

NAGPUR HIGH COURT

Ramchandra Raghunathdasji Bhangde

Vs

Ramgopal Raghunathdasji

First Appeal No. 45 of 1954

(Mudholkar and Naik, JJ.)

03.10.1949. 28.09.1955

JUDGMENT

Naik, JJ.

1. This judgment will also govern Civil Revision No. 645 of 1949.

2. The appellant Ramchandra had instituted a suit for partition and separate possession of his 1/3rd share in certain moveable and immovable property against his brothers Ramgopal and Madangopal and the sons of Ramgopal. During the pendency of the suit Madangopal died and his widow Sarjubai was brought on record as defendant in his place. After the institution of the suit he also joined Geetabai, the widow of his predeceased son Tilokchand, as defendant 5 to the suit and amended the plaint by adding para. 5(a), which runs thus :

"The defendant No. 5 is the widow of Tilokchand a deceased son of the plaintiff. Although her share if any in the joint family property is included in that of the plaintiff and if necessary she can take action against the plaintiff alone. The plaintiff has joined her as a defendant to avoid contest on the part of defendants 1 to 4."

In her written statement Geetabai contended that she was entitled to a share equal to that of her deceased husband Tilokchand. She also stated that she wanted a partition and separate possession of her share and prayed that she should be transposed as plaintiff No. 2. The Court allowed her transposition and accordingly she was joined as plaintiff 2 to the suit.

3. The question is what share Geetabai is entitled to. It may be mentioned that besides Tilokchand, Ramchandra had one more son by name Dwarbadas who died in the year 1947. Tilokchand died in the year 1944. According to Ramchandra, at the date of Tilokchand's death, he and his two sons were each entitled to a 1/3rd share in the 1/3rd share which Ramchandra had in the entire joint family property. That is to say, according to him, the share of himself and of Tilokchand and Dwarkadas was 1/9th each in the entire joint family property. He contends that what Geetabai is entitled to claim is only 1/9th share in the entire family property. According to

Geetabai, however, she is entitled to 1/6th share as Dwarkadas had died before the institution of the suit for partition. The court below by its order dated 3-10-1949 upheld Geetabai's contention. Ramchandra thereupon preferred Civil Revision No. 645 of 1949 in which he challenged this decision of the Court below. The revision application was however kept pending till the partition suit itself was decided. The suit was decided on 23-1-1954 and in the decree Geetabai was held entitled to 1/6th share in the entire joint family property. Against this decree Ramchandra has preferred the present appeal. Thus, it would be seen that the subject-matter both of the appeal and the revision application is the same.

4. It is common ground that Geetabai is entitled to claim a partition and separate possession of her deceased husband's interest in the property by virtue of Sub-Ss. (2) and (3) of Section 3, Hindu Women's Rights to Property Act, 1937. Those sub-sections are as follows :

"(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga 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."

5. It is contended on behalf of Ramchandra that the extent of the share to which a deceased coparcener's widow is entitled must be ascertained with reference to the state of affairs obtaining at the date of the death of that coparcener. If this contention is correct, then Geetabai would be entitled to 1/9th share in the entire joint family property and not 1/6th as claimed by her. On behalf of Geetabai it is contended that the appropriate date for determining the extent of the share to which a deceased coparcener's widow is entitled would be the date on which the right to obtain a partition and separate possession of her share is exercised by the widow of that coparcener. If this contention is correct, then it would follow that her share would be determined with reference to the state of affairs obtaining on the date on which the right to enforce a partition is exercised by her and was thus liable to be diminished or augmented by reason of births and deaths in the family. In the instant case, Dwarkadas having died before the date of partition, Geetabai's share would be augmented and she would be entitled not merely to 1/9th share but to 1/6th share in the entire joint family property.

6. The learned counsel for Ramchandra points out that the widow who is given a right to obtain a partition of her deceased husband's interest in the coparcenary property by such Act is not thereby raised to the status of a coparcener. He further said that the augmentation of the share can only result by the operation of the rule of survivorship and that only a coparcener can claim the deceased coparcener's interest by survivorship. Thus, in the instant case, the only coparceners left in Ramchandra's branch of the family after Tilokchand's death were Ramchandra and Dwarkadas and upon the death of Dwarkadas it was the former alone who obtained the latter's interest by survivorship. In support of his contention the learned counsel placed reliance on the following passage in - '*Parappa v. Nagamma*',

"(6) 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 coparcener though she continued to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she continued the legal persona of the husband till partition.

