PATNA HIGH COURT

Khatrani Kuer

Vs

Tapeshwari Kuer

A.F.A.D. No. 943 of 1961

(V. Ramaswami, C.J., R.K. Choudhary and K. Sahai, JJ.)

22.01.1964

JUDGMENT

Sahai, J.

1. This case has been placed before this Bench because there are conflicting decisions of this Court on some of the points of law involved in it.

2. This appeal by the defendant, Khatrani Kuer, arises out of a suit for partition. The facts of the case may be summarised as follows. I may first give short geneology.
There was a partition between Sidhnath and his brothers in 1939 after the death of Bisheshwar, and they were separate from each other. We are not concerned with the properties allotted to Gauri and Jagannath because the controversy in this case relates only to the property held by the branch of Sidhnath. As I have indicated, Chandrapal died in a state of jointness with his father before 1953 but long after 1937, when the Hindu Women's Rights to Property Act, 1937 (hereinafter to be referred to as the Act) came into effect. His father, Sidhnath, died in 1953, and his mother, Jasmati, died in 1954. Thereafter Tapeshwari instituted the suit out of which this appeal arises, and framed it as a simple suit for partition. The defendant alleged that plaintiff Tapeshwari was not the daughter of Sidhnath but that of Gauri. She also alleged that Tapeshwari was not in possession, and hence a simple suit for partition did not lie.

3. The Subordinate Judge, who tried the suit, held that the plaintiff was not the daughter of Sidhnath, that she was not entitled to any part of the property held by his branch even if she was his daughter, and that she was not entitled to maintain a simple suit for partition as she was not in possession. On these findings, he dismissed the suit.

4. On appeal, the 1st Additional District Judge of Gaya has held that the plaintiff is the daughter of Sidhnath, that she is entitled to half of the property held by his branch, and that she can maintain the suit as, being a co-sharer, she must be deemed to be in possession. He has also referred to the fact that ouster has not been pleaded. He, therefore, allowed the appeal, and passed a preliminary decree for partition.

5. Appearing on behalf of the appellant Mr. Balbhadra Prasad Singh has challenged the lower appellate Court's finding that the plaintiff is the daughter of Sidhnath; but he has not been able to advance any reason in support of his argument. The finding is one of fact, and, in the absence of any good ground for interference, it must be accepted.

6. It has not been disputed before us that Chandrapal had, at the time of his death, an interest along with his father, in a joint Hindu family property, and hence, by operation of Sub-Section (2) of Section 3 of the Act, his widow, Khatrani, carne to have, in the property, the same interest as Chandrapal had. It is not alleged that Khatrani claimed partition, nor that there was a partition between her and Sidhnath or Jasmati. That the interest of Sidhnath passed to his widow, Jasmati, on his death in 1953 has also not been questioned. The first point, however, which learned counsel for both sides have agitated, is whether the property held by Sidhnath at the time of his death was his 'separate property' within the meaning of Sub-Section (1) of Section 3 of the Act. The controversy has centered round the point whether the expression 'separate property' as used in that Sub-Section means only self-acquired property or it covers also property held by a sole surviving coparcener and property allotted on partition to a coparcener who has no male issue.

7. There is no doubt that, under the ordinary Hindu Law, 'separate property' meant not only self-acquired property but also, in certain circumstances, property held by a sole surviving coparcener and property allotted to a coparcener on partition with other coparceners, when he had no male issue. The expression has been defined in Section 230 of Mulla's Hindu Law. Items 6 and 7 of the list given in that section are :

> "(6) Share on partition. - Property obtained as his share on partition by a coparcener who has no male issue.
> "(7) Property held by sole surviving Coparcener :- Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt."

In *Bajirao Tukaram v. Ramkrishna*[1], their Lordships have observed at p. 24 as follows :

> "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member."

