

# ORISSA HIGH COURT

Gangadhar Rout

Vs

Subhashini Bewa

First Appeal No. 2 of 1950

(Panigrahi, C.J. and P.V.B. Rao, J.)

24.09.1954

## JUDGMENT

### **Pantgrahi, C. J.**

1. This appeal arises out of a suit for a partition filed by Subhashini Devi, the widow of one Harimohan who died as an undivided member of a Hindu joint family consisting of himself and defendants 1 and 2 who are the appellants before us. Harimohan died in or about the year 1942. Items 13 to 18 of the properties mentioned in Schedule Ga attached to the plaint were purchased by defendants 1 and 2 under Exts. B to B-2 and Ex 2 between the years 1943 to 1945. The appellants claimed that these items, which had been subsequently purchased, did not constitute the joint family property in which the plaintiff could claim a share as they were their self-acquisitions. The learned Subordinate Judge negatived this contention and gave a decree for partition in respect of all the properties, including the disputed items 13 to 18 of Schedule Ga.

2. The only point that has been strenuously urged before us is whether these items are liable to be partitioned as joint family properties. Mr. Sinha, learned counsel for the appellants, contends that the widow is entitled to a partition of only the properties as they existed at the time of the death of her husband while the rival contention urged on behalf of the respondents is that she is entitled to a share in her husband's interest in all the properties as they stood at the time of her suit for partition. A vast array of authorities has been placed before us in support of either view as the interpretation of Section 3(2) of the Hindu Women's Rights to Property Act, has led to a divergence of opinion among the different High Courts and among learned Judges of the same High Courts.

3. So far as the decisions of this Court are concerned, we have been referred to the earliest case on the subject, reported in - '*Kunja Sahu v. Bhagaban Mohanty*<sup>1</sup>', to which Ray, C.J. and myself were parties. There the question was whether a widow could alienate her husband's undivided interest in the coparcenary without suing for partition. The decision of the Bench was that she could. But we arrived at this conclusion through different processes of reasoning. Ray, C.J. held that the interest devolving upon the widow under the Act must be deemed to be property and necessarily carried with it the incident of transferability while in the hands of the widow,

irrespective of whether she enjoyed a limited or absolute interest. I held that as the Act itself laid down that the interest devolving on the widow is a limited interest known as the Hindu women's estate an alienation for necessary purposes was permissible. I was of the view that "the same interest" meant that the interest of the husband devolved on the widow to the same extent, that is, subject to the rights and obligations which that interest had at the time of her husband's death. The next reported case of this Court is - *Radhi Bewa v. Bhagwan Sahu*<sup>2</sup>, decided by a Special Bench. The question before their Lordships in that case was whether the Hindu Womens' Rights to Property Act was retrospective so as to make its provisions available to a widow whose husband had died before the passing of the Act. The decision of the majority was that it was retrospective, while Das J., as he then was, took the contrary view. There are however a number of observations made by His Lordship which have been taken advantage of by learned counsel for the appellants and have been pressed upon us for our acceptance. On the question as to whether the interest that the widow acquires in a coparcenary is the same fluctuating interest as that of her husband, His Lordship observed:

"For the purpose of the present discussion it may not be necessary to express any final opinion as to whether those views are correct".

Again, in paragraph 8 of the Judgment His Lordship observed that:

"though the question as to whether the interest that the widow takes is a fluctuating one does not require to be finally decided for the purpose of this case, a consideration of this question helps the discussion and is not out of place".

The observations that follow in the succeeding paragraphs must therefore be taken as obiter and not necessary for the decision of that case. The majority view in *Radhi Bewa's Case (B)* has been subjected to much criticism by another Bench of which I was a member, in - *Nandakishore v. Sukti Dibya*<sup>3</sup>. It is therefore clear that there is no direct authority of this Court on the question whether the properties that are sought to be partitioned can also include subsequently acquired property of a coparcener assuming of course that these subsequent acquisitions were made out of the income of the properties which had existed at the time of the death of the plaintiff's husband,

4. The question whether a widow takes, by survivorship or by inheritance, the interest of her deceased husband under Section 3(2) of the Hindu Womens' Rights to Property Act, has become a *Vexata questio*'. The use of the word "devolving" in sub-section (3) is largely responsible for the divergent views taken by the different High Courts. In *Radhi Bewa's case*, Das, J. took the view that devolution implied succession and that devolution by succession and accrual of right thereon must occur at the very moment when the succession opens. It was, therefore, held that since the widow acquires the right of her husband on his death, the devolution could only be by succession. But as

observed by the Federal Court in -*In Be: Hindu Womens' Rights to Property Act 1937*, AIR 1941 F.C. 72, the words "devolution" and "succession" do not convey a connotation that would preclude their application to describe the operation of the rule of survivorship. Similarly, the words "succession" and "inheritance" have been used in several Indian enactments as interchangeable, succession being one category of inheritance. It is true that some eminent writers have used the word "devolution" as comprehending cases of survivorship but not of

succession, but as has been pointed out by the Federal Court, devolution may be wider in scope than succession in the sense that the former is not restricted to the result of a death. The view that the widow takes by succession and not by survivorship also finds support from some of the reported cases of other High Courts. See - '*Saradambal v. Subbarama Aiyar*<sup>4</sup>', where Venkataramana Rao J. held that the Act has taken away the rule of survivorship and allowed the property to "descend to his wife". In a later case, - '*Natarajan v. Perumal*<sup>5</sup>', decided by Horwill J. (His Lordship) observed that she takes neither by survivorship nor by inheritance, but by a survival of the husband's person in her. This view was, however, dissented from in - '*Jadaobai v. Pooranmall*<sup>6</sup>', where a Division Bench of that Court held that the widow does not take the property by survivorship but by succession and that a succession certificate was required before she could realise the decretal debt of her husband. The Patna High Court held in - '*Siveswar Prasad v. Harnarain Mal*<sup>7</sup>', that the widow takes as an heir of her deceased husband. In a later case of the same High Court, - '*Kedarnath v. Radhashyam*<sup>8</sup>', Sinha, J. held that she takes not by survivorship but by inheritance. Reuben J., after reviewing the authorities on the question held that

"the weight of judicial opinion is that the widow succeeds not by survivorship, but by inheritance or something akin thereto".

