

# ORISSA HIGH COURT

Keluni Dei

Vs

Jagabandhu Naik

Second Appeal No. 552 of 1950

(Mohapatra and Das, JJ.)

25.09.1957

## JUDGMENT

### **Mohapatra, J.**

1. This second appeal has been filed by defendants 1 and 2 against the reversing judgment of Sri T.V. Rao, Subordinate Judge of Balasore, dated 15th July 1950, arising out of a suit brought by the original plaintiff Kangali Naik for declaration of title, for confirmation of possession, or, in the alternative, recovery of possession. Rushi and Kangali (the original plaintiff) were two brothers. Rushi is long dead leaving behind him his two sons Bhagirathi and Bdlaram. Both the brothers Bhagirathi and Balaram died in the same month, that is, October-November of 1939 and at an interval of nearly 10 or 12 days as the deaths were due to cholera. But nevertheless it is the admitted position that Balaram died first leaving behind him his only heir the widow Pitei. Pitei died after April 1944. Bhagirathi died leaving behind him his widow Keluni (defendant No. 1) and his daughter Malati (defendant No. 2), It is in respect of the interest of Balaram that the present controversy arises. According to the plaintiff, Balaram and Bhagirathi were separate, and Balaram having died leaving his only heir the widow Pitei and after the death of Pitei, Kangali, the paternal uncle of Balaram, is the next preferential heir and is entitled to the property in suit. Defendant No. 1 Keluni, the widow of Bhagirathi, executed a deed of surrender on 23rd February 1945 in favor of her daughter Malati (defendant No. 2) on the basis of which the plaintiff's possession having been disturbed, the present suit has been brought.

2. The defense version is that Balaram and Bhagirathi were continuing joint till the death of either; Pitei never possessed the suit property separately but she was all along living with Keluni. After the death of Pitei in the middle of 1944, her interest in the property passed by way of survivorship to Keluni who alone is entitled to the property in preference to Pitei's husband's heir Kangali.

3. The trial Court dismissed the plaintiff's suit accepting the contention of the defense that in fact Bhagirathi and Balaram were joint and that on Pitei's death her interest passed by way of survivorship to Keluni. The lower appellate Court has confirmed the finding of the trial Court that Bhagirathi and Balaram were joint at the time of their death, but nevertheless has reversed

the judgment of the trial Court on the ground that Balaram's interest, which passed on to Pitei on the basis of Act 18 of 1937 (Hindu Women's Rights to Property Act, 1937), cannot pass in favor of Keluni by way of survivorship, and the plaintiff being the next preferential heir is entitled to the property in suit. He therefore decreed the suit of Kangali.

4. As I have indicated above, both the Courts below having come to the concurrent finding, which has not been challenged before us, that Balaram and Bhagirathi were joint till the time when Balaram died on 1st November 1939, the only question that remains to be determined in the present appeal is whether on the death of Pitei, Balaram's interest in the joint family property will pass by way of survivorship in favor of Keluni or will be inherited by Kangali, the plaintiff. The present respondents are the legal representatives of the original plaintiff Kangali.

5. The entire question depends upon the interpretation of Sub-sections (2) and (3) of Section 3 of Act 18 of 1937. The sub-sections run 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."

Mr. Misra, appearing on behalf of the appellants, took us through quite a number of decisions which throw light on the interpretation of the above two sub-sections. The following positions seem to be well settled now in almost all the High Courts in India that on the death of the husband

(i) the widow shall have the same interest as the husband had, but nevertheless this does never mean that there is a disruption in the joint family but the joint family still continues and further that the widow continues as a member of the joint family;

(ii) the widow steps into the shoes of her husband neither by way of survivorship, as she was never a coparcener before nor does! she get the property by way of inheritance-1 (To hold that she would get the interest of her husband by way of inheritance, the inheritance would tantamount to say that there is a disruption in the family and the joint family status is damaged and destroyed which is never the intention of the Legislature in pronouncing this particular Act on the statute book; her special rights are created by virtue of the provisions of the statute alone); and

(iii) the third important point which also has been accepted view is that the interest which the widow gets is a fluctuating one liable to be enhanced by the deaths of some coparceners in the family, or to be diminished by subsequent births. It is never a fixed interest as the husband had never a fixed interest. She gets whatever interest her husband had at the time of his death only by the special provisions of the Act itself.

