

(1966) 10 BOM CK 0010
In the Bombay High Court
Case No : Second Appeal No. 838 of 1959

Ranu Thaku Kokate

APPELLANT

Vs

Santu Goga Bhangare and Others

RESPONDENT

Date of Decision : 25-10-1966

Acts Referred:

Hindu Succession Act, 1956 — Section 31

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

Citation : AIR 1968 Bom 1 : (1967) 69 BOMLR 463 : (1967) MhLj 844

Hon'ble Judges : Kotval, C.J.;Tarkunde, J;Chitala, J

Bench : Full Bench

Advocate : K.B. Sukhthankar, for the Appellant; P.S. Joshi, for the Respondent

Judgement

Kotval, C.J.

(1) This second appeal has been referred for decision to the Full Bench as it involves an important question as to the scope and effect of sections 2 and 3 of the Hindu Women's Rights to Property Act XVIII of 1937 as amended by Act XI of 1938. The facts upon which the questions arise fall within a narrow compass. One Yesu had two sons; Pandu and Goga. Pandu had a wife Dhondi and two daughters Jani and Patri. Pandu died in 1939 leaving behind his widow Dhondi, two daughters Jani and Patri and a widow of his predeceased son Sakharam. The name of the widow of the predeceased son does not appear on the record before us. Goga had two sons Santu and Bahiru. On 24th March 1939 a partition took place between Goga and Dhondi, the widow of his brother Pandu, and by that partition Dhondi was given the agricultural lands which were the subject-matter of the suit. They are lands admeasuring in all 21 acres and 11 1/2 gunthas. It appears that on the same day that the partition took place, Dhondi sold away the entire property to the 1st defendant Ranu Thaku Kokate for a sum of Rs. 300. After the sale Dhondi died in 1945 and after her Goga died in 1949.

(2) Now the suit was a suit for possession of joint family property. In the suit the plaintiff was Santu, the son of Goga. He joined his brother Bahiru as the third

defendant because the latter declined to join with him as the plaintiff. The first defendant was Ranu Thaku Kokate, the purchaser of the lands, the second defendant was one Valu Gangaram Kanade who was joined because he was on the date of the suit recorded as the holder of some part of the lands sold by the deceased Dhondi; the third defendant was Bahiru Goga Bhangare (defendant No. 3) who, as we have said, was joined as a pro-forma defendant.

The plaintiff claimed that Dhondi being a limited owner had no right to sell the fields to the defendant No. 1, because they were joint family properties. The plaintiff claimed the properties as the reversionary heir to Pandu's estate in the hands of Dhondi along with his brother the third defendant, after the death of Dhondi. They claimed that though Dhondi had claimed partition of the property from Goga in 1939 she still held the property as a limited owner and could alienate it only for legal necessity. The sale to the first defendant was without legal necessity and the plaintiff as reversionary heir had the right to suit, the first defendant, who was the purchaser, denied that Pandu and Goga were joint when Pandu died. According to him Pandu was separate from his brother Goga and Dhondi inherited his separate property and had a right to sell away the fields to him. In any case he pleaded that even assuming that Dhondi held the property as a limited owner, Dhondi sold them away for legal necessity. Her husband Pandu had some debts to pay and therefore, his widow Dhondi sold the property to discharge the debts. Moreover she had to maintain herself and her daughters and therefore there was legal necessity for the sale of suit lands. The second defendant adopted the defence of the first defendant. The third defendant, the brother of the plaintiff, filed no written statement.

The trial Judge dismissed the plaintiff's suit. He held that the suit lands were sold for legal necessity and that the sale was binding on the plaintiff and the defendant No. 3, but in addition the trial Judge held that the plaintiff was not the reversionary heir of the deceased Pandu.

The plaintiff appealed and the Extra Assistant Judge at Nasik reversed the decision of the trial Court. He has held that the plaintiff and the defendant No. 3 were the reversionary heirs of the deceased Pandu. On the question of legal necessity for the sale of the suit properties he held that the legal necessity had not been established. In the result he held that the plaintiff and the defendant No. 3 were entitled to recover the property from the first defendant and granted a decree in their favour. The first defendant is the appellant before us.