Their Lordships of the Privy Council have quoted this passage with approval in *Anant Bhikappa v. Shankar Ramchandra*[2],

8. It follows that, when there is no woman capable of introducing a coparcener in the family, either in nature or by way of adoption, the property held by a sole surviving coparcener and property allotted on partition to a coparcener without a male issue
would cease to be joint family property, and would become separate property of the 'holder, under the ordinary Hindu Law. The question which arises, however, is whether the meaning of the expression 'separate property' as used in Section 3(1) of the Act is the same. I read that section along with the first proviso as it stands after being amended by the Hindu Women's

Rights to Property (Amendment) Act (XI of 1938):

> "3. Devolution of property. -
> (1) When a Hindu governed by the Dayabhag School of Hindu law dies intestate leaving any property, and when, a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of Sub-Section (3), be entitled, in respect of property in respect of which he dies intestate to the same there as a son;
> Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son :"

The words which stood in the original Act before the amendment in place of the words "be entitled in respect of property in respect of which he dies intestate to the same share as a son" were "devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son".

9. A Division Bench of this Court had, in *Kandkumari Devi v. Mt. Bulkan Devi*[3], to consider the meaning of the expression 'separate property' as used in Section 3(1) of the Act. Beevor, J., who delivered the judgment of the Bench, has observed :

> "It will be noticed that the words 'an interest in a Hindu joint family property' in Section 3(2) do not refer merely to property bearing a particular character, as described above though the words 'Hindu joint family property' alone may refer to property bearing such particular character. The addition of the words 'an interest in' shows that the whole phrase 'an interest in a Hindu joint family property' has a reference also to the mode of possession or enjoyment of that property. I think it is natural to conclude that the words "separate property' in Section 3(1) 'also have a reference to the mode of possession or enjoyment. In other words the phrase 'separate property' in Section 3(1) is contrasted not with the words 'joint family property' in Section 3 (2) but with the words 'an interest in a Hindu Joint family property', laying particular emphasis on the word 'interest'. The sole surviving coparcener of a Mitakshara joint Hindu family has not merely an interest in the property, but holds the property exclusively or separately whatever its character. I come, therefore, to the conclusion that the words 'separate property' in Section 3(1) mean property which the intestate held separately, in the sense that he held it without the participation of other coparceners."

10. With great respect, I do not think that the significance attached to the words 'an interest in' in Section 3(2) is correct. The question which has first to be decided is whether the property in question is joint family property or separate property. Referring to the passage in Bajirao Tukaram's case AIR 1942 Nagpur 19, which has been approved by the Judicial Committee in Anant Bhikappa Patil's case, 70 Ind App 232 , Beevor, J., has himself stated at p. 89 :

> "It follows that although there may be at a particular time only one surviving coparcener of a Hindu joint family there may still be 'joint family property' 'or coparcenary property' in which any new male member introduced into the joint family will take an interest by birth or adoption." Hence, the property held by a sole surviving coparcener or a coparcener, to whom it has been al-. Jotted on partition, may be joint family property or coparcenary property under the ordinary Hindu Law in certain circumstances. So long as that situation continues, that coparcener can only be said to have an interest in a Hindu joint family property, though, until a new coparcener is introduced into the joint family, he may have unrestricted powers of enjoyment and disposition over, the property. The point to emphasize is that, so long as a property is joint family property, the coparcener holding it, either with other coparceners or as a sole surviving coparcener or as a coparcener to whom the property has been allotted on partition, must be said to have only an interest therein. It is for this reason that the word 'interest' has been used in Section 3(2) of the Act which deals with only 'joint family property' and not 'separate property'. It will not be correct, in my opinion, to say that the words 'an interest in' have reference to the mode of possession or enjoyment. Irrespective of those words, therefore, it has to be decided whether a particular property is held as 'separate property' or 'joint family property'. If it is separate property, Sub-Section (1) of Section 3 will govern it. On the other hand, Sub-Section (2) of Section 3 will govern it if it is an interest in joint family property.

