
(1970) 04 BOM CK 0015

In the Bombay High Court

Case No : Spl. C. Appla. No. 163 of 1967 with Spl. C. Appla. No. 724 of 1968

Narayanrao Shamrao Deshmukh and others

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 28-04-1970

Acts Referred:

Hindu Succession Act, 1956 — Section 6, 8

Citation : (1970) MhLj 913

Hon'ble Judges : D. B. Padhye, J

Bench : Single Bench

Advocate : P. P. Deo in Spl. C. appln. No. 163 of 1967, S. N. Kherdekar in Spl. C. appln. No. 724 of 1968, for the Appellant; P. G. Palshikar, Asstt. Govt, Pleader and Respondents Nos. 2 and 3 were not represented in Spl. C. Appln. No. 163 of 1967, P. G. Palshikar, Asstt. Govt. Pleader For respondent No. 1, Respondent No. 2 was not represented in Spl. C. Appln. No. 724 of 1968, for the Respondent

Final Decision : Allowed

Judgement

D. B. Padhye, J.—These two petitions raise a common question of law and are dealt with together. Special Civil Application No. 163 of 1967 is by the three heirs of one Shamrao Deshmukh who died on 15-6-1957 leaving behind him his son Narayanrao, his widow Sulochanabai and his mother Gangabai, who are the present petitioners. While Shamrao was alive he and the petitioner No. 1 formed a joint Hindu family in which according to the Hindu Women's Right to Property Act, 1937, Shamrao's widow and Narayanrao's mother, Sulochanabai, had a right to claim partition in the event of the partition between the father and the son and after the death of Shamrao she had a right to claim partition from her son Narayanrao. The Hindu Succession Act which came into force with effect from 17th of June 1956 made the mother also an heir along with the son and the widow and in the share owned by the deceased Shamrao during his life time the son, the widow and the mother held equal shares. As per the decision of the Division Bench of this Court in Rangubai Vs. Laxman Lalji Patil, when the interest of the deceased coparcener is to be determined" u/s 6 of the Hindu Succession

Act, the Courts have first to determine what is the property available for partition, then partition all the (sic) property setting aside the share of the widow to which she is entitled in her own right and divide the share of the deceased coparcener amongst the heirs,

Thus when a Hindu coparcener leaves a widow and a son on his death, on a partition during the life time of him, the widow would have been entitled to one-third share and on succession to a further one-sixth share. On the basis of this decision for determining the share which would go to the heirs of Shamrao it will have to be assumed that there was a notional partition immediately before the death of Shamrao between him, his son and the wife and Shamrao "would" have had only one-third share in the property which would devolve on "his death on his death" u/s 8 of the Hindu Succession Act. On the basis of the authority of this decision, his son Narayanrao would be having four-ninth share, the widow Sulochanabai would have had four-ninth share and the mother Gangabai would have had one-ninth share. On the death of Shamrao these respective shares became defined and would on their respective deaths go to their own heirs. Thus the three heirs of Shamrao would become the tenants-in-common having well defined shares in the property left after the death of Shamrao.

2. Special Civil Application No. 163 of 1967 arises out of the proceedings under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, which shall hereinafter be referred to as the Ceiling Act which came into force with effect from 26th of January 1962. The joint family of Shamrao and Narayanrao held 305.49 acres land in the Vidarbha Region and mostly in the (Nagpur District, the ceiling area being 108 acres in some places and 96 acres in others. If total area of 305.49 acres is taken to be as one unit then there would admittedly be much excess area in the occupation of the petitioners and that much excess area would be liable to be declared as surplus Under the Ceiling Act.