Now this being second appeal we are bound by the findings of facts reached by the appellate Court and Mr. Sukthankar on behalf of the appellant has rightly not pressed any ground against the findings of the appellate Judge that there was no legal necessity for the transaction of sale between Dhondi and the first defendant Ranu. Therefore, so far as the points raised in the appeal before us are concerned, it must be accepted that Dhondi sold the suit lands without legal necessity. The principal point which has been raised in the present case is that Dhondi when she took the property on the partition with Goga, exercised her

statutory right of partition under the provisions of Section 3 of the Hindu Women's Rights to Property Act. If so, her rights in the property after her life time cannot be taken by the plaintiff and the third defendant by survivorship or by inheritance, but the property will go by inheritance to the heirs of her deceased husband Pandu who are the two daughters Jani and Patri. Upon that contention it will be seen that a pure question of law arises for determination in the present appeal. Since on this question there is conflict of authorities the question has been referred to a Full Bench.

Prior to the coming into force of the Hindu Women's Rights to Property Act a Hindu Widow inheriting property was subject to certain restrictions on alienation and the property which she held would devolve upon the next heir of the last full owner upon her death. Though the whole estate vested in her and she represented it she had only a power of alienation subject to limitation, the limitations being that there should be legal necessity for the alienation or that the alienation should have been reasonably made as to the necessity or that the next reversioner to the alienation should have consented to it or under certain circumstances that she should have surrendered her estate. Apart from these conditions she had no power of alienation and on her death the property passed to the heirs of her late husband.

Upon this customary law were engrafted the provisions of the Hindu Women's Rights to Property Act XVIII of 1937 which came into force on 14th April 1937, and inevitably the attempt to impose by statute a new but qualified right in favour of women upon the orthodox Hindu law based on ancient custom has affected in diverse unforeseen ways several branches of that law and given rise not merely to complexities but to diverse views as to what the legislature truly meant when it purported to give enlarged rights to women. In *Dagadu Balu Vs. Namdeo Rakhmaji and Others*, Chief Justice Chagla observed that the language of the Act was not happy and its provisions obscure. How obscure are its provisions and how difficult of interpretation its language will be seen from what follows :-

The preamble of the Act indicates that it was enacted to give better rights to women in respect of property and it is one of the first pieces of legislation which the State undertook as a measure of Hindu Law Reform. It was followed in later years by other similar legislation. Sections 2 and 3 of the Act run as follows (we quote only that portion of Section 3 which applies to Hindus governed by the Mitakshara which is the case here):-

"2. Notwithstanding any rule of Hindu law or custom to the contrary; the provisions of Section 3 shall apply where a Hindu dies intestate.

3.

(3) 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.

(4) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's estate, provided however that she shall have the same right of claiming partition as a male owner.

(5) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies."

Section 3(2) provides that a Hindu widow shall have in the property "the same interest as he (her husband) himself had". What is involved in the expression "same interest" was an initial difficulty which had to be resolved, for the Hindu coparcener had quite apart from a right to be the Karta of the joint Hindu family also the right to ask for partition and the right to take by survivorship. His right of alienation was limited by considerations of legal necessity or for payment of family debts. The words "same interest" leave the field wide open, and if nothing more had been said would have given rise to the argument that the widow gets all the above rights of a coparcener and indeed in spite of the qualification of the new rights in Section 3(2) by Section 3(3) such arguments were advanced and in some of the reported cases, upheld.

(6) In sub-section (3) it is provided (1) that the interest which the widow gets "shall be the limited interest known as Hindu Women's estate" and (2) that a Hindu widow on whom an interest devolved under the provisions of sub-section (2) "shall have the same right of claiming partition as a male owner". Now here again, the exact connotation of the words "same right of claiming partition as a male owner" has given rise to much divergence of opinion and questions of great difficulty. To say in the same breath that the widow's interest shall be the "interest known as Hindu Woman's estate" and also to say that she can claim "partition as a male owner" are two completely antithetical propositions from the point of view of customary Hindu law. The paradox is not resolved by the earlier declaration in Section 3(2) that the widow shall have in the property "same interest" as he (the husband) himself had.

(7) One of the rights incidental to the right to claim partition is the right of a coparcener to bring about a disruption of the joint family and one of the questions acutely debated among Courts in construing this sub-section has been whether a Hindu widow who has been given this right under sub-section (3) of Section 3 has the right by claiming partition to bring to an end the joint family of which her husband was a coparcener. Authorities, on the other hand, have gone so far as to say that she herself by virtue of this provision has become a coparcener in the joint family, but it is now practically the unanimous opinion among Courts, that by the rights conferred by sub-sections (2) and (3) of Section 3 of the Hindu Women's Rights to Property Act, a widow succeeding to

her interest created by that Act does not become a coparcener herself, much less has she the right ever to become a Karta. That is the only point upon which the authorities are now agreed. As to what are the other implications of the Act and to what extent its provisions modify the Hindu law there has been no unanimity.

