

BOMBAY HIGH COURT

Indubai

Vs

Vyankati Vithoba Sawadba

(Patel, C.J. Wagle, J.)

26.03.1965

JUDGMENT

Patel, J.

(1) This revisional application arises out of an order made under the provisions of Order 22 Rule 4 of the Code of Civil procedure in a suit.

(2) That short facts are that the one Balajis left two sons vithoba and Pandurang after his death who were members of the joint family. Vithoba died in 1912 leaving behind him Vyankati, defendants No. 1 and Gopalam defendants No. 2 Pandurang died in 1941 leaving behind him his widow Sarubai and daughter behind him his Indubari who was married. At the time of this death the joint family was posed to the suit property. In August 1961. Pandurang's widow Sarubai filed a suit claiming partition of the her share in the property against the defendants. After issue were framed, sarubai was examined on commission. Thereafter she died on 20th October 1962. Before the her death she had executed a will and bestowed her properties in favor of her daughter India. Indubai then made an application under the provisions of Order 22 R. 3 for being brought or record in place of her mother as the plaintiff claiming the properties under the will or in any event by reason of S. 15 of the Hindu Succession Act 1956. She claimed thereof to be the legal representative of the deceased plaintiff. Further evidence had not been led. The learned trial judge dismissed the application.

(3) The learned judge rejected the contention of the petitioner that S. 14 of the Hindu Succession Act, 1956 applied as Sarubai was not in possession of the property at the date of the suit. He relied upon her evidence on the commission that after her husband's death she did not live with the defendants that is since 1941 she did not stay in the family house saying "she remained alienated from the family for more than twenty years after her husband's death. Therefore it could not be inferred that she was in possession as a widow of her husband and her interest became enlarged by reason of S. 14 of the Hindu Succession Act." Then he relied upon

Sudersan Das v. Ram Kirpa Das AIR PC 44 and Banaji Daso v. Jivaji Yeshvant, AIR 1930 Bom 333 and Said "the doctrine is that possession of joint estate is adverse to any claim to such an estate as a separate one and the possession of by a family may by lapse of time become adverse to a separate estate". The while considering 1959 SC 577, he observed "Surabaya never showed any concern to the suit property right after 1941. She remained away immediately after Pandurangs, death. The defendants possession therefore become adverse" death of held that in such a case rights of reversionary heirs would of course be barred at the expiration of the twelve years from pandurangs death and the relied upon *Mr. Kirpal Kaur v. Bachan singh* . As to the agricultural land, he relied upon S. 151 of the Madhya Pradesh Land Revenue Code, 1954 and the decision *sitabai v. Kothulal* .

(4) Mr. Manohar relies on S. 14 of the Hindu Succession Act, 1956 in support of the will in favor of the applicant and her right to succeed to Sarubai's interest otherwise than under the will.

(5) Section 14 of the Hindu Succession Act, 1956, effected a change in the old Hindu law and covered widow estate into an absolute estate in the respect of the all "property an possessed by her" *In Bekayamma v. Veerayya*.¹ (S). "Possession" was constructed in its widest sense to mean that the state of "owning or having in one of the hand or power" similar view was taken by this high court. This view has been affirmed by the supreme court in the . The application of the meaning of the phrase was also to the not left in doubt in this the case. In this case a the husband of B, had died in 1920 an by will authorized her to adopt a son. She adopted a son C in 1942 and he was placed in possession of the property. D alleged that the was the nearest reversion of A and filed that the suit for declaration that the adoption of was invalid and not binding on him. He failed in the trial court and also the high court supreme court a preliminary objections was taken under S. 14 of the Hindu succession Act, 1956 the contenting being that the inasmuch h as the widow the had become the full owner of the estate this suit could not succeed. Their lordship said that if their adoption was invalid the widow would become the absolute owner under the section as Cs possession must the regard permissive possession an the appeal was dismissed.

(6) The question is whether Sarubai Possessed the property in the above sense. Mr. Khare contends in the she didn't possess of property at all and so there is no question of S. 14 of the Hindu Succession of act applying. His contention is that the sarubani no doubt acquired an contention interest in the property butt n her death the cases of action did not decisions in *Shamrao, v. Kashibai*², *Subba Rao v. Kaishan Parasadam* and *Jiwandandan Singh v. Sia Ram Pradas Sing*, . We must, therefore consider the nature of her interest in the property when the Hindu Succession Act, 1956, came into force and the effect of her filing the suit.