3. After the coming into force of the Ceiling Act, the petitioners filed in joint return showing the total extent of land as 305.49 acres but contending that by a family arrangement between the parties on 30-3-1957 their shares in the property were defined and accordingly these petitioners were holding district shares in the property and each of them was entitled to retain land upto the ceiling area. Out of the total area shown it was alleged that some of the properties were already transferred and they could not be taken into account. After considering all the objections of the petitioners, the Sub-Divisional Officer with powers of the Collector found that the total area to be taken into consideration for determining the surplus land would come to acres and with this only we are concerned in the Special Civil Application No. 163 of 1967, With respect to this area the contention of the petitioners" was that they were no longer members of a Hindu undivided family on the death of Shamrao, nor did it form a group or unit, the members of which by custom or usage are joint in estate or possession or residence and, therefore, the ceiling and the surplus area have to be determined with respect to their respective shares. This contention

found no favour with the Sub-Divisional Officer who held that the petitioners are joint in estate and possession by custom and thus the group of these persons would constitute a "family" within the definition of the word "family" in section 2 (II) of the Ceiling Act. It further appears from the order of the Sub-Divisional Officer that the petitioner No. 1- Narayanrao and his grand-mother petitioner No. 3 Gangabai were joint in, mess and residence also which would suggest that the petitioner No. 2, the mother of the petitioner No. 1 is having a separate residence.

4. In appeal before the Maharashtra Revenue Tribunal the only point for consideration was whether the whole of the land measuring 304.63 acres should be taken as one unit as belonging to the family as defined in section 2 (11) or whether the share of each of the petitioners should be taken separately to find out the surplus area with each of them. The Revenue Tribunal agreed with the view expressed by the Sub-Divisional Officer taking the view that since the petitioner No. 1 and the other petitioners are living jointly and he is managing the property on behalf of the other petitioners they must be held to be members of the Hindu joint family or at least the three members of the joint family held the property in jointness. The Revenue Tribunal, therefore, took the view that the family will be considered as one unit and the right to hold the area under the Ceiling Act will have to be decided in that fashion. Taking, therefore, 96 acres of land as the ceiling area for this unit of all the three petitioners the Tribunal held in agreement with the Sub-Divisional Officer that the remaining land was the surplus.

5. In Special Civil Application No. 724 of 1968, the land in question was owned by one Mahadeoappa of village Adgaon, tahsil Akot, district Akola. He died on 10-6-1960 leaving behind him his widow Bahnabai, son Jagannathappa and the married daughter Mandakini. Bahnabai was called upon to file a correct return on which she showed in the return the total land of 160.29 acres contending, however, that she had only one-third share in the lands of Mahadeoappa which she was separately managing and the ceiling area for that place being 78 acres, no land of hers should be declared as surplus. The petitioners also alleged that they had one-third share in the lands and the lands falling to their share did not exceed the ceiling area. They also raised other contentions about some lands being with the tenants which should be excluded from consideration. Out of the two lands said to be with the tenants, the Deputy Collector accepted their contention with respect to one field and rejected with respect to the other, with the result that the total land that could be taken for consideration for determining the surplus would be 157.15 acres. The Deputy Collector taking the heirs of Mahadeoappa as one unit found that the surplus area with those persons was 79.15 acres. This finding has been confirmed by the Maharashtra Revenue Tribunal also in appeal.

6. The heirs of Mahadeoappa were contending before the Deputy Collector that they had been separately cultivating the lands. The Deputy Collector took the

view that, in the first place, they could neither partition the land, nor could sub-divide the same in view of the provisions of section 6 of the Ceiling Act nor was there any documentary evidence to show that the lands were cultivated separately. The Deputy Collector took the view that the total land was a joint family property held by the successors of Mahadeoappa. However, with respect to the petitioner No. 2 Mandakinibai, he observed that she was married in 1958 and her father died in 1960 and, therefore, she could not be regarded as the member of the joint family also. If the property left on the death of Mahadeoappa was his self-acquired or separate property, then u/s 8 of the Hindu Succession Act each of them will have one-third share in that property. If, however, the property left on the death of Mahadeoappa was his joint Hindu family property, then the widow Bahenabai would have four-ninth share, son Jagannath would have four-ninth share and the daughter Mandakinibai would have one-ninth share. The Revenue Tribunal however, expressed that there was no definite material on record to show whether the property held by Mahadeoappa was his separate property or the joint family property. However, if the shares of the three heirs namely, the two petitioners and Bahenabai are to be taken separately for the purposes of determining the surplus area, then it could not make any difference whether the property was the separate property of Mahadeoappa or it was the joint family property because in either case the shares of each of the three persons would be less than the ceiling area and no land would be liable to be declared as surplus. The point for consideration in this case also is the same as in the earlier case, namely, whether the whole property left by deceased Mahadeoappa and now owned by the three co-heirs, Bahenabai, Jagannathappa and Mandakinibai in defined shares should be taken as one unit for the purposes of determining the surplus area. Mandakinibai is admittedly a married woman and resides with her husband and does not reside with her mother and brother. The contention of Mandakinibai that she is separately managing her one-third share has been dealt with by the Revenue Tribunal in casual manner Stating:

"Their stand has been that the property of each heir was separately managed and that effect are the versions of Vithalappa, Baban and Dattuappa. Their versions are really not very forceful and it was difficult for them to say how without a division there was separate cultivation and separate management,"

It was, therefore, observed that there was no allegation of a partition or division and the evidence of separate management was neither here nor there and of no legal consequence. The Revenue Tribunal further observed that each one of them has no doubt an undivided share in the property but each one of them has that undivided interest in the whole of the property. It, therefore, took the entire area of 157.15 acres as one unit of which there were three co-owners each having different fractional shares and on the basis of this, it declared an area of 79.15 acres of land as surplus.

7. In the ceiling proceedings on the basis of Bahenabai's return these petitioners

had objected to any area being declared as surplus contending that they had one-third share each in the property, but their objections" Were rejected.

8. Section 4 of the Ceiling Act provides that subject to the provisions of this Act, no person shall hold land in excess of the ceiling area, as determined in the manner hereinafter provided in the Act. Sub-section (2) thereof provides that subject to the provisions of this Act, all land held by a person in excess of the ceiling area, shall be deemed to be surplus land, and shall be dealt with in the manner hereinafter provided for surplus land. Section 2 (22) defines the word "person". According to this definition, "person" includes a family. "Family" has been defined in section 2 (11). It says:

"family" includes, a Hindu undivided family and in the case of other person, a group or BEU the members of which by custom or usage, are joint in estate or possession "of residence."

the term "member of a family" is defined in section 2 (20), "Member of a family" means a father, mother, spouse, brother, son, grand-son, or dependent sister or daughter, and in the case of a Hindu undivided family a member thereof and also a divorced and dependent daughter. It would thus be seen that the ceiling area has to be determined with respect to a person or a family and the excess land has to be declared surplus. If the family consists of more than five members, then the ceiling area to be retained by the family is increased as per the provisions of section 6 of the Ceiling Act, which provides as under:

"6. Where a family consists of members which exceed five in number, the family shall be entitled to hold land exceeding the ceiling area to the extent of one-sixth of the ceiling area for each member in excess of five, so however that the total holding shall not exceed twice the ceiling area; and in such case, in relation to the holding of that family, such area shall be deemed to be the ceiling area:

Provided that for the purpose of increasing the holding of a family in excess of the ceiling area as aforesaid, if any member thereof holds any land separately, he shall not be regarded as a member of that family for such purpose."

Under the ordinary Hindu Law in the case of a coparcenary, the interest, of the deceased coparcener would go by survivorship to the surviving coparcener, This principle has been recognised even by section 6 of the Hindu Succession Act, which provides that when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. There is, however, a proviso to this section which modifies the ordinary Hindu Law., According to this proviso, if the deceased had left him surviving a female relative specified in class 1 of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession; as the case may be, under this Act and not "by survivorship. In the

two instant cases it is the proviso to section 6 of the Hindu Succession Act that would come into operation because in both these cases on the death of the male member, there are female relatives specified in class-II of the Schedule, namely, in the first case, the mother and the widow, and in the second case, the widow and the daughter. Explanation 1 to this section is also important. It says:

"Explanation 1. - For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

In both these cases before me, it is clear that there is no longer a coparcenary on the deaths of Shamrao in one case and Mahadeoappa in the other in the absence of anything to show that Narayanrao and Jagannathappa in their turn have sons. If so, the coparcenary will continue. That would not, however, make any difference so far as the female heirs are concerned, though they might continue as members of a joint family, with the exception of Mandakini. The question, therefore, is whether the three persons in each of the two cases could be said to be other persons or a group or unit, the members of which by custom or usage, are joint in estate or possession or residence and hence the "family" within the meaning of section 2(11) of the Ceiling Act for the purposes of determining the area to be retained by them and for the declaration of the surplus area.