(8) If one turns to the authorities, one finds that so far as the interpretation of sub-sections (2) and (3) of Section 3 is concerned, three distinct and separate views have been propounded which some of the authorities call the conservative or orthodox view as opposed to the radical view and a middle of the line view - a view which in our opinion best reconciles the provision of the statute with the normal Hindu law and has the imprimatur of high authority. The conservative or narrowest view of the provision of the Act is to be found expressed in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam* by Padyala Muthaiya and Another, , which is followed in a decision of the same High Court in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, , *Parappa v. Nagamma*, and by Hidayatullah C. J., as he then was, in *Bhagobai Vs. Bhaiyalal and Others*, , and by a Division Bench of the Nagpur High Court in *Shamrao v. Kashibai*, ILR 1955 Nag 728 = AIR 1956 Nag 110 There is also a decision of a Full Bench of the Madras High Court in *Alamelu Ammal and Others Vs. Chellammal (Died) and Others*, .

(9) The most powerful statement of this point of view is to be found in the judgment of Venkatarama Ayyar J. in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam* by Padyala Muthaiya and Another, . In that case the facts were that one Nagiah had three sons who were members of a joint undivided Hindu family. One of the sons K. died leaving behind a widow R. and a daughter K. P. who was posthumously born. The widow R. instituted a suit under the Hindu Women's Rights to Property Act for partition of the husband's one-fourth share in the joint family properties, but pending the suit she passed away. Then an application was made to bring her minor daughter K. P. on the record as her legal representative. The defendants in the suit were the surviving brothers of K. and their mother, the widow of Nagiah. They opposed the substitution of the daughter K. P. on the ground that the cause of action for partition under the Act and for maintenance which the widow had claimed were personal to her and that they did not survive to the daughter. It was argued before the Division Bench that Section 3(2) completely put an end to the right of survivorship possessed by the coparceners under the law as it stood prior to the Act and the section had in consequence the effect of causing a severance in status of the deceased coparcener and that the provision in Section 3(3) that the widow was to take a women's estate implied that after her death the estate would devolve on her husband's heirs. It was, therefore, urged that the daughter would take as an heir to her father and the brothers could not take as surviving coparceners.

(10) Venkatarama Ayyar J. repelled this contention and pointed out that prior to the enactment of the Act and the right of the widow flowed from the text of Brihaspathi, "when a person dies and his wife survives, half his body survives in

her; when half the body of a person survives, how can another person take his property? Thus according to the Hindu law theory the widow being the surviving half of her deceased husband could not alienate his property but merely held it on his behalf as a limited owner.

(11) The learned Judge pointed out that it was upon this state of the law that the provisions of the Act came to be engrafted and if that was the state of law then there can be no question of either severance of status by operation of law or of succession by the widow as heir. "The true scope of Section. 3(2) then is" the learned Judge said "that it modifies the pre-existing law on the subject to this extent that, where under the law as it stood before the Act the interest of the coparcener lapsed on his death, thereby augmenting the interest of the surviving coparceners, under that section, the interest of the deceased coparcener does not lapse where he leaves a widow surviving. As against her, the right of the coparceners to take by survivorship is taken away. To this extent the right of survivorship under the Mitakshara law is modified". In a latter passage the learned Judge pointed out "the true purpose of Section 3(3) is not to confer rights on persons other than the widow, but to limit her rights over the estate to which she becomes entitled u/s 3(2). So long as she is alive the right of survivorship of the members of the coparcenery is so to say held in suspension but on her death it revives and, therefore, on her death the property will go by survivorship to the coparceners of her deceased husband. The learned Judge then observed at page 269 (of ILR Mad) = (at pp 230-231 of AIR) as follows:-

"To sum up, Section 3(2) of the Act does not operate as a 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 rights 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 which the widow takes u/s 3(2) does not, on her death, devolve on her husband's heirs; and that the right of the coparceners to take by survivorship is suspended as against the widow of a deceased coparcener and such right reasserts itself on her death."

The above statement of this shade of opinion as to the construction of the provisions of sub-section (2) and (3) of Section 3 has been the basis of all the cases which took that view subsequently. It was followed in a latter Full Bench decision of the same High Court is Parappa alias Hanumanthappa and Another Vs. Nagamma and Others, and reaffirmed in Alamelu Ammal and Others Vs. Chellammal (Died) and Others, , and is supported by the view of Hidayatullah J. in Bhagobai Vs. Bhaiyalal and Others, , and his earlier view sitting in Division Bench in the Nagpur High Court in Air 1956 Nag 110, referred above.

