

(1983) 12 BOM CK 0032
In the Bombay High Court
Case No : Second Appeal No. 169 of 1983

Annat Gopalrao Shende	Vs	APPELLANT
Jankibai Gopalrao Shende and Others		RESPONDENT

Date of Decision : 12-12-1983

Acts Referred:

General Clauses Act, 1897 — Section 13, 13(2)
Hindu Succession Act, 1956 — Section 23

Citation : AIR 1984 Bom 319 : (1983) 86 BOMLR 123 : (1984) MhLj 183

Hon'ble Judges : Waikar, J

Bench : Single Bench

Advocate : M.I. Sharif, for the Appellant; V.S. Sohoni, for the Respondent

Judgement

This Judgment has been overruled by : Narashimaha Murthy Vs. Smt. Susheelabai and others, (1996) 4 AD 243 : AIR 1996 SC 1826 : (1996) 4 JT 300 : (1996) 113 PLR 376 : (1996) 3 SCALE 625 : (1996) 3 SCC 644 : (1996) 1 SCR 414 Supp

1. This appeal raises an important question as to the interpretation, the scope and applicability of s. 23 of the Hindu Succession Act (hereinafter called the Act) when a Hindu dying intestate leaves only a single male heir and female heirs specified in class I of the schedule. There is a welter of judicial opinions on the point in the other High Court. There is however, no judicial opinions on the point in the other judicial pronouncement of this Court.

2. It is necessary at the outset to refer to s. 23 of the Act which runs as follows :-

23. Special provisions respecting dwelling houses. - where a Hindu intestate has left surviving him other both male and female heirs specified in Class I of the schedule and his or her both male and female heirs specified in class I of the schedule and his or her property in by members of his family, them notwithstanding anything contained in this Act, the right of any such female heir

to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein but the female heir shall be entitled to a right of residence therein :-

Provided that where such female heir is a daughter she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

3. The facts of the present case are very plain and simple one Gopalrao Shende died on 12-6-1966 leaving behind him his widow Jankibai (plaintiff) one son Anant (Def No 1) four married daughter - Rajionibai, Puhspabai, TARabai and Vijayabai (defendants Nos. 2 to 4 and 6) and the one (unmarried daughter) Malini (defendant No. 5). The property left behind is only one double storied residential house which was the self-acquired property of deceased - Gopalrao, Jankibai resides on the ground floor while her son Anant resides on the first floor. The married daughter are residing with their respective husband elsewhere. Admittedly, the plaintiff and the defendants each has 1/7th share in this dwelling house.

4. The claim of Janaki for partition was resisted only by her son Anant, mainly on the ground that she has no legal right to ask for her share by partition in the dwelling house in view of s. 23 of the Act, as he is the sole male heir of class I and the he does not want any division or partition.

5. This defence found favour with the learned trial Judge and he dismissed the suit, relying on one decision of the Calcutta High Court Arun Kumar Sanyal Vs. Jnanendra Nath Sanyal and Another, in which it is laid down

"It is clear from the section that the legislature does not approve of division of a dwelling house at the instance of a female heir against the will of the male heir. This restriction which has been imposed by s, 23 prevents fragmentation or disintegration of a family dwelling house at the instance of the female heirs to the hardship and difficulties to which the male heirs may be put. A Hindu may die leaving a son and a number of daughter. If the at instance oof nay such to be partitioned against the wish of the son, he may be put to great hardship. The house may not be capable of partition and in that case it will have to be sold, If , in such a case, it is held that S. 23 is in applicable because of the absence of male heirs as contended on behalf of the appellant, in our view, it will defeat and frustrate the very purpose for which the section the has been enacted. In the first instance, the section imposes a bar when it provides "the right of any such female heir to claim partition of te dwelling house shall not arise" but the bar is removed only on the happening of the contingency namely, when the male heirs choose to divide their respective shares therein . It may be that there is one male heir and one female heir and there may not be any chance of that contingency to happen, but that will be no ground to say the section is inapplicable. The rule which has been laid down by S, 23 clearly indicate thee intention of the legislature that female heirs should not be allowed to divide the

dwelling house against the will of the male heir, and on a proper construction of the section, we are of the view that it is also the intention of the legislature when there is only one male heir. If the male heir choose to divide the dwelling house undoubtedly the female heir or heirs will be entitled to claim partition but so long as no such choice is actually exercised the female heirs are debarred from claiming partition".

6. The lower appellate Court reversed this finding and decreed the claim, having opted to follow the decision of the Orissa High Court reported in AIR 1975 Orissa 2028, Hemlata Devi v. Umashankari.

7. The contrary view is expressed by this decision thus :-

"When a Hindu male dies intestate, a female heir is not entitled to enforce her right of partition of dwelling house, under s. 23 unless the male heirs exercise their right. If there are more than one male heir then there is a possibility of any one of such heirs asking for a female heir in such case can claim her legitimate share. But where there is a single male heir there is no possibility of that male heir claiming any partition entitled to claim partition. Their right to claim partition of the dwelling house is not excluded by S. 23".

