PATNA HIGH COURT

Sm. Satrughan A

Vs

Sabujpari Isser

(C.P. Sinha and N Untwalia, JJ.)

28.03.1958

JUDGMENT

C.P. Sinha, J.

1. The suit giving rise to this appeal has been instituted by Mosammat Chando Kumari, widow of one Babuji Isser, for partition of the joint family properties. This plaintiff died during the pendency of the suit and was substituted by her two daughters, Sabujpari and Sujan Devi. Defendant No. 10 Mosammat Rajeshwari Issrain, widow of Mohan Lall Isser, was transposed to the category of plaintiffs, and she was numbered as plaintiff No. 3.

2. To understand the relationship between the parties and the plaintiff's case, it is proper that the following genealogical tree should be given :

HIRAMAN ISSER | _____ | | Anmole Isser Sublal Isser | | _____ | | | Mohanlal Isser = Mosst Rajeshwari Babuji Isser = Mosst, Chando Ghiran Isser (D.10-P.3) (Original P) | | | _____ | _____ | | Ramgobind (D.5) | | Satruhan Isser (D.1) Rasbihari (Dead) | Sab jpari Sujan Devi | | (P.1) (P.2) _____ | | | | | Ramasrey (D.2) Ramkumar(D.3) Kailash (D.4) |

_____ | | | | Ramchandra (D.6)

Prabhu Saran (D.7) Siri Ram (D.8) Ramesh (D.9)

3. According to the plaintiff's case at the time of the survey operations, Babuji Isser was joint with his brother, Ghiran Isser and his cousin, Mohanlal Isser in mess, business and property. Later in 1934, Babuji Isser separated from his brother and cousin. Some of the properties, irrespective of their valuation and the share of the parties, had been divided, between them at the time of separation, but the properties now subject matter of the suit, comprised of landed properties, movables, money-lending business etc., were left joint. Babuji Isser died on the 28th October 1937, leaving behind his widow, the original plaintiff, and his two daughters, present plaintiffs 1 and 2, Thereafter, the plaintiff asked for partition several times, and the last request was made on the 15th January 1949. But, as the defendants refused to partition the properties in suit, the suit had to be instituted on the 23rd April 1949.

4. Defendant No. 10 as already indicated, has been transposed to the category of plaintiffs, and she also prayed for a separate patti in the event of partition. Defendant No. 5, son of Mohanlal Isser, though filed a written statement, did not contest the suit. Defendant No. 1 alone, namely, the son of the brother of Babuji Isser, contested the suit. His defence is that Babuji Isser died in a state of jointness with the other members of the family, that his widow, Chando, died issueless in the year 1940, that the plaintiff was not Chando Kumari the widow of Babuji Isser, but she was one Jageshwari, sister of the second wife of Mohanlal Isser, that Sabujpari and Sujan Devi were the daughters of Mohanlal by his second wife, and that neither the original plaintiff nor the present plaintiffs were ever in possession of the properties 01 Babuji Isser.

5. The Court below has accepted the genealogy given by the plaintiff, and has held that the original plaintiff was Chando Kumari, the widow of Babuji Isser, and that the present plaintiffs 1 and 2 are the daughters of Babuji Isser and Chando Kumari. It further held that Babuji Isser died in a state of jointness with other members of the family, that the plaintiff's case to the effect that Babuji Isser had separated in 1934 had not been proved, and that the possession of the plaintiff was also not proved. So far as plaintiff No. 3 was concerned, it was held that Mohanlal had died some time before 1934, and as such, his widow, plaintiff No. 3, was not entitled to get n separate patti for her share. On these findings the suit was dismissed.

8. The present appeal is by the plaintiffs 1 and 2, and the only ground urged in support of the appeal is that the institution of the suit by the widow operates to define the share of Babuji Isser and causes disruption of the joint family, and that the interest of Babuji Isser became defined and separate, and, upon the death of Chando Kumari, the property devolved on his two daughters. It is said that, under the provisions of the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) as amended by (Act XI of 1938), the institution of the suit by the widow of Babuji Isser

effected severance in the status of the joint family, and that, on the death of the widow, the original plaintiff, the present plaintiffs 1 and 2, the daughters of Babuji Isser, are entitled to a decree for partition.

7. The relevant provisions of the aforesaid Act (which will hereafter be referred to as the Act) are contained in Section 3, Sub-sections (2) and (3), which read as follows :

"(2) When a Hindu governed by any school of Hindu Law other than Dayabhaga School or by Customary laws 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".

