

(1972) 08 KAR CK 0001
In the Karnataka High Court
Case No : No. 50/65

Shivadeviamma and Others

APPELLANT

Vs

Sumanji and Others

RESPONDENT

Date of Decision : 04-08-1972

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 14 (1)
Mysore High Court Act, 1962 — Section 7, 7 (2)

Citation : AIR 1973 Kar 296 : AIR 1972 Kar 296

Hon'ble Judges : Ahmed Ali Khan, Acting C.J.;Santosh, J;Sadanandaswamy, J;Malimath, J;Chandrashekhar, J

Bench : Full Bench

Advocate : B.P. Holla, for the Appellant; K.R. Karanth and K.R.D. Karanth, for the Respondent

Judgement

Chandrashkkhar, J.—A Division Bench of this Court consisting of Honniah and Venkataramiah, JJ., has, by its order dated 23-6-1972, referred to a Full Bench the following questions:

"Whether it is open to a Full Bench to decline to answer the questions referred to it u/s 7 of the Mysore High Court Act, 1961, and to send back the case to the Division Bench, without answering the questions referred to it, but with a direction to give reasons in support of the order of reference?"

2. We shall briefly narrate how the above question came to be referred to this Full Bench. In the present appeal (in which the above question has been referred to this Full Bench), one of the questions that arose for determination was whether a female member of an Aliyasanthana family constituting a Nissanthathi Kavaru, can dispose of by a will her share in the Kutumba of which she is a member. It was contended on behalf of the appellant that though u/s 36 (3) of the Madras Aliyasanthana Act, 1949, such a member has only a life interest in the properties allotted to her, such life interest gets enlarged into an absolute estate by virtue of Section 14(1) of the Hindu Succession Act, 1956. The above

contention runs counter to the ruling of a Division Bench of this Court in *Amba Shedthi v. Paddakke Shedthi* (1969) 2 Mys LJ 377 in which it was held that it was never intended by Parliament to apply the provision of Section 14 of the Hindu Succession Act to Aliyasanthana females who were Nissanthathi Kavarus under the Aliyasanthana Act. After considering the aforesaid contention of the appellant's counsel, the Division Bench, by its order dated 3-11-1970, formulated the following three questions of law and referred them to a Full Bench u/s 7 of the Mysore High Court Act, 1961.

(1) Does Section 14(1) of the Hindu Succession Act, 1956, apply to the case of life interest acquired before or after the commencement of the said Act, under Sections 35 and 36 of the Madras Aliyasanthana Act, 1949 (Madras Act No. IX of 1949), by a female who has completed fifty years of age (a Nissanthathi Kavaru) and possessed by her and does such female hold such property absolutely and not as a holder of life interest?

(2) Are provisions of Section 36 (3), (4) and (5) of the Madras Aliyasanthana Act, 1949 (Madras Act IX of 1949) inconsistent with Section 14(1) of the Hindu Succession Act, 1956, in so far as they relate to females governed by Aliyasanthana Law and do those provisions cease to apply to such females even though they may have completed fifty years of age by virtue of Section 14 of the Hindu Succession Act, 1956?

(3) Has a female, governed by Aliyasanthana Law who has completed fifty years of age, the power to bequeath under a Will her divided interest in the property acquired by her at a partition u/s 35 of the Madras Aliyasanthana Act, 1949 (Madras Act IX of 1949)?

The material portion of the order of reference reads:

"We find that the several questions argued before us have not been examined in the decision in *Amba Shedthi*'s case. We, therefore, feel that the question decided in that case required to be re-considered by a larger Bench, in view of the decision of this Court in *Mallawwa v. Kallappa* 1966 (2) Mys LJ 633 mentioned earlier and the two decisions of the Supreme Court referred to above. Having regard to the importance of the questions involved, we think that this is a fit case to be decided by a Full Bench."

