KERALA HIGH COURT

Saraswathi Ammal

Vs.

Anantha Shenai

Appeal Suit No. 481 of 1961, in O. S. No. 45 of 1956

(M.S. Menon, C.J. and M. Madhavan Nair, J.)

04.01.1965

JUDGMENT

Madhavan Nair, J.

1. This is an appeal by the 5th defendant from the preliminary decree in a suit for partition of a Hindu family.

2. The suit properties belonged to Lakshmana Shenoi, the late husband of the appellant, as his self-acquisitions. Defendants 1 to 4 are their sons and defendants 6 to-8 their daughters. They had another son, Anantha Shenoi, whose widow is the 4th plaintiff, and sons the plaintiffs 1 to 3. It is agreed at the bar that the 6th defendant has, after the institution of this suit, gone out of the family by marriage and therefore may be left out of count here. Lakshmana Shenoi died in 1943. This suit for partition of his estate was instituted in 1947; and the preliminary decree, under appeal herein, was passed on January 2, 1958. The judgment of the Subordinate Judge reads;

> "The 5th defendant is the widow of Lakshmana Shenoi. Defendants 7 and 8 are unmarried daughters . . . . . The widow and the unmarried daughters are to be maintained out of the yield of family properties . . . . . Provision has to be made for maintenance of defendants 5, 7 and 8 and for the marriage expense of defendants 7 and 8. The learned counsel for both the plaintiffs and defendants submitted that share equal to that of a son may be set apart, to the 5th defendant for her maintenance, and the maintenance of defendants 7 and 8 until their marriage. The share is to revert to plaintiffs and defendants 1, 3 and 4 after death of 5th defendant and marriage of defendants 7 and 8."

The appellant challenges the imposition of a condition of reverter on the share allotted to her.

3. The 2nd defendant died pending suit. The Court below has divided his share among his brothers, defendants 1, 3 and 4 even though the appellant, his mother, is alive. But, that part of the decree is not in challenge in this appeal by the mother.

4. Counsel for the appellant contended that in the suit properties the appellant is entitled to a

share, equal to that of a son, which, in the light of Section 14 of the Hindu Succession Act, 1956, must enure to her absolutely. Counsel for the plaintiffs challenged the widow's right to a share in the joint family properties and contended that it was by the plaintiffs' concession that the appellant has been given a share in this case and that such concession being for an allotment subject to reverter the appellant cannot claim anything more.

5. Lakshmana Shenoi died before the Hindu Succession Act, 1956, came into force. He was a native of the erstwhile State of Travencore and the suit properties were also in that State. The law in pre-1956 days is stated in Mulla's 'Principles of Hindu Law' thus :

> "A. Hindu governed by the Mitakshara law dies leaving a widow and a male issue. He leaves self-acquired property. The male issue will inherit the property subject to the obligation to maintain the widow out of that property." (Vide Illustration A to para 559).

6. That the appellant is entitled to maintenance out of her late husband's properties is not disputed here. The contention of the plaintiffs is that she is not entitled to a share of the properties in lieu of her right to maintenance. Mulla's 'Principles of Hindu Law' states the rule in that respect thus :

> "A mother cannot compel a partition so long as the sons remain united. But if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property" (Para 316).

The term "joint family property" is synonymous with "coparcenary property". (Para 220).

7. Mr. Sivasankaran Panicker contended that the above rule applies to coparcenary property only and that the sons inheriting the self-acquired properties of a Hindu father took them as co-heirs, and not as members of a coparcenary. The contention is obviously untenable. In Mulla's 'Principles of Hindu Law', the learned author says categorically :

> "Thus, if A holds separate or self-acquired property, on his death it becomes joint family property in the hands of his male issue." (Notes to para 222).
>
> "A son, a grandson whose father is dead and a great grandson whose father and grand father are both dead, all succeed simultaneously as one heir to the separate and self-acquired property of their paternal ancestor . . . . . Sons, grandsons, and great-grandsons inheriting together as aforesaid succeed to the estate of the deceased as coparceners. On a partition among them they take per stirpes and not per capita. (Para 29).
>
> "According to the Mitakshara school two or more persons inheriting jointly take as tenanting common except the following four classes of heirs who take as joint tenants with rights of survivorship :
>
> (a) Two or more sons, grandsons, and great-grandsons who are living as members of a joint family, succeeding as heirs to the separate or self-acquired property of their paternal ancestor. . . . . (Para 31).
>
> "It is very important to note that the only property that can be ancestral is property inherited by a male Hindu from any one of his three immediate paternal ancestors, viz., his father, father's father and father's father's father. . . . . ." (Para 223).

Mayne in his 'Hindu Law and Usage' also says likewise :

> "Hence all property which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral properly, and is at once held by himself in coparcenary with his own male issue." (Para 275).

The Supreme Court in *Arunachala Mudaliar v. Muruganatha Mudaliar*[1], has observed it to be settled law "that a Mitakshara father has absolute right of disposition over his self-acquired property to which no exception than be taken by his male decendants . . . . . The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands." There can therefore be little doubt that the properties inherited by the sons of a Hindu are ancestral or joint family properties in their hands.