11. In any case, the decision in Nandkumari Devi's case, AIR 1945 Patna 87 has been superseded by a later decision of the Federal Court in *Umayal Achi v. Lakshmi Achi*[4], In that case, there was some difference of opinion on the question of validity of the Act, with which we are not concerned in this case; but Varadachariar, J., interpreted the words 'separate property' as used in Section 3(1) of the Act, and Spens, C.J., and Zafrulla Khan, J., fully agreed with his interpretation. The short facts of the case, which may be stated, were that Arunachalarn Chettiar died on the 23rd February, 1938, leaving him surviving two widows, the widow of a predeceased son, who died in 1934, and some daughters. He also left a will, executed on the 8th January, 1038, whereby he entrusted the management of his properties to two of his near relatives as executors, and directed them to arrange for the adoption of three suitable boys by his two widows and by his widowed daughter-in-law, respectively. No adoption was actually made. The daughter-in-law instituted the suit, claiming a half share in the estate left by Arunachalarn Chettiar and praying for partition. As her husband died before the Act came into force, she could not get the benefit of Sub-Section (2) of Section 3. Their Lordships considered whether the properties held by Arunachalarn Chettiar as a. sole surviving coparcener after the death of his son were 'separate
properties' within the meaning of Sub-Section (1) of Section 3, and held that they were not. The conclusion reached by them is that 'separate property' within the meaning of Sub-Section (1) of Section 3 is self-acquired property and not property held by a sole surviving coparcener or a coparcener holding property allotted to him on partition.

12. Varadachariar, J. has started the discussion on the point by saying that the question as to what is 'separate property' "requires a more detailed examination of the scheme of the Act with due

regard to the established rules of 'Hindu Law". He has observed that the expression 'separate property' has sometimes been used in cases governed by the Mitakshara school of Hindu Law in the limited sense as referring only to self-acquired property; but, if the test of power of disposition is taken into consideration, two other kinds of property, viz., property held by a sole surviving coparcener and property allotted on partition to a coparcener, who has no male issue, would resemble self-acquired property. He has further observed :

> "There is, however, this difference between them, viz., that in the case of self-acquired property, the owner's power of disposition will continue to remain undiminished throughout his lifetime, unless he chooses voluntarily to threw it into the joint family stock, whereas, in the case of the other two kinds of property, his power of disposition will become qualified and his interest reduced the moment a son is born to him or the widow of a predeceased coparcener takes, a boy is adoption. It would not therefore be right to place these three kinds of property on the same footing merely on the ground that at a particular point of time, the owner may enjoy unrestricted powers of disposition over them. That is why in enumerating the several items constituting 'separate property' in paragraph 230 of his book on Hindu Law, Sir Dinshaw Mulla has taken care to add certain qualifying words in respect of items 6 and 7 (share obtained on partition and property held by sole surviving coparceners)."

13. He has then considered the scheme of the Act, the defects which the Act set out to remedy and the words used in the provisions of the Act in order to find out the particular sense in which the expression 'separate property' has been used in Section 3(1). His Lordship has observed :

> "It is only if the owner had sons (including in that term, grandsons and great grandsons) that the widow would be excluded by the sons. Legislative interference was required to obviate hardship when the owner left a widow as well as sons. Once we take note of the contingency requiring legislative interference, 'the difference between separate property in the strict sense and separate property in the loose sense will become apparent'.
> " (I have underlined (here in ' ') this part of the sentence for emphasis.) "In the former case, the sons would not become coparceners with their father and the inheritance will devolve on them only at their father's death. But in the case of property obtained by the father on partition or obtained by him as the last surviving coparcener, the moment sons are born to him, they will become coparceners and there will be no occasion for the property devolving on them at the death of their father. The closing words of Section 3(1) of the Act, viz., 'devolve upon his widow along with his lineal descendants in like manner as it devolves upon a son' will be appropriate to the former case but lot to the latter case."

14. I have pointed out that the words substituted by Act 11 of 1938 in place of the words which His Lordship has quoted are "be entitled in respect of property in respect of which he dies intestate to the same share as a son". In the case of property held by a sole surviving coparcener, or property allotted on partition to coparcener who has no male issue, a son will get an interest by birth. There is no question of his becoming entitled to the property on the death intestate of his

father. It is manifest that these words are appropriate only to self-acquired, property in which the son can only get a share on the death intestate of his father.

