

(1971) 01 RAJ CK 0010
In the Rajasthan High Court
Case No : First Appeal No. 92 of 1961

D.P. Rai Ahuja

APPELLANT

Vs

Rameshwar Lal and Others

RESPONDENT

Date of Decision : 22-01-1971

Acts Referred:

Hindu Womens Right to Property Act, 1937 — Section 3

Citation : AIR 1971 Raj 269 : (1971) 4 WLN 13

Hon'ble Judges : L.N. Chhangani, J;J.P. Jain, J

Bench : Division Bench

Advocate : S.K. Jindal, for the Appellant; M.B.L. Bhargava, for the Respondent

Final Decision : Dismissed

Judgement

Jain, J.—This first appeal is directed against the decree dated 31st July, 1961 passed by the Senior Civil Judge, Ajmer in a suit for partition originally instituted by Shrimati Keshar Bai.

2. One Badridas Taksali who owned considerable property died in October, 1942. He left behind him his widow Smt. Keshar Bai and two sons Trijokinarain and Surajnarain, sons of his pre-deceased son Shri Motilal. The family was joint and they continued to live jointly. The business of the family in the lifetime of Badridas Taksali was a cloth business and it was carried on in the name and style of Chhogalal Badridas. On 13th of August, 1944 Trijokinarain and Surajnarain created a simple mortgage of two suit havelies and borrowed a sum of Rs. 25,000/- from Basantiram, defendant No. 1 on the ground that they needed money for cloth business. A mortgage deed Ex. A. 1 was executed to that effect. The mortgage money was not paid and Basantiram filed a suit against Trijokinarain and Surajnarain and obtained a decree for the sum of Rs. 26,148-2-0 with interest and costs of the suit. The decree was for more than Rs. 35,000/-. In execution of the decree Basantiram mortgagee sought the sale of the two suit havelies sometime in the year 1956.

After the sale was advertised, Smt Keshar Bai brought the present suit on 2nd May, 1956, praying that she was entitled to half of the property and it be declared that the decree passed in favour of Basantiram is null and void, so far as her share was concerned in the suit property and her half share be partitioned by metes and bounds and she be put in possession of her share. Defendant No. 1 Basantiram pleaded that the loan was advanced to Trijokinarain and Surajnarain for legal necessity and it was binding on the plaintiff as well. It was also contended by him that the suit was collusive and in fact Trijokinarain is at the back of the suit. Trijokinarain and Surajnarain were defendants Nos. 2 and 3 in the suit. Trijokinarain alone filed a written statement and admitted allegations in the plaint and he did not oppose the partition of the property.

3. During the pendency of the suit Smt. Keshar Bai sold her interest to one D. P. Rai Ahuja and the latter was allowed to be substituted as plaintiff by the order of the trial court dated 13th January, 1961. The learned trial Judge on the pleadings of the party settled seven issues and recorded the evidence of the parties. After having considered the evidence and the relevant law on the subject he held that in view of the provisions of Section 3 of the Hindu Women's Rights to Property Act, as amended by Act XI of 1938 (hereinafter referred to as the Act) Smt. Keshar Bai succeeded to the interest of her husband in the joint Hindu Family Property along with defendants Nos. 2 and 3 and her interest in the suit property was half and she was entitled to claim partition of her share in the suit property. As regards issue No. 2 he held that the money under the mortgage was borrowed for legal necessity and as such it was binding upon the plaintiff. He found all other issues for the plaintiff and decreed the plaintiff's suit in the following terms:

"A decree to the effect that the plaintiff is entitled to get the suit property partitioned and has half share in it but he shall be entitled to do so only after the mortgage-decree in favour of defendant No. 1 and against defendants 2 and 3 is satisfied and if something remains after the satisfaction of that decree, is hereby passed."

4. Shri D. P. Rai Ahuja being aggrieved by this decree of the learned Senior Civil Judge, Aimer has come before us in this appeal and it has been contended on his behalf by his learned counsel that the mortgage created by the two grandsons of Smt. Keshar Bai does not bind her share who had inherited the interest of her husband under the provisions of the Act. It has also been contended that there is no evidence of the legal necessity. On the other hand, the learned counsel for the respondent Basantiram submits that the property left by Badridas Taksali remained a coparcenary property, even when the interest of the deceased Badridas devolved on his widow under the Act and is subject to the same incidents which are attached to the coparcenary property, because the widow had not claimed partition till then. We have heard the learned counsel for the parties and considered the rival contentions with case.