8. Learned Government Advocate, who appeared for the appellants, lays stress on the following expressions occurring in these two sub-sections" same interest as he himself had" and "she shall have the same right of claiming partition as a male owner", and submits that the widow, namely, the original plaintiff, had the same right as her husband, Babuji Isser, had in the properties of the joint family. In other words, the interest of Babuji Isser, as a member of the joint family was liable to fluctuation by death or birth in the family, and likewise after his death, the interest of his widow in the properties was subject to the same fluctuation, and further that as in a case of a male member of the family, the unequivocal expression of intention to separate effects severance of the joint status of the family, such expression of intention by the widow also effects severance, and the institution of the suit by the widow in the present case caused severance of status of the joint family and, therefore, the appellants, the present plaintiffs 1 and 2, are entitled to a decree for partition as the heirs of Babuji Isser. It is conceded, however, that the rights of the widow in the properties are subject to one limitation provided for by Sub-section (3) of Section 3, namely, that the interest of a Hindu widow shall be limited as a Hindu woman's estate.

9. It would be helpful for further consideration of the point at issue in the present appeal to understand the implications of a Hindu woman's estate. The Privy Council, in the case of Moniram Kolita v. Keri Kolitani, I. L. R. 5 Cal. 776 (A), had made the following observations at p. 789 of the report:

"According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship ..... does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes,

though in some respects for only a qualified interest. Her estate is an anomalous one and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs of her husband. The succession does not open to the heirs of husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death."

In Ram Sumran Prasad v. Gobind Das, I. L. R. 5 Pat. 646 : (A. I. R. 1926 Pat. 582) (B), an eminent Judge of this court observed as follows at p. 676 (of I. L. R.) : (at p. 589 of A. I. R.).

"She succeeds as any other male member to the entire estate of her husband (moveable and immovable) and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male coparcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband. She is supposed to be half the body of her husband and confers so much temporal and spiritual benefit on her husband as half of his own body does and associates with him in the performance of religious sacrifices: Smritichandrika, Chapter XI, Para. 6. A lawfully wedded wife is so called 'Patni' as correlative of the term 'pati' (husband) ..... During the life time of the husband the wife acquires ownership of a dependent character and on his demise she obtains independent power over it."

10. It is in this back ground that the provisions of the Act should be considered. In Sub-section(2) of Section 3, a widow is given the same rights in the property of a Hindu joint family as the husband himself had. It is in my mind quite clear that under this law the widow is given the same rights in the property which her husband had as member of the joint family. The interest of the husband in the present case, as I have said already was liable to fluctuation; that is to say, if there was a birth in the family his share was reduced, if there was a death in the family, there was augmentation to his share. Likewise, alter his death, so far as the interest of his widow is concerned, that interest again is subject to the same fluctuation. In case the widow died without severance of the joint family status, the interest which she got under the law would devolve on the survivors, in the family. The language of the section, in my opinion, is clear enough and there is no ambiguity about it, and no other view appears to be possible. By sub s. (3) of Section 3, the widow is given the same right to claim partition as a male owner. What does this mean? Here again, she is entitled to the same right of partition as any other male member of the family. In other words, she could cause severance of the joint family, status "by her unequivocal intention

to separate as if she was a male owner, and, therefore, the institution of the suit for partition by her is an expression of unequivocal intention to separate.

11. The legislature by this Act intended to give better rights to women in respect of property and the principle of this legislation appears to have been based upon the well known text of Vrihaspati which, when rendered into English, runs as follows:

"When a person dies and his wife survives, half his body survives in her, when half the body of a person survives, how can another person take his property?"

It is for this reason that Sub-sections (2) and (3) of section 3 speak of having given to the widow the same interest in the property as her husband and the same right of claiming partition as a male owner. It is the unanimous opinion of the courts in both country that this fiction of the half body of the husband surviving in the widow is responsible for the enactment of this law and, if that fiction has been recognised by the Legislature and the language of the Act makes no reservation about the rights which the widow gets, being the same as the husband had, except in one respect, namely the nature of the estate in her hands, then, in my opinion, there appears to be no reason why the rights given to the widow should fall short of any right which the husband possessed in the property. In this connection, 1 would like to refer to the observation of the Supreme Court in State of Bombay v. Pandurang Vinayak, A. I. R. 1953 S. C. 244 at p. 246 (C) as also the observations of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbbury Borough Council in (1952) A. C. 109 (D) which have been quoted with approval in the aforesaid Supreme Court case.