15. His Lordship, Varadachariar, J., has father referred to the language used in the first proviso, and has attached great significance to the words "shall inherit in like manner as a son". He has pointed out that, in the case of a Hindu governed by the Mitakshara school of Hindu Law, a son inherits the self-acquired property but gets by survivorship the other two kinds of property left by his father. I may quote his Lordship's own words :

> "Here again, the expression, 'inherit in like manner as a son' in the proviso is significant. That is apposite to a devolution of the father's self-acquired property but, in respect of the other two kinds of property, there will be no inheritance by the son as he would have become a coparcener with the father immediately he was born."

16. It is thus abundantly clear that his Lordship has definitely held that the expression 'separate property' in Section 3(1) means 'self-acquired property' and not the other two kinds of property and further that this conclusion is based mainly upon a consideration of the scheme, necessity and language of the Act.

17. The relevant facts in *Tayi Visalamma v. Tayi Jagannadha Rao*[5], were that one Ramayya Naidu separated from his son in 1938 and thereafter he died intestate on the 17th December, 1946. Following the decision of the Federal Court in Umayal Achi's case, AIR 1945 FC 25, their Lordships held that the property held by Ramayya Naidu on partition with his only son continued to be joint family property within the meaning of Sub-Section (2) of Section 3, and did not become separate property within the meaning of Sub-Section (1) of Section 3. On this basis, they held Ramayya Naidu's widow to be entitled under Section 3(2) to the entire sixteen annas interest held by him after separation from his son.

18. A similar question arose for consideration before a Division Bench of this Court in *Trisul Mahto v. Doman Mahto*[6], Their Lordships held that, in Umayal Achi's case AIR 1945 FC 25 the Federal Court placed a narrow interpretation upon the expression 'separate property' as used in Section 3(1) of the Act. On this basis they held that the
property held by a Hindu as the last surviving coparcener of a joint family could not, but self-acquired property could be regarded as 'separate property' within the meaning of Section 3(1). They also held that, the property obtained by a coparcener on partition from his brothers was not 'separate property' in his hands. The case of ILR 23 Pat 508 : AIR 1945 Patna 67 was brought to their Lordships' notice, and they observed that the view expressed in that cases could not be regarded as authoritative as the principle, laid down by the Federal Court took precedence over it.

19. Krishnaswami Nayudu, J. held in a case that property allotted to a coparcener on partition with his sons would be 'separate property' within the meaning of Section 3(1) of the Act. He distinguished the decision of the Federal Court to Umayal Achi' s case, AIR 1945 FC 25 by saying, that that decision must be confined to the cast of a sole surviving coparcener because the case before that Court was one of a sole surviving coparcener. A Letters Patent Appeal was taken against his decision, and the decision of the appellate Bench is reported in *Subramanian v. Kalyanaraina Iyer*[7], Rajamannar, C.J., who delivered the judgment of the Bench, found himself

unable to agree with. Krishnaswara Nayudu, J. He observed :

> "The principle of the Federal Court decision would, in our opinion, equally apply to the case of property taken by a member of the joint family at a partition of family properties. Indeed,, throughout the judgment of Varadachariar, J. who delivered the leading judgment, property held by a sole surviving coparcener and property which, a coparcener is allotted at a family partition are mentioned together as standing on the same footing."

Their Lordships, accordingly, held that the expression 'separate property' in Section 3(1) did not cover either of the two kinds of property referred to in the quotation.

20. In *Smt. Jana v. Salt. Parvati*[8]*,* there was a partition between the father, Gadi and his son, Santosh. Thereafter. Santosh sold one acre of land out of his share to Gadi. The question arose on Gadi's death whether the property held by Gadi was an interest in joint family property or was separate property. Desai, J. held, in accordance with the decision in Umaya Achi's case, AIR 1945 FC 25 that it was an interest in joint family property and that Sub-Section (2) of Section 3 of the Act governed the case.

21. A completely different view has been taken on the point under consideration by a Division-Bench of this Court in *Mt. Asarfa Kuer v. Bhuneshwar Rai*[9]*,* It is necessary to give a short genealogy in order to understand the facts of the case. It is as follows : Bhuneshwar Rai instituted the suit for partition. It was held that Sukhdeo Rai; husband of defendant No. 3, who was the appellant belong this Court, died before the Hindu Women's Rights to Property Act was passed, and that Halkhori was separate from his brothers and also from Ramadhar Rai, who wrongly claimed to have remained joint with him. In view of these findings, Asarfa Kuer, defendant No. 3, could only succeed if it was held that the property in the hands of Halkhori Rai as the time of his death was 'separate property'. Their Lordships allowed the appeal, holding that it was separate property, and that Asarfa Kuer was entitled to Halkhori's share under the first proviso to Section 3(1).

