

## **BOMBAY HIGH COURT**

Shivappa Laxman

Vs.

Yellawa Shivappa Shivagannavar

Second Appeal No. 1238 of 1949, , from decision of Asst. J. Belgaum, Appeal No. 101 of 1948

(Gajendragadkar and Vyas, JJ.)

27.11.1952

### **JUDGMENT**

#### **Gajendragadkar, J.**

1. This appeal raises a short and interesting question as to the nature of the rights which a Hindu widow acquires under Sub-Section (2) of Section 3, Hindu Women's Right to Property Act, No. 18 of 1937. The property in suit consists of lands situated at Vadril in the taluka of Chikodi. These properties originally belonged to the undivided family of Shivappa and his son Laxman. Laxman died on 13-3-1945, leaving behind him his widow Yelawwa. She is plaintiff 2 in this suit. On 8-3-1946, Shivappa executed a deed of gift in respect of the properties in suit in favour of his daughter Laxmawwa. She is defendant 4 in the suit. On 9-3-1946 Shivappa adopted Laxman belonging to, the branch of his separated brother also known by the name of Laxman. On 19-4-1946, Yelawwa adopted Shivappa, who is plaintiff 1. On 11-8-1946, Shivappa died leaving surviving behind him his widow Yelawwa. Yelawwa is defendant 1 in the present suit. The daughter-in-law of Shivappa and her adopted son have brought the present suit challenging the validity of the deed of gift executed by the deceased Shivappa in favour of Laxmawwa; and the point which the Courts below had to decide was whether it was competent to Shivappa to make a valid deed of gift in respect of the suit properties when his widowed daughter-in-law was alive. The contention of the plaintiffs' was that, on the death of Laxman, his widow Yelawwa was entitled to the same interest in the property as the deceased Laxman had at the time of his death and in view of this interest which had devolved upon Yelawwa, it was not open to Shivappa to make a valid deed of gift in favour of his daughter. That is how the question as to the nature of the rights which devolve upon Yelawwa under Sub-Section (2) of Section 3 of Act No. 18 of 1937 has to be considered in the present case. The learned trial Judge took the view that the deed of gift was invalid whereas the lower appellate Court has taken a contrary view. Since the plaintiffs' suit has been dismissed by the lower appellate Court, they have come to this Court in the present second appeal.

2. It was urged on behalf of the donee in the Courts below that the properties which are the subject-matter of the gift were the separate properties of Shivappa and so he was entitled to deal with them in any manner he liked. This contention has been rejected by both the Courts and it has been found that the suit properties originally belonged to the undivided family of Shivappa and his son Laxman. It is on this footing that we have to decide the point of law raised before us in this appeal.

3. The Hindu Women's Right to Property Act was passed with a view to amend the Hindu law to give better rights to women in respect of property. In regard to the undivided families governed by the Mitakshara school of Hindu law, Sub-Section (2) of Section 3 provides that when a Hindu governed by the Mitakshara school 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 in the property the same interest as he himself had. In other words, by this subsection the widow of an undivided Hindu is given the same interest in the family property which her deceased husband had during his lifetime.

This provision is subject to the proviso mentioned in Sub-Section (3) and the effect of this subsection is that the interest which devolves upon a Hindu widow under Sub-Section (2) will be the limited interest known as a Hindu women's estate. This sub-section however clearly provides that, though the interest of the Hindu widow is a Hindu woman's estate, the Hindu widow would have the same right of claiming partition in respect of the said interest as a male owner. Prior to the passing of this Act, the interest of her deceased husband would not have devolved upon his widow and it would not have been open to any Hindu female belonging to an undivided Hindu family to claim a partition even if she had a share in the property as for instance a mother. This Act, therefore, confers upon the Hindu widows a new right, qualifies the right by making it a Hindu woman's estate and no more; and makes it clear that the Hindu widow can enforce this right by claiming a partition in the same way as a male member can do. As a result of these provisions, the rule of survivorship has received a serious blow. It is no longer possible to apply this rule of survivorship to the interest of a deceased coparcener if he leaves surviving him his widow. Formerly, the interest of the deceased coparcener in the undivided properties passed on to the other surviving coparceners by survivorship. Devolution of such an interest by survivorship is now no longer possible because the interest of the deceased coparcener must now devolve upon his widow. Even before this Act was passed, females who by marriage entered the undivided family were regarded as members of an undivided family. They were, however, never given the status of coparceners and it may be that, even after the passing of this Act, the Hindu widow on whom the interest of her deceased husband devolves would not be a coparcener properly so called. She is however, a member of an undivided family who is entitled to the same interest rest in the properties of the family as her deceased husband had.

4. It is true that piecemeal legislation passed for removing obvious anomalies, or making pressing progressive changes, in Hindu Law tends to lead to complications; because it is

sometimes difficult to reconcile the new provisions made by the amending Acts with the rest of the structure of Hindu law. The effect of the provisions of Section 3 on the constitution of the surviving family after the death of a coparcener is an illustration in point. The undivided Hindu family would now consist of coparceners and a female who has a share in the properties of the family. The right to property is conferred on the widow without giving her the status of a coparcener. This position is likely to raise some problems which may not admit of a logically consistent answer. The question as to how the deceased husband's interest devolves upon his widow has given rise to conflicting views. This devolution cannot be attributed to survivorship because survivorship applies as between coparceners and the widow is not a coparcener. The learned editor of the recent edition of Mayne's Hindu Law and some decisions of the Madras High Court have described this devolution as by inheritance. Bhagwati and Dixit, JJ. have however, taken a contrary view. It has been held by them in - '*Nagappa Narayan v. Mukanibe*', that it would be "fallacious" to describe the devolution of such interest on the Hindu widow as based on inheritance or succession. On this view, the devolution of such, interest should be treated as of a special kind laid down by the Act - differing alike from succession and survivorship. Even so, both Bhagwati and Dixit, JJ., agree that the undivided interest of the deceased husband in the family properties does not go to the surviving coparceners after his death, but it devolves upon his widow in the manner contemplated by the Act.

