

(1966) 07 MP CK 0008

In the Madhya Pradesh High Court

Case No : Second Appeal No. 402 of 1962

Jhangalu Shivcharan

APPELLANT

Vs

Pancho Bai

RESPONDENT

Date of Decision : 11-07-1966

Acts Referred:

Hindu Womens Right to Property Act, 1937 — Section 3(1), 3(2)

Citation : AIR 1968 MP 172 : (1968) ILR (MP) 293 : (1968) JLJ 588 : (1968) 13 MPLJ 233

Hon'ble Judges : P.K. Tare, J

Bench : Single Bench

Advocate : M.L. Chobe, for the Appellant; R.K. Pandey, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tare, J.

This is an appeal by the defendant against the decree, dated 29-6-1962, passed by the II Addl. District Judge Durg, in Civil Appeal No. 11-A of 1962, modifying the decree, dated 8-1-1962, passed by the Civil Judge Class II, Bemetara, in Civil Suit No. 54-A of 1959.

The appellant is the step son of the respondent. The appellant's father, Shivcharan held certain properties shown in Schedule B attached to the plaint and Schedule A which had been filed with the plaint, but now which is annexed to the decree of the trial Court as family properties. In the year 1937-38, Shivcharan effected a partition between himself and his son whereby the property mentioned in Schedule A was allotted to the father, while the property mentioned in Schedule B was allotted to the appellant. At that time, the appellant's real mother, Gouribai was alive. She died on 19-12-1948. Shivcharan himself died on 18-7-1953. Although the partition was effected subsequent to the coming into force of the Hindu Women's Rights to Property Act, 1937, no claim for a share was made either by Panchobai or by Gouribai. After the death

of Shivcharan on 18-7-1953, disputes started between the step mother and the step son. The respondent filed a suit for a declaration of her title to the entire property mentioned in Schedule A, which had been allotted to her husband, Shivcharan in the partition. She also claimed possession and injunction restraining the respondent from interfering with her rights.

According to the appellant, respondent had no right to that property. However, the trial Judge passed a decree for joint possession of the property mentioned in Schedule A on the assumption that in respect of the separated share of the father the mother and the son would succeed to the same, presumably u/s 3(1) of the Hindu Women's Rights to Property Act, 1937.

Against that decree, the present appellant neither filed an appeal nor a cross-objection. But it was the present respondent who filed an appeal claiming relief in respect of the entire property of her deceased husband, presumably, u/s 3 (2) of the Hindu Women's Rights to Property Act, 1937. The learned appellate Judge opined that the divided share of the father could not be considered to be separate property by virtue of the pronouncement of their Lordships of the Federal Court AIR 1945 25 (Federal Court) . The learned appellate Judge expressed the opinion that the matter will be governed by Section 3(2) of the Hindu Women's Rights to Property Act, 1937, and as such, the plaintiff would be entitled to claim possession of all the property of her deceased husband allotted to him in the partition.

The learned appellate Judge mainly placed reliance on Tayi Visalamma Vs. Tayi Jagannadha Rao and Another, , Onnamalai Ammal Vs. Seethapathi Reddiar, and K. Lakshamma v. K.C. Kondayya, AIR 1961 Andh Pra 505 as also a Division Bench case of the Nagpur High Court, namely, AIR 1949 108 (Nagpur) . These decisions and some others which I propose to refer to entitle later are based on the Federal Court case of AIR 1945 25 (Federal Court) , which has clearly laid down that for the purposes of Section 3(1) of the Hindu Women's Rights to Property Act, 1937, the share of a sole surviving coparcener or a divided share of a coparcener cannot be considered to be separate property for the purposes of succession. Their Lordships have laid down that the word "separate property" as used in Section 3(1) of the Act, has a limited sense analogous to self-acquired property. It is only in the self-acquired property that the widow or widows would have interest equal to that of a son. Thus, in view of the pronouncement of their Lordships of the Federal Court, it is the settled law that Section 3 (1) of the Hindu Women's Rights to Property Act, 1937 cannot at all be attracted in respect of the divided share of a coparcener. To that extent, the learned appellate Judge was right in reversing the view of the trial Judge. But the further question is whether Section 3(2) of the Act can be availed of by the widow of a separated coparcener.

Before advertng to the cases, I may state certain broad facts which would indicate the difficulties in accepting the Division Bench view of the Nagpur High Court as expressed in AIR 1949 108 (Nagpur) . Of course, sitting singly, I am not

in a position to dissent from that view. But I may observe that the question whether Section 3 (2) applies was not put forth for consideration before the said Division Bench. Had that argument been advanced, it might have been considered probably with a different conclusion and the contrary result. At the time partition was effected in the year 1937-38. the two wives of Shivcharan had undoubtedly an interest in the family property; and at the time of that partition they could have certainly claimed their own share as wives by virtue of the general Hindu Law. In this connection, see Section 315 of the Principles of Hindu Law by Sir D. F. Mulla (12th Edition). However, the two wives of Shivcharan did not exercise that option in that partition of the year 1937-38. But all the same, their interest in the family property under the general Hindu Law during the life time of their husband and u/s 3 (2) of the Hindu Women's Rights to Property Act, 1937 after the death of their husband was there throughout. One of them died in the year 1948 before the death of Shivcharan. However, the other elected to exercise her right in respect of her interest after the death of her husband in the year 1953. The question is whether she can do it and to what extent.

