

BOMBAY HIGH COURT

Mahadu Kashiba Varnekar

Vs.

Gajarabai Shankar Varnekar

Second Appeal No. 807 of 1951, Satara in Civil Appeal No. 433 of 1949

(Bavdekar and Chainani, JJ.)

01.12.1953

JUDGMENT

Bavdekar, J.

1. The property in the suit, from which the present appeal arises, originally belonged to a joint family consisting of two brothers, Shripati and Shankar. Shankar died first leaving a widow Gajara, who was the plaintiff in the suit. On 11-5-1945, Shripati executed a sale deed of all the properties of the joint family in favour of defendant No. 1 for Rs. 700, and the properties are since then in the possession of defendant No. 1. Shripati died in September 1945. On 28-8-1947, the plaintiff gave a notice to defendant No. 1, and then she instituted the present suit for partition and separate possession of her half share in the lands, which were conveyed by Shripati to defendant No. 1. The defence was that Shripati was suffering from T.B.; that he had already incurred debts, because he had to undergo heavy expenses for his treatment in the Wai hospital, and that he had also further necessity of moneys for his treatment. It was the case of defendant No. 1 besides that in any case he had made inquiries and had satisfied himself as to the existence of the necessity, and the inquiries being bona fide, he was protected.

2. The learned appellate Judge has found upon this contention that out of the consideration of Rs. 700, Rs. 500 were required by Shripati to pay off his earlier debts and also for the expenses of treatment to be undergone thereafter. He held that so far as Rs. 200 are concerned, the matter was doubtful, and it may be that they were borrowed by Shripati in order to make an advance upon a mortgage to one Khashaba. He said, however, that the amount was not very big, and the sale was, therefore, justified by legal necessity. In the alternative, he said that defendant No. 1 had made inquiries and satisfied himself as to the existence of the necessity, and the alienation could not, therefore, be challenged in any case by the plaintiff.

3. Now, in second appeal these findings of fact are binding upon us. It is true that so far as the

amount of Rs. 200 advanced to Khashaba is concerned, the learned trial Judge was inclined to think that it may be that Shripati paid this amount out of the amount realised by the sale of the family properties to defendant No. 1 after the sale. But even so, there is a further finding that in any case defendant No. 1 had made *bona fide* inquiries with regard to the existence of the necessity and satisfied himself as to it.

4. The only question, therefore, is whether Shripati, who was admittedly the manager at the time of the joint family, had got power to alienate for legal necessity family properties. That he would have had such right, if it had not been for the fact that upon the death of Shankar on 11-6-1941, Gajara obtained an interest in the property, which was commensurate with Shankar's interest, is not in dispute. It is contended, however, on behalf of the plaintiff that it was not competent to Shripati after the enactment of the Hindu Women's Rights to Property Act, 1937, to alienate even for legal necessity the properties of the family. The power which Shripati had got, as manager of the joint family, to alienate for legal necessity family properties was derived by him from his position as the manager of a coparcenary. When Shankar died in 1941 and Gajara obtained, because of Section 3(2), Hindu Women's Rights to Property Act, 1937, his interest, she had not become a coparcener along with Shripati. She had, therefore, an interest in the property, which could not be equated with the interest of a coparcener, and Shripati could not sell the property, in which she had such an interest, in exercise of powers, which must be referred to the powers of a manager in respect of coparcenary property.

5. Now, Section 3, Hindu Women's Rights to Property Act, 1937, has been the subject-matter of a number of cases, which have come up before the High Courts. There has been some difference of opinion about its interpretation; but so far as this High Court is concerned, the following propositions may be taken to have been established :

(1) The interest which a widow takes, upon the death of her husband, in her husband's property is a fluctuating interest. It is liable to decrease by the number of coparceners in the family increasing by a birth or adoption. On the other hand, it is capable of augmentation, in case one of the coparceners, who was alive at the time when her husband died, dies subsequently :

'Nagappa Narayan v. Mukambe';

(2) The interest which she takes is not a separated interest, separated, that is, from the interests of the other members of the family, who may, of course, be coparceners. Her interest is, like the interests of her husband, an undivided interest in the joint family properties, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate, until the suit for partition is filed by her.