The Bombay High Court has taken an intermediate view and has held in - '*Nagappa Narain v. Mukambe*<sup>9</sup>', that the devolution of the deceased husband's interest on the widow is neither by survivorship nor by inheritance, but is a special mode of devolution created by the Act. This view has found favour in certain later decisions of the Madras High Court as for instance in - '*Seethamma v. Veeranna Chetty*<sup>10</sup>', - '*Subba Rao v. Krishna Prasad*<sup>11</sup>',

5. It may therefore be safely inferred that the present trend of decisions is in favour of the view that the devolution of an estate, on the widow, under Section 3(2) of the Act is neither by survivorship nor by inheritance, but is a special right created in favour of the widow by the Statute. She is not a coparcener in the family, nor is she a joint tenant with the coparceners. Her interest lapses, on her death, not to her husband's heirs but to her reversioners, namely, the other coparceners. She cannot be the Karta of the family by reason of the limited estate that she acquires, nor can she call upon the manager to account for the income of the family. She cannot question the alienation made by the manager for justifying necessity. In other words, her interest in the property remains just as it was before the passing of the Act, except that under the Act she can call for a partition and reduce her husband's interest to separate possession. Under the Hindu Law she had only a right to maintenance in the joint family, while the Hindu Women's Rights to Property Act, which is designed to give her better rights, enables her to step into the shoes of her husband and ask for partition. But the interest given to her by the Act is still the limited estate known as the Women's estate. Her right and liabilities in other respects remain the same as they were before the passing of the Act. If and when she works out a severance of status by suing for partition, the interest of her husband in the property gets defined and acquires a separate existence as an entity. This interest will devolve, on her death, on her husband's heirs and not revert to the coparcenary as it has already been disrupted.

6. If, therefore, she remains only as a member of the family and does not become a coparcener by reason of the Act, what is the nature of the property that she is entitled to share in when she

sues for partition. The Act does not, by itself, effect a severance in status. The joint family continues to have the same status as it had at the time of the death of her husband. The property referred to in Section 3(2) of the Act, is the joint family property held by the coparcenary. The Section provides that the widow shall have the "same interest as he himself had" in that property at the time of his death. The interest is of a fluctuating character and is liable to be either reduced or augmented on the birth or death of a coparcener. If the husband of the widow had not sued for partition, his interest in the coparcenary property would be open to the risk of fluctuation. Can it be said that his widow gets a superior right under the Act? Can she insist upon the identical share which her husband would have had at the time of his death? One of the incidents of a coparcenary property is that no coparcener can predicate what his share is at any definite point of time, unless he gets his share separated by partition. It would be anomalous to hold that a widow would be entitled to claim a definite share which her husband could not have. The inclination of my mind is to hold that the Act gives the widow just what her husband had, namely, his undivided interest, subject to fluctuations arising out of the varying fortunes of the family. If her husband had sued for partition he would be entitled to a share in all the properties belonging to the family as they existed at the date of the suit. It would therefore be a logical inference to make that his widow stepping into his shoes would have the same right to share in all the properties belonging to the family as they existed at the date of the suit.

7. Mr. Sinha's contention that her right should be restricted to the property that existed at the time of her husband's death is upon the use of the word "had" in sub-section (2) of Section 3 which says that the widow shall have in the property the same interest as he himself had, but as I have said the Section refers to the interest that her husband had and not to a share, namely, the interest he had of enjoying the income jointly with the coparceners and, if necessary, of calling for a partition of that interest. It is this interest that devolves upon the widow and can be worked out at any time she chooses, otherwise, the result would not only be anomalous, but would be highly inequitable. Take, for instance, a case where the joint family had deposited Rs.5,000/- in a Bank fetching interest, at the time of the death of a coparcener. The deposit fetches interest and there is a substantial accretion to the corpus by the time his widow sues for partition. If Mr. Sinha's contention were to be accepted, the widow would be entitled only to a share in the corpus and not in the subsequent accumulations of the income which grew out of that corpus. Take the converse case of the deposit being lost to the family as a result of the failure of that Bank. Would the widow be entitled to call upon the remaining coparceners to contribute for the loss and give her a share of the corpus that has vanished? The result in both the cases would be opposed to reason. If the widow chooses to remain silent and does not ask for partition she must take the risk of either there being an accumulation or a dwindling of the corpus. Much the same reasoning would apply to immovable property and the widow could take a share in the family property as it existed at the time of her suit.