8. The view of the Calcutta High Court Arun Kumar Sanyal Vs. Jnanendra Nath Sanyal and Another, is also shared by the Madras High Court in Janabai Ammal Vs. T.A.S. Palani Mudaliar, The decision of the Orissa High Court is dissented from and what is observed is this :-

"Even in cases where there is only one male heir and the very object with which the section has been enacted would be caused to the female heirs in not being able to claim partition is certainly relatively less than the injustice that could be done to the single male member".

9. Thus, the High Court of Calcutta and Madras extend the application of s. 23 even to a case where there is only one male heir though, apparently in such a case the female heir has not the ghost of a chance to take her share? Said Lowell:-

"They are slaves who dare not be in the right with two or three"

10. Likewise these decisions tell a female heirs:-

Unless with male heirs two or three your interest heirs not to be"

11. I must say at the outset that S. 13(2) of the General Clauses Act, which mentions that "words in the singular shall include the plural and vice versa" cannot be made applicable for construing the words "male heirs" occurring in section 23 as to include a single "respective" appearing in s. 23 of the Act cannot be given any effect if we are to construe male heirs" as to include "male heir" with the aid of S. 13 of the General Clauses Act. Thus in the context in which the word "male heirs" is used in S. 23 it would not in my opinion, include a singular. Again the General Rule of interpretation of statute is that one must not vary the word

of statue "verbis legis non est recedendum". It is therefore, necessary to ascertain the intention of the legislature.

12. Now it is true that the object of s. 23 is to prevent fragmentation and disintegration of a family dwelling house at the instance of a female heir or heirs to the prejudice of the male heirs. True it is that it is intended to repeat one of the ancient Hindu tenets to preserve a family dwelling house as an impartible asset. It is a special provision meant to preserve and safeguard a family dwelling-house, when it devolves in accordance with provision of this Act. It cannot be gainsaid that the female heir specified in class I inherit the house even in the dwelling house absolutely. The course of devolution of property under s. 8 of the Act, however, is restricted so far as female heirs are concerned, and this restriction is to operate only till the happening of an event envisaged under s. 23 of the Act. Their right is only kept in abeyance until the male heirs choose to divide their respective shares in the family house. When there are more than one heir of the inter state residing jointly together and forming a joint Hindu family, it is in the fitness of things and as intended by the legislature that at the instance of female heirs who are strangers, their joint abode should not be disrupted and their joint status impaired. But this object no longer surviving when there is no joint Hindu family with male members residing together in a family house on one hand and female heir on the other. With a sole surviving coparcener or a lone male heir with other or a lone male heir with other female heir or the one on whom the property (including the dwelling house) devolves as per the provisions of s. 8 of the Act and who all take simultaneously they are all tenants in common. To restrict their rights in such situation also is not merely to postpone that restriction till the happening of any event (as that event can never occur)

13. The statutory rights bestowed and conferred by S. 8 on the female heirs are restricted or curtailed respecting dwelling house only under the circumstances envisaged under s. 23 of the purpose being to defer actual partition of the family dwelling house partition of the family dwelling house which is actually in occupation of the members of the family of the intestate until the male members themselves choose to restrict their joint status. This exception and restriction must be construed strictly and strongly and it is in fact, implied that no other exceptions are contemplated by the legislature. Firstly, therefore, as already stated, in the case of single or sole male heir, there is no joint family, no joint family dwelling of joint family members and, therefore, there is no object and no purpose, that is calculated to be served by keeping the devolution of female heirs in abeyance. Secondly to construe this section to mean that the restriction applies even in case where there is only one heir of the intestate, would be to construe it beyond the purpose plainly indicated and to forfeit, verily the established and vested rights of the female heirs when they take as tenants in common with the single male heir.

14. Again, in determining the true scope and applicability of s. 23 of the

consideration of comparative hardship between the single male heir and the female heirs, as sought to be pointed out in AIR 1982 Mad 62, in my view, is out of place and has no relevance. Now, when there are only two male heirs and a comparatively large number of female heirs prejudice and hardship is bound to be caused to them also, in the event of their choosing to sever and divide. On the other hand, where a male heir and his step-sister or his niece (deceased's brothers daughter) are the only two heirs of class-I hardship and prejudice to him too such a female heir if she is to be perpetually deprived of her right of succession bestowed on her right Law. Hardship and prejudice, in my view, therefore, is no good consideration. In case of any object being nullified and one cannot read in S. 23 more than what it enacts and anything more than what the legislature really intended. With respect therefore, I am unable to recover the High Court of Orissa is more consistent with the text of S. 23 and the intended of their legislature.

15. In the result, therefore, this second appeal is dismissed with cost.

16. Appeal dismissed.