(3) The family consequently continues to be a joint one, till the widow files a suit or a separation of interest is otherwise brought about.

6. To these cases I would like to add a case, in which an analogous question was decided, namely, - *'Shivappa Laxman v. Yellawa'*², It was held in that case that it is not competent to a

manager of a joint Hindu family, in property belonging to which the widow had got an undivided interest, to make a gift of the property which is not justified by the limited powers of a manager to make a gift under the Hindu law.

7. The question as to whether a manager has got power to alienate joint family property when there is legal necessity, in spite of the existence of a widow in the family, who has got an undivided interest in the property and is entitled to sue for partition, has to be

¹ AIR 1951 Bom 309

² AIR 1954 Bom 47

answered in the light of these decisions. Now, once it is conceded that the family does not cease to be joint by the very fact of the widow taking an interest in its property, it is obvious that the manager must have powers, at any rate, to manage the estate of the family. It is contended on behalf of the plaintiff that the view has been taken in other High Courts that the interest which a widow takes under Section 3, Hindu Women's Rights to Property Act is a separated interest, and in support of this proposition reliance is placed upon a case of the Orissa High Court in - '*Kunja Sahu v. Bhagaban Mohanty*³', The question which arose in that case was whether it was permissible for a widow, who obtained an undivided interest in the property of the joint family, of which her husband was a member at the time of his death, to sell that interest without, in the first instance, effecting a partition between herself and the other members of the family. The case came from Bihar, where it is not open even to a coparcener to make an alienation of his undivided interest in favor of a stranger. It was held that the widow was entitled to sell her undivided interest in the property without making a partition. It was observed (p. 37) :

"..In the statute, under consideration, the only words of limitations are to be found in the expression 'limited interest of a Hindu Women's Estate' occurring in Sub-Section (3). In short interpreting the provisions of Sub-Section (3), according to the plain grammatical meaning of the language in which it is enacted and after assigning such meaning to the terms of art (namely, Hindu Women's Estate), such meaning as they carry under the law in which the terms are used, the interest that a widow gets in her husband's interest in a joint family estate is the same as she would get in her separate or self-acquired properties.

If there is nothing in conflict as between the two sub-sections due to the plain grammatical meaning of the words 'the same interest' in Sub-Section (2), it should be limited in its connotations to quantity rather than quality or nature and character of the interest for the sake of reconciling the two sub-sections so as to produce a coherent and harmonious working of the Act. As Sub-Section (3) is clear and unambiguous, any ambiguity or indistinctness in the meaning of Sub-Section (2) emerging from its language must be dissolved on account of the latter's subordination to the former and a harmonious construction should be put upon it so as to give effect to Sub-Section (3). In this view, the widow has a limited power of disposal over the interest that devolves upon her. The objection as to alienation by a coparcener of his interest in the joint family estate is not applicable when that interest devolves upon or is acquired by one who is not a coparcener of the joint family. Take the instance of a coparcener's interest having been attached

by his creditor during his life time. His subsequent death does not prevent the attaching creditor from getting the attached interest sold. It is because as soon as it is attached, it is prevented from lapsing into the joint family estate and stands out of fluctuation. It then becomes a specified interest. 'It so happens when it devolves upon the widow'. After devolution, it is an interest which unlike a coparcener's interest can be predicated with certainty. In that event, as a property, it carries with it the incidents of transferability at the hands of its holder either limited or absolute.'

8. Now, this decision proceeds upon the view that the interest which a widow takes in the property of a joint family, of which her husband was a coparcener at the time of his death, was not a fluctuating interest. It has been decided in two cases of this Court that her

³ AIR 1951 Ori 35

interest is liable to decrease and augmentation. It cannot possibly, therefore, be anything but a fluctuating interest. The view of this Court, therefore, is in direct conflict with the view which was taken by the Orissa High Court in the case of 'Kunja Sahu (O)'.