22. Misra, J., who has delivered the judgment of the Bench, has not noticed the Bench decision in AIR 1957 Patna 441. He has referred to the decision of the Federal Court in Umayal Achi's case, AIR 1945 FC 25 and this Court's decision in Nandkuinari Devi's case, AIR 1945 Patna 87. Having referred to the difference in approach between the two cases, he has proceeded to consider whether the decision in Umayal Achi's case, AIR 1945 FC 25 had been rightly interpreted as laying down that separate property was only self-acquired property, and not property held by a sole surviving coparcener or property allotted on partition to a coparcener without a male issue. With reference to the decision in Umayal Achi's case, AIR 1945 FC 25, His Lordship has observed :

> "It is thus apparent that the decision of that case rested upon the peculiar position of the widow in the Madras State, inasmuch as there a widow can adopt a son to the deceased husband even without an authority from him; provided consent is given by his sapindas when the husband dies separate, or where consent is obtained from the undivided coparcener, where he dies in a state of jointness with others.

"Moreover, the peculiar facts of that case were that the deceased had left behind a will in which he specifically directed that the two widows were entitled to adopt two boys and the daughter-in-law was to adopt also a boy, respectively, so that they were on the facts of that case specifically authorised to make adoption. Pending adoption the executors under the will, who were near relations of Arunachalam, were asked to manage the property. The adoptions were not made and the plaintiff brought the suit.

"It appears, therefore, that the potentiality of adoption had not come to an end and, therefore, the properties at the time would not be regarded as the separate property of Arunachalam as held solely by him independent of any one else "

23. As I have already shown, Varadachariar, J. has interpreted the expression 'separate property' in Section 3(1) of the Act on the basis of the scheme, necessity and language of the Act. He has nowhere referred as the basis of his interpretation to the power of a widow in Madras State to adopt, nor has he referred to the fact that Arunachalam had left a will whereby he had given specific direction for adoption by his widows and his daughter-in-law. His Lordship laid down as a general principle that separate property must be interpreted in the narrow sense to mean self-acquired property and not in the loose sense as covering the other two kinds of property. With great respect to their Lordships who decided Asarfa Kuer's case, AIR 1959 Patna 210, I am of opinion that they have erroneously confined the principle of the decision in Umayal Achi's case, AIR 1945 FC 25 only to a case in which the possibility of adoption has not come to an end. When the Federal Court or, now, the Supreme Court lays down a principle and supports it with a certain reasoning, it would not, in my opinion, be correct to ignore the reasoning and to say that the principle or the conclusion is only partially correct as that much only can be justified on another line of reasoning. Besides, the Act in question is one of general application throughout India. The expression 'separate property' in Section 3(1) cannot be interpreted to mean one thing in one State and another thing in another State, depending merely upon the variance in the extent of the right of a widow to make an adoption.

24. Misra, J., has accepted the principle laid down in Nandkumari Devi's case, AIR 1945 Patna 87, and, in that case, he has also attached great significance to the words 'an interest in' as used in Section 3(2) of the Act. As I have already observed undue emphasis should not be placed upon those words.

25. I am clearly of the opinion that the interpretation put in Nandkumari Devi's case, AIR 1945 Patna 87 upon the expression 'separate property' and also the interpretation put upon that expression in Asarfa Kuer's case, AIR 1959 Patna 210 are erroneous. These decisions are, therefore, overruled to that extent.

