BOMBAY HIGH COURT

Rangubai

Vs

Laxman Lalji Patil

(Patel, C.J. Bal,J.)

20.08.1965

JUDGMENT

Patel, J.

(1) This second appeal has been referred to a Division Bench by Chandrachud J., as it raise the important question of interpretation of S. 6 of the Hindu Succession of Act, 1956, and also as some doubt was entertained by the learned of the Division Bench in Shirmabai Bhimgonda v. Kaglonda Bhimgonda, of which I was a member.

(2) The facts are the plaintiff is the widow of Lalji patil. At this death, he left the plaintiff and the defendants his adopted son. The window filed the present suit, claiming half share in the property. The trial court granted one-sixth share to her and the learned assistant judge with slight modification confirmed this decree.

(3) The editor of Sir Dinshaw Mulla's principles of Hindu Law. Expresses the opinion that in view the Explanation to S. 6 of the Hindu Succession Act, 1956, only one - third share in the coparcenery property would-be available for distribution - in this case between the plaintiff and the defendants - and if this is the correct interpretation of the section. In shriamabai Bhimgonda Patil's case, the Division Bench or which I was a member decided that , in view of S. 4 of this act, the wife right to the claim and a share at the notional partition was abrogated as it was merely in lieu of maintenance's and therefore the whole of the share offer husband which was equal to that the to son, that the one-half, was available for partition between the next heirs. If that the judgment is rights the plaintiff would-be entitled to one-fourth share in the suit property.

(4) The third view now propounded on behalf of the widow in the present case is that the she is entitled to one = third share of the at notional partition and one- half of the one - third share on succession to her husbands share, which together becomes one - half of the whole property.

(5)The question is by no means an easy one to answer. The Hindu Succession Act, 1956, was

brought onto statute Book with the purpose of amending and codifying the law relating to the intestate succession amongst Hindus, section 6 a of the Act, recognize the principles of the Hindu law that coparcenery property goes by the survivorship. The proviso oft section, however qualities the law of survivorship only Explanation 1 to the proviso is material to the present question, Section 6 is as follows:

> "When a male Hindu and dies after the commencement of this act, having at the time of dis death an interest in Mitakshara Coparcencery property in hisinterest in the property shall desolate by surviouship upon the surviving members of the coparcenery and not in accordance and with this act.Provided that if the decades had left him surviving a female relative specified in class I of the schedule of a male relative specified is that class who claims through such female relative the interest of the decease's in the Mitak share coparcencery of property shall devlove by testamentary or intestate succession , as the case may be under the this act and not by survivorship.
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> Explanation 1, - For the purpose of this section, the interest of the Hindu Mitakshara conparcener shall be deemed to be the share I the property that would have been allotted to him it a partition to the property has taken place immediately of before his death, irrespective of whether he was entitled to claim partition or note.
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> Explanation 2, - Nothing contained in the proviso to this section shall be constructed as enabling aspersion who has separated himself from the coparcenery before the death of the deceased or any of this heir to claim on in the a share in the interest referred to therein."

(6) Mr. Rane Supports the view in Shirambai's case, Accoridng to him, the principal adopted inthat case namely that the share towhich the wife or widow is entitled atpartitions is lost to her by reason of if not S. 4 of the Hindu Succession act and at any rate S. 4 of the Hindu adoptions and Maintenance's act, 1956 the section being worded in similar terms Both sections so far as relevant areas follows.:

> "4 (1) Save as otherwise expressly provided in this act,:-
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> (a) any text, rule to interpretation of Hindu law or any custom or usage as part of that law in the force immediately before the commencement of this act shall case those effect with respect to any shall case which provision is made in this act.
>
> 9b) any others, law in force immediately before the commencement of this act shall case to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

(7) In order to consider how far this contention can be valid, one has to consider the nature of the wife's or mother's right to a share at a partition between her husband and her sensor her sons.

(8) we must now therefore consider the nature of the right. The question arose before this High Court in an indirect form in *Lakshman Ramchandra v.satybhamabai*[1] The matter arose in a suit brought a sole survivin members of the husband family and bona fide purchases for value from him of some immovable an trail property of the family West J. Made a careful analysis to the Hindu Lawrelating to the rights of a wife to demand a share at a partition between her husband and sons and of ambition at a partition between her sons he says [p 503].