9. A Hindu coparcenary is a much narrower body than the joint family. A Hindu coparcenary includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grand-sons and great grand-sons of the holder of the joint property for the time being. The conception of a Joint Hindu family constituting a coparcenary "that of the common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor. The coparcenary is purely a (sic) of law. It cannot be created by act of parties. However joint Hindu family is much wider body and consists of all persons (sic) descended from the common ancestor and includes also the family members (sic), as the wives of these persons and their unmarried daughters. However the daughter (sic) to be a member of her father's family on marriage and (sic) a member of her husband's family. In Special Civil Application No. 78 of 1968, the position, therefore, is clear that Mandakinibai who married even before the death of Mahadeoappa ceased to be a member of Mahadeoappa's family and also could not be a member of the family on Mahadeoappa's death along with her mother Bahenabai and brother Jagannathappa. The joint and undivided family is the normal condition of Hindu society and an undivided Hindu family is ordinarily joint not only in estate, but also in food and worship. The existence of joint estate is not an (sic) (sic) to constitute a joint family and the family which does not own any property may nevertheless be joint. However, where there is joint estate and the members of

the family become separate in estate, the family ceases 4(c) fee jp3atj.4though mere severance in food and worship does not operate as a separation These are the principles which have long been accepted, and have bee(c) stated by Sir Dinshaw Mulla's Hindu Law in Chapter XII, sections 212 to 214, Thirteenth Edition. It is in the light of these principles that the (sic) arising in these cases will have to be considered with reference to the definition of the word "family" given in section 2 (11) of the Ceiling Act.

10. The definition of the word "family" is an inclusive definition and includes a Hindu undivided family. A Hindu undivided "family" will include a Hindu coparcenary as well as an ordinary joint Hindu family without there¹ being any coparceners. Besides these two categories the word "family" also includes other persons who are joint in estate or possession or residence and a group or unit, the members of which by custom or usage are joint in estate or procession or residence. During the life-time of Shamrao he, his son Narayanrao, wife Sulochanabai and mother Gangabai formed a joint Hindu family and Shamrao and Narayanrao were the coparceners thereof. After the death of Shamrao Narayanrao being the only surviving coparcener there no longer remained a coparcenary, but the joint family of Narayanrao, Sulochanabai and Gangabai would continue. There is nothing to show that Narayanrao, Sulochanabai and Gangabai separated in residence after the death of Shamrao and the devolution of his interest on Narayanrao, Sulochanabai and Gangabai. The regaining property devolved on Narayanrao as a sole surviving coparcener or on him and his sons, if any. That property together with the property which he got on succession out of Shamrao's share would constitute his family property. Similar would be the case in the other case on the death of Mahadeoappa. On his death his son Jagannathappa and widow Bahenabai Would continue as members of the family though that cannot be said about his daughter Mandakini, who went out of the family on account of marriage¹ prior to the death of Mahadeoappa, The latter part of the definition of the word

"family" would not, therefore, apply to these persons and they would be covered by the first part of the definition itself. After the death of Shamrao, Narayanrao, Sulochana and Gangabai have well-defined shares in their own rights conferred on them by statute, namely, the Hindu Succession Act and not on account of their being members of a joint Hindu family. The whole of the property on the death of Shamrao now owned by Narayanrao, Sulochanabai and Gangabai cannot be said to be the property of the Hindu family a whole. Similarly, on the death of Mahadeoappa, Jagannathappa, Bahenabai and Mandakini have also well-defined shares in their own rights under the Hindu Succession Act and it cannot be called the property of the family and in no case the property which has devolved on Mandakini can be called to be a property of the family. Even if the three persons in the first case and the two persons in the second case can be said to be other persons in the definition of the word "family", they cannot be said to be the members of a group or unit which by custom or usage are joint in estate or possession or residence. On getting their shares on the death of a member of the