8. In a suit for partition the Court has to ascertain who the parties are that are entitled to a share, besides determining the assets and liabilities available for partition. The plaintiff's rights have got to be determined on a consideration of both the factors. I would, therefore, hold that the plaintiff is entitled to a share in all the properties of the family as they existed on the date of the partition irrespective of whether they existed at the time of her husband's death or not. See AIR 1951 Bombay 309 and - *Parappa v. Nagamma*<sup>12</sup>, and - *Shivappa v. Yellawa*<sup>13</sup>,

9. It has been found that the family owned fifteen acres of land at the time of the death of the

plaintiff's husband and that about five acres were purchased by the appellants between the years 1943 and 1945. The learned Subordinate Judge has found that the individual incomes of the appellants were not such as to enable them to acquire these properties. No accounts of the joint family income of the appellants have been produced and they have failed to prove that these items were their self-acquisitions. In these circumstances the Court below was right in concluding that they grew out of the joint family income and formed a part of the joint family property. The plaintiff would accordingly be entitled to her half share therein.

10. I would, therefore, affirm the decree of the learned Subordinate Judge and dismiss this appeal with costs.

**P. V. B. Rao, J.**

11. Defendants 1 and 2 in a suit for partition filed by the plaintiff are the appellants. Kangali and Mani were the sons of Pahali Rout. Kangali had two sons - Gangadhar defendant No.1 and Khetramohan defendant No.2. Mani had one son Harimohan and the plaintiff is his widow. Harimohan had died about 5 years prior to the suit. The plaintiff alleged these three defendants 1 and 2 and her deceased husband Harimohan were living jointly in mess and property till Harimohan died leaving no male issue; that the plaintiff continued to live joint with the defendants; that under the Hindu Women's Rights to Property Act, 1937, she acquired the interest of her husband in the joint family property and she filed the suit for partition of the interest of her husband.

The properties consist of the Schedule property in which defendants 3 to 5 are cosharers having 10 annas 8 pies share. The plaintiff claims 2 annas 8 pies share in the Kha schedule property and 8 annas share in the Ga schedule property belonging exclusively to the plaintiff and defendants 1 and 2. The properties described in Gha schedule are movable properties of the plaintiff and defendants 1 and 2 in which also she claims 8 annas share. The properties described in Una schedule are the movable

properties exclusively belonging to the plaintiff as her 'joutuk' properties which are in the custody of the defendants. She claims partition of the properties described in Kha, Ga and Gha schedules and possession of the properties described in Una Schedule. Defendants 3 to 5 do not object to the partition but urge that the property which is in their specific possession as mentioned in the schedule of the written statement should be allotted to their shares.

12. Defendants 1 and 2 have no objection to the plaintiff's share being partitioned in the Kha schedule properties. They dispute her right to certain items in the Ga schedule properties. They contend that lots 13 to 18 of the Ga schedule properties are their self-acquired properties in which the plaintiff has no share. In the remaining lots of the Ga schedule properties they claim 10 annas 8 pies share and allege that the plaintiff is entitled only to 5 annas 4 pies share as her husband contributed an equal share in consideration money as each of the defendants 1 and 2. They also contend that plaintiff has no right to any of the properties described in Gha schedule. They allege that the Una schedule properties are with the plaintiff.

13. The learned Subordinate Judge held that the plaintiff is entitled to a partition and as admitted by the defendants she is entitled to a half share, that is, 2 annas 8 pies share in the Kha schedule properties. With regard to the Ga schedule properties he held that lots Nos.13 to 18 are also liable to partition and that the plaintiff is entitled to 8 annas share in all the Ga schedule properties.

With regard to the Gha schedule properties also he held that the plaintiff is entitled to 8 annas share. He held that the plaintiff is entitled to recover 'sunnar nutha' valued at Rs.30/-, sunar nuluk valued at Rs.6/4/- and rupar godhela valued at Rs.18/- in all Rs.54/- out of the Una schedule properties.

14. In appeal, the learned counsel for the appellant contended (1) that the plaintiff is not entitled to 8 annas share in the Ga schedule properties other than covered by lots 13 to 18; (2) that the Gha schedule properties are the joutjik properties of defendants 1 and 2; (3) that the ornaments referred to in the Una schedule were never in their custody; and (4) that with regard to items 13 to 18 of Ga schedule, the plaintiff is not entitled to any share, as they were the self-acquired properties of defendants 1 and 2 and as they were acquired subsequent to the death of Harimohan in which Harimohan had no interest at the time of his death and the plaintiff consequently has no right to claim a partition.

15. With regard to the first point that the plaintiff is not entitled to 8 annas share in the properties of Ga schedule other than items 13 to 18, it is admitted that these properties were acquired jointly by defendants 1 and 2 and late Harimohan. The learned counsel for the appellant contends that in these properties she is not entitled to 8 annas share, but only to a 1/3rd share as these properties were jointly acquired by all the three persons. It is in evidence that all these properties were acquired from the joint family income. The defendants' contention that for acquiring these properties each one of them contributed an equal share of consideration is not made out and cannot be accepted. They having been acquired from the joint family income, the plaintiff is entitled to 8 annas share.

16. As regards Gha schedule properties which consist of cattle, furniture and utensils, the defendants 1 and 2 failed to prove that they were their exclusive properties. A list said to have been prepared of the joutuk presented to them at their marriages, is not produced in evidence though they admit that the list is available at their house. There is no evidence also that these properties were obtained as joutuk properties. These properties were thrown into the common stock and the commissioner prepared a list of joint family movables. All these properties mentioned in the list are joint family properties and the plaintiff is entitled to an 8 annas share.