From the standpoint of the other male members of the joint family, the right to survivorship was suspended. The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passed away. She would have during her lifetime all the powers which her husband had save that her interest was limited to a widow's interest. She could alienate her widow's interest in her husband's share: she could even convey her absolute interest in the same for necessity or other binding purposes. She could ask for partition and separate possession of her husband's share. 'In case she asked for partition her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition.' If she divided herself from the other members of the family during her lifetime on her demise the succession would be traced to her husband on the basis that 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." It is difficult to understand how this passage at all supports the argument of the learned counsel. Indeed, this passage supports the contention raised on behalf of Geetabai. The words underlined (here in ") by us leave no doubt as to the view held by the learned judges in the matter. Moreover, the learned Judges have also pointed out that the right of survivorship of the male members of the family was suspended by reason of the operation of the Act. Again, we would point out that the learned Judges have quoted with approval the following passage in - '*Subbarao v. Krishna Prasadam*'²,

"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 does not on her death, devolve on her husband's heirs; and that the right of coparceners to take by survivorship is suspended as against the widow of a deceased coparcener and such right reasserts itself on her death."

The learned counsel also relied on another passage in the judgment;

"(8) The law may therefore be summarized thus by reason of the Federal Court decision, the scope of the Act is confined to properties other than agricultural lands. It follows that 'interest' in Section 3(2) of the Act must be construed as interest only in such property. If so construed, the Act left untouched the rights of the widow and other male members of at

joint Hindu family in respect of agricultural property as they existed under the general Hindu law.

To put it differently, there are two devolutions, as it were, in respect of the interest of the deceased husband in the joint family property. So far as the interest in agricultural property is concerned, the law of survivorship would continue to govern the right of succession. But in respect of non-agricultural property, the provisions of the Act would apply. Thereafter the courses of devolution of the two kinds of property would be different; the one governed by the Hindu law and the other by the provisions of the Act. If so, the widow cannot have obviously any right to claim a share there under the provisions of the Act in respect of agricultural property, though her pre-existing right under general Hindu law to claim maintenance is observed. This is because for the simple reason that no new rights were conferred on her under the Act as interpreted by the Federal Court in respect of agricultural property as the property is outside the scope of the Act.

7. It would be clear from what the learned Judges have observed that, according to them, the law of survivorship would not operate in respect of the property to which the Act applied, though the law would apply in respect of the property to which the Act did not apply. No doubt, as held by the Federal Court in 'In the matter of the Hindu Women's Rights to Property Act, 1937', AIR 1941 FC 72, the Act applied to non-agricultural property only and not to agricultural property. However, subsequent to the decision of the Federal Court, the Central Provinces and Berar Act VI of 1942 (The Central Provinces and Berar Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1942) was enacted whereby the Hindu Women's Rights to Property Act, 1937, was extended also to agricultural property situate in Madhya Pradesh, and the term 'property' in the Hindu Women's Rights to Property Act, 1937, as in force in Madhya Pradesh, was defined to include and was deemed always to include, agricultural land. In the circumstances, therefore, there will be no difficulty so far as this State is concerned as to the manner of devolution of agricultural and non-agricultural property, that is to say, the law of survivorship would be suspended during the lifetime of the widow of the deceased coparcener in regard to non-agricultural as well as agricultural property.

8. In - '*Chinniah v. Sivagami Achi*³', it was pointed out that the Legislature, while enacting section 3 of the Hindu Women's Rights to Property Act 1937, did not intend to give the widow any greater rights than, those possessed by her husband. That case was the reverse of the present because there, after the death of his son, the father adopted another son and therefore the question arose as to whether the widow would be entitled to half share in the joint family property or 1/3rd, and it was held that she would be entitled to 1/3rd share. Following the principle enunciated in this case, it was held in - '*Gangabai v. Parmesharibai*⁴', that under Section 3(2), Hindu Women's Rights to Property Act, 1937, a Hindu widow's interest in her husband's coparcenary estate, so long as she does not claim partition, is liable to be increased or decreased by the death, or birth of a coparcener in the joint family in the same way as if her husband had been alive.

9. In - '*Gurudayal v. Sarju*⁵', Bose, C.J. and J. Sen, J. pointed out that in Sub-Section (1) of Section 3 Hindu Women's Rights to Property Act, 1937, wherein the Act deals with the devolution of the self-acquired property of a Hindu word "share" is used whereas in Sub-Ss. (2) and (3) wherein the Act has dealt with the devolution of the joint family property of a deceased

Hindu the word "interest" is used. The learned Judges having contrasted the two sets of provisions said :

"It is to be observed that the Act does not say that she (the widow of a deceased coparcener) shall have the same share as he had at the date of his death, and of course it could not say so because until partition a coparcener has no share but only an interest, It is clear then that the word 'interest' in Sub-Section (2) has been used in a different sense from the word 'share' in Sub-Section (1)."