Section 3 of the Act reads as follows:

"3(1) When a Hindu governed by the Dayabhaga 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 share 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:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(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.

(4) x x x"

Prior to this Act a Hindu widow was only entitled to a right of residence and maintenance from the other coparceners of the family. But by the provisions of Sub-section (2) of Section 3 of the Act on the death of a coparcener governed by the Mitakshara School of Hindu Law, his widow will have in the property the same interest as her deceased husband had. The widow has also been given a right to claim partition. It has, however, been provided that the interest devolving on her will be the limited interest known as a Hindu woman's estate. The Act seeks to make fundamental changes in the concept of coparcenary and the rights of the members of the family in a coparcenary property.

The Act in investing the widow of a member of coparcenary with the interest which the member had at the time of his death has introduced changes which are alien to the structure of a coparcenary. The interest of the widow arises not by inheritance nor by survivorship but by statutory substitution. Her interest in the property is limited interest known as a Hindu woman's estate but the Act gives her the same power to create partition as the male owner has. Their Lordships of the Supreme Court in *Satrughan Isser Vs. Smt. Subujpari and Others*, observed in para 7 of the decision as follows:

"By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby

introduced into the coparcenary, and between surviving coparceners of her husband and the widow so introduced, there arise community of interest and unity of possession. But the widow does not on that account become a coparcener: though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of Statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu Law of the Mitakshara School of taking that interest by the rule of survivorship, remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property: *Potti Lakshmi Perumallu Vs. Potti Krishnavenamma*, The interest acquired by her u/s 3 (2) is subject to the restrictions of alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition on the termination of her estate, her interest will merge into the coparcenary property. But if she claims partition, she is served from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by Section 3(3) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve upon her husband's heirs."

In the present case Smt. Keshar Bai had not demanded partition and allowed herself to continue jointly with her grandsons defendants Nos. 2 and 3. If she had claimed partition earlier than the mortgage had been created she would have had her share defined and determined and in that event, it must be conceded that any alienation by the body of the coparcenary or by the manager of the coparcenary would not have affected her share. But in a case where the widow continues to live jointly with the other coparceners and had not claimed any partition the position would be different. It is true that she herself does not become a coparcener and a member of the coparcenary family and she only has an interest in the coparcenary property. In this situation if the property continues to be a coparcenary property it must be held that it is subject to all the incidents which are attached to coparcenary property. If the "Karta" of the undivided Hindu family alienates the property for legal necessity or for the benefit of the estate it must bind the entire coparcenary property and the widow in that situation cannot say that that alienation will not bind her interest in the property because on that date her share remains undefined and undetermined.

In *Shivappa Laxman and Another Vs. Yellawa Shivappa Shivagannavar and*

Others, a coparcenary consisted of S and his son L. L. died in 1945 leaving behind a widow L. W. In 1946 S made a gift to his daughter of the major portion of the lands belonging to the joint family. After the death of S. LW adopted P. LW and P filed a suit challenging the gift on the ground that S. was not competent to make a valid gift of the joint family property. It was held that when the gift was made by S, LW had a share in the properties under the Hindu Women's Rights to Property Act of 1937, and therefore S, although he was the sole surviving coparcener, was not entitled to make the gift. The learned Judges of the Bombay High Court held that it was beyond the competence of the manager to make a gift of Immovable properties belonging to the family.

The principle was clearly meant for the case of a gift and cannot be extended to alienation falling within the competence of a manager of Hindu coparcenary. This is abundantly clear by the following observations of the Court:

"The position of a Hindu widow's interest in the family properties is in our opinion, somewhat analogous to the undivided right of the coparcener at least so far as the manager's powers of management and alienation are concerned; so that if the said interest of the Hindu widow is sought to be defeated by an unjustified alienation, she would be entitled to challenge it just in the same manner as a coparcener would. It may be that the effect of this Act is not to cause the severance of status automatically on the death of a coparcener, and that the family may continue to be joint, in that case the manager would still be entitled to exercise his ordinary powers under Hindu Law. But it is clear that it is beyond the competence of a manager to make a gift of Immovable properties belonging to the family."