> "Through her marriage a Hindu Woman according to Jimuta Vahana, acquires an interest in her husbands property though only according to some writers of a secondary kind such as a may be divested by a gift by the husband to third party. A higher interest could certainly not be assigned to her constantly with that text of Manu [ChaVII Pl 416] (Supra)which ranks her along with a son and slave as incapable of having wealth exclusively her own, but this interests has been deemed enough to entitle her to an equal share wish sonnies of the where her husband makes a partition of his property. The vyavahara Mavkha deals even with the reunion of a wife with the husband which implies a previous partition in the case sense probably of the allotment oaf share in division with son Apastamba Denies [Cole, Dig., bk, V ch, II p l89] that such apparition can take place because of the essential unity of the married pair, a reason which could not apply after the husband death. That event, however while removing the superior and dominant interest of the husband the superior and dominant interest of the husband papers to the have been recognized that the least some oft smarts as bringing out the wives right into greater definiteness Manu [Chap. V., pl 148] and Narada [pt 1 ch III 36]alike insist on the dependence of the woman, yet Narada [pt I, ch III, 39 ,40] assigns to the widow on her husband's death,a general control of the estate in priorty even to sons, Manu [ch.I 104] says that a partition cannot be made during her life bythe sons -cannot be made, it has been understood, without herassent - and H.H. willson [work vol 5, p28] make the necessity of thisconsent a ground for the right ofabsolute disposal over theshare allotted to her in the partition [2, Str, H.L. 383]. In this presidency the son's right toparty partiionas ifsubsists against their mother but the widow's rightshas not been regarded by the Sharstris asorginating in the partition, though a separate effect in thus given to it [Mitak, ch I sec VII., Pl I] In thecase at I west and Buhler, 27, Q 10 and the in several other cases, as at 2 Wast, and Buhler 29 ,the widow hasbeen pronounced entitled to a share equal tothat of a single son who is beign such could not makeapartition isthesence towhich the text ofthe Mitakshara Directly applices. That this shars is not amere maintencances tobe allowed I nteh discharge of filial duty appears from the pasages of Vysas Quoted in

> VyavaharaMayukah,chap IV., sec IV Pl 19:- "Even childless with wives of the father are pronounced equal shares" The sons therefore who is partition fail at allot theproper share if to their mother canbe compelled to doit afterwards, 2 West and Buhler 31 Q. 3. In Bengal it hasbeen held that the mother is a necessary party to a suit brought by a son for a partiion *Lajeet Singh v. Rajcoomar Sing*[2]. ".

"If the mother is a ncessary party to a suit for partition, it is hard to conceive of her as not having asinterest inthe property the as distinuished from a mere claim against the persons of her sons for a sufficient allotment."

(9) Referring to the ratio of the decision in *Deen Dayal Lal v. Jud Deep Narain Singh*[3], "This is to be referred to the wifes right in her husbands property acquired by her marriage.It would, therefore, seem to the suggested that though she has no right to demand a partition as such her right ois not a right availble against the husband and sons personally but is aright in te property of the coparcenery.

(10) Mr. Rane referred us to a good many decisions where it has been share observed thatthe rights to a wife or a mothers toshare at a partition between coparaceners is in lieu of maintainance. These decision are *Hemangini Dasi v. Kedar Nath*[4] and*Raoji Bhikaji v. Anant Laxman*[5] the last being prtamull Agarwalla v. Dhanbaji Bidi Where the judical committee had occasion to consider to the nature of the rights. Their Lorships Approved the observations of Mitter J, in *sheo Dyal Tewaree v. Judoonath Tewaree*[7], which are as follows:

> ".....the mother or the grandmother is entitled to a share when sons orgransons divide the family estate between themsevles but [that] she cannot be recongised as the owner of such until the division is actually made, as she has no pre - existing right in the estate except a right of maintenance."