6. It appears very clear from the provisions of the Act that so far as her husband's estate is concerned, it does not pass by way of survivorship to the other coparceners according to the ordinary rules of Hindu Law; but such rights of the other coparceners are kept in abeyance till the death of the widow. The widow nevertheless, by the specific provisions of the Act itself, is given the right to claim for partition in which case indeed there is a disruption in the family, and the interest of the husband on the death of the widow will go to the next heir of the husband. There is a further restriction on the rights conferred on the widow, that is, she has only a Hindu Woman's estate.

7. We will now refer to a Bench decision of our High Court reported in *Gangadhar v. Subhasini Bewa*<sup>1</sup>, Panigrahi C.J. and Rao J. wrote two separate judgments but substantially agreed on points of controversy. In the judgment of my learned brother Rao J. we get a review of most of the decisions of different High Courts on the point till that year. They have laid down that the right of the widow to succeed to the interest of her deceased husband in the joint family properties under Section 3 (2) of the Hindu Women's Rights to Property Act, 1937, is neither by inheritance nor by survivorship. It is a special right created in favor of the widow by the statute on the recognition of the principle that the widow is the surviving half of the deceased husband and she does not get the interest as the heir of her deceased husband. Section 3 (2) does not operate as severance of the interest of the deceased coparceners. The interest which devolves on the widow is a fluctuating one liable to augmentation and reduction. The widow still continues to be a member of the joint family, but under the provisions of the Act she has been given the right to effect partition. The main question involved in the case before their Lordships was whether widow's rights conferred under the provisions of the Act are a fixed one, or liable to fluctuation so that she will get a share on partition in respect of the properties acquired by the other members of the joint family after the death of her husband. Rao J. on a review of the cases of the different High Courts, observed in paragraph 34 (of ILR Cut): (Pr. 44 of AIR) of the report as follows :

"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." Nagpur and Patna had taken a different view at the time of that decision. Nagpur view was pronounced in the case of *Jadaobai v. Puranmal*<sup>2</sup>, where their Lordships observed as follows :

"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."

But even this Nagpur view has undergone a change in subsequent decisions of 1956 and 1957. In the case of *Ramchandra v. Ramgopal*<sup>3</sup>, their Lordships Mudholkar and Naik JJ. pronounced their view that though at the time of her husband's death the widow of the predeceased son was entitled only to 1/3rd interest in her father-in-law's interest in the joint family property, the quantum of interest was to be determined at the date of the suit for partition and as other son had died before the suit, her interest had increased to 1/2 of the father-in-law's interest, that is to say, the interest of the widow was a fluctuating one entitled to augmentation. In the case reported in *Tukaram v. Mt. Gangi*<sup>4</sup>, the learned Judges Mudholkar and Tambe JJ. followed the previous

decision of their High Court reported in *Hanuman v. Tulsabai*<sup>5</sup>, and held that the interest held by a widow in a joint family property by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937, is a fluctuating one and is liable to increase or decrease according as there are additions to or deaths in the members of the family. But the Patna view has not undergone much change. The view pronounced by the Patna High Court in the case of *Kedar Nath v. Radha Shyam*<sup>6</sup>, was again reiterated in the case of *Ramsaran Sao v. Bhagwat Shukul*<sup>7</sup>, to the effect that the widow succeeds not by survivorship but by inheritance or something akin thereto. 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. But nevertheless their Lordships have expressed the view also that she has the same interest in the property as the last male owner had and her interest is therefore liable to fluctuation by variations in the number of coparceners. On a consideration of the above positions, therefore, we are of the view that the propositions we have laid down at the outset can well be taken to be fairly well settled and we respectfully agree with the view expressed by their Lordships Panigrahi C.J. and Rao J. In the case reported in ILR (1955) Cut 61.