9. It is contended, however, that even upon the footing that there is no separation of the joint family, when a coparcener dies leaving a widow, who obtains his interest under Section 3(2), Hindu Women's Rights to Property Act, 1937, that interest can be sold only by the widow herself. It is true that the property will still continue to be joint family property, in which the widow could only be said to have had an undivided interest. But there is nothing to prevent the coparceners and the widow together from alienating property, if it was felt that it was necessary to do so in the interests of the family. In the case of '*Nagappa Narayan v. Mukamba*', this Court has taken the view that the interest which a widow gets in the property of the joint family, of which her husband was a coparcener at his death, is not an interest obtained by her by inheritance but is an interest created in her at the moment of her husband's death by a statute. It is said that in that case we must not look upon that interest in the same manner as we do upon an estate of inheritance to which a widow succeeds under the rule of Mitakshara succession. The interest is not really speaking an interest obtained under the Hindu law, and if it is to be conveyed, it could only be conveyed under the general law, that is, by the widow herself.

10. Now, even though it is perfectly correct that it is after all always possible for the widow and such coparceners of the joint family as are in existence at the time to make an alienation of any part of a joint Hindu family property by acting together, that does not mean that there is no power in anyone else to do so in any circumstances. There was power in the manager even before the death of the widow's husband to sell the joint family property for legal necessity, and if we accept the contention which has been advanced on behalf of the plaintiff, it would mean that that power came to an end when the husband died and the widow took an interest in the joint family property under the statute. One could have understood this argument, in case the Hindu law ceased to apply upon the death of a husband. Mr. Albal, who appears on behalf of the plaintiff, has frankly conceded, however, that it would not be possible for him to argue that upon the widow obtaining an interest in the joint family property upon the death of her husband, the Hindu law ceased to be applicable, and as a matter of fact, it would have been impossible for us to

accept that contention, even if it had been made. Sub-Section (3) of Section 3 of the Act specifically says that the interest devolving on a Hindu widow under the provisions of Section 3 shall be the limited interest known as a Hindu woman's estate.

That interest would obviously, therefore, have to be governed by the provisions of Hindu law. The result of the sub-section will be that the widow could, without any legal necessity, alienate her own life estate in the property, but if she wanted to convey her undivided interest absolutely, it would be necessary that there should, be legal necessity for the alienation. In what circumstances the alienation will be justifiable would consequently have to be determined by a reference to the provisions of the Hindu law as regards the occasion when a widow, who has got what is called a Hindu woman's estate, may alienate property, of which she is a limited owner.

11. Nor could the interest fluctuate unless it continues to be governed by the Hindu law.

12. Then we come to the remaining interest in the property. It is obvious that even though the widow obtains an interest in the property under Sub-Section (2) of Section 3, Hindu Women's Rights to Property Act, there is nothing to prevent the other coparceners from seeking a partition of the family property. This they would be entitled to do only under the Hindu law, and it is obvious that when a partition has to be effected, it will have to be effected in accordance with the provisions of the Hindu law. The widow's interest as well as the remaining interest in the property, remaining, that is after the interest, of the widow is excluded, will therefore continue to be governed by the Hindu law. It is obvious, therefore, that not only does the Act not contemplate that the Hindu law should cease to apply; but it has made a definite provision that the Hindu law should continue to apply to the widow's interest after the death of the husband and the widow's acquisition of his interest in the property under the Act. The result of the decided cases also is to show that it continues to be governed by the Hindu law.

13. It is said, however, that even so the result would at the most be that inasmuch as the joint family continues, there would be a manager, and the manager would have powers of management of the joint family property. It does not follow that the manager should necessarily have powers to alienate family properties even for legal necessity. If there is any such legal necessity felt, it would be open to the manager to ask the widow to join in the conveyance, and if we were to hold that the manager would have power to sell the joint family property, including the widow's interest therein, for the purposes of family necessity, we would be placing the widow in a worse position than what she was in before. Strictly, of course, the manager may be entitled to sell the property, only in case of legal necessity; but legal necessity may be brought about under the Hindu law by mismanagement, and this would, so to speak, cut into the rights which have been given to the widow under the Hindu Women's Rights to Property Act, which was designed to give the widow better interest in the property of the joint family, of which her husband was a coparcener at the time of his death.