(12) It is no doubt true that in applying the provisions of this Act one must have regard to the law existing on the date of its enactment, that is to say the principles of Hindu common law as they were applied by the Courts prior to the

coming into force of the Act, and so we will assume for the sake of consideration of this point that the Hindu law postulated the principle that when a person dies and his wife survives, half his body survives in her and, therefore, when half of the body of a person survives the wife cannot alienate his property. But if the husband continues to live in her after his death, we can see, no reason why she cannot exercise her husband's right to partition and the coparcenery to which her husband belonged. When the statute categorically gives the widow the same interest in the joint family property "as he (the husband) himself had and also says that "she shall have the same right of claiming partition as a male owner" why must it be supposed that she can still put an end to the joint status only for her own benefit and no more? The question is not what was the Hindu law before the Act but the question is to what extent it was intended to modify the law by the provisions of Sections 3(2) and 3(3) of the Act. There is nothing in the Act which indicates that the right of partition conferred upon the widow is a right which is peculiar or personal to her. On the other hand, it seems to us that when the Legislature in conferring the right upon the widow used the words "the same right of claiming partition as a male owner" and used especially the word "partition" the legislative draftsmen could not have been unaware of the fixed connotation which the word "partition" had by then acquired as being an act by which the joint status is disrupted or put an end to and of the governing text of Manu IX-47 which has been accepted in all the authorities as the guiding principle that once a partition is made it is made irrevocably and once for all.

(13) Next we may point out that in this respect at least the legislature has not left anything in doubt. The words used are not the "same right of claiming partition", but "the same right of claiming partition as a male owner". Now it goes without saying that under the Hindu law as it existed prior to the Act, no one but a male owner could put an end to the joint status. Therefore, the ambit of the right which the Hindu widow is given by Section 3(3) is further made clear. It is the same right which a Hindu male owner exercised prior to the coming into force of the Act. If by the exercise of the statutory right of the partition given to her, the widow can by a partition only temporarily separate her husband's share for her own benefit and during her own life-time, only, then assuredly she is not getting "the same right of claiming partition as a male owner". It will be a much attenuated right of partition, which the statute however never intended to curtail.

(14) We may also say that we are not in agreement with the remark in Subha Rao's case, (at p. 265 of ILR Mad report = (at p. 229 of AIR), that "the true purpose of Section 3(3) is not to confer rights on persons other than the widow but "to limit her rights over the estate" to which she becomes entitled u/s 3(2)" (underlining (here in " ") is ours). In our opinion Section 3(2) gives the widow the same interest as her husband had and Section 3(3) defines the ambit of that interest. It is not merely a provision meant to lay down limitations. As we have said the male owner can be a coparcener and as such take by survivorship, he can become a Karta and he can claim partition and thereby disrupt the joint family. By Section 3(2) read with Section 3(3) the widow cannot become a

coparcener and cannot become a Karta but in terms has the right to partition "as a male owner". That can only imply that she can also like her husband claim a partition and disrupt the joint family.

In *Bhagobai Vs. Bhaiyalal and Others*, , Hidayatullah J. high-lighted the fact that in sub-section of Section 3 the Legislature did not use the word "coparcener" but only the words "a male owner" and he, therefore, drew a distinction as follows :-

"She (the widow) is not enabled to bring the coparcenery to an end as a coparcener can by asking for a partition. She has the same right of claiming a partition as a male owner but not as a coparcener. That right is available only to a coparcener, which, as the Full Bench admits the "widow is not" (The Full Bench to which the learned Judge was referring was *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, to which we shall presently advert.)

(15) It is now settled law despite some authorities to the contrary that a Hindu widow by virtue of the rights given to her by sub-sections (2) and (3) of section 3, does not become a coparcener. Indeed that right under the Hindu common law could only belong to a male upon all authorities it is now settled that right has not been given to the widow by this legislation. If it was the intention of the legislative draftsmen that the widow should not become a coparcener, we can see no other course open to him but to use the generic expression which he has used "as a male owner". That would be the most convenient and effective way of saying that the widow will have the right of partition which a male owner possesses while at the same time she does not become a coparcener. Apart from that, we may also say that even under the Hindu common law cases can arise where a Hindu male member claims partition of joint family property from a person who is not a coparcener and with whom he does not form coparcenery. Sub-section (1) of section 3 refers to a case of separate property and confers upon a widow certain rights in respect thereof. sub-section (3), however, is not confined to cases arising under the provisions of sub-section (2) only but may cover cases falling under sub-section (1). One can conceive that in such circumstances a male owner may sue for partition although he is not a member of a coparcenery; hence the need to use the expression "partition as a male owner" in sub-section (3) of section 3 and not merely the expression "partition as a coparcener" which of course covers most of the cases normally.