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory notion is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion ..... In (1952) A. C. 109 (D), Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947 made reference to the same principle and observed as follows:

'If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it .... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.' "

It follows, therefore, that the logical conclusion of the fiction aforesaid is to clothe the widow

with all the rights that the husband had including the right it) ask for partition which has been expressly given to her by the Act. The Act, in my opinion, mykes no difference between the widow and her late husband in regard to her interest in the joint family. As she represents half the body of her husband, whatever interest is given to her is given to her on that account, and it is for this reason that when she dies, her interest in the property does not go to her heirs but goes to the heirs of her husband, whom she represents in her body. The conclusions to which 1 have arrived are supported by the authorities of this court in Kedarnalh v. Radhashyam, AIR 1953 Pat 81 (E) where it was laid down as follows :

"As already stated, the widow and Kedarnath, her husband's brother, agreed to take all the properties half and half. To that extent, the compromise petition (Ex. A) is certainly evidence. The law is well established that a registered document is not absolutely necessary to prove a cessor of jointness amongst members of a Mitakshara family. Hence, though the compromise petition (Ex. A) may not be admissible to prove that such and such properties were allotted as a result of a partition between the two branches, or that the widow has an absolute interest in her moiety share in the family properties, it is certainly admissible to prove a cessor of the jointness between her and Kedar Nath."

In the present case also, likewise, the institution of the suit for partition by Chando Kumari effected disruption of the joint family, and the present plaintiffs 1 and 2 are entitled to continue the partition suit filed by their mother, not as heirs of the mother but as heirs of their father, because, on the death of Mst. Chando Kumari, the plaintiffs father must be deemed to have died with her and that date he died as a separated member of the family. In the aforesaid case, it was also observed as follows :--

"In my opinion, there is no justification for holding that defendant 7 is the present case on her husband's death became a coparcener with Kedar Nath, the plaintiff, in full sense of the term; so as to attract the rule of survivorship. The better opinion in my view, is that the widow takes the property, the share of her deceased husband, by inheritance, with the result, that, on her death, the property goes not by survivorship to the plaintiff but by inheritance to her husband's heirs, namely, in the present case to the daughters and, after them, to such sons of the daughters as may then be in existence. That being so, it must be held that the plaintiff has no locus standi to institute the suit."

In the present case, it is not necessary to decide as to whether the widow became a coparcener in the full sense of the term or whether she was entitled to the share of her husband by inheritance. If the fiction is that half the body of the husband survives in the widow, then there could be no question of the widow getting the property of the husband by way of inheritance. As was said in some of the cases, "the legal persona of the husband" continues to live in the widow, and,

therefore, if such be the fiction, there may not be a case of inheritance. The more correct view may be that, after her husband's death, the widow succeeds not by inheritance or survivorship but under the provisions of the statute. Again, whether she remains merely a member of the joint family or becomes a coparcener also does not fall to be decided in this case. If, however, 1 had to decide the question, I was inclined to the view that, carrying the legal fiction to its logical conclusion, the widow does become a coparcener in the family with all the implications of coparceners hip, including the right of survivorship, subject, of course, to the limitation, imposed by this Act. In another case of this Court in Mt. Dhanwamia v. Deonandan Mahto, AIR 1957 Pat 477 (F), the statements of the widows in a complaint petition in a criminal case to the effect that Khublal the husband, was separate from his brother, Bhokhawan, was held to have the effect of effecting separation in estate, and, following the case of A I R 1953 Pat 81 (E), it was held that the property would not go by survivorship to the brother but by inheritance to the heirs of their husband, namely, Khublal. These two decisions give effect to the proposition that the widow has the same rights as her husband had in effecting severance in the joint status of the family by unequivocal intention to separate.

12. Learned Advocate General, however, submitted that, so tar as the plaint in this case is concerned,, no claim was made on the basis of the Act of 1937, and that the Act gave only personal rights to the widow, and after her death, the suit had abated, as the partition suit had not been finally decided. In my judgment there does not appear to be any substance in any of these submissions of the learned Advocate General. The plaintiff was not required to plead law in the plaint; it was enough for her to have stated the facts, and the courts are entitled to give relief to the plaintiff according to law. But apart from this, it appears from paragraph 8 of the plaint itself that "the plaintiff made demands upon the defendants and specially defendant "No. 1 who is the manager of the entire joint business and the joint landed and moveable properties alter the death of plaintiff's husband to partition everything by metes and bounds according to the shares of the parties but all in vain. There is no chance of the settlement of the matter outside the Court. Hence this suit."

In paragraph 13, the following statement is to be found :

"That the cause of action of the plaintiffs arose on the 15th January, 1949, when the plaintiffs asked the defendant to divide and partition the assets privately and the defendants refused to do the same within the jurisdiction of the court."

