

# ORISSA HIGH COURT

Ananda Naik

Vs

Haribandhu Naik

First Appeal No. 32 of 1963

(R.K. Das and G.K. Misra, JJ.)

12.10.1966

## JUDGMENT

### **Misra, J.**

1. The decretal order is that plaintiffs Nos. 1 and 2 and defendant No. 1 have Rs.  $\frac{1}{4}$  interest each and plaintiffs Nos. 3 to 6 and defendant No. 2 have Rs.  $\frac{1}{6}$  interest each in the joint family property left by Joydeb. Mr. Misra contends that plaintiff No. 1 and defendant No. 1 are each entitled to Rs.  $\frac{1}{6}$  interest and plaintiffs Nos. 2 to 6 and defendant No. 2 are each entitled to Rs.  $\frac{1}{8}$  interest. Thus the controversy in this appeal is confined only to fixation of shares. Facts relevant to the aforesaid controversy need only be stated. Joydeb Naik died on 22-8-59. He had three wives. The first wife had no issues Ananda (defendant No. 1) and Jasoda (defendant No. 2) are the son and daughter respectively through his deceased second wife Labhanya. Ali Bewa (Plaintiff No. 2) is his third wife. Haribandhu (Plaintiff No. 1) is the son and plaintiffs Nos. 3 to 6 are his daughters through plaintiff No. 2. Thus, Joydeb died leaving behind him his widow (Plaintiff No. 2), two sons (Plaintiff No. 1 and defendant No. 2) and five daughters (plaintiffs Nos. 3 to 6 and defendant No. 2). At the time of Joydeb's death, there was no disruption in the coparcenery consisting of himself and his two sons.

2. The case of the plaintiffs is that though there was no disruption in the coparcenery at the time of Joydeb's death, his interest shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. By legal fiction Joydeb's interest would be treated to have been partitioned immediately before his death. As a necessary logical corollary, the share of Ali Bewa would be carved out and she would be entitled to  $\frac{1}{4}$ th of the total property in the notional partition amongst Joydeb, herself and her two sons. The Rs.  $\frac{1}{4}$  share belonging to Joydeb, who died intestate would devolve upon his widow, sons and daughters equally, and as such, each of plaintiffs Nos. 1 and 2 and defendant No. 1 would be entitled to Rs.  $\frac{1}{6}$  share and each of plaintiffs Nos. 3 to 6 and defendant No. 2 would be entitled to Rs.  $\frac{1}{6}$  share. Defendant No. 1 pleaded that as before Joydeb's death there was no actual severance of joint status or partition by metes and bounds, the question of plaintiff No. 2 getting a share does not arise. Joydeb's interest in the coparcenery property immediately before his death would be Rs.  $\frac{5}{4}$  and residue belonged to plaintiff No. 1 and defendant No. 1. On Joydeb's death, the Rs.  $\frac{5}{4}$  interest belonging to him would devolve

upon all the eight heirs equally, and as such, each plaintiff No. 1 and defendant No. 1 would get Rs. -/6/- interest and the rest would get Rs. -/8 each.

3. The answer to the problem rests on the construction of Section 6 of the Hindu Succession Act, (Act 30 of 1956) (hereinafter to be referred to as the Act). The relevant portion of the section may be quoted:

Section.....

"6 When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving member of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship.

Explanation 1 - For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

The main part of the section retains the doctrine of survivorship. The proviso introduces a radical change in the concept of the traditional Hindu Law. Female relative Specified in Class 1 of the Schedule or male relatives specified in that class who claim through such female relatives inherit as heirs under the Act in partial modification of the doctrine of survivorship. A daughter, daughter of a pre-deceased son, of a pre-deceased daughter and daughter of the pre-deceased daughter could not have inherited the property of the deceased in respect of his interest in Mitakshara coparcenary but for the proviso.

4. Before analysing Explanation 1, it would be profitable to examine the legal position as it was under the Hindu Women's Right to Property Act (Act 18 of 1937) (hereinafter to be referred to as the 1937 Act), and under the old Hindu law as it stood before that Act was passed.

5. In *Duryodhan v. Lilabati*<sup>1</sup>, the following two propositions of law were laid down. They may be extracted:

"(a) Law is well settled that when the husband is alive the wife herself cannot demand a partition. But when a partition takes place amongst the husband and sons, the wife is entitled to a share equal to that of a son. Law has gone so far as to lay down that even where a partition had already taken place amongst the father and the sons without reserving a share for the wife, the partition can be reopened.