8. But even then it would not help the present defendant-appellants on account of the special features of the case. Here the last two members of the joint family were the widows of the two brothers who were coparceners. The pertinent question is whether on the death of one widow, that is, Pitei, Keluni will get the entire property by way of survivorship. In all these decisions of the different High Courts in India, some of them which were reviewed in the above mentioned Cuttack case, the point which arose for determination, was the interpretation of the underlined (here into " ") words in sub-section (2), that is, "shall have in the property the same interest as he (husband) himself had". Their Lordships in interpreting this interest that the widow got by virtue of the provisions of the Act pronounced that the interest cannot be a definite and specific interest which will be contrary to the conception of a Hindu joint family where no member before partition can lay his hand on his interest being a specific and definite share. To give such an interpretation to the Clause would lead to the logical conclusion that the Act was brought into existence in order to disrupt the entire joint family defining the interest of the widow on the death of a particular coparcener leaving behind him a widow. This was not and could not be acceptable. They had, therefore, to fall back on the position that she would be getting a fluctuating interest subject to augmentation and reduction as her husband had. But all the same they made it clear that she did not get the interest of her deceased husband by way of survivorship and neither by way of inheritance. It is significant to note that her rights are confined within the four corners of the language of the statute itself and are the special creation of the statute. The position remains unassailable as it appears to me that she was neither a coparcener prior to the death of her husband nor has she been made a coparcener by the provisions of the Act. This position has been categorically asserted in almost all the decisions of the different High Courts excepting the one of a Division Bench of Madras which we will comment later. No useful purpose will be served by giving quotation that she was not made a coparcener by virtue of the provisions of the Act from each of the decisions. We will refer to only a few. The Madras view undoubtedly is crystallized in the Full Bench decision reported in *Parappa v. Nagamma*<sup>8</sup>, of the report their Lordships observed :

"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."

In the case of *Shivappa v. Yellawa*<sup>9</sup>, Gajendragadkar J. sitting with Vyas J. observed as follows:

"The effect of the provisions of Section 3 on the constitution of the surviving family after the death of a coparcener is an illustration in point. The undivided Hindu family would not consist of coparceners and a female who has a share in the properties of the family. The right to property is conferred on the widow without giving her the status of a coparcener.

This position is likely to raise some problems which may not admit of a logically consistent answer. The question as to how the deceased husband's interest devolves upon his widow has given rise to conflicting views. This devolution cannot be attributed to survivorship because survivorship applies as between coparceners and the widow is not a coparcener."

9. The only dissenting judgment in India interpreting this provision of the Section as conferring on her the status of a coparcener is that of Govinda Menon and Ramaswami JJ. in the case of *Manorama Bai v. Rama Bai*<sup>10</sup>, Ramaswami J. after discussing the question at great length observed :

"The incidents of coparcenership can be conveniently summed up as every individual member having, by virtue of being a coparcener, an interest in coparcenary property; a right to enforce partition; until partition takes place an unpredictable and fluctuating interest in the joint and undivided property possessed and enjoyed in common by the coparcenary the interest being a fluctuating interest enlarged by deaths and diminished by the births in the family; right to be in joint possession and enjoyment of coparcenary property, reside and to be maintained in the family house; and as a necessary corollary thereof, be bound by the alienations for benefit and necessity and the legitimate acts of management of the karta."

His Lordship therefore concluded :

"There does not seem to be any justification for saying that the widow is not pucca coparcener and at the best is a kucha one not entitled to the rights of survivorship at least (the last male preserve) as a coparcener as she has no right by birth."

We are not prepared to attach importance to this decision inasmuch as it being a Division Bench case, it goes beyond the decision of the Full Bench decision of the same High Court. It is to be noted, Ramaswami J., who delivered the judgment in 1957 case, was also a party to the judgment of the Full Bench division of the year 1954. The position is indisputable that the two fundamental conceptions to constitute a member of the family as a coparcener are that he has a right by birth and that he must be a male member of the Hindu joint family. These two being conspicuously absent in the case, the widow on whom certain special rights have been conferred by the provisions of this special enactment cannot aspire for her status of a co-parcener in the absence of express provisions in the Act.

10. Mr. Misra concedes very fairly to accept the position that the status of a co-parcener is not conferred on her by the provisions of the statute; but nevertheless he strongly argues that inasmuch as she continues the existence of her husband and her interest being a fluctuating one liable to augmentation and reduction, the necessary conclusion is that she gets the rights of the other widow, Pitei, by way of survivorship on the death of Pitei. Survivorship is an incident which can be availed of by a co-parcener only under the Hindu law with two exceptions, that is survivorship amongst co-widows and the survivorship amongst the daughters of the same father. When we take it as the accepted view that by virtue of the provisions of the Act she has not attained the status of a co-parcener and that her rights are confined only to the four corners of the provisions of the Act, it is not possible for us to accept the contention of Mr. Misra that she got the interest of Balaram after the death of Pitei by way of survivorship. In this case neither of the widows was a co-parcener.