8. Mr. Krishnamoorthy Iyer contended that the Rule mentioned in para 6 above is not prevalent in South India and read the following observations in Mulla's 'Principles of Hindu Law :

> "Madras State - In Southern India the practice of allotting shaves upon partition to females has long since become obsolete." (Notes to para 315).
>
> "Madras State - In Madras a mother is not entitled to a share. She is entitled only to a provision for her maintenance which must not in any case exceed the share of a son." (Notes to para 316).

The above Notes are based on an observation without discussion in *Subramanian Chetti v. Arunachalam Chetty*[2], at p. 8 : "Considering that the right of a mother to a share in a partition between the sons is not enforced in this Presidency, the question whether the view of the Calcutta High Court or the Allahabad High Court is correct, in so far as this Court is concerned, is of no practical importance." It is pertinent to note that in a later case. *D. Lingayya v. D. Kanakamma*[3], the same High Court has observed : "The wives of the male coparceners in a Hindu family are not entitled to equal shares with the males in the family estate . . . . . but . . . . . they are entitled to a portion of the estate for their enjoyment during their lifetime sufficient to maintain

[1] AIR 1953 SC 495
[2] ILR 28 Mad 1 (FB)
[3] ILR 38 Mad 153 : AIR 1916 Mad 444

them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves." No decision of the Travencore High Court adopting the view expressed in ILR 28 Mad 1 (FB) has been cited to us. On the other hand, in *Chockalinga Konar v. Aiyana Pillai*[4], the claim for maintenance made by a widow against the son of her husband (step-son) was held by Subramania Iyer, J., with the concurrence of Chatfield J., to be based on "her right in the family property" which cannot be "defeated by her possession of property acquired without the help of family funds", or dissolved except by "partition as in the case of male coparceners, with this difference that in her case the partition takes the form of a separate and permanent provision for her maintenance."

9. The question here is not whether the widow's right to a share in lieu of maintenance at a partition among her sons has become obsolete in Madras; but the question is whether she was so entitled in Travencore. In this connection it must be remembered that the Hindu law as administered in Travencore was in certain respects not the same as that was prevalent in the Madras State. Smrithi Chandrika was considered to be a work of high authority in Madras, but not in Travencore. In *Kunjan Pillai v. Ananthu*[5], the Travencore High Court observed :

> "The respondent's learned vakil relies on a text of Manu and on the Smrithi Chandrika and Veeramithrodaya which follow that text as supporting the view of the learned Judge. But these authorities cannot be followed here when they are opposed to the Mitakshara."

The law of pious obligations in the Madras State required the debt to be antecedent, but no such condition is recognised in Travencore. (See *Neelathankam Nadar v. Peerumuhamad*[6], The Principles of Hindu Law by Mulla made little reference to the laws and customs current in the State of Travencore or Cochin. General observations made by the learned author on the basis of the practice in Madras cannot therefore be taken as reflecting the Hindu Law in practice in the abovementioned States. It follows that, in the absence of precedents of the High Courts of Travencore or Cochin - which is the case here - reference has to be made to the law laid in the original texts themselves.

10. In Yagnavalkya Smrithi, Chapter II verses 114 and 115 deal with partitions by the father, and verse 123 deals with partition by the sons after demise of the father. They, with their translations by Colebrooke, read thus : (When the father makes a partition, let him separate his sons (from himself) at his pleasure, and either (dismiss) the eldest with the best share or (if he chooses) all may be equal sharers. If he makes the allotments equal, his wives, to whom no separate property has been given by the husband or the father in law, must be rendered partakers of like portions.) (Of heirs dividing after the death of the father, let the mother also take an equal share). The commentary on the above verses, in the Mithakshara runs thus; (When the father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons. No rule being suggested (for the will is unrestrained),

[4]18 Trav LJ 433 [6]1945 Trav LR 1 (FB)
[5]14 Trav LJ 383

the author adds, by way of restriction, "he may separate (for this term is again understood) the eldest with the best share", the middle one with a middle share, and the youngest with the worst share . . . . . are translated by Colebrooke as the best share, a middle share and the worst share. I would translate them as a big share, an average share and a small share). The term 'either' is relative to the subsequent alternative "or all may be equal sharers". That is, all namely the eldest and the rest, should be made partakers of equal portions. This unequal distribution supposes property by himself acquired. But, if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared . . When the father, by his own choice, makes all his sons partakers of equal portions, his wives to whom separate property had not been given by their husband or by their father-in law, must be made participant of shares equal to those of sons. But if separate property have been given to a woman, the author subsequently directs half a share to be allotted to her). (Of the heirs separating after the decease of the father, the mother shall take a share equal to that of a son, provided no separate property had been given to her. But if any had been received by her, she is entitled to half a share, as will be explained). Thus, according to Mithakshara, the widow is entitled to a

share of the joint family properties at a partition thereof among her sons, equal to that of a son or a moiety thereof as the case may be. It is therefore not correct to say that it was by a special concession of the plaintiffs that the appellant became entitled to a share in the suit properties. The concession made by the plaintiffs in the Court below was only to give effect to the real law on the matter, which is no 'concession' at all but the fulfillment of a legal obligation on their part. Under the Mithakshara Law the normal right of a Hindu widow is to maintenance out of the income of the whole of the joint family estate; but when the joint family estate is divided, she is entitled to a share of the estate in lieu of her right to maintenance. Her right to the share arises on partition among the sons, and then only. Admittedly, under the preliminary decree in this case the sons and the grandsons of a late son became separated individually; and therefore the appellant has become entitled to a share in the suit properties.