26. Following the decision in Umayal Achi's case, AIR 1945 FC 25 I hold that the property held by Sidhnath at the time of his death in 1953 was joint family property, and that it was under Section 3(2) of the Act that his interest passed to his widow Jasmati. Had it been held that it was 'separate property' of Sidhnath, an anomalous position as contemplated by Varadachariar, J. in the illustration given in the second column at p. 33 of Umayal Achi's case, AIR 1945 FC 25 would have arisen. Having already got half share as representing her husband, Khatrani might have claimed under the first proviso to Section 3(1) to share half and half with Jasmati the remaining

share in the property on Sidhnath's death. She would thus have got three-fourths share and Jasmati would only have got one-fourth share in the property of Sidhnath's branch. That would have been manifestly inequitable.

27. Mr. Balbhadra Prasad Singh has argued that even if the property was joint family property at the time of Sidhnath's death, it became separate property in the hands of Jasmati, with the result that, on her death, the property possessed by her would devolve under Section 3(1) of the Act. Alternatively, he has argued that, even if the property remained joint family property, it would pass to Khatrani on Jasmati's death by survivorship because Chandrapal must be held to be alive in the person of Khatrani. It is necessary now to consider these arguments.

28. As observed by Chagla, C.J. in *Dagadu Balu v. Namdeo Rakhmaji*[10], the provisions of the Act in question are obscure, or at least the language is not very happy. Some propositions can, however, be safely laid down on an interpretation of its provisions. Firstly, a Hindu widow, when she gets an interest in a Hindu joint family property in place of her husband under Sub-Section (2) of Section 3, does not become a coparcener in the joint family. This is because, under the ordinary Hindu Law, it is only a male who can become a coparcener, and he obtains that status by the mere circumstance of birth in a Mitakshara Hindu joint family. There is nothing in Sub-Section (2) which can be construed as conferring the status of a coparcener upon the widow by statute. Indeed, the language of that Sub-Section shows that she does not become a coparcener because what is given to her is her husband's interest in the family property and not his position or status in the joint family itself. Furthermore, the provisions of Sub-Section (3), which are to the e fleet that the interest devolving upon a Hindu widow under the provisions of Section 3 would be the limited interest
known as a Hindu woman's estate, militate against the conferment of the status of a coparcener upon her. Reference may be made to *Kedar Nath v. Radha Shyam*[11], *Ramsaran Sao v. Bhagwat Shukul*[12], and *Keluni Dei v. Jagabandhu Naik*[13], in which it has been held that the widow does not become a coparcener. In *Sm. Sabujpari v. Satrughan Isser*[14], C.P. Sinha, J., who has delivered the judgment of the Bench, has observed at p. 408 that, had it been necessary to decide whether a widow became a coparcener in the full sense of the term, he would have been inclined to take view that she does become such a coparcener subject to the limitations imposed by the Act. With great respect, I am unable to accept this view. Nothing further need be said, however, because his Lordship has not given his final decision as it was not necessary to decide that point.

29. Secondly, the widow, taking an interest in a joint Hindu family property under Section 3(2), does not take it by survivorship because, as I have already observed, she does not become a coparcener. The mere fact that she takes that interest does not amount to a disruption of the joint family because, if that had been intended by the Legislature, the right of claiming partition would have been unnecessary, and it would not have been specifically given of her. With disruption of the family, she cannot be held to take the interest by inheritance. It has been observed in *Siveshwar Prasad v. Lala Har Narain*[15], that the widow, taking an interest in joint family property under Section 3(2), takes it by inheritance. I respectfully disagree. It seems quite clear that the widow takes the interest by virtue of a special statutory right conferred upon her by the Act, and shoes not take it either by survivorship or by inheritance. I may refer in this connection to AIR 1958 Patna 405. It has been held in that case that the right which the widow gets in property under Section 3(2) of the Act is not by way of inheritance or survivorship or succession but it is a statutory right on the basis of the fiction that half the body of her deceased husband

survived in her. Reference may also be made to *Gangadhar Raut v. Subhashini Bewa*[16], *Hare Krishna Das v. Jujesthi Panda*[17],

30. Thirdly, the joint family, in the property of which a widow gets an interest under Section 3(2) of the Act, continues as before. The widow is not clothed with all the rights of her deceased husband because, for instance, she cannot inherit the property of her husband's nana as he could, if there were no nearer heirs. But the interest which she gets in the joint family property is the same as that of her husband. This means that, so long as she does not claim partition, her interest is liable to fluctuate i.e., increase or decrease, on the death or birth of a coparcener. In AIR 1954 Patna 318, a Bench of this Court has held that the widow does not become a coparcener but she becomes a member of the joint family with certain special statutory rights.