And then the learned Judges went on to say that reading the two Sub-Sections together and contrasting the difference between the word 'share' in Sub-Section (1) and the word 'interest' in Sub-Section (2) they were of opinion that the interest which the widow obtains is the interest which the deceased husband had at the time of his death.

10. As to what was meant by her husband's interest, the learned Judges pointed out that it included, among other things, the right to claim a partition but not an obligation to claim it at any particular point of time, and went on to say :

"It is to be observed that Sub-Section (3) emphasizes that the widow gets the same right to claim a partition 'as a male owner'. It does not state that she gets the share which the husband would have had at the date of his death if there had then been a partition. She must, therefore, be treated as a male owner with his right to claim a partition when he pleases, with its concomitant, the right to have the 'shares ascertained as they exist at the date of partition."

In an earlier case, but reported later in - '*Mt. Bhiwra v. Mt. Renuka*'⁶, the same learned Judges have applied the very principle which they have clearly laid down in the aforesaid case. The propositions laid down by the Bombay High Court in various cases which arose there under section 3, Hindu Women's Rights to Property Act, 1937, have been set out thus by Bavdekar, J. In '*Mahadu v. Gajarabai*'⁷,

"(1) The interest which a widow takes, upon the death of her husband, in her husband's property is a fluctuating interest. It is liable to decrease by the number of coparceners in the family increasing by a birth or adoption. On the other hand, it is capable of augmentation, in case one of the coparceners, who was alive at the time when her husband died, dies subsequently - '*Nagappa Narayan v. Mukambe*'⁸,

(2) The interest which she takes is not a separated interest, separated, that is, from the interests of the other members of the family, who may, of course, be coparceners. Her interest is, like the interest of her husband, an undivided interest in the joint family properties, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate, until the suit for partition is filed by her.

(3) The family consequently continues to be joint one, till the widow files a suit or a separation of interest is otherwise brought about."

The view taken by the Bombay High Court accords with that taken by Bose, C.J. and Sen, J. and by the learned Judges of the Madras High Court. It has also been followed in - '*Laxman v. Gangabai*⁹', taken by Ray, C.J. and Panigrahi, J. in - '*Kunja' Sahu v. Bhagaban Mohanty*¹⁰', to the effect that though the rule of survivorship is kept in abeyance by the Act the interest which devolves upon the widow becomes defined and definable in her hands, though it continues to be a part of the joint family estate.

12. The learned counsel then referred us to the cases which hold that the share which an alienee of a coparcener's interest acquires by the alienation is that to which his alienor was entitled on the date of the alienation and argued, that the position of the widow of the deceased coparcener, in so far as the determination of the quantum of her interest in the property is concerned, is the same as that of an alienee from a coparcener. We can find nothing in section 3 of the Act to justify such a conclusion. The view expressed in the Orissa case that the share of a widow is defined as soon as her husband dies is not supported by the language of Sub-Ss. (2) and (3) of section 3 of the Act is opposed to the view taken by this and the other High Courts. Indeed, as has been pointed out by Bose, C.J. and J. Sen, J. neither sub-section refers to the widow's 'share'; but, on the other hand, each of them refers to the 'interest' which the widow shall take. Not only that, but Sub-Section (3) confers upon her and right to obtain a partition whenever she chooses. In other words, the Act specifically provides for the ascertainment and separate possession of the widow's share at such time as she desires to have it ascertained and separated. Since the property continues to be joint family property, despite the fact of the widow taking the place of her husband after his death, she is like any other member of the family entitled to the joint enjoyment of every portion of that property in the same manner as the other members of the family.

The question, therefore, of determining the extent of her share does not arise at the time of her husband's death, just as it does not arise in, respect of the other members of the family. That question arises only when the right to claim a partition is exercised either by her or by some other member of the family. It is therefore that date which is the crucial one for determining the quantum of interest or the extent of her share. In our opinion, therefore, the view taken by the Court below is correct.

13. Accordingly, we affirm the decree of the Court below and dismiss the appeal as well as the revision application with costs. Since the two cases were argued together, we see no occasion to fix separate counsel's fee for the revision application. Counsel's fees in the appeal will be Rs. 50/- , if certified.

Order accordingly.

Cases Referred.

¹1954 Mad 576 (579) (AIR V 41) (FE)

² AIR 1954 Mad 227

³ AIR 1943 Mad 21

⁴ AIR 1949 Sind 5

⁵ AIR 1952 Nag 43

⁶ AIR 1952 Nag 215

⁷ AIR 1954 Bom 442

⁸ AIR 1951 Bom 309

⁹1955 Madh B 138 ((S) AIR V 42)

¹⁰AIR 1951 Oris 35