5. It would be noticed that however this particular mode of devolution is described, there is no doubt that it devolves on the death of the husband on his widow and as from the time of his death the said interest vests in the widow. Perhaps it may be possible to take the view that the said interest should be treated as ascertained and defined when it devolves on the widow and in a sense this view may be logical. But that may lead to the result of automatic severance of the widow from the surviving coparceners; and it may be that on the whole it was not the intention of the Act. It appears that Legislature intended that the family should, despite this special devolution of interest on the widow, continue joint as before. Therefore, after the death of her husband, the widow continues to be a member of the joint family with the said interest vested in her. One inevitable result of this position is that the quantum of her share would be liable to fluctuations, as indeed was the undivided share of her husband in his lifetime. The share would be determined when partition takes place and it is now competent to the widow to claim partition and have her share determined and separated. That in effect is the decision of this Court in - '*Nagappa's case*'.

6. But until severance is brought about the family would continue to be joint and so it would have a manager who would be clothed with all the powers as such a manager. Therefore, in the case of a sole surviving coparcener, he cannot now claim the unfettered powers as before. He is no doubt the sole surviving coparcener literally speaking; but he is also the manager of an undivided family consisting of himself and the widow of a predeceased coparcener and this widow has a share in the properties of the family. That must inevitably impose limitations upon his power to deal with the family property.

7. It is contended by Mr. Sukhtankar before us that the only effect of Sub-Ss. (2) and (3), Hindu

Women's Right to Property Act is in substance to give the widow a right to demand a partition and that until this right is actually exercised by the Hindu widow, the sole surviving coparcener can deal with the property in any manner he likes. If the share of the Hindu widow is liable to fluctuation, if it can increase or decrease before she makes a claim for partition, the said share cannot be deemed to be vested in the Hindu widow and so the alienation made by Shivappa cannot be challenged by her on the ground that her right in the property is adversely affected by it. That in substance is the argument urged before us by Mr. Sukhtankar. We are unable to accept this argument. It is well settled that in an undivided Hindu family the share of each coparcener is not determined until a partition is effected and during jointness it is liable to fluctuation by deaths or births in the family; but that does not mean that the coparcener has no vested right in the undivided share of the properties. The position of a Hindu widow's interest in the family

<sup>1</sup> AIR 1951 Bom 309

properties is, in our opinion, somewhat analogous to the undivided right of the coparcener at least so far as the manager's powers of management and alienation, are concerned; so that if the said interest of the Hindu widow is sought to be defeated by an unjustified alienation, she would be entitled to challenge it just in the same manner as a coparcener would. It may be that the effect of this Act is not to cause the severance of status automatically on the death of a coparcener, and that the family may continue to be joint; in that case the manager would still be entitled to exercise his ordinary powers under Hindu law. But it is clear that it is beyond the competence of a manager to make a gift of immoveable properties belonging to the family. The gift in question is not and cannot be supported on the ground that it is a gift validly made through affection. Almost all the properties are gifted away by Shivappa to his daughter and so it is common ground that this deed of gift can be sustained only if it is held that Yelowwa has no right to challenge it until she successfully asserts her claim for a partition. Since, in our opinion, the interest of Laxman had already devolved upon Yelowwa, it cannot be said that this interest can be defeated by an invalid alienation like the one in suit.

8. The principal reason which weighed with the lower appellate Court in dismissing the plaintiffs' claim was that Yelowwa was not a coparcener in the family of Shivanpa and that her adopted son could not have challenged the gift deed. In regard to the gift deed in suit, we are not satisfied that the adopted son could not have challenged it himself. Whether or not the adopted son can challenge this gift would depend upon whether the gift amounts to a valid alienation or not. In - '*Anant Bhikappa v. Shankar Ramchandra*<sup>2</sup>', their Lordships of the Privy Council have expressly provided that the adopted son would be bound by prior alienations made by a sole surviving coparcener, but that in the context clearly refers to lawful alienation. The case of the plaintiffs is that at the time when the gift deed in suit was executed by Shivappa, it was invalid because Yelowwa had a share in the properties and Shivappa was not authorised to gift them away. If the alienation in the present case was thus invalid when it was made, it would, we think, be open to the adopted son to challenge it. This however is a matter of academic interest in the present case; because the challenge to the deed has proceeded in the present litigation more from Yelowwa than from the adopted son himself.

9. Therefore, we must hold that the lower appellate Court was wrong in dismissing the plaintiff's suit. It is agreed that if the deed is held to be invalid, the result would be that the plaintiffs would be entitled to recover possession of their share in the immoveable properties described in the plaint. This share would, however, be one-third. At the time when we are passing this decree, there are three sharers in the property. (1) Yelawwa (the widow of Shivappa) defendant 1, (2) Laxman (adopted son of Shivappa) defendant 2 and (3) Shivappa, plaintiff 1, and his adoptive mother Yelawwa, plaintiff 2 Plaintiffs 1 and 2 between them would be entitled to one-third; they do not want to divide the properties as between themselves. Defendants 1 and 2 would be entitled to one-third each. It is clear that Yelawwa would hold her share as a limited owner and on her death it will again devolve on her adopted son Laxman and plaintiff 1 half and half.

10. With this modification, the decree passed by the trial Court is restored. The appellants would be entitled to their costs in this appeal. There will be no order as to costs in the Courts below.

<sup>2</sup> AIR 1943 PC 196

Order accordingly.