31. Gajendragadkar, J. has observed in *Shivappa Laxman v. Yellawa Shivappa*[13], as follows :

> "It appears that Legislature intended that the family should, despite this special devolution of interest on the widow, continue joint as before. Therefore, after
> the death of her husband, the widow continues to be a member of the joint family with the said interest vested in her. One inevitable result of this position is that the quantum of her share would be liable to fluctuations, as indeed was the undivided share of her husband in his life time. The share would be determined when partition takes place and it is now competent to the widow to claim partition and have her share determined and separated. That in effect is the decision of this Court in *Nagappa Narayan v. Mukambe*[14], "

Reliance may also be placed in support of this proposition on Gangadhar Raut's case, AIR 1955 Orissa 135, Harekhishna Pas's case, AIR 1956 Orissa 73 and Keluni Dei's case, AIR 1958 Orissa 47.

32. Fourthly, the joint family will, undoubtedly, be disrupted if the widow of a coparcener, who has succeeded to his interest, asks for partition. Her share would then be determined, and, on her death, it would pass to her husband's heirs. If she dies without asking for partition and coparceners of her husband are living, the interest held by her would pass to those coparceners by survivorship. The reason is that the right of survivorship of the coparceners of her husband is only kept in abeyance during the life-time of the widow who gets her husband's interest by reason of the statutory right conferred upon her. If however, there is no coparcener of her husband alive at the time of her death, the property held by her cannot pass by survivorship for the simple reason that there is no one living who is entitled to that right. In such a case also, the property held by her would pass to her husband's heirs because, under Sub-Section (3) of Section 3, she holds only a limited interest known as the Hindu woman's estate. Reliance may be placed in support of these propositions upon Hare Krishna Das's case, AIR 1956 Orissa 73 and Keluni Dei's case, AIR 1958 Orissa 47.

33. It follows from the propositions which I have discussed above that Mr. Balbhadra Prasad Singh's contention that the joint family property which Jasmati took under Section 3(2) of the Act on her husband's death in 1953 became 'separate property' in her hands cannot be accepted. It remained an interest in property which was impressed with the character of joint family property,

and it could not pass on her death as the 'separate property' of her husband. The Act applies only on the death of a male Hindu and not on the death of a female Hindu. Its provisions could not, therefore, be applied on Jasmati's death, and hence Jasmati's share could not, in any case, pass on her death to Khatrani under Section 3(1) of the Act. Khatrani could not take Jasmati's interest on her death in 1954 even by survivorship as neither Jasmati nor Khatrani ever attained the status of a coparcener. Jasmati's interest in the joint family property, therefore, passed to her husband's heir who, under the ordinary Hindu Law, undoubtedly, was his daughter, Tapeshwari, the plaintiff. In this view of the matter, it is manifest that Tapeshwari is entitled to the share which was held by her mother, Jasmati, in her life-time, and that her suit has been rightly decreed.

34. No interference is, accordingly, called for. The appeal is dismissed with costs.

Ramaswami, C.J.

35. I agree.

Choudhary, J.

36. I agree.

Appeal dismissed.

Cases Referred.

[1] AIR 1942 Nag 19
[2]70 Ind App 232 at p. 239: (AIR 1943 PC 196 at p. 199)
[3] AIR 1945 Pat 87
[4] AIR 1945 FC 25
[5] AIR 1955 Oris 160
[6] AIR 1957 Pat 441
[7] AIR 1957 Mad 456
[8] AIR 1958 Bom 346
[9] AIR 1959 Pat 210
[10] AIR 1955 Bom 152
[11] AIR 1953 Pat 81
[12] AIR 1954 Pat 318
[13] AIR 1954 Bom 47
[14] AIR 1958 Pat 405
[15] ILR 23 Pat 760 and in AIR 1953 Pat 81
[16]AIR 1955 Oris 135
[17] AIR 1956 Oris73 and AIR 1958 Oris 47