(7) Under old Hindu Law widow and had no right except that of maintenance's in the property of the joint family of which her husband dies as a member. Even in the case of separate property if

her husband left a male issue then her only right was one of the maintenance's. By Hindu Women's Right to Property act, 1937, substantial change was made in divided into four parts. Sub - section (2) gave her the joint family "the same interest as her husband had" By sub - section (1) as to the separate property of a coparcener and in the case of those governed by the Dayabhaga school, the widow took equally with the known as windows estate but got the right to the claim partition.

(8) The Legislature gave her full right in the property that her husband and with out any limitation except that she got the estate as a widow. It is clear that this right is given to the her not in lieu of maintenance or only for the purpose of maintenance or only for the purpose of maintenance. It was therefore in held that she could alienate. It was therefore held coparcenary property for legal necessity was she which she got as his heir under the same act, Harekirshnan Das v. Juesthi Panda, (S) and Prem Mahotan, v. Bandhu Mahto . It was also held by the this court is the Dagagdu v. Namdeo that she could alienate her own restricted interest to enjoy the property during her lifetime and that the alien could also enjoy the property during the lifetime and for this purpose of he could claim partition. The ratio of these decisions is that she had disposing power over the property.

(9) The decisions in subba Rao's case , Shamrao's case, AIR 1956 Nag 110 (SUPRA), Jiwnadan Singhs case and Alamelu Ammal v. Chellammal (FB) were given with reference to the position obtaining before the Hindu Succession Act 1956 come to be enacted. Apart from, this it seem come to be with great respect that the scope of S. 14 of the Act which give the widow right in the property of her husbands is considerably narrowed down by consideration of old law. The decisions in Dagdu's case do not support this view. There is no justification in our view for saying that the right of widow in the property ended with the death for the his joint statutes by declaring his intention to effect partition she also could, as she and the same interest in the prepay as the that for the husband. There can also not be any doubt that the inters in her husbands property which she got under sub - section (2) was also be devolution if the same way that the she got a she in the separate property of her husbands as the son under sub - section (1) as sub - section (3) oft Act speaks of both the devolution. The arguments sometimes made that bemuses the words "succession" is not used in the Act the widow rights are personal and end with the her death is not justified as the word has been applied in many statues even to survivorship also. (See in the matter of Hindu Women Rights to prepay Act 1937, AIR 1941 FC 72). It is not necessary however to pursue the question further as in our however view S. 14 of the Hindu Succession act has considerable effect on he matter.

(10) As stated earlier "Possessed" as used in the section means the state of the "owning and having a disposing powers". This is must mean aright in the property which is capable of

enjoyments whenever the widow will so to do. Having regard to decision in and she had ownership over her interest in the joint family property that she got on her husband's death without even claiming partition and if that is so she must be regarded as being in possession of the property. It isn't necessary in our view, that she should reduce her shares to possession either by actual partition or even asking for partition. By reason of S. 14 of the Hindu Succession Act her limited estate became transformed into full estate with all its incidents including that if she passed her heirs in accordance with S. 15 of the Act. It is not necessary for her to decide whether she could will away the property without demanding partition. In the present case, she had demanded partition and she would therefore be entitled to make a valid bequest by will.

(11) The learned trial judge held that the defendant No.1 had prescribed adverse joint family title and the fact that at another place he has been held to have become owner by adverse possession. Without a trial the learned judge ought not to have gone into these matters. It seems to us that there has been a confusion of thought in the reasoning of the learned judge. It is well settled that in the case of members of a joint family even if a member has gone out for a considerable length of time and has not enjoyed the benefit of the property his rights in the property are not lost. Even in the case of co-owner possession of one is regarded as that of all. In other words, mere non-enjoyment of the property as a co-owner does not mean that the person in possession prescribes adverse title to the non-participating owner. In order for the adverse title to be prescribed, the person in possession must be proved. (See *Nargiabai D.B. Acidawala v. Jehangir Homusji Mody*³). The learned judge has also misunderstood the decisions in AIR 1930 Bom 333, as well as the decision in the case of Babaji. In Babaji's case AIR 1930 Bom 333 joint family property was claimed as separate property and the court held that the joint family had prescribed an adverse title. In Mr. Kirpal Kaur's case a widow who had no right in the property except that of maintenance had been in enjoyment of the property as if she were entitled to it and it was held that she had become owner by adverse possession. The learned judge was in error in the holding that Sarubai's right in the property was lost.