The Division Bench case of AIR 1949 108 (Nagpur) , is relied on by the learned counsel for the appellant to urge that as between the divided son and the widow of the deceased-Shivcharan, the divided son would be a preferential heir; and in no case can the widow claim to have any interest as obviously Section 3 (1) of the Hindu Women's Rights to Property Act, 1937 cannot be invoked. As already indicated by me earlier, the question u/s 3 (2) of the Act was not at all considered by the said Division Bench as probably no arguments on those lines were advanced. It was because of that that the learned Judges constituting the Division Bench held that under such circumstances, the divided son would be a preferential heir to the widow of the deceased; and in the opinion of the Division Bench, the Hindu Women's Rights to Property Act, 1937 made no difference. It is, therefore, clear that the said Division Bench case has left the question of applicability of Section 3 (2) of the Hindu Women's Rights to Property Act, 1937 open; and moreover it has been dissented from in subsequent decisions of other High Courts which presently I propose to refer to.

At this stage, I may further refer to the pronouncement of their Lordships of the Supreme Court in S.S. Munna Lal Vs. S.S. Rajkumar and Others, , wherein their Lordships have laid down that for the purposes of Section 14(1) of the Hindu Succession Act, 1956, the share of a Jain widow declared by a preliminary decree passed in a suit for partition of joint family property would be a share possessed by her within the meaning of that Section. Their Lordships specifically rejected the earlier view of the Privy Council in AIR 1936 20 (Privy Council) . Thus, according to their Lordships, even the undivided share of a widow declared by a preliminary decree in the absence of a division by metes and bounds would still be an interest held by her under the Hindu Women's Rights to Property Act, 1937 vide Section 3 (2) of the same, which would after the enactment of the Hindu Succession Act, 1956 become her absolute estate. This interest of a Hindu widow as per Section 3 (2) of the Hindu Women's Rights to Property Act, 1937

can only be extinguished by any of the recognised modes known to law, and I may say that it cannot be made to disappear on some ingenious argument as to the interpretation of the law by resort to a rule of interpretation or misinterpretation. At any rate, in the present case the interest of the respondent u/s 3 (2) of the Hindu Women's Rights to Property Act, 1937 was there after the death of her husband. That interest cannot be said to have vanished merely because of her husband and son effecting a partition between themselves. She did not relinquish her interest, nor can her interest be said to have been dissolved in any legal manner. Therefore, there can be no doubt that that interest continues unless extinguished according to law. That interest in the present case would naturally arise after the death of her husband when the respondent would become a widow. Earlier, she could certainly claim a share as a wife under the general Hindu Law.

I may refer to the cases of other High Courts taking the view that Section 3 (2) of the Hindu Women's Rights to Property Act, 1937 applies to such a situation. In *Tayi Visalamma Vs. Tayi Jagannadha Rao and Another*, a Division Bench held that where a Hindu father had effected a partition with his only son and the parties were governed by the Madras School of Hindu Law, the properties which fell to the share of the father would not be separate properties for the purposes of Section 3 (1), but would be joint family properties within the meaning of Section 3 (2) of the Hindu Women's Rights to Property Act, 1937. It was, therefore, held that after the death of the father, his widow would be entitled to the same interest in him which he had. The learned Judges relied on the Federal Court case of AIR 1945 25 (Federal Court) and dissented from the observation of the Nagpur High Court in AIR 1949 108 (Nagpur) about that interpretation of the observations made by their Lordships of the Federal Court.

Later on, Desai J. in *Jana and Another Vs. Parvati*, held that where there was a partition between a father and his son, the father's widow would be entitled to his interest by virtue of Section 3 (2) of the Hindu Women's Rights to Property Act, 1937. To the same effect is the view expressed by the Division Bench of the Madras High Court in *Onnamalai Ammal Vs. Seethapathi Reddiar*, where the facts were similar to the facts of the present case. The Division Bench relied on the Federal Court case of AIR 1945 25 (Federal Court); *Tayi Visalamma Vs. Tayi Jagannadha Rao and Another*, and the earlier case of its own Court, namely, *A.N. Subramanian late minor by G.S. Lakshmi Ammal Vs. A.S. Kalyanarama Iyer and Others*, . Similar view was expressed by the Division Bench of the Andhra Pradesh High Court in *Kakumani Lakshamma Vs. Kakumani China Kondayya and Another*, and it was further reiterated by another Division Bench of the Madras High Court in *The Commissioner of Income Tax Vs. S.S. Thiagarajan Shiyali*, .

Thus, all other High Courts have taken the view that under such circumstances, the widow of a deceased coparcener can invoke Section 3 (2) of the Hindu Women's Rights to Property Act, 1937 in respect of separated share of that

coparcener regarding family property. Although Section 3(2) of the Act was not invoked in the Division Bench case of the Nagpur High Court, namely AIR 1949 108 (Nagpur) that case came to the decided merely on the question whether Section 3 (1) of the Act could be invoked. Had the question relating to Section 3(2) of the Act been decided by the Division Bench, I would, sitting singly, be bound by that. But that question not having been decided, I think that I am free to take my own view based on the decisions of the different High Courts mentioned above and the Division Bench case of the Nagpur High Court cannot be cited as an authority for a wide proposition to the effect that the Hindu Women's Rights to Property Act, 1937 cannot at all be invoked in such a case. I feel that that is too wide a proposition contended on behalf of the appellant, which it is not possible to accept. For this reason, I am of opinion that the learned appellate Judge was right in decreeing the respondent's claim to the entire interest of her deceased husband.

Consequently, this appeal fails and it is accordingly dismissed with costs Counsel's fee in this Court according to schedule or certificate, whichever be less. The costs of the Courts below shall be borne as directed by the first appellate Court.