14. Now, in the first instance, we are not satisfied that holding that the manager has got power to

alienate for family necessity the joint family property, including the interest obtained by a widow upon her husband's death, in it, would really speaking place the widow in a worse position than before. It is true that the manager may sometimes mismanage the estate, and if the legal necessity is brought about by his mismanagement, it would not be a defense for the widow to point to his mismanagement, as it would not be any defense to any other coparcener to do so. But that does not alter the fact that the power of a manager would be limited to cases in which he could demonstrate to the Court, that there was, as a matter of fact, legal necessity for the alienations effected by the manager. It has got to be remembered that before the Act the widow in a joint Hindu family was entitled only to a right of maintenance. It is futile to argue, therefore, that if we were to hold, as the defendants in this case want us to hold, we would be placing the widow in a worse position than what she was before.

15. The power of the manager of a joint Hindu family to alienate family properties stems from necessity, which is its sanction, and so long as the joint family continues, the unity of title continuing, the same necessity must justify its alienation, in spite of the fact that there is substituted, after the death of a coparcener, his widow as a joint owner of the family property. It is true that the text of Yajnavalkya, which is the foundation of the judicial decisions with regard to the powers of a manager to alienate joint family property, by referring to the power of one alone to dispose of what belongs to more than one, has rendered scope for an argument that the power of a manager has reference to the interest of the coparceners. It has to be remembered, however, that even though only the coparceners take an interest in the joint family property by birth, others have rights in it. It may be, for example, that there are widows in the family who have got a right to be maintained there from; there may be daughters, who have got a right for provision being made for their marriages and maintenance up to the time of their marriages; there may be mothers who would be entitled to a share upon a division being made among their sons. All these rights are liable to be defeated by an alienation made by a manager. It would not be correct, therefore, to say that the basis of the power of a manager to sell a property has got reference only to the coparcenary interest of the others. Its basis is really speaking, as I have stated above, necessity. The power is wielded by the manager in the interests of the joint family as a whole.

16. It has to be remembered that to hold otherwise would lead to extremely inconvenient results. There may be a genuine legal necessity for alienating family property. There may be debts, which may be binding on the widow, and if the widow is unwilling to join in the execution of a mortgage deed or a sale deed, the family may have to wait for the creditor to file a suit and allow the family property to be sold in execution. If the widow is obstinate, this would be often detrimental to the interests of the family. It is always more advantageous to sell property by private negotiation than to allow it to be sold in execution.

As was pointed out by the Madras High Court in the case of - '*Ramaiya v. Mottayya*⁴', (p. 958) :

"..though the Act conferred new rights of succession upon widows, yet, in view of its far reaching consequences on other branches of the Hindu law, the Act should be so construed as to make no further inroad into the Hindu Law than is warranted by its plain terms. In all other respects the Legislature might be presumed to have left the Hindu Law unaffected...."

That is especially the case when holding otherwise would lead to such extremely inconvenient results. It is true that hard cases would not justify bad law, but there is ample foundation for the power of the manager to alienate family property for necessity in spite of the widow joining the coparceners as an owner.

17. In that view of the case, the appeal must be allowed, and the plaintiff's suit will stand dismissed. Parties will bear their own costs throughout.

Chainani, J. :

18. It has been held in AIR 1951 Bombay 309 that the death of a coparcener, leaving behind him a widow, who, under the Hindu Women's Rights to Property Act, 1937, has been given the same interest in the joint family property as her husband had, does not result in the disruption of the joint family, or the separation of the widow from the surviving coparceners. This also follows from the right given by Section 3(3) of the Act to the widow to claim a partition. As, therefore, the joint family continues until the widow

⁴ AIR 1951 Mad 954 (FB)

asks for a partition, its well-recognized incidents also continue. One of these is the right of the 'karta' or the manager of the family to represent the family and to be in management of its affairs; see - '*Kallian Rai v. Kashi Nath*⁵', in which it was held that so long as the widow does not claim a partition, the status of a joint Hindu family continues, and that the widow is capable of being represented in business transactions and in suits by the 'karta' of the family. It has, however, been urged that while the manager may have the power to manage the affairs or the business of the family, he cannot alienate the widow's interest in the joint family property. Under the Hindu law, the manager can alienate for legal necessity any joint family property, including the interests of both the adult and minor coparceners therein. The widow was not a coparcener before the Hindu Women's Rights to Property Act was passed. It has been held in '*Nagappa Narayan v. Mukambe*, and in other cases that the widow does not become a coparcener by reason of her taking the same interest as her husband possessed in the joint family property : See - '*Natarajan Chettiar v. Perumal Ammal*⁶', and - '*Radha Animal v. T.I.T. Commr., Madras*⁷', It has, therefore, been contended that the rule of Hindu law, under which a manager can alienate for legal necessity the interests of the other coparceners in the joint family property, will not apply in the case of the interest acquired by a widow after the death of her husband, as she is not a coparcener. There might have been some force in this argument, if the view was taken that the interest taken by the widow in the joint family property on the death of her husband was specified or defined, being