(11) It would seem, however, that the Hindu Succession, Act has made considerble impact onthis decision as can be seem from the decision in Munnala v. Rajkumar . The facts of thiscase simple. One Garibdas left a son Gulzarilal who died in the 1939 leaving behind him two sons, Munnalal and Ramchand, and the widow of the predeceased son, Bhurilal, Sahebala, oneof the son onMunnalal, filed a suit for partition and separate possession of his one- twelfth share in the joint famil property. As hehad not brought all theparties on record, the jduge ordered that the absent parties should be brought on record, including great - grantmoth Khilonabi, Ultimately, a preliminary decree was madefor partition five - twenty - fourth to Ramchand and his sons one - fourth to Khilonabai and one - fourth toRajkumar adopted by Bhuribai. The Defendants appelatedd against this decree to High Court , and during the pendency of the appeal Khiloabai died On july 3, 1956, Ramchand and Munnala applied to the impleaded as her legal

respresentatives in the respect of the interst in the property awarded to her bythe preliminary decree. The judgment of the superme court was delivered by Mr. Justice, Shah who after referring to the decision of the Judicial committee in pratapmull's case Says.

> "Pratapmull's case, undoubtedly laid down that till actual division of the share declarded for partition of joint familestate, a Hindu wife or mother was not recongnised as owner, butthe rule cannot inour judgment apply after the enactment of theHindu Succession Act. The act is a codifying enactment and has made act far reaching changes in the strucure of the Hindu law of inheritances and sucession the act confers upon Hindu females full rights of inheritancs and sweeps away the traditional limitations on her powers of dispositions which were regarded under the Hindu law as inherent in her estate. It is ture that under the Sastric Hindu Law, the sharegiven to Hindu widow on partition between her sons orher gransons was in lieu of her rights to maintenances. She was not entitled to claim partition. But the legislature by enacting the Hindu Women's Rights to property Act 1937, made a significant departure ofthe branch of the law the act gave a Hindu Widow the same interst in theproeprty which her husband had at time of hisdeath and if the este was partitioned she become owner in spveatly ofher share, subject onth peculiar rule of extinction of the estate of the death autal our civil. It cannot be assumed having regard to this development that in enacting S. 14 of the Hindu Sucession Act ,the Legislature merely intended to declare the rule enunciated by the privy to declare the rule enuncaited by the privy council pratapmulls case His Lorship considered the combined effect of section 4 and 14 of Act andheld the premliminary decree having declaredthe rights in favour of Khillonabai, she become dentitled to the absolute rights in the property. The view of taken in Munnalal's case , that the rights of a wife or mother to a share onpartition is not amere personal right meant to assure her ofher maintenace but a rights in propety wouldfind support from decisions such as in Jairam Nathoo v. Nathoo Shamji [1906] 8 Bom LR 632, and Hushensab Rajesab v. Basappa Puradappa where is it held that from the valuve of such must be deducted the value of any stridhan received by her as gift from her father-in-law or her husband. The rule is based onthe undertandable principle that if she is to have a share in the coparenery that if she tobut just and and fair theshe must account for whatever she has received fromthe coparcenery property.

(12) Similarly, the rights of the daughters and others not entitledd to a share on a partition ofthe coparcenery property for whom provision has to be made isnot mademere personal rights but a rights in the coparcenery property [*Rajagopala Ayyat v. Venkataraman*[7] Sir Dinshaw Mulla's Hindu Law, 12th Edn., p. 476 Section 304 and p. 187 section 110] (13) Mr. Rane, relying on some of the provisions of the adoptions and Maintenances Act has argued that the wife's ormothers rights to share or the rights of daughters for provisions on partition of thejoint family

property is abrogated. He refers toS. 18 which defines therights of maintenances of a wife against ttheher husbands under certain circumstances section 19 which defines the rights maintenances of widowed daughter - in - lawagainst her father - in - law and section 20 which obliges aHindu to maitain hisor her childern and aged parents. In the second set come Section 21 and 22 which define the righs of son. The sections of themsevles show thatthe obligations of is personal. It has no relationsof righs ofproeprty. It has no relatins rights ofperson entitled to provisions being made out of the coparcenery property ofassuch. If as we have stated above the rights othe wifeof the mother to claim ashares in corporntion property and the daugters in etc. To have property and the daugters in etc. To have property and the daugters in etc to have a provision of nd the daughtes made isnot a "provision having been madein the in this Act" as required by section 4(a) thenthe priniples old Hindu Law cannot be said to be arrogated. Section 4(b) of evidently cannot apply.

(14) Section 6 recognises the Hindu Law of survivorship but the proviso crearte and exteption andprovides for devolutation of the interst of the deceased coparcener it the died intestate and left any and the female heris specifed in clauses 1 or male relative specified therein the claiming through such female relative probadly, if the Explanation such has not been there there wouldnot havebeen any diffcity inaccpeting theinterpreation suggested in Dinshaw mulla principles of Hindu Law and by others text writers. The difficulty has been created reaon of such Hindu Mitakshara coparcener. According to the Explanantion to the interest is.