17. The Una schedule properties consisting of the ornaments of the plaintiff must be held to belong to the plaintiff. The defendants' contention that from the time of her husband's death she was living in her father's house and the widowhood ceremony was performed there and those ornaments were not given to them cannot be accepted. It has been held by the learned Subordinate Judge that the properties other than her ornaments described in the Una schedule consisting of utensils, furniture's, etc., are the joint family properties and the plaintiff has no right to them and this finding is not challenged before us. The plaintiff in her evidence states that these ornaments were removed from her body and were given to her Dedhasur Gangadhar for safe custody. The defendants contend as stated above that she was at her father's house and the widowhood ceremony took place there. The plaintiff, according to her evidence, went to the house of her husband immediately on hearing of his illness: that her husband died the next day and that the widowhood ceremony was performed at her father-in-law's place. P.W.2 corroborates her evidence in this respect. The defendant's story cannot be believed. The defendant says that he sent defendant 5 to inform her of the death of her husband. But this D.W.5 though he was present in Court was not examined to corroborate that story. There is no specific denial in the written statement of the entrustment of these ornaments to the defendants. So, I hold that the ornaments

had been entrusted to Gangadhar and he is liable to return them to the plaintiff or must pay then value, Rs.54/-.

18. Coming to the last point which is the most important one, it was vehemently argued by the learned counsel for the appellants that the plaintiff cannot claim any share therein. Items 13 to 18 of Ga schedule properties were admittedly acquired after the death of Harimohan in the names of defendants 1 and 2. These acquisitions are covered by Exts. B to B2 and Ext.2. The plaintiff's name does not appear as a purchaser in these kabalas. Exhibit 2 is the original kabala of lot No.15 measuring 1.62 acres purchased for a consideration of Rs.600/- dated 9-5-1946. This was filed in Court by the plaintiff. Exhibit B comprises lot No.17. It is for Rs.200/- and is dated 18-2-1945. Exhibit B1 is for lots Nos.13 and 14 for Rs.100/-dated 13-1-1943. Exhibit B2 is for lot No.16 for Rs.300/- dated 17-5-1944. The total consideration paid for all these kabalas is Rs.1,200/- and they were acquired within a period of 4 years. The defendants contend that these are their self-acquired properties in which the plaintiff has no share. The vendors of these properties were not examined to prove that the consideration for these kabalas was paid from the money belonging to defendants 1 and 2. The second defendant is a school teacher drawing a salary of Rs.22/- a month and the first defendant owns a grocery shop. Gangadhar is the Karta of the joint family and was managing the joint family properties and was getting income from those properties. I, therefore, hold that these are not the self-acquisitions of defendants 1 and 2 but are the joint family properties having been acquired from the income of the joint family.

19. But the question still remains whether the plaintiff is entitled to a share in these properties, they having been acquired after the death of Harimohan.

20. The learned counsel for the defendants-appellants contends that the plaintiff's under the Hindu Women's Rights to Property Act, 1937 as amended by Hindu Women's Rights to Property Act (Act 11 of 1938) would be the share which the husband would be entitled to at the time of his death and that share would be in the properties which were in existence at his death. He contends that the widow under the said Act is not entitled to a share in the subsequent acquisitions of the joint family after the death of her husband as under the Act she succeeds to her husband's interest by inheritance and as such the point of time to ascertain the quantum of that interest is the date of death of the husband. He further contends that the widow ceased to be a member of the family and her interest cannot be a fluctuating interest but is a definite share of the husband in the properties existing at the time of the death of the husband. This contention necessitates a consideration of the relevant sections of the said Act.

21. The Central Legislature enacted the Hindu Women's Right to Property Act (Act 18 of 1937) in 1937 and it came into force on the 14-4-1937. The said Act was amended by Act 11 of 1938. The Federal Court by its decision in AIR 1941 FC 72 decided that the Act was ultra vires in so far as it related to agricultural land in respect of which only the Provincial Legislature had competence. Consequent thereupon the Orissa Legislature passed Orissa Act 5 of 1944 extending the Hindu Women's Rights to Property Act of 1937 to agricultural lands in Orissa. For purposes of this appeal, the relevant provisions of the Act which are material are sub-sections (2) and (3) of Section 3 which are as follows:

"(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law 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'.

(3) Any interest devolving on a Hindu Widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

22. The learned counsel for the appellant relies upon the statement in *Mayne on Hindu Law and Usage*, 11th Edition, at page 708 which is-

"When a widow succeeds to her deceased husband's interest in a joint family, she takes it only by inheritance and not by survivorship; she had no right by birth and she was not a co-owner prior to his death. There are no words in the Act by which she can be deemed to be a coparcener. The interest which devolves upon her is declared to be a Hindu Woman's estate. That means that on her death it will go to her husband's heirs which cannot mean all his coparceners. In other words, on her death, whether before or after partition, her interest will go to her husband's male issue who will take it as ancestral property.

Whether they will take it as tenants-in-common or as coparcenary property is a different question. In the absence of her husband's male issue, her interest will pass to the daughter, daughter's son or other heirs of her husband. The Act however does not effect a statutory severance or disruption of the entire family. To interpret the Act as effecting such a severance would cut across the recognized principles of Hindu law and would not take for a rational and orderly succession." On the strength of this passage the learned counsel contends that she succeeds to her husband's interest by inheritance and that her share is what her husband is entitled to on the day of his death in the then existing family properties. But the learned Editors of the book observe later on as follows

"The intention of the Act seems to be only to interrupt 'survivorship' and to protect the right of a widow so that she may have the same interest as if she continued the legal persona of her husband till partition. The fact that she will hold her interest under the Act in quasi-severalty does not materially alter the position of the joint family in other respects. Having regard to her position as a member of a joint family and to the object of the Act and to the words 'the same interest as he himself had', she cannot be deemed to be in a better position than her husband if he had lived.