(b) The interest of the widow is a fluctuating one and does not crystallise into definiteness

until either a severance of joint status or a partition by metes and bounds takes place. The quantum of interest which a Hindu widow is entitled to under Section 3(2) of the Hindu Women's Right to Property Act is to be determined on the date on which she seeks to enforce partition under sub-section (3) of Section 3." The first proposition enunciates the law as it stood before the 1937 Act and the second under the 1937 Act. The learned Advocates for both the parties accept this decision as laying down the correct law.

It is necessary to determine the share amongst the parties under the law as it stood before the 1937 Act. If there had been a partition during the life time of Joydeb, the property would have been divided into four equal shares amongst Joydeb, Plaintiff No. 2, plaintiff No. 1 and defendant No. 1. In a partition after Joydeb's death, the property would have been equally divided amongst plaintiffs Nos. 1 and 2 and defendant No. 1. The 1937 Act only deals with the right of widows to inherit property on the death of their husband. It does not deal with the case of a wife getting a share in partition during the life time of her husband. This Act also did not affect the right of the wife or the mother to get a share in the partition amongst the husband and the sons which they had under the preexisting law. If there would have been a partition during the life time of Joydeb under the 1937 Act, Joydeb, plaintiff No. 1, plaintiff No. 2 and defendant No. 1 would be entitled to equal share in the property. On the death of Joydeb, the  $\frac{1}{4}$ th share belonging to him would be inherited only by plaintiff No. 2 under Section 3(2) of the 1937 Act as the property allotted to Joydeb in a partition of the joint family property is not separate property within the meaning of Section 3(1) of that Act. Thus, in such a case, plaintiff No. 2 would be entitled to Rs. -/8/- of the entire property and plaintiff No. 1 and defendant No. 1 would be each getting only Rs. -/4/-. Under Section 3(2) of the 1937 Act, the widow would be entitled to the entire interest of her husband in the joint family property. If the property was separate property which is used in the narrow sense of its being self-acquired property, the widow would be entitled to the same share as a son. In this case. there was no actual severance of the joint status or partition by metes and bounds during the life time of Joydeb. The property was joint family property. Plaintiff No. 2 would be stepping into the shoes of her husband and the entire property would be divided into three equal shares amongst plaintiff No. 2, plaintiff No. 1 and defendant No. 1. The expression "separate property" and "interest in the Hindu joint family property" are used in juxtaposition in sub-sections (1) and (2) of Section 3. Both the sub-sections together comprise the entire property left by a person. "Separate property" in Section 3(1) has been used in the narrow sense of self-acquisitions of a person and does not include such properties as are allotted to a coparcener in a partition of the joint family properties or inherited by the sole surviving coparcener (see *Umayal v. Laxmi Achi*<sup>2</sup>).

6. Explanation 1, however, introduced a radical change. Though in fact Joydeb's interest in the coparcenary property had not been carved out, a legal fiction was introduced that the interest shall be deemed to be the share in the property which would have been allotted to him, if a partition of the property had taken place immediately before his death. It postulates that in order to fix the interest of Joydeb, a partition immediately before his death must be taken to have occurred. If that is the legal hypothesis, it follows as a logical corollary that plaintiff No. 2 must be allotted a share in that partition amongst the father and the two sons. Thus, immediately before Joydeb's death not only his interest was carved out as being  $\frac{1}{4}$ th of the total interest in the coparcenary property, but the interest of plaintiff No. 2 was marked out as being equal to that of a son. The explanation was necessary in view of the provision

whereunder inheritance in coparcenary property by succession was introduced even in respect of outsiders to the joint family which was unknown to Hindu law before 1937 and was to some extent recognized under the 1937 Act by treating the widow as a statutory heir. Under the Explanation disruption of the joint status had to be recognized immediately before the death of the deceased coparcener. The share may now be determined on the aforesaid principle. In the notional partition, Joydeb, plaintiff No. 2, plaintiff No. 1 and defendant No. 1 would be each entitled to Rs.-/4/-. On Joydeb's death his Rs. -/4/- interest would devolve upon the heirs being the relatives specified in Class 1 of the Schedule under Section 8 of the Act and the division among the heirs shall take place in accordance with the rules laid down in Section 10. The Rs. -/4/- interest of Joydeb would thus be divided amongst all the eight persons (Plaintiffs Nos. 1 to 6 and defendant Nos. 1 and 2). Each of plaintiff No. 1 plaintiff No. 2 and defendant No. 1 would get Rs. /4/6 and each of the rest would get Rs. -/-/6 interest. The learned trial court took the correct view. *Rangubai v. Laxman*<sup>3</sup>, also takes the same view.

7. In the result, the appeal fails and is dismissed. Parties to bear their own costs throughout.

**Das, J.**

4. I agree.

Appeal dismissed.

Cases Referred.

<sup>1</sup> AIR 1966 Ori 148

<sup>2</sup> AIR 1945 FC 25

<sup>3</sup> AIR 1966 Bom 169