These two paragraphs leave no room for doubt that the plaintiff exercised her right to claim partition and she did not make a demand upon the defendant No. 1 and her cause of action is laid on the basis that she had, on the 15th January, 1949 made her last demand for partition; and if she had a right under the Act, her right could not be jeopardised merely because no reference is made

to the Act in the plaint. Following observations from Girja Bai v. Sadashiv Dhundiraj. 43 Ind App 151 : (AIR 1916 P G 104) (G) may be quoted :

"It would probably be enough for the determination of this appeal to say that nothing would be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severally by the notice of October 1, 1908 coupled with this suit, and that these acts amounted to a separation with all his legal consequences (pp. 158-59) (of I A) : (p. 107 of AIR) ... In Hindu Law, 'partition' does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in Appovicr's Case 11 Moo Ind App 75 (H) at pp. 76 78, 'both division of title and division of property (p. 159) (of I A): (pp. 107-108 of AIR) . . . In fact later writers leave no room for doubt that 'separation' which means the severance of the status of jointness, is a matter of individual volition. For example, Nilkantha, the author of Vyavahara Mayukha (Ch. IV. S 3, Mandlik's translation, p. 38) expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration I am separate from thee for partition in a particular condition of the mind, and the declaration is indicative of the same."

13. So far as the second question raised by the learned Advocate General is concerned, upon the considerations which have weighed with me in coming to the conclusion that the widow is clothed with all the rights which her husband had in the joint family, the question of personal rights of the widow does not come in, because it is not her own individual self but it is as representing half the body of her husband that she is given rights in the joint family. To that extent, it cannot be called a personal right. In another sense, however, it may be called a personal right for the reason that, on her death, the property which she gets on partition is to go not to her heirs but to the heirs of her husband.

14. I should now like to consider some of the cases, and, in particular, the cases of Movva Subba Rao v. Movva Krishna Prasadam, A(R 1954 Mad 227 (I) and Parappa v. Nagamma AIR 1954 Mad 576 (FB) (J). In the earlier case, the facts very much resembled the facts of the present case. The widow had brought a suit for partition of her husband's share in the joint family property. The plaintiff died, there was an application for substitution on behalf of her daughter, the application was allowed by the first court and the daughter was substituted. Dealing with that case in revision in the High Court, their Lordships summed up the position in law under the Act as follows :

"To sum up, 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 which the widow takes under Section 3 (2) does not, on her death, devolve on her husband's heirs and that the right of the coparceners to take by survivorship is suspended as against the widow of a deceased co-parcener and such right reasserts itself on her death."

After this observation, it was held that the right claimed by the widow for partition of one-fourth share in the joint family property did not survive to the first respondent, namely, the daughter, and that to that extent, the auction abated. With great respect to their Lordships I regret to say that the question, whether the institution of a suit for partition by the widow effected separation in the status of the joint family, was not tackled and decided. I am also unable to follow that, if the widow "survived half of her deceased husband", how the right given to her by the Act becomes a personal right of the widow, and if the estate of the husband is taken by the widow, how could that estate go to the surviving members of the family and not to the heirs of the deceased husband ? Had it been held that the institution of the suit by the widow effected no severance in the joint status of the family, then it logically followed that the rule of survivorship acted in favour of the surviving members of the family, and the estate of the husband would not go to his heirs. But there is complete absence of any discussion in the judgment about the effect of the institution of the suit for partition by the widow after the enforcement of the Act. In the other case AIR 1954 Mad 576 (FB) (J), the facts were that the widow of the deceased member of the joint family and her two daughters had brought a suit for partition. The suit was decreed, and an appeal was preferred by the defendants, and, with a slight modification in regard to certain matters, the appeal was dismissed, and their Lordships made the following observation :

"The Act therefore 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 oi 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 himself 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 the joint Hindu family,. This conception of the legal persona of the husband continuing to live in her steers clear of many of the anomalies and inconsistencies that otherwise would arise."