Though the language of the Act is by no means free from ambiguity, there will be many inconveniences and hardships resulting from the view that she takes the estate, as on the date of her husband's death. So this state of things could not have been intended by the Act. The anomaly of a widow holding a woman's estate in the undivided property of her husband must be necessarily dealt with as a special case; the 'interest she takes may well be a fluctuating interest till there is partition'. It has accordingly been held, following this view, that her 'right should be determined as on the date of her demand for partition."

23. The learned counsel also relied upon the observation of Jagannadhadas J. (as he then was) in

the case of ILR (1951) Cut 177 : AIR 1951 Orissa 378. This was a case decided by a Special Bench in which the main question for consideration was whether the Act was retrospective so as to confer a right on a widow whose husband died prior to the passing of the Act. The majority judgment consisting of the then Chief Justice and Narasimham J. was that the Act was retrospective. In the judgment of the Division Bench where Jagannadhadas J. differed with the Chief Justice, he observes at page 187:

"The one thing is clear from these sub-sections. It is this: The quantum of the interest which a widow gets is the same as a husband had during his lifetime and therefore does not fluctuate with reference to any future changes in the constitution of the family. It is also clear that that interest is measured by what it was when the husband died, since the interest is referred to in sub-section (3) as 'devolving' on her from her husband and in sub-section (2) as being the same which he had when he died.

It is also well settled that a widow getting her rights under Section 3(2) does not become a coparcener in the family and therefore does not represent her husband in that sense. With the liability to fluctuations of interest which her husband's interest would have undergone, if he continued to live till the date of commencement of the Act, and if there had been any changes in the family between the date of her husband's death and the date of the commencement of the Act. It is, therefore, reasonably clear that the commencement and the question of the widow's interest has reference to the point of time, when her husband died and it would also appear that her rights are in respect of the family property as it stood at the time when her husband died. If this is the correct view of the amplitude, the quantum and the commencement of the widow's interest, it appears to me to be almost impossible to fit in the case of a widow whose husband died prior to the Act, into the frame-work of Section 3(2)". In the dissenting judgment of the Special Bench, Jagannadhadas J. practically reiterated his views stated above where the learned Judge says:

"On her death, her interest in the joint family property, or the share therein which she may take on separation, does not, prima facie, revert back to the joint family or coparcenary as such, but goes to the heirs of her husband as the fresh stock of descent."

The point for decision in this case being whether the widow of a coparcener who had died before the Act came into force, could claim the benefit of the Act, the questions as to the nature of the right which a widow gets under Section 3(2) and the course of devolution of that estate after her death did not arise for decision in this case and the observations of the learned Judge cannot be taken to be a considered pronouncement in the matter. On the other hand, in the majority judgment, Chief Justice Ray observes on this question as follows:

"On partition, the Karta's power of management and control would be kept in abeyance in regard to the property which has fallen to a widow, for such time as she remains in its possession..... When she dies the woman's estate goes back to the joint family if it exists. The conception of Hindu Law is that after woman's estate terminates, the property goes back to the stock from where it had come. In the present case, the stock is the coparcenary and coparcenary property.

It is the same interest that her husband had, that means, a coparcener's interest in the coparcenary property. There is absolutely no guarantee either in the implied conception or connotation underlying the idea of Hindu woman's estate or in the language of the Act that would warrant the conclusion that the property should go to her husband's heirs as his separate property, he being considered to be a fresh stock of descent for the purpose of inheritance."

24. The learned counsel for the appellant also relies on a sentence in the judgment of Chief Justice Ray in the case of AIR 1951 Orissa 35 wherein the learned Judge says:

"I cannot go so far as that because it would be difficult to assume that her interest will be enhanced on the death of coparcener as it would have been had her husband been alive." Indicating that in his Lordship's view the interest which the widow had cannot be enhanced. But the learned Judge also says in another portion of his judgment: "The rule of survivorship that stands in the way of widow succeeding to her husband's estate in a joint family property is suspended for her benefit.....The general effect of the Act is that the rule of survivorship is kept in abeyance."

But Justice Panigrahi (as he then was) in coming to the same conclusion as the learned Chief Justice that the alienation made by the widow was valid, observes in the course of his judgment:

"The Act does not effect a statutory severance of status though it creates, on the death of a coparcener, a limited interest known as the Hindu Woman's estate in favor of his widow. The coparcenary remains intact, but the husband's interest does not pass to his coparceners by survivorship and devolves on his widow. The widow remains a member of the coparcenary though she is not a coparcener herself. She can thus be represented by the Karta of the family and the interest that she has acquired is liable to fluctuation as the interest of any other living coparcener is, unless she carves out her estate from the coparcenary by a partition.

The Act being remedial, it should receive a beneficial construction so that the purpose of the legislation may be carried out. If the appellant's contention were to be accepted, the result would be that, on the death of a coparcener, his widow should invariably be driven to file a suit and she can claim no right in the coparcenary unless it is disrupted. This could hardly have been the result intended by the Legislature."

This decision does not therefore help the appellant's contention.

25. In the case of AIR 1953 Orissa 240 Panigrahi, J. (as he then was) observes, with reference to the observation made by the Chief Justice in 'Radhi Bewa's case' that reduction by fluctuations is permissible, but not enhancement:

"Fluctuation of an interest by births or deaths is one of the normal incidents of a Hindu coparcenary. I can find no authority for the proposition that the interest is liable to fluctuation by reduction, but not by enhancement. Either a member is a 'coparcener' or he

is not."