family, they may cleave to enjoy their shares separately and also may have separate residence and it cannot be said that because for the sake of convenience they live together or enjoy the property jointly though in separate shares, they are doing so by any custom or usage. In fact, the latter part of the definition of the word "family" contemplates some clans or tribes which by long custom or usage reside together or have joint estate or possession without anyone of them having any defined share in the property as in the case of a coparcenary where no coparcener can predicate his share while the coparcenary continues. This latter part is included in the definition to cover such groups or units which are akin to a Hindu coparcenary, but cannot be included in the first part of the definition....:

11. In the instant cases it cannot be said that the three members in the first case and two members in the second are joint in estate or possession, because each of them has got a well defined share in the property and would be in possession to the extent of that share. These persons are tenants-in common and not joint tenants since each of them has got a well-defined share. As laid down by the Privy Council in *Jogeshwar Narain Deo v. Ramchandra Dutt* I L R 23 Cal. 670 at p.679, the principle of joint tenancy is unknown to Hindu Law except in the case of coparcenary between the members of an undivided family. Since the three members in the first case and the two members in the second do not form a coparcenary, they cannot be said to be joint tenants. No doubt, u/s 2 (22) of the Ceiling Act, "person" includes a family, but while construing section 4, the word "person" can be read as "family" where the family as a whole owns land and would not include cases where the members of the family have defined shares in the same. This would be clear from the proviso to section 6 of the Act. u/s 4 read with section 6 a family consisting of five members would be entitled to retain land upto a ceiling, area and land in excess thereof would be declared as surplus. However, when the members of a family exceed five in number, then for each additional member, an area to the extent of one-sixth of the ceiling area is allowed, so however that the total holding shall not exceed twice the ceiling area. But while so. Calculating the ceiling area a member of the family who holds any land separately is not to be regarded as a member of that family for such purpose. Even though, therefore, ordinarily a person may be a member of a Hindu joint family for the purposes of the Ceiling Act, he would not be held to be a member if he holds land separately- This would show that in determining the ceiling area even with respect to persons who are members of a family, a person holding separate property is to be considered as a separate unit and with respect to him the ceiling area has to be fixed. If in the instant cases the members of the joint family had exceeded five in number then while determining the ceiling area of Narayanrao in the one case and Jagannathappa in the other, the land held by Sulochanabai and Gangabai in the first case and held by Bahenabai in the other, could not have been taken into consideration for increasing the holding of a family in excess of the ceiling area. Similarly, in determining the ceiling areas with respect to Sulochanabai, Gangabai or Bahenabai, the areas held by

Narayanrao or Jagannathappa would not be taken into consideration. It would thus appear that in the first case, Narayanrao, Sulochanabai and Gangabai and in the other case, Jagannathappa and Bahenabai would not constitute a family for the purposes of the Ceiling Act. Of course Narayanrao, his wife, sons, unmarried daughters and mother, in the first case, and in the other case Jagannathappa, his wife, sons, unmarried daughters and mother would constitute a family for the purposes of calculating the area to be retained by him. The lands which have devolved upon these person are held by these persons separately as they are tenants-in-common though the lands may not actually be divided by metes and bounds. Each of them can be said to be lawfully in actual possession of the land as owner to the extent of his or her share. It follows from this, that while determining the land to be retained and declaring the land as surplus, the land of each tenant-in-common or each individual owner alone has to be taken into consideration and it is with reference to him or her alone that the family members are to be ascertained and the area to be retained has to be found.