(12) Mr. Khare, has contended as a last resort that at least qua the agricultural property, the applicant has no rights to come on the record. Mr. Khare has invited attention to the provisions of S. 151 of the Madhya Pradesh Land Revenue Code 1954 and contended that the section prescribes a special mode of succession and therefore its operation is not affected by reasons of S. 4(2) of the Hindu Succession Act 1956. Such a view was taken by Vyas, J. in .

(13) Section 151 of the Madhya Pradesh Land Revenues Code runs as follows:

"Subject to his personal law the interest of a tenure-holder shall on his death pass by the inheritance survivorship or bequest, as the case may be"

Section 4 of the Hindu Succession Act was intended to give overriding effect to the provisions of the act over all other laws applicable to Hindus except as provided by the act. Out of this, as exception, has been created by the sub-section (2). It says: declared that nothings contained in this act shall be deemed to affect the provisions of any law for the time being in force proving for the prevention of the fragmentation's of agricultural the devolution's "For the removal of doubts it is hereby of tenancy rights in the respects of such holdings" In this case no reliance's is placed in on any law providing for the presentation of the fragmentation of the Agricultural holdings or forth fixation of the ceilings. It is said however that S. 151 provides for the devolution of agricultural lands and therefore this sub = section applies. This arguments therefore must be examined.

(14) In order that the exception created by S. 4(2) of the Hindu Succession act can apply the legislation must provide for devolution of tenancies. Tenancy legislation's were and are well known. It is impossible to regard the Land Revenue act as teensy legislation. So far as the four districts of the central provinces are concerned the earliest act is the central Provinces Land Revenues Act. It sparks of the proprietary rights in the land and the tenure of the land prevalent seems be similar to Bhagdari and Narwadari tenures of Gujarat in some respects. As the occupants of the land were properties of they had hereditary and transferable title and therefore no express provisos seems coexist in this respect. Then came the central provinces land Revenues Act 1917. As the rights were made but as to widow right to inheritance was declared to be such as the right would get in the other property on the death of her husband. In Raiyatwari villages by S. 212 the rights of Raiyats were declared heritable but not transferable. As to the coded districts of Bear the Governor General of Council made a law known as the Beara Land Revenue code 1928 under the Indian (Foreign Jurisdiction) Order in council 1902. Section 56 of the same in terms similar to S .151 of the present Land Revenues Code and the marginal note is "Occupants right heritable and transferable" The present code of 1954 seems to be sequel to abolition of special tenures and Jamindaris. It has prescribed the condition under which a tenure holder occupies that land. There are two classes of tenure holders, Bhumiswamis and Bhumidharis but S. 151 applies to both. The holding of the tenure holders are not tenancies. Not being tenancy legislation, exception in S. 4(2) of the Hindu Succession Act does not apply.

(15) Even apart from this, the contention cannot be accepted. The section occurs in Chapter XII of the code which defines the classes of tenures, their liabilities and privileges. The tenure holders and have permanent rights in the land and the section is intended to make it clear that the right is heritable. No doubt the languages is not very happy but having regard to the legislative history it is clear beyond doubt that ordinary law oft holders is intended to apply. It also recognizes the right of the holder to pass it on by bequest. If the holder if an individual it would pass to left a will. If a joint family held that land it would go by survivorship according to the

ordinary law. It is not as if that the special rule has been laid down in order to preserve the integrity of land and prevent its further sub-divisions of or for the convenience of the collection of the revenue or the rent. The ordinary law therefore of inheritance, survivorship or bequest operates. If a holder is governed or any special law, customary or statutory, then the devolution is intended to be governed by the same.

(16) What Mr. Khare contends is that the words "Subject to his personal law" meant the personal law as it existed when the statute was passed, that is in , 1954. He contends that S. 151 (of Land Revenue Code) is a reproduction, of S. 11 of the Central provinces Tenancy act, 1920, as amended in 1941, and the words "subject to his personal law" must be confined only to the law as then obtaining. The history only to the law as then obtaining. The history of the legislation does not justify the contention. It may be that the Tenancy Act came to be repealed by the code but that may be due to the very comprehensive recent tenancy legislation. Does it personal law as in force in 1928, or the personal law as in force in 1954? The purpose of S. 151 was one of the applying the law of the succession of by which the holder was governed it can only which a holder was governed. There are no words in this section to mean personal law as applicable on particular day. The normal rule of construction is that "the language of a statute is generally extended to new things which are not known and could have been contemplated by the legislation when it was passed" (Maxwell on Interpretation of statutes pp. 76 and 262). Until 1956 the personal law of the Hindu was the ordinary law applicable to him. By the enactment of Hindu succession Act, his personal law was changed in suppression of the all his old law and therefore on the death when the question arose this become his personal law.