In my opinion, therefore, none of the decisions cited by the learned counsel for the appellant of this Court supports his contention.

26. The learned counsel for the appellant also relies upon the case in - '*Bhagwat Shukul v. Mr. Kaporni*'<sup>4</sup>, which also does not help him, as it simply says:

"The plaintiff who is undoubtedly an heir to her deceased husband under Section 3(2) of the Hindu Women's Rights to Property Act, 1937 will have the same interest in the disputed property as her husband had at the time of his death".

27. The case of AIR 1944 Nagpur 243 supports the plaintiff's contention to some extent. In that case, their Lordships in dealing with the question whether the widow succeeds to the properties of her husband under the Act by survivorship or succession in order to decide the question whether a succession certificate is necessary to realise a decree standing in the name of her husband, held that the widow succeeds by inheritance, under the Act, to the interest of her husband. They observe:

"Survivorship having been ruled out the only other mode by which she will be clothed with the rights of her husband in the property, though to a limited extent, would be by succession or inheritance if she claims under the Hindu Women's Rights to Property Act."

In my view, this reasoning of the learned Judges is not correct, if I may say so with respect, as the later decisions to be noticed presently show that this does not necessarily follow. The trend of judicial decisions seems to be that the succession of the widow under the Act is neither by survivorship nor by inheritance. The widow's right is held to be a special statutory right.

28. In the case of AIR 1942 Madras 212. Venkataramana Rao, J. held that a widow of an undivided member of a Hindu joint family takes the same interest in the joint family property as her husband himself had, subject to the restrictions placed on her powers by Section 3(3) of the Act. In this case the plaintiff had obtained a decree for money against defendant 1 who died subsequent to the date of the decree. His wife defendant 3 was brought on the record as his legal representative. The question that arose for determination was whether the properties which were in the hands of the defendant 3 were liable to be attached in execution of the decree. The relevant provisions of the Hindu Women's Rights to Property Act were considered by the learned Judge and he observed that under Section 3(2) of the Act the interest taken by the widow was the same interest as the husband himself had, that is, the interest of an undivided member of a joint family in the joint family property and that the said interest was capable of definition and so far as this presidency is concerned, it is liable to separation by partition and alienable inter vivos for valuable consideration and liable to be seized in execution of a decree for the personal debts of the member and that giving the language its plain meaning the widow takes that interest subject to the rights and obligations attached to that interest and subject to the restriction placed on her powers by Clause (3) of Section 3 of the Act. But this case does not help the appellant as it was assumed in this case that the Act had taken away the rule of survivorship and allowed the

property to descend to his wife. The interest which the widow takes on the death of her deceased husband is not an estate by inheritance. She simply steps into the shoes of her husband. The consequence of that decision would be that the plaintiff would be able to attach the undivided share in right, title and interest of her husband in execution of a decree which he had against her husband before his death. The undivided share in right, title and interest of the husband not having gone either to any other member of the joint family by survivorship but having devolved upon her in the manner contemplated by the Act would be liable to attachment at the instance of the judgment-creditor and in this view the judgment of the learned judge, if I may say so with respect, is correct and does not in any way support the appellant's contention.

29. In the case of - '*Radha Ammal v. Commissioner of Income Tax, Madras*'<sup>15</sup>, in which the point for consideration was whether a widow who becomes entitled to an interest in the estate under the Act becomes a coparcener and can claim to be a Karta of the joint family, there is an observation by Viswanath Sastri J. as follows:

"A widow who takes her husband's estate under Act (18 of 1937) gets it only by inheritance according to the rule prescribed by statute and not by survivorship."

But this observation was not material to the decision in the case and the exact point whether she should succeed by inheritance, was not before their Lordships for their consideration.

30. The learned counsel then relied upon a decision of the Patna High Court in AIR 1945 Patna 116. A Division Bench consisting of Fazl Ali C.J. and Reuben J. held that the interest which is acquired by a widow under the Act is not as a survivor but as an heir of her husband and that the interest therefore is an asset of her husband and can be proceeded against by a creditor even though it may be an undivided interest in a joint family property. But under the Mitakshara law the undivided interest of a coparcener might be attached in his lifetime in execution of a decree against him for his personal debt. But it could not be attached after his death except where the coparcener is the father. So this decision loses much of its force.

31. The learned counsel for the appellant then relied upon the case of AIR 1953 Patna 81. Their Lordships Sinha and Reuben JJ. held in this case that on the death of a Hindu survived by a widow, a brother and daughters, the widow does not become a coparcener with her husband's brother, in the full sense of the term, so as to attract the rule of survivorship. She takes the property, the share of her husband, by inheritance, with the result that on her death the property goes not by survivorship to the husband's brother but by inheritance to her husband's heirs. But Reuben J. who was a party to the decision in AIR 1945 Patna 116 observes in his judgment as follows:

"To sum up, the weight of judicial opinion appears to be that under the Act the widow succeeds not by survivorship but by inheritance or something akin thereto.'" (His Lordship does not definitely say that she succeeds by inheritance only). "The property in her hands is liable to be followed in execution of the debts of the previous male owner. She continues to be a member of the joint Hindu family and, as such, can be represented by the Karta in proceedings in Court.

She has the same interest in the property, subject to sub-section (3) of Section 3 as the last male owner had. Her interest is, therefore, liable to fluctuation by variations in the number of coparceners. Her interest is a limited one of the nature known as a Hindu Woman's estate, but she has the same right of claiming partition as a male owner. She confines in herself the persona of the male owner and, on her death, the property devolves as it would have devolved if he had died on the date when she dies." This observation, in my view, militates against the decision of their Lordships that the widow takes the estate by inheritance as in that case there could be no room for fluctuation of interest.