(16) If the right of partition conferred by sub-section (3) of section 3 is a right such as well recognised in the Hindu common law till the date of the Act, then it must follow as a necessary corollary that when the widow claims a partition as a male owner she claims partition no doubt in her own right, but to the property of her husband . If the partition is of property in which her husband had a right then it cannot revert to the former members of the coparcenery upon the widow's death, for property which has once been separated from the coparcenery cannot merely revert without anything more.

(17) In the Full Bench case of *Alamelu Ammal and Others Vs. Chellammal (Died)*

and Others, referred to above though no doubt *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, was relied on it will be noticed that no other point of view was put forward before the Full Bench but what was argued was that in view of certain remarks of the Full Bench in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, that decision overruled the decision in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, - not expressly, but by implication and it was really that point which induced the reference to the Full Bench in *Alamelu Ammal and Others Vs. Chellammal (Died) and Others*, . The point was negatived and the decision in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, in so far as it held that the provisions of section 3(3) of the Act did not operate to effect a severance of interest of her deceased husband and that the right which the widow got was personal to her and came to the original coparcenery was not overruled by the observations in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, . We do not, therefore, think that upon the real question which falls to be determined in this appeal the decision of the Full Bench in *Alamelu Ammal and Others Vs. Chellammal (Died) and Others*, carries the matter any further than the decisions in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, .

(18) We have just referred to the decision of the Full Bench in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, - *Parappa's case*- and we may say at once that though it held that *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, , was rightly decided, a certain passage therein conflicts with the remarks of Venkatrama Iyyar, J. in *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, . After referring to the provisions of the Act Mr. Justice Subba Rao delivering the judgment on behalf of the Full Bench posed two points at page 187 (of ILR Mad) = (at p. 578 of AIR as follows:-

"To afford a satisfactory solution to the problem raised, it would be convenient to consider the question from three aspects :

(i) What were the rights of a Hindu widow in her husband's interest in the joint family property under Hindu Law before the Act?

(ii) What were the changes effected by the Act in respect of her right?

(with the third point we are not here directly concerned)"

Then the learned Judge pointed out that the rights of a widow under the general Hindu law in the joint family property were well settled; "that the wife of a coparcener becomes a member of the family, though she does not attain the status of a coparcener. In remote antiquity her claim to a share was recognised; but the later development of the law, perhaps due to her subordinate position in the family, reduced the content of her rights and confined it to a claim for maintenance from and out of the joint family property. But her husband's

interest in the family property would pass by survivorship to the other members of the family. In essence her right to maintenance was attached to property". As to the effect of the Act upon these provisions of the law the Full Bench held at page 192 (of ILR 1954 Mad) = (at p. 579 of AIR) as follows :-

"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 a coparcener, though she continues 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 persons 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 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 the 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."

The underlined (here in " ") portion of the passage we have quoted expresses, in our opinion, correctly-and we say so with the greatest respect- the position that would arise if the widow exercises her right to partition u/s 3(3) of the Act, and in the present case we are concerned with just such a position. With the rest of the statements in the passage we are not directly concerned in the present case, but we have quoted this passage at length because it should not be torn from its context. We have already said that so far as the Full Bench decision in *Alamelu Ammal and Others Vs. Chellammal (Died) and Others*, *Alamelu Ammal's* case is concerned, it did not consider any possible contrary view because all that was urged before that Bench was that the decision in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, had not overruled *Movva Subba Rao and Another Vs. Movva Krishna Prasadam by Padyala Muthaiya and Another*, . Secondly, even in *Alamelu Ammal and Others Vs. Chellammal (Died) and Others*, the said remarks were not disapproved or dissented from but all that was said was "the observations in *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, regarding succession to the interest of the widow after

partition were obiter" (See p. 117 (of ILR Mad) = (at p. 104 of AIR).