(17) True the decision in Supports Mr. Khare. With respect we find it very much difficult to agree with the conclusions of the learned judge. The learned judge assumes that S. 151 of the Madhya Pradesh land Revenue Code prescribed a particular law of the devolution and secondly that it is with the respect to tenancies. It only provided that the holding was heritable and his personal law of succession applied. The next S. 152 makes the Bhumiswami - tenures transferable and except by the Mortgage. In view of what we have said there can be no question of S. 4(2) of the Hindu succession of act saving the rights of survivors.

(18) We may also observe that this does not involve constructing the words "Any law for the time of being in force" in sub - section 92) of S. 4 of the Hindu Succession Act to mean "any law which come into force" as has been supported in the above case once it is held that the S. 151 of the code merely recognizes that the tenure is heritable and will pass according to the law applicable to the tenure holder.

(19) There is serious difficulty in accepting the ratio in Siabai's . Section 151 of the Madhya Pradesh land Revenue Code applies to all land holder from the Government, that is the rural as

well as the from and open as well as built and upon. We may take the case of the land in city on which huge building has been built. According to the decision I note above case in the a case like the decision in the above case in the case like the preset, the land would be taken by the surveyor or servos while the structure of the would be taken be the heirs of the husbands of the widow. One has to imagine and those resulting in such cases. It is true and that if the languages of an enactment's of is clear than the court has no concern with the consequences and utmost apply the law. Giving a reasonable and natural meaning to the section, as the we have done, avoids such a consequences.

(20) The matter may be viewed from another point of view. The law applicable to pandering under the Land Revenue Acts was the ordinary Hindu law as amended by Hindu Women's Rights to the property acts as a resell of which the Sarubai took the properly on his death. The limitation of there right I the property is limitation on her and that has been removed. This does not affect in any manner anything's that is prescribed in S. 151 of the Madhya Pradesh Land Revenues code, 1954, since the section does not place any restriction on a mown acquiring does not place any restriction on a woman acquiring absolute rights of owner on ship. This content therefore also fails.

(21) It was lastly contended by Mr. Khare that the in any event the Hindu Women's Rights to property act 1937 could not possibly apply to agricultural property. Originally when the act was passed it was hardly realized that the central legislature and would have been no powerboat he legislate with regard to the agricultural lands. It was only after the decision of the Federal, court in the matter of the Hindu Woman's Rights to Property that this position seemed to the have been crystallized. Different states therefore, enactment's acts giving similar rights to widows in the respect of agricultural lands. In this case the central provinces and Berar Act (No VI of 1942) being the central provinces and bear Hindu woman Rights to property (Extension to Agricultural Land) Act, 1942, received the assent of the Governor on the 6th of June, 1942 and it provided that the terms "property" in the Hindu Woman rights to property Act 1937, and the Hindu Woman rights to property (Amendment) Act, 1938, as in force in Madhya Pradesh shall included, agricultural land. The privies thereof is not material for our present purposes. This proviso creates and except. It was attempted to be argued that the inasmuch a this act was passed in 1942 and pandurang land left of the Pandurang. The simplest answer is that the act has been made restrospective expressly by its very languages. By now Itis well settled so far this court in concerned that the words " Shall be deemed to always to have:" gave retrospective operations to a statute we have no doubt therefore that the act applied to cases where the owners died even before the local was enacted provided that the provisions of the Hindu Woman' rights to property Act 1937, and Hindu to Woman Rights to property (Amendment) Act, 1938 were applicable.

(22) In the result, we set aside the order made by the learned trial judge and direct that the petitioner be shown as the legal representative of sarubai in her places and the suit be that the suit is the of 1961 and four years have shall hear that suit from day to day and the decide it within three months after the vacation. The in this courts and also the in trial courts in respect in the this application.

(23) KI/AGT/R.G.D.

(24) Revision allowed.

Cases Referred.

1AIR 1957 Andh Pra 280

2AIR 1956 Nag 110

345 Bom LR 104 and AIR 1950 PC 44