> "Deemed to be the share in the property that would have been allotted to himif a partition of the property had taken place immediately before this death".

The question is what was intended by the legislation when in enacted this Explanantion. The intention of the liegaltion isto be found form the words used givign them their ordinary meaning. The Explanantion enacts of in effect that there shall be deemed to ahve been a that partition before the his death andsuch property as would have come to his share would be divisible amongst of his heris. It introduces and legal flctiions of partition before his share cannot be possible determined. In section 7 cannot be possible determined provision of succession to persons governedbythe Marukkattayam law by subsection (2) there is Explananation to each whichalso governed defiens to him interst of such coparcener to mean such the share in thepropery that the would have fallen to him in the herif partitionofthe property per captia had been made such share isthe before deemed of havebeen allottdd to him or her absolutely. It would therfore appe from the scheme of sectiions 6 and 7 that the legislature intended that is shall be deemed that there was a partition in fact and substances of and that such property as would be availble to the decaseswould be divisible among in the heris.

(15) It this so, can it then be said that though the legislature intended that there shall be deemed

to be partition of the property andthe share of the deceased coparcener shall be deemed to have been separated the share to th whcih the wife wouldbe entitled should fall in the vacuum and no relief can the granted to her? To put it in onther words where the wife of the such coparcener is entitled to share of atsuh partitioner, shouldshe not be entitled to claim it andd should such share be alloed to be enjoyed bytheson orsons? The supreme Courts in commissioners of Income - tax Delhi v. S. Teja singh had occasion to deal with legal fictions of the. In paragraph 6 ofthe judgment T.L. venkatarama Aiyat J., speakig on behalf of the court, says:

> "it is rule of the intrepretation well settled that in construning thescope of a legal fiction of it would be proper andeven necessary to assume all those facts onwhich lalone the fiction of can operate."

The His Lordships cited the observations of Lord Asquith in *East End Dwellings Co. Ltd, v. Finsbury Borough Counci*[8]*,* with approval. These observations of the are to the following effets:

> "If you are bidden to treat an imaginary state of affirs asreal, you must surely, unless prohibited from doing so, also imgaine as real the consequences and incidents which, if the purtative state of the affairs had in fact, existed mustinevitable have flowed from or emancipation from the 1939 levl of rents. The statute says that your mus imgaine of a certain stateof the affiras itdoes not say that having doneso your must causes orpermit your imagination to the boggle when it comes to the inevitable corollries of that state of affairs:.
>
> Unless therfore there is anythings contained in the Explanantion of sectio 6 or section7, the legal fiction of the of partition andseparation of the share be carried to its logical conclustiion. The shares become carried ot fixed as the partition had taken palkce during his lifetime of and the decision of the case of , and becomes applicable. If anyperson to is entitled to a share on such partition or to maintenances and if he of she insits upon it, then thecourt cannot refuse to give effectsof to such sharesof rights to the mainteances and marriages expensess. It isture on boutbt, the neither ofthe sectiion 6 nr I nthe section 7 is there a provision of for awarding such a share. However it appears to usthat it is not necessary of the expressly state so and the legal fiction of the Explanation of implies with in the furtherconsequences of that if any one is entitled to such shares as the is allowable to the her she is entitled on demand to have thatshare.

(16) In.Venkiteswara Pai v. Luis , a full Bench of theHigh Cort whileconsidering theprovisions oforder 22, Rule 4 held, that in vieww of the proviso and Explanation ot section 6, the share ofa deceased coparcener of in the coparcenery property of must be deemed to havebeen partitionedout immediatly before his death and the have deloved on this heris. It is indeed true of

that thatcase does not touch the present question. But it does not touch the partition isdeemed to have been effected and on the dates of thedeath of the coparcener and it ismust share as mustbe deemed to have come to him that is divisable amongst his heris.