32. In the case of - *Vinod Sagar v. Vishnubhai*<sup>16</sup>, it was held that the widow continues to be a member of the joint family as she was even during her husband's lifetime and further expressed a doubt as to whether her interest would be subject to fluctuation by births and deaths in the family as her husband's interest would have been and what the widow gets is the interest which her husband had at the time of his death and not what he might have had if he had continued to live. In my view, this case cannot support the appellant's contention. On the other hand, many decisions of the Madras, Bombay, Allahabad and Sind High Courts take a view of the Act which completely cuts the contention put forward by the learned counsel for the appellant.

33. In the case of AIR 1943 Madras 246 Horwill J. held that where a widow endorses a promissory note executed in favor of her deceased husband, the endorsee need not procure a succession certificate in favor of the widow before institution of a suit on the note. The learned Judge observes:

"The widow does not obtain the right given under this section by survivorship. She was not a coparcener before her husband's death and she was not one afterwards. I do not however think that it follows that because the widow does not obtain her right by survivorship that she must obtain it by inheritance. The effect of Section 3, Clauses (2) and (3) may be regarded as a survival of the husband's persona in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances.

As the widow did not inherit her right, no succession certificate is necessary."

34. The same view was reiterated by the learned Judge in another case - *Satyanarayana Charrlu v. Narasamma*<sup>17</sup>, wherein he held that:

"Although she is not a coparcener, she has the rights of her husband who was a coparcener. She is a member of the joint family and the son is the proper person to bring a suit on behalf of the joint family of which his mother is a member."

35. In the case of - *Chinniah Chettiar v. Sivagmi Achi*<sup>18</sup>, a Division Bench of the same High Court held that a widow under the Act succeeds to her husband's fluctuating interest in the joint family property and therefore her share should be worked out as on the date when she filed the suit for partition. The learned judge observed:

"A coparcener's interest is not a fixed interest it is subject to alteration. For example, it is

affected by the death of a coparcener, or by the adoption of a son by a coparcener.....The section does not give the plaintiff any greater rights than those possessed by her husband and when she sought partition, the joint family had been increased by the adoption of a son by the head of it."

36. The view of Horwill, J. was accepted in a Division Bench of the Madras High Court in the case of AIR 1950 Madras 785. Their Lordships observed:

"In our opinion, the status of a Hindu widow of a deceased member of a joint family governed by a Mitakshara under the provisions of the Act is not that of a coparcener, but that of a member of the joint family with certain special statutory rights. The death of a coparcener who is a member of a Hindu joint family does not effect a severance or disruption of the joint family, merely because he leaves behind him a widow who has certain statutory right under the Act. The widow cannot be regarded in any sense as the widow of a divided member.

The result is that the joint family will continue as before except that the widow would have a special limited statutory right. Because the joint family continues its well-recognized incidents will also continue, namely, the right of the Karta to represent the family and to be in management of its affairs."

37. In the case of AIR 1954 Madras 227 an exhaustive and lucid expression of the nature of the widow's right under the Act, if I may say so with respect, was given by their Lordships. In that case, pending a suit by a Hindu Mitakshara deceased coparcener against her husband's brothers for partition of her husband's share in the family properties under the provisions of the Act. She died and an application was preferred on behalf of her minor daughter for bringing her on record as legal representative and continuing the suit. The learned Judges rejected that application holding that the daughter cannot succeed in maintaining the application and observed:

"Section 3(2) of the Act does not operate as severance of interest of the deceased coparcener, the right which a widow gets under that section is not as heir of her deceased husband: it is a statutory right based on the recognition of the principle that a widow is the surviving half of her deceased husband: that the incidents of that right are those specified in the Act: that such right is one personal to the widow and comes to an end on her death: that the estate does not, on her death, devolve on her husband's heirs: and that the right of coparceners to take by survivorship is suspended as against the widow of a deceased coparcener and such right reasserts itself on her death."

38. In the case of AIR 1954 Madras 576 a Full Bench of the Madras High Court held:

"The Act has conferred a new right on the widow of a deceased coparcener in modification of the pre-existing law. Section 3(2) of the Act does not bring about a severance of interest of the deceased coparcener. Certainly the widow is not raised to the

status of a coparcener though she continued to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she continued the legal persona of the husband till partition. From the standpoint of the other male members of the joint family, the right to survivorship was suspended.

The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passed away. She would have during her lifetime all the powers which her husband had save that her interest was limited to a widow's interest. She could alienate her widow's interest in her husband's share; she could even convey her absolute interest in the same for necessity or other binding purposes. She could ask for partition and separate possession of her husband's share. In case she asked for partition her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime on her demise the succession would be traced to her husband on the basis the property was his separate property. If there was no severance, it would devolve by survivorship to other members of joint Hindu family. This conception of the legal persona of husband continuing to live in her steers clear of many of the anomalies and inconsistencies that otherwise would arise."

39. In the case of - '*Rathinasabapathy V. Saraswathi Animal*'<sup>19</sup>, another Division Bench of the Madras High Court held that under the Act the widow does not get either by survivorship or by inheritance, but it is a special statutory right which she gets solely by reason of her being the widow of her husband.