With this lucid exposition of the law, I am in respectful agreement, except, of course, with this reservation as to whether the widow became a coparcener or not as, in my opinion, this matter is not free from doubt. Their Lordships also approved the summing up already quoted by me, of the learned Judges, in the former case A I R 1954 Mad 227 (I). Doubts have been raised as to how this Full Bench approved the summing up by their Lordships in the earlier case. But I think, that, if the summing up by their Lordships in the previous case be taken to relate to a period of the time after the husband's death and the widow dying without effecting severance of the joint family state in my opinion, no fault could be found with the views expressed in the summing up by their Lordships. I say, however, with respect, that the summing up cannot be correlated to the facts of that case and, in particular, to the fact that a suit for partition had been instituted by the widow, and during the pendency of that suit she had died. I have already said that the attention of their Lordships does not appear to have been drawn to that aspect of the case as to whether the institution of a suit for partition by a widow by itself effected severance or not. The case reported at page 227 (I) (supra) has referred to several other decisions of the other Courts, specially of Orissa in Radhi Bewa v. Bhagwan Sahu, A I R 1951 Orissa 378 (K) at pp. 388 and 398 and of Allahabad in Kallian Rai v. Kashinath, A I R 1943 All 188 (L) at p. 189. In the Orissa case, it was held as follows :

"It is now well settled that the Act has not the effect of introducing the widow as a coparcener iota the joint family along with the other coparceners that the widow gets the interest of her husband by succession as his heir and not by survivorship, but that no disruption of the coparcenary is effected thereby. .... The interest which she gets from her husband in her hands being the limited interest of a Hindu Woman's estate, is subject to alienation and 'devolution in the same way. It follows that while her interest is an interest in the joint family property it is not a co-parcenary interest, it is only an ex-coparcenary interest. 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 husband as the fresh stock of descent".

In the Allahabad case, it was held as follows :

"The act was intended to give better rights to woman in respect of property that is the Preamble to the Act--but there is no indication that the Act intended to interfere with the established law relating to joint family. Whatever inroads it may have made on the doctrine of survivorship, it does not effect a statutory severance or disruption of the joint family."

In Vinod Sagar v. Vishnubhai Shanker, AIR 1947 Lah 388 (M) it was held as follows :

" .... it would seem to follow that by merely expressing her unequivocal intention to claim partition a widow does not act and cannot bring the joint status of a family to an end and the property would not in spite of her claim lose the joint family character, permanently, although the family may be found to have lost its dominion on the property after it is divided by metes and bounds and may not be able to deal with it for at least as long as the widow is alive and has not conveyed it for consideration under a legal necessity. And until a partition by metes and bounds is brought about a Karta would be entitled to act as such even if the shares of the other members of the family are found to have been specified. His powers of management and control would be in abeyance in regard to the property when it has fallen to a widow on partition for such time as she remains in possession of the property after a partition by metes and bounds. But whether they are lost for ever or merely remain in a state of suspended animation it is not necessary to decide."

15. In the view which I have taken, however. I cannot possibly subscribe to the view mentioned above to the effect that expression of unequivocal intention to claim partition by a widow does not cause severance in the status of the joint family, and I do not accept the above observation as a good law on the subject.

16. After having considered the various authorities and the various aspects of the case, my conclusions are that, under the provisions of the Act a widow of a deceased co-parcener is placed in same position as the deceased coparcener was, for the reason of the fiction that half the body of the deceased husband survived in the widow; that, like her husband, the widow also is entitled to effect severance of the joint status of the family by an unequivocal expression of intention to separate; that such unequivocal expression of intention is evidenced by instituting a suit for partition; that, after severance is effected in the joint family status by institution of a suit for partition by the widow the lawful heirs, namely, the heirs of the deceased husband, are entitled to continue the partition suit, if the widow dies during the pendency of the suit; that in case the widow does not exercise her right of partition and dies without expressing any intention to separate, the interest of the husband, which she enjoyed, goes by survivorship to the other members of the joint family; that the right which the widow gets under the Act is not by way of inheritance or survivorship or succession but she gets that right as representing the husband himself, it is a statutory right; and that the property which she gets after partition does not devolve after her death on her heirs but goes by inheritance to the heirs of the husband.

17. The Court below has found that the plain-tiffs are not in possession of the property in suit. That finding, however, must be construed as a finding that the plaintiffs had failed to prove that Babuji Isser, the father of the plaintiffs appellants had died after separation, as was the case in the plaint. It must, however, be held that, after the father, the appellants' mother and, after their mother's death, the appellants are in joint possession of the suit properties through the defendants.

18. In the circumstances and on the considerations mentioned above the appeal is allowed, the judgment and decree of the Court below are set aside and the suit is decreed in so far as the appellants (Plaintiffs 1 and 2) are concerned, and it is directed that the usual preliminary decree for partition be drawn up by the Court below. The plaintiffs 1 and 2 will be entitled to the share in the joint family property as it was on the date when the suit for partition was filed by the original plaintiff. There will, however, be no order for costs of this Court or of the Court below in special circumstances of this case. The suit has been rightly dismissed so far as plaintiff No. 3 is concerned and that decree has become final, plaintiff No. 3 having not appealed against that decree.

Nandlal Untwalia, J.

19. I entirely agree.