the same to which her husband would have been entitled if he had separated from the joint family at the time of his death and that thereafter she was a tenant in common with the surviving coparceners. In that view, there would have been considerable force in the contention that the widow's interest being separate and fixed was not subject to the authority of and could not be alienated by the manager. This view has, however, not been accepted by this Court, and in '*Nagappa Narayan v. Mukamba*', it has been held that the interest which a Hindu widow takes under the Hindu Women's Rights to Property Act is the same interest which her husband had in the joint family property, that her husband at the time of his death would have an undivided share, right, title and interest in the joint family property, that that is the same undivided interest in the property which the widow takes after his death, and that consequently it is a fluctuating interest capable of increasing by deaths and decreasing by births in the joint family, until the partition is claimed and severance of joint status is effected. In that case, the widow's share was held to have been augmented by the death of a coparcener in the family after the death of her husband. The same view has been taken by the Madras High Court in - '*Chinniah v. Sivagarm Achi*⁸', in which the widows share in the joint family property was held to have been reduced by an adoption made in the family after the death of her husband. Until, therefore, the widow claims a partition, there is unity of possession and unity of title in the property, in which she has an interest. The manager's authority must, therefore, necessarily extend over the whole joint family property, including the widow's interest therein.

19. The Act gives the widow the same interest in the joint family property as her husband had. It also gives her a right to ask for a partition. But apart from giving the widow these rights, the Act does not make any other change in the Hindu law. The interest given to the widow being the same as her husband had, it follows that she takes that interest with all its rights and liabilities : see - '*Saradambal v. Subbarama Ayyar*⁹',

⁵ AIR 1943 All 188

⁷ AIR 1950 Mad 538

⁹ AIR 1942 Mad 212

⁶ AIR 1943 Mad 246

⁸ AIR 1945 Mad 21

and - '*Siveshwar Prasad v. Lala Har Narain*¹⁰'. No higher rights are given to the widow than what her husband possessed. In '*Chinniah v. Sivagami Achi*', the Madras High Court has held that the widow, could not be in a better position than her husband if he had lived. In the words of Horwill, J. in '*Natarajan Chettiar v. Perumal Ammal*', "there is a survival of the husband's persona in the wife." If the husband was alive, his undivided interest in the joint family property could be sold by the manager for legal necessity. The interest obtained by the widow in the joint family property being the same, it would be subject to the same liability even after her husband's death, so long as she continues to be a member of the joint family and does not ask for partition or bring about severance of the joint status.

20. In my opinion, therefore, the manager of a joint Hindu family can alienate for legal necessity joint family property, including the interest in the property of the widow of a predeceased coparcener.

21. Similar view is taken in the following passage in Mayne's Hindu Law, 11th edn., p. 710 :

"..so long as such partition has not been made, the status of the joint Hindu family continues, and the widow is capable of being represented in business transactions and in suits by the 'karta' of the family. Her interest will be liable for joint family debts properly incurred and can be bound by an alienation made by the 'karta' for family necessity or benefit."

22. It has been suggested that the view which we are taking might result in hardship, inasmuch as a widow may be deprived of all her means of maintenance by the manager by alienating all the joint family property. There is no substance in this contention, because the Hindu law imposes a limitation on the powers of the manager, and that is, that any alienation made by him would not be binding on the other members of the joint family, unless it is for legal necessity. The widow's interest cannot, therefore, be alienated, except in cases of necessity, it is also open to her to protect her rights by claiming a partition at any time when she deems fit to do so.

23. I, therefore, agree with the order proposed by my learned brother that the appeal should be allowed.

Appeal allowed.

¹⁰ AIR 1945 Pat 116