same view was taken by the Orissa High Court in the case of *Ananda Naik v. Haribandhu Naik*[3]*,* wherein it was observed –

> "Explanation 1 however introduced a radical change. Though in fact Joydeb's interest in the coparcenary property had not been carved out, a legal fiction was introduced that the interest shall be deemed to be the share in the property which would have been allotted to him, if a partition of the property had taken place immediately before his death. It postulates that in order to fix the interest of Joydeb, a partition immediately before his death must be taken to have occurred. If that is the legal hypothesis, it follows as a logical corollary that plaintiff No. 2 must be allotted a share in that partition amongst the father and the two sons. Thus, immediately before Joydeb's death not only his interest was carved out as being 1/4th of the total interest in the coparcenary property but the interest of plaintiff No. 2 was marked out as being equal to that of a son. The explanation was necessary in view of the provision where under inheritance in coparcenary property by succession was introduced even in respect of outsiders to the joint family which was unknown to Hindu law before 1937 and was to some extent recognised under the 1937 Act by treating, the widow as a statutory heir. Under the Explanation disruption of the joint status had to be recognized immediately before the death of the deceased coparcener."

[2] AIR 1959 SC 352

[3] AIR 1967 Ori 194

In my opinion, these decisions lay down a correct interpretation of Section 6 and with respect, I entirely agree with the same. Mr. Desai, learned Advocate for the respondents, however, referred to the case of *Shiramabai v. Kalgonda Bhim gonda*[4]*,* wherein a contrary view was taken by the Division Bench consisting of Patel and Chitale, JJ., wherein it was observed that :-

> "It is not possible to uphold the contention of the appellant that as the explanation to Section 6 defines the interest of the coparcener to be the share that the father would have got on a partition it amounts to an express saving of that rule of partition for the obvious reason that, it does not enjoin actual partition and does not enable the mother to reduce her share into possession. The explanation is intended to be of general application and cannot be treated as saving the abovesaid rule of partition. To uphold the contention would produce most unjust results which could never have been intended by the legislature." It may be noted that in the latter Bombay case in AIR 1966 Bombay 169 (supra), the Division Bench which included Patel, J. did not follow this decision and held

that the mother would be entitled to a share. The Bombay High Court took a view that from the scheme of Sections 6 and 7, it appeared that the Legislature intended that there was a partition in fact and substance and that the said property as would be available to the deceased would be divisible amongst his heirs. In my view, the latter decision seems to lay down a correct proposition of law. As already stated earlier, the effect of the proviso and explanation 1 to Section 6 of the Act clearly indicates that the principles governing coparcenary Hindu property were not to be applicable in case a coparcener died leaving behind him his heirs which included females specified in class I of the schedule. In my opinion, therefore, even though the Hindu Women's Rights to Property Act, 1937 has been repealed by Section 31 of the Act, the plaintiff in the instant case would be entitled to claim partition and obtain physical possession of her share. The Kerala High Court in the case of *Venkiteswara Pai Rama Pai v. Luis*[5], has taken a different view. I need not discuss the principle enunciated therein for the simple reason that in Bombay where Mayukh was applicable, a widow was entitled to a share equal to that of her husband and if the effect of the explanation 1 to Section 6 is taken into consideration, the mother will be entitled to a share whenever the interest of the deceased coparcener devolves on his heirs by succession as laid down in the proviso to Section 6 of the Act. In my opinion, therefore, the learned Judge below was clearly in error in holding that 1/3 share of the deceased could be distributed amongst his heirs and that 2/3 thereof would go by survivorship to the son viz., defendant No. 1. In my opinion, both the plaintiff and defendant No. 1 would be entitled to 1/3 share each in the joint family property left by the deceased Nandshanker and the plaintiff and all the defendants would be entitled to 1/6 share in 1/3 share of the deceased which he could have got on partition,

8. Miss Shah, learned Advocate for the appellant submitted that cross-objections have been filed on behalf of the respondents Nos. 4 and 5 for Rs. 5,000 towards their marriage expenses. She urged that marriage expenses of the other daughters were incurred by the father during his lifetime and now after his death, it would be just and proper if the

[4] AIR 1964 Bom 263

[5] AIR 1964 Ker 125 (FB)

marriage expenses were incurred out of the family property, it may be noted that barring the suit immovable property, there is no other property from which marriage expenses could be incurred. The suit property has already been divided between the heirs as per particulars stated above. The plaintiff who is the mother of these two daughters viz. respondents Nos. 4 and 5, is getting 1/3+ 1/18 share in the suit property. Each of the respondents Nos. 4 and 5 also would be getting 1/18 share therein. In view of this state of affairs, it is not necessary to pass any order for marriage expenses of the said two daughters. In my opinion, from her share, the plaintiff would be able to meet the marriage expenses of her daughters.

9. Lastly, Mr. Desai, learned Advocate for the respondents Nos. 1 to 3 invited my attention to

Section 23 of the Act which says that –

> "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."

Relying on these provisions, the learned Advocate urged that the first floor of the suit property is occupied by the members of the family. Unless the male heir viz. defendant No. 1 chose to divide the respective shares therein, no partition could be ordered by the court Mr. Desai, therefore, urged that so far as the first floor of the suit property is concerned no order for partition should be made and all the members of the family who are using the same as residence should be allowed to use the same as before. There is great force in the submission made by Mr. Desai. It is not disputed before me that the first floor is occupied by the plaintiff as well as all the defendants and they are in exclusive possession of specified portion thereof. It is not therefore necessary to order any partition with regard to the first floor of this house. The plaintiff and defendants may continue to occupy the same as before till defendant No. 1 chose to divide the respective shares therein as provided in Section 23. So far as the ground floor and out-houses are concerned, they shall be divided amongst the plaintiff and defendants as under:-

10. The plaintiff will get 1/3 share therein as the wife of her deceased husband plus 1/6 share in 1/3 interest of the deceased in the suit property which comes to 1/18 in the property. Similarly, defendant No. 1 who is the son will also get 1/3 share therein in his own right as a son plus 1/6 in 1/3 interest of the deceased which comes to 1/18 share in the suit property. Each of the four daughters viz.' respondents Nos. 2, 3, 4 and 5 will get 1/6 in 1/3 interest therein which comes to 1/18 share in the suit property.

11. In the result, the appeal partly succeeds. The judgement and decree of the trial Court are hereby modified and, it is hereby declared that the plaintiff will get 1/3 plus 1/18 share in the suit property. Defendant No. 1 will get 1/3 plus 1/18 share therein and each of the defendants Nos. 2, 3, 4 and 5 will get 1/18 share therein. The physical partition of the suit property will be made according to the shares mentioned above only with regard to the ground floor of the suit bungalow and all the out-houses. The first floor of the suit bungalow will be utilized for residence by the members of the family as before, till defendant No. 1 chose to make partition by metes and bounds. A copy of the decree of this appeal to be sent to the Collector under Order 33, Rule 14, Code of Civil Procedure for recovering the court-fees on the memo of appeal and the

cross-objections from the appellant and respondents Nos. 4 and 5 respectively. In view of the facts of this case, there will be no order as to costs throughout. Cross-objections are also dismissed with no orders as to costs.

Order accordingly.