12. Applying these tests while determining the area to be retained u/s 4 of the Ceiling Act, the lands owned by Narayanrao, Sulochanabai and Gangabai in the first case and by Jagannathappa and Bahenabai in the second case have to be separately considered. In the first case, Narayanrao and Sulochanabai have four-ninth share each in the property left on the death of Shamrao and Gangabai has one-ninth share. It is with respect to these separate shares that the surplus area has to be found separately. In the total area of 304-63 acres land which is in excess of four-ninth share of Narayanrao and Sulochanabai and one-ninth share of Gangabai could alone be declared as surplus land. In the other case also Jagannathappa and Bahenabai have four-ninth share each in the 157.15 acres of land left after the death of Mahadeoappa and Mandakini has got one-ninth share. In this case also the excess area will have to be determined with respect to four-ninth share of Jagannathappa and Bahenabai and one-ninth share of Mandakini. The decision cited on behalf of the respondents in *Parvati v. Janabai* 1968 Mh. L J 441 has in fact no application to the present cases. It was a case under the Hindu Women's Rights to Property Act and no question was whether after the partition of a family property the share obtained by a member of the joint Hindu family retained its character as joint family property. This has nothing to do with the question involved in these cases. *Satrughan Isser Vs. Smt. Subujpari and Others*, is also not helpful for determination of the question before us as it dealt with the Hindu Women's Rights to Property Act and the nature of the interest the widow got on partition. The decision of this Court in *Dadarao v. State of Maharashtra* 1969 Mh. L J 813 is applicable to a limited extent, namely, with respect to the share of Mandakini in the second case and on the authority of this decision in no case can Mandakini's share be taken into consideration for determining the ceiling area of Jagannathappa and Bahenabai.

13. The lower Courts, therefore, were not justified in taking the whole property left on the death of Shamrao in the first case and Mahadeoappa in the other case as one unit for the purposes of determining the land which could be retained and

the land which could be declared as surplus. Accordingly, the orders of the Sub-Divisional Officer, and the Maharashtra Revenue Tribunal in both the cases are set aside. So far as Special Civil Application No, 72 of 1968 is concerned, the total land being 157.15 acres, the shares of Jagannathappa, Bahenabai and Mandakini would be less than the ceiling area which is 78 acres. Thus no land out of this 157.15 acres of land could be declared as surplus and the proceedings with respect to this land have to be quashed. They are accordingly quashed and it is held that no land out of 157.15 acres is liable to be declared as surplus.

14. So far as Special Civil Application No. 163 of 1967 is concerned, the ceiling area comes to 96 acres. In this land Gangabai has one ninth share which is less than the ceiling area and as such, so far she is concerned no land can be declared as surplus. So far as Narayanrao and Sulochanabai are concerned, each of them has got four-ninth share and their shares may exceed the ceiling area. It is not known as to how many are the members of Narayanrao's family. Unless that is determined, it cannot be said whether there is any surplus area or not. Similar would be the case with Sulochanabai. The Collector or the Sub-Divisional Officer with Collector's powers will have, therefore, to make further enquiries with respect to the land which can be declared surplus vis-a-vis Narayanrao and Sulochanabai separately. After making such determination, if any land is found to be surplus, then such surplus land will be so declared and the landholders Narayanrao and Sulochanabai as well as Gangabai will be given an option as to which lands they want to retain to themselves and which lands could be declared as surplus.

15. In the result, both the Special Civil Applications Nos. 163 of 1967 and 724 of 1968 are allowed. The proceedings out of which Special Civil Application No. 724 of 1968 arose are quashed and no further enquiry is necessary in that case; whereas the case out of which Special Civil Application No. 163 of 1967 arises is remanded to the Sub-Divisional Officer for further enquiry in accordance with law and for taking necessary action thereon. A difficulty might arise in this case as to which land could be declared as surplus. If there is an agreement between the three landholders, an option should be given to these three landholders to agree to the lands which they together wish to retain to themselves leaving the matter of division of that land inter se to them and the land which they want to be declared as surplus should be declared as surplus. In case, however, the three landholders do not agree amongst themselves as to which land should be declared as surplus, then it will be open to the Sub-Divisional Officer to declare so much land which is found to be in excess of the ceiling area with respect to each of the landholders from the total area as surplus land.

16. Both the petitions are allowed, but there will be no order as to costs in either of them.