11. Section 14 of the Hindu Succession Act, enacts :

> "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."
>
> Explanation : In this Sub-Section includes both movable and immovable property acquired by a female Hindu . . . . . at a partition, or in lieu of maintenance or arrears of maintenance . . . . . .
>
> (2) Nothing contained in Sub-Section (l) shall apply to any property acquired . . . . . under. . . . . a decree or order of a civil court . . . . where the terms of . . . . the decree, or order . . . . . prescribed a restricted estate in such property."

The import of the word 'Possessed' in the above provision had been clarified by the Supreme Court in *Munnalal v. Rajkumar*[7], thus :

> "This Court in *G.T.M. Kotturuswami v. Setra*[8], held that the word 'possessed'

[7] AIR 1962 SC 1493

[8] AIR 1959 SC 577

> in Section 14 is used in a broad sense and in the context means the state of owning or having in one's power'. The preliminary decree declared that Kilonabai (the widow of the propositus) was entitled to a share in the family estate and the estate being with the family of which she was a member and in joint enjoyment, would be possessed by her."

In that case, the High Court thought the Hindu widow's right under the preliminary decree for partition to be inchoate and therefore not 'possessed' by her within the meaning of Section 14, Hindu Succession Act; but the Supreme Court held :

> "By Section 14(1) manifestly it is intended to convert the interest which a Hindu female has in property, however restricted the nature of that interest under the Sastric Hindu law may be, into absolute estate. *Pratapmull Agarwalla v. Dhanbati Bibi*[9]. undoubtedly laid down that till actual division of the share declared in her favour by a preliminary decree for partition of the joint family estate a Hindu wife or mother was not recognised as

> owner, but that rule cannot in our judgment apply after the enactment of the Hindu Succession Act . . . . . It is true that under the Sastric Hindu law, the share given to a Hindu widow on partition between her sons or her grandsons was in lieu of her right to maintenance. She was not entitled to claim partition . . . . . Manifestly, the Legislature intended to supersede the rules of Hindu law on all matters in respect of which there was an express provision made in the Act . . . . . The High Court was therefore, in our judgment, in error in holding that the right declared in favour of Kilonabai was not possessed by her . . . . . ."

12. Counsel pointed out that in AIR 1959 SC 577 the word 'possessed' in Section 14 of the Hindu Succession Act has been construed to mean 'possessed at the date of the commencement of the Act'. That observation was in regard to an interest acquired and alienated by a widow before the Act, and cannot therefore apply to an interest acquired after the Act. Section 14(1) covers "interests acquired before or after the commencement of the Act". An interest acquired after the Act cannot be. possessed on the date of the Act. The interest of the appellant in the present case was acquired on the date of the preliminary decree dated January 2, 1958. Till then it was not her property. She had only a right to maintenance out of the income of the joint family estate. But, with the passing of the preliminary decree she acquired property and that in possession as held in AIR 1962 SC 1493. So the present case is clearly within the ambit of Section 14(1) of the Hindu Succession Act.

13. Of course, Section 14(2) enacts that if the preliminary decree which conferred the property on the widow made it a restricted estate -for example, subject to reverter - Section 14(1) cannot apply to such property. But the operation of Section 14(2) docs not arise in this appeal where the question is of the propriety of the imposition of a restriction, and not the effect of it. As has been held in *Pathumma Beebi v. Krishnan Asari*[10], a decree within the meaning of Section 14(2) of the Hindu Succession Act cannot be a decree which is under appeal, but only a decree become final. If the object if Section 14(1), as pointed out in AIR 1962 SC 1493 is to convert the interest of a

[9] AIR 1936 PC 20

[10] 1961 Ker LT 265 : AIR 1961 Ker 247

Hindu female, which, under the Sastric Hindu law, would have been a limited interest, into an absolute interest, and by the Explanation thereto, the expression 'property' was given the widest connotation to include property acquired "at a partition or in lieu of maintenance", the imposition of the condition of reverter would be to defeat the legislative provision. The attempt of Court should always be to effectuate, and not to defeat the purpose of an Act, particularly if that can be done without violation to the language of the Act.

14. The appeal succeeds. The condition of reverter attached to the share allotted to the appellant under the preliminary decree of the Court below is discharged. Of course, the decree will stand in other respects.

15. The appellant will have her costs from the contesting respondents.

Appeal allowed.