(17) The view that we are taking is consistent with the objects of he Legislature dunder the old shastric law, there were stringent restrictions on females inheriting and possessing properties. There were also stingent condititons regarding their powers of disposal over such properties. In may of the schools governed by the Mitakshara law as close on heir as a sister or daughters daughter,s or a son's daughter, or sister's son were not entitled to inherit the brother. The grandfather or the maternal uncle. In order to remove these disabilites Act No.2 of 1929 Known as the Hindu Law of Inheritance Amendment of Act of 1929 was passed which gave for thefirst time a place of femals inthelist of heris entitled to succeed to the person. Then come the Hindu to women;s Rights to property act 1937, whichofthe first time recongised the rights of the widow forthe first time recognised the rights of widow to inherit the property of husbandandalso to acquire his interest even in copearcenerty properies. The present Act repealing the 1937 Act provides for succession could hardly have been itended that the share of her sons should be augmentedb y a supposed notional partition for determining by the share of her husband of effect betweens on her sons it she had to good fortune of have morethan clald onson. Similarly it could hardly havebeen intented that the provision requiredto be made out theofthe coparcenerty property for the maintenances of marriage of expenses of daughers should be left to the sons. It wouldnto the giving all the effect to the language of th statute of the mother is deined tie her leigitimate share in thecoparcenerty property on parition would is demed have taken palce of time of her husband deant. It may also be restricing the implication of hte words used in the section ofthe hold that the respect of the maintenances and marriage expenses of daguthers and others on suhc arragements should be made of the should beleft again the mercy of their brothers we have beeb referred to the articles ofth Dr. J. Duncan M.Derrettin 66 Bom LR Jour section p. 169 and B. Shriamayya of the 67 Bom LR journal section p. 65. In the first article the author has advocated the views of which have been expressed bythe Editor of sir Dinshaw Mulla's principles of Hindu law. The second articles supports the decisions Shirmabai Bhimagonda Patils case It is true that in view of what we have stated above, the decision if shirmabai's case, cannot be accepted. On the other hand it is also extremely difficult toaccept the apparent also extremely difficutlt section expressed in Sir Dinshaw view of Mulla's Hindu Law.

(18) Out conclusion, therefore is that the when the interst of the deceased coparcener is to be determined, the courts should be first determined what is the property available for partition as provided as section 304, Sir Dinshaw mulla's Hindu Law p. 475, the partitio the coparcenerty property setting aside the share if the widow to which she is entitled in the her own rights of the divide the share o the decases decree make proper provision for the maintenances and marriage

provision for the maintenances of and marriage expenses of the daguthers and award the widow her due shares in the coparcencery property and divide the property of her husband amongst the heirs.

(19) It seems that some arguments was made before Chandrachud, j. Based on the fact that section 30 of this act, which respaled by the Hindu Women's Rights to property act 1987, is itself repleced by the Act 58 of the 1960. It was propably suggested that the rights of the widow in thecoparcenery property were revived by this repeal. It is sufficient to say in this connection that section 7 of the General cluases of act lays down that the repeal of an eactment of which repelated an earlie one, the replated enactment. In this case apart from the General Clauses Act, even therepealing Act, No. 58 of 1960 itself provides of by section 5 that the repeal of theprovisonsof by repealing enactments will not revive of the enactments repelated by them.

(20) If aBench disagrees with the judgment of another Divison of Bench, the ordinary procedure of is to refer the matter of the to a fuller Bench for re-consideration. However, I was a party to the decision in Shirmabai's case and can state that the we had not been in a postition to consider all the prosand the cons of the the matter. Therefore as held in parappa Ningappa v. Mallappa Kallappa we are not bound by that decision.

(21) In thiscase there are no daugthers and no disqualified heris. On a partition during the lifttime of Lalji Patil the plaintiff would have been entitled to one - third shares and no succession to a further one - sixth share. Her share, therefore, in the property will be one - half share.

(22) We therefore, modify the decree the of the courts below the by decreeding to the platiniff one - half share insted of one -sixth shares. A preliminary decree will accordingly be drawn up and remitted to the trial court for the effectings partition in accordances with the preliminary decree in two months from the record reaching the tiral court.

(23) As the question involved issome what difficult is seems it would be proper is to orderth parties to bear their own costs throughout.

(24) EJ/D.H.Z.

(25) Order Accordingly.

Cases Referred.

1[1877] ILR 2, Bom 494

2[1874]12 Beng LR 373

3[1876] 4 Ind App. 247, [PC] he says [p. 507]

4[1888] 16 ind app 115 [PC]

520 Bom LR671, [AIR 1918 Bom 175]

6[1868] 9 Sought WR 61, 63

7AIR 1947 PC 122

81952 AC 109at the p. 132