11. There is one other feature in the Act itself which offends against the view that she is made a co-parcener. The Act confers on her a widow's estate which, according to Hindu Law, is never possessed by the co-parcener. The language of the clause quoted above is that she will have in the property left by her husband the same interest as he himself had - whatever interest in the property her husband had is conferred on her.

The incident of survivorship, as it appears to be pretty clear to me, cannot be taken to be an interest in property. Analyzing the conception a little more, when a co-parcener in a Hindu family dies, his interest lapses and the interests of the co-parceners are enhanced. The right to get the property by way of survivorship comes in only after the death of the man having interest in the property. So it cannot be said that the incident of getting the property by survivorship can be taken to be an interest in the property. On these considerations therefore we are of the view that Keluni did not get the property of Balaram after the death of Pitei by way of survivorship. It must go therefore to the next heir of Balaram who is undoubtedly the plaintiff.

12. The above considerations lead us to the position that after the death of Bhagirathi, the last co-parcener, the co-parcenary ceased to exist as the widows Keluni and Malati cannot in any event be termed as co-parceners according to Hindu conception. Keluni and Pitei therefore possessed the properties of Bhagirathi and Baiaram as tenants-in-common. On Pitei's death therefore her life estate ceased and it must revert to the heir of Baiaram who is undoubtedly the original plaintiff Kangali. We will last of all make a reference to another decision of our High Court reported in *Harekrishna Das v. Jujesthi Panda*<sup>11</sup>, There it was observed by their Lordships Panigrahi, C.J. and Rao, J., that the interest of a widow succeeding under Section 3(2) of the Hindu Women's Rights to Property Act to her husband's interest in co-parcenary property goes to the heirs of her husband after her death in the absence of any co-parcener living at the time of her death. There one Sadhu died after the passing of the Hindu Women's Rights to Property Act leaving his widow and a son Gopi who was a co-parcener with him. Gopi also died unmarried thereafter. In a suit by a sister and the sister's son of Sadhu as plaintiffs challenging certain alienations made by the widow in respect of the properties left by Sadhu and Gopi as being without legal necessity, Rao, J., in para. 13 of his judgment observed as follows:

"It may be noted that in this case Gopi having died, there is no co-parcenary existing. The widow is the only member of the joint family. She having succeeded to the interest of her

husband under the Act continues to have that interest till her death and if there is a coparcener in existence at the time of her death he would succeed to those properties.

But on the facts of this particular case, if she continues to be entitled to that interest till her death and after her death in the absence of a co-parcener that interest must revert to the heirs of her husband as till that time half of her husband's persona remains in her. As far as this interest of her husband is concerned, Gopi cannot be said to be the last male holder entitled to the property because he predeceased her and died at a time when the widow of Sadhu possesses and enjoys his interest under the Act. The last male holder entitled to that interest can only be Sadhu and that interest after her death in the absence of Gopi must be taken by the heirs of Sadhu and not of Gopi." These observations support the position that when the co-parcenary ceased, the two widows in the present case can only possess as tenants-in-common and on the death of each her husband's heirs must succeed.

13. In conclusion, therefore, we confirm the judgment and decree of the lower appellate Court. The plaintiff's suit stands decreed and the appeal by the defendants is dismissed with costs throughout.

**Das, J.**

14. I agree.  
Appeal dismissed.

Cases Referred.

<sup>1</sup> ILR 1955 Cut 61

<sup>2</sup> AIR 1944 Nag 243

<sup>3</sup> AIR 1956 Nag 228

<sup>4</sup> AIR 1957 Nag 28

<sup>5</sup> AIR 1956 Nag 63

<sup>6</sup> AIR 1953 Pat 81

<sup>7</sup> AIR 1954 Pat 318

<sup>8</sup> AIR 1954 Mad 576 (FB). At p. 579

<sup>9</sup> AIR 1954 Bom 47

<sup>10</sup> AIR 1957 Mad 269

<sup>11</sup> ILR (1955) Cut 709