The same view was taken in another case Mahadu Kashiba Varnekar Vs. Gajarabai Shankar Varnekar,

5. In Allahabad case, Udai Narain Rai v. Dharamraj Rai ILR (1954) 1 All 204 a suit was brought on a mortgage executed by the manager of a joint Hindu family. One of the parties was the widow of a deceased coparcener who was entitled to an interest under the Hindu Women's Rights to Property Act and the question was whether she could put the plaintiff to proof that the mortgage was binding on the joint family property. The learned Judges held that she was so entitled. Malik C. J. who spoke for the Court stated:

"Under the Hindu Women's Rights to Property Act, Smt. Muna Kuer has been given the same interest in the property as her husband had. It is not necessary to define the extent of that interest but there seems to be no good reason why she should not have the right to plead that the mortgage is not binding as it was not executed for legal necessity that is to say, why she should not have the same right as her husband had of challenging the mortgage?"

6. In case Ramalingam Pillai and Others Vs. Ramalakshmi Ammal and Others, it was held that where the son of her husband had become the manager of the family after the husband's death he can alienate any part of the joint family

property for legal necessity and for purposes binding on the family. The widow would then be bound by such alienation. If, on the other hand, the alienation was such that it cannot be supported by necessity or benefit, then it is obvious that the widow who is entitled in her husband's right to a half share in the property would not be bound by any alienation made by the manager of the family even though he may be the sole surviving coparcener. From the authorities referred to above it is more than clear that any alienation by the manager of the family will not affect the interest of the widow that she had received under the provisions of the Act unless the said alienation was for legal necessity or for the benefit of the estate. It cannot, therefore, be held that because in a certain coparcenary property the widow had her interest under the provisions of the Act, the alienation made by the manager of the family or by all the coparceners of the family, even if the alienation was for legal necessity or for the benefit of the estate, will not bind her interest. We are, therefore, unable to accept the contention of the learned counsel made on behalf of the appellant. The learned trial Judge had rightly considered this question and in our opinion his conclusions on this question are right.

7. Now coming to the second contention of the learned counsel that there is no evidence on record that the mortgage in question was created for legal necessity, we need only state that there is no substance in this submission. Smt. Keshar Bai has not said anything in this regard in her plaint. She has only stated in her plaint that the mortgage and the resultant decree obtained by defendant No. 1 against defendants Nos. 2 and 3 are void and eventually against her share in the property; Basantiram has pleaded in his written statement that the properties mortgaged were the joint family properties on 13th August, 1944 and the loan was advanced for legal necessity and that was, therefore, binding on the plaintiff. The plaintiff did not even at this stage obtained leave of the Court to submit her replication to plead that the mortgage loan was not taken for legal necessity of the family.

Issue No. 2 framed by the learned trial Judge was: "Is the mortgage decree mentioned in para No. 4 of the plaint binding upon the plaintiff? If so, what is its effect upon the suit?" Parties led their evidence. The plaintiff in her statement as P. W. 4 has stated in examination-in-chief that the mortgage amount of these properties was used for the family purpose. She, however, stated in her cross-examination by Trijokinarain himself that Trijokinarain was doing speculation business and the mortgage amount was lost in speculation. She further stated that it was Trijokinarain who informed her that the mortgage amount was lost by him in speculation. Trijokinarain appeared as her witness as P. W. 9. He has not stated a word as to why he borrowed a sum of Rs. 25,000/- and for that purpose. He did not even refute the recital that he had made in the mortgage deed. Basantiram as D. W. 1 has stated that the money was needed by the two brothers Trijokinarain and Surajnarain for their cloth business. He made enquiries about it and thereafter he advanced the loan to them. He also stated that they had invested the money in their cloth business and they brought the cloth from

Kishangarh and Bombay. He also deposed that they continued to work their cloth business in the same old name of Chhogalal Badridas. Chandmal D. W. 3 stated that Badridasji Taksali was running a shop and doing cloth business in the name and style of Chhogalal Badridas. As already indicated above, in the mortgage deed Ex. A1 it was stated by defendants Nos. 2 and 3 that they were in need of money for cloth business and they are taking the loan of Rs. 25,000/-for that purpose.

In this view of the evidence we are of the opinion that the learned Judge was right in holding that there was legal necessity and the mortgage was binding on the entire coparcenary property. Smt. Kesar Bai who undoubtedly had interest in the coparcenary property was equally bound by the mortgage and thus the entire coparcenary property is liable to pay the amount due under the mortgage decree.

8. No other point was pressed. The appeal fails and is hereby dismissed. Having regard to the circumstances of the case we, however, pass no order as to costs.