

BOMBAY HIGH COURT

Shiramabai Wife Of Bhimgonda

Vs.

Kalgonda Bhimgonda

A. F. A. D. No. 1520 of 1961. against decision of Dist. J., Sangti, in Civil Appeal No. 258 of 1960

(Patel and Chitale, JJ.)

18.12.1963

JUDGMENT

Patel, J.

1. The question in this case is one of interpretation of Section 6 of the Hindu Succession Act 1956.
2. One Bhimgonda died leaving behind him, the plaintiff his widow, a son defendant No. 1, three daughters defendants, 2, 3 and 4 by his predeceased wife Anjanabai. Bhimgonda and his son formed a coparcenary and owned the suit property. Jangonda defendant No. 5 is the father of Anjanabai and defendants Nos. 6 and 7 are two co-sharers of some properties. The plaintiff filed this suit for partition and possession of her share in the properties claiming that she was entitled to $\frac{1}{3}$ plus $\frac{1}{15}$ i.e., $\frac{2}{5}$. Defendant No. 1 contended that she was entitled to only $\frac{1}{10}$ th share and no more. The learned trial Judge hashed that the plaintiff has $\frac{2}{5}$ th share in the family properties, and the learned District Judge has held that the plaintiff is entitled to $\frac{1}{15}$ th share, but as the defendants had admitted it to be $\frac{1}{10}$ th, he decreed accordingly. The question that arises is not easy to answer.

Section 6 of the Hindu Succession Act, 195S, is-as follows :

"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.

Provided that, if the deceased had left him surviving a female relative specified in class 1 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 devalue by testamentary or intestate succession, as the case may be, under this. Act and not by survivorship.

Explanation 1. - 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.

Explanation 2. - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein." Bhimgonda died joint with his son and the question is; What was Bhimgonda's interest i.e. what would be the share that would have been allotted to him on partition between his son and himself. If an actual partition is the criterion, on the basis of the rule of Hindu law that on a partition between father and sons wife is entitled to a share, Bhimgonda would have only 1/3rd 1/3rd going to the plaintiff. It must be noticed that the section does not provide for actual partition at first as at death, and allotment of shares to the shares and then for a division of the property falling to the share of the deceased coparcener amongst his heirs. The anomaly therefore would be that 1/3rd share which would go to the mother on actual partition she will not get, as there is not a partition during the life-time of father, nor does the section so provide and it will remain with the son and the widow and daughters will get a share only out of 1/3rd of the entire property. This is not the only complication as will appear from the next para.

3. In the present case defendants 2, 3 and 4 are daughters some of whom are unmarried. Under Hindu Law-before division between cosharers their maintenance and expenses for their marriage must be provided for, out of the joint family property. The 1/3rd share will therefore be further reduced. Is it then correct to hold that this was never intended and explanation to the section only means such share as would come to him on a division between only the male coparceners as such without any reduction ? In other words does it mean that while considering the share of the deceased coparcener females should be wholly disregarded ? If this view is taken, difficulties may arise where a person dies joint with his brothers and has two or three sisters. Undoubtedly a provision for their marriage and maintenance has to be made on a partition between the brothers otherwise it would bring about more unjust results.

4. The learned author of Sir Dinshah Mulla's Hindu Law has expressed the view in a case similar to the one in hand that only 1/3rd share will be available for division. The learned author with respect has not taken into account the rights of females in the property who are as of right entitled to a provision for their maintenance and marriage expenses. In this connection it must be noticed that Hindu Women's Rights to Property Act, 1937, has been repealed, the result being that the widow cannot claim partition and possession. The Succession Act does not provide for actual partition as at the death of her husband and allotment of the share to her which she would have

got in such property. The partition, referred to in the explanation is merely notional. The result would be that the property available for division between her and other heirs would be reduced. It would be highly unjust to her and to the other heirs and the sons' shares will be augmented for which there is no rational reason. The question is, was such a result intended by the legislature ?

5. We must construe the section not by itself but along with the other provisions having due regard to the scheme of the Act. Section 4 in this connection may also be noticed. It gives overriding effect to the provisions of the Act and is as follows :

"4. (1) Save as otherwise expressly provided in this Act,

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

Mr. Paranjape relies on this section. He says that the rule of the Mitakshara law that on a partition the mother is entitled to a share (a limited estate) and that daughters' maintenance and marriage expenses should be provided is for the reason, that they do not have any share in the family property as such nor are they entitled to succeed partition must be deemed to have been abrogated. In our view this submission is well founded. 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.

6. We therefore hold that the interest of a Hindu Mitakshara coparcener available for division under this section will be such share in the property as would be allotted to him if a partition of the property had taken place immediately before his death amongst the coparceners according to the rules of Hindu law with the qualification that the rule of Hindu law providing a share to the mother and maintenance and marriage expenses of the daughters must be treated as abrogated in view of Section 4 which gives the Act overriding effect.

7. In the result the appeal fails and is dismissed. There will be no order as to costs.
Appeal dismissed.