40. This view of the Madras High Court was also taken by the Bombay High Court in the case of AIR 1951 Bombay 309. It was held that the interest which the widow gets in the joint family property on her husband's death was neither an interest by survivorship nor one by inheritance but was one specially created under the terms of the Act. The interest which the widow acquired in the family property was liable to fluctuation and until a separation was demanded, it was not possible to ascertain the share to which the widow would be entitled under Section 3(2) and (3) of the Act.

Although the widow got an interest in the joint family property as a result of the death of her husband she got a share in the property of the family as at the date of the suit for partition.

41. In the case of AIR 1954 Bombay 47 their Lordships held:

"Alter the death of her husband the widow continued to be a member of the joint family; that the said interest vested in her; and that the quantum of her share would be liable to fluctuations and that the share would be determined when partition takes place."

42. In the case of - '*Gangabai v. Sm. Parmesharibai*'<sup>20</sup>, it was held by a Division Bench of the Sind High Court that under Section 3(2) of the Act a Hindu Widow's interest in her husband's coparcenary estate, so long as she does not claim partition, is liable to be increased or decreased by the death or birth of coparcener in the joint family in the same way as if her husband had been

alive.

43. The same is the view of the Allahabad High Court also. In the case of - '*Kallian Rai v. Kashi Nath*<sup>21</sup>', it was held that the Act was intended to give better rights to women in respect of property but there is no indication that the Act intended to interfere with the established law relating to joint family. Whether inroads it may have made on the doctrine of survivorship, it does not effect a statutory severance or disruption of the joint family.

44. It can thus be seen that the Madras, Bombay, Allahabad and Sind High Courts have definitely taken the view that the right of the widow under the Act to succeed to the interest of her husband in the joint family properties is not by inheritance or survivorship but under a special statutory enactment. The view expressed in Mayne's Hindu Law, 11th Edition that the widow takes her interest by inheritance is not accepted by these Courts. Even the Editors of the Mayne's Hindu Law have not gone to the logical extent to which the conception of the widow's right to take by inheritance goes. If the widow takes the interest of her husband by inheritance it necessarily follows that her interest in the joint family properties cannot be fluctuating but the learned Editors clearly say at page 711 that the widow's right should be determined as on the date of her demand for partition.

45. This Court also is in favor of the view that the widow does not succeed by inheritance and that the interest which devolves on her after the death of her husband is a fluctuating interest as can be seen from the view of the then Chief Justice in 'Radhi Bewa's case' and the view of Panigrahi J. (as he then was) in 'Kunja Sahu's case' and the case reported in AIR 1953 Orissa 240.

46. The consensus of judicial opinion is in favour of the view that the widow does not succeed to her husband's interest under the Act by inheritance, that the interest to which she succeeds is a fluctuating interest that she continues to be a member of the joint family till partition. Till then the legal persona of the husband continues in her and on the basis of the principle laid down by Lord Westbury in - '*Appovier v. Ramasubayan*<sup>22</sup>', that no individual member when the family remains joint can predicate that he has a certain definite share therein the widow's interest to which she succeeds under the Act being a fluctuating interest her rights are to be worked out on the state of the joint family and joint family properties at the time she files the suit for partition.

47. To sum up, the Act merely provides that the widow shall have the same interest in the property which her husband had. If it was the intention of the Legislature that she took the estate as heir to her husband it could have quite clearly expressed that intention by providing that she should inherit the estate as if the deceased had become

divided in status. The object of the Act was only to restore the original state of Hindu Law under which when a person died and his wife survived, half his body survives in her. It is only this right that was intended to devolve on the widow under the Act. The Legislature extended this rule to widows of coparceners in Mitakshara joint family and enacted that the interest of the husband will not be left on his death if there is a widow surviving him because he is still alive in his widow. Section 3(2) does not operate as severance of the interest of the deceased coparcener. The right which the widow gets under the section is not as heir of her deceased husband. It is a statutory right based on the recognition of the principle that the widow

is the surviving half of the deceased husband. The interest which devolves on her is a fluctuating interest. She continues as a member of the joint family till she demands a partition and that she is entitled when she sues for partition to the share of her husband in family properties as they stand at the time of the partition suit and the share to which he would be entitled to then.

48. In this view, the plaintiff is entitled to 8 annas share also in items 13 to 18 of Ga schedule properties.

49. The appeal therefore fails and is dismissed with costs.  
Appeal dismissed.

#### Cases Referred.

<sup>1</sup> AIR 1951 Ori 35

<sup>2</sup> AIR 1951 Ori 378

<sup>3</sup> AIR 1953 Oris 240

<sup>4</sup> AIR 1942 Mad 212

<sup>5</sup> AIR 1943 Mad 246

<sup>6</sup> AIR 1944 Nag 243

<sup>7</sup> AIR 1945 Pat 116

<sup>8</sup> AIR 1953 Pat 81

<sup>9</sup> AIR 1951 Bom 309

<sup>10</sup> AIR 1950 Mad 785

<sup>11</sup> AIR 1954 Mad 227

<sup>12</sup> AIR 1954 Mad 576 (FB)

<sup>13</sup> AIR 1954 Bom 47

<sup>14</sup> AIR 1944 Pat 298 (FB)

<sup>15</sup> AIR 1950 Mad 538

<sup>16</sup> AIR 1947 Lah 388

<sup>17</sup> AIR 1943 Mad 708

<sup>18</sup> AIR 1945 Mad 21

<sup>19</sup> AIR 1954 Mad 307

<sup>20</sup> AIR 1949 Sind 5

<sup>21</sup> AIR 1943 All 188

<sup>22</sup>11 Moo Ind App 75 (PC)