(19) The view we are inclined to take is in accord with several decisions of other High Courts, particularly of the Patna High Court in Sabujpari and Another Vs. Satrugan Isser and Others, , Mt. Khatrani Kuer Vs. Smt. Tapeshwari Kuer, of the Orissa High Court in Harekrishna Das and Another Vs. Jujesthi Panda and Others, , Keluni Dei and Another Vs. Jagabandhu Naik and Others, and the minority judgment of Mr. Justice Jagannadhadas in Radhi Bewa and Another Vs. Bhagwan Sahu and Others, and the judgment of Mr. Justice Umamaheswaram in K.M. Ramaswami Chetti and Others Vs. P.K. Lakshmamma (Died) and Others, , was also a Full Bench case and it pointed out that a right which a widow gets u/s 3 (2) is neither by way of inheritance nor survivorship[but "by virtue of a special statutory right conferred upon her by the Act" (see p. 267), which is also the view accepted in several other cases. It is a statutory right, on the basis of the fiction that half the body of her deceased husband survives in the widow. That it is a statutory right is now confirmed by the Supreme Court in Potti Lakshmi Perumallu Vs. Potti Krishnavenamma, . Then the Full Bench pointed out in paragraph 32 the effect which will result if the widow asks for partition and the Full Bench held :

"Fourthly, the joint family will, undoubtedly, be disrupted if the widow of a coparcener, who has succeeded to his interest, asks for partition. Her share would then be determined and, on her death, it would pass to her husband's heirs."

With respect we accept this as the correct position that would emerge upon the provisions of the Act in a case where the widow claims partition. We must not be held to endorse the other propositions laid down in the Patna case and in some of the other cases cited above, because they are really not necessary for the disposal of the case before us, especially the view taken that the property would pass by survivorship to the then living coparceners of her husband if the widow does without claiming partition.

(20) Apart from the two views to which we have adverted we have already said that there is a third view propounded upon the provisions of section 3 of the Act, where it was held that when a widow takes an interest in the property of her husband u/s 3(2), she becomes an outright coparcener. See ILR 1945 Mad 402 = AIR 1945 Mad 21 cited with approval in Manorama Bai Vs. Rama Bai and Others, in the judgment of Ramaswami, J. That view was dissented from in Keluni Dei and Another Vs. Jagabandhu Naik and Others, and we are in agreement with that dissent. If that view were correct, then the provisions of section 3(3) conferring the right of partition would make no meaning.

(21) In our opinion, the position as to the effect of section 3(2) and section 3(3) of the Hindu Women's Rights to Property Act is as follows : (and in stating the position we would strictly confine ourselves to the facts of this case and no further). Upon the widow succeeding to the interest of her husband u/s 3(2) and

claiming a partition under the right given to her under sub-section (3) of section 3, the interest of her husband in the joint family property is completely separated from the coparcenary property and that interest in the property of her husband on the death of the widow would pass not by survivorship to the erstwhile members of the coparcenary but to the heirs of her husband.

(22) In that view, it seems to us that upon the partition having taken place in the present case between Dhondi and Goga on 24th March, 1939 the suit property ceased to be joint family property of Pandu and Goga. Upon the death of Dhondi, the property would devolve on the heirs of Pandu, but since Dhondi disposed of the property during her lifetime the purchaser thereof, the first defendant Ranu would rightly take it as his property unless the alienation is challenged as not being for legal necessity. The appellate Court adverted to this position and remarked that Dhondi had claimed partition from Goga under the Hindu Women's Rights to Property Act and had been given a share in the joint estate, but it argued that since under the Act Dhondi could take only a limited estate of a Hindu widow and nothing more, the property must be deemed to be the share of her husband Pandu who had died during the continuance of the coparcenary. It was not a case where Dhondi succeeded to self-acquired property and, therefore, it follows that the property would go to the surviving coparceners who were admittedly the plaintiff and the third defendant, the sons of Goga. In our opinion, in so holding the appellate Court made a clear error of law in so far as it failed to appreciate the proper effect of the new right created u/s 3. We have shown that upon Dhondi claiming a partition and upon her death, the property would pass not to the surviving members of the coparcenary but to the surviving members of the coparcenary but to the heirs of her late husband Pandu, i.e., to the two daughters of Pandu, namely Jani and Patri. However, since Dhondi sold the property to the first defendant Ranu, the first defendant will be the rightful owner thereof unless the alienation were to be successfully challenged by the reversionary heirs of Pandu e.g. Jani and Patri.

(23) In the result, therefore, we allow the appeal, set aside the judgment and decree of the appellate Court and restore that of the trial Court. Having regard to the fact that the position in this case depended upon the decision of an important question of law which required considerable discussion and clarification, we think that the proper order to pass should be that each party should bear its own costs in this Court and the lower Appellate Court.

(24) Appeal allowed.