3. Accordingly, the aforesaid three questions came up for consideration before a Full Bench (consisting of Govinda Bhat, Venkataramiah and Datar, JJ.) Govinda Bhat, J., (with whom Datar J., agreed) was of the opinion that the case should be referred back to the Division Bench for a clear order of reference, as his Lordship felt that the order of reference did not contain the reasons for casting a doubt on the correctness of the decision in *Amba Shcdihi*'s case (1969) 2 Mys LJ 377 or a reasoned criticism of the view accepted therein. His Lordship observed thus in the course of his opinion:

"The order of reference does neither state that the Bench of two Judges differs

from the view taken by the earlier Division Bench in Amba Shedthi's case (1969) 2 Mys LJ 377 nor do they formulate a reasoned criticism of the view accepted therein. They do not also state in express words that they doubt the correctness of the decision in Amba Shedthi's case (1969) 2 Mys LJ 377. The order of reference does not state that there are decisions of other High Courts in India which are strongly persuasive and take a different view from the view which prevails in this High Court."

4. In his dissenting opinion, Venkataramiah, J., took the view that even if an order of reference by a Division Bench does not contain the grounds on which it disagrees with an earlier decision, the Full Bench cannot refuse to hear and decide the questions referred to it. His Lordship observed that though it would be better if the order of reference contains the grounds on which a Division Bench differs from the view expressed by another Division Bench, the Full Bench would be failing to exercise the jurisdiction vested in it u/s 7 of the Act if it (the Full Bench) does not answer the questions referred to it. His Lordship was of the view that the case had to be heard by the Full Bench and that the questions referred to it must be decided by it without sending back the case to the Division Bench for reconsidering the matter.

5. In view of the decision of the majority of Judges comprising that Full Bench, the matter was referred back to the Division Bench for a clear order of reference in the light of the interpretation of Section 7 of the Mysore High Court Act by the majority of Judges.

6. When the matter came up before the Division Bench, it took the view that the Full Bench had no power to direct the Division Bench to do what the former wanted the latter to do. In that view, the Division Bench again referred the case to a Full Bench to answer the question which we have already set out in para 1 supra. That is how the case has come up before this Full Bench.

7. In deciding the question referred to this Full Bench, the opinion of other High Courts on that or similar question, do not appear to us to be of much assistance, because a reference to a Full Bench of this Court, is governed by an express statutory provision, namely, Section 7 of the Mysore High Court Act, whereas it has not been shown that there are corresponding statutory provisions, governing such reference in other High Courts. In those High Courts a reference to a Full Bench appears to be governed by precedents, conventions and/or rules made by the concerned High Courts regarding the powers of the Chief Justice to constitute Benches and to direct the posting of cases before them (such Benches). Section 7 of the Mysore High Court Act reads:

"S. 7. Reference to Full Bench:--(1) Where in any proceeding pending before it, any question of law or usage having the force of law arises, a Bench consisting of not less than two Judges of the High Court may, if it thinks fit, and shall, if it differs from the view taken by a similar Bench of the High Court on the said question refer to a Full Bench of the High Court the question of Jaw or usage

having the force of law.

(2) The decision of the majority of Judges comprising a Full Bench of the High Court shall be the decision of the High Court."

8. Sub-section (1) of Section 7 consists of two parts. The first part provides that if in any proceeding pending before a Bench of not less than two Judges, any question of law or usage having the force of law arises, such Bench may, if it thinks fit, refer such question to a Full Bench. The second part of that sub-section provides that if in any proceeding pending before it a Bench consisting of not less than two Judges differs from the view taken by a similar Bench of this Court on such question, the former Bench shall refer such question to a Full Bench.

9. Whether a reference to a Full Bench comes within the first or the second part of Sub-section (1) of Section 7, there is nothing in that sub-section which expressly provides what an order of reference to a Full Bench should contain.

10. Sub-section (2) of Section 7 does not also expressly provide what the Full Bench should do when a question is referred to it by a Division Bench under Sub-section (1) of that Section. It is nowhere expressly stated in that Section that the Full Bench shall hear and decide the question referred to it by a Division Bench. Nor does that section expressly state whether the Full Bench can send back the case to the referring Bench, either for modifying or clarifying such question or for making a clear order of reference.

11. However, the necessary implication from the provisions of Sub-section (2) of Section 7 is, in our opinion, that when a question is referred to a Full Bench, it (the Full Bench) should hear and decide such question so that the referring Bench may decide the case in accordance with the decision of the Full Bench on that question.

12. If a Division Bench refers to a Full Bench a question of law on which there is an earlier decision of a similar Bench, can it be said that there is, by necessary implication from the provisions of Section 7, a duty cast on the referring Bench to formulate in its order of reference to the Full Bench a reasoned criticism of the view taken by the other Bench or to offer an alternative to that view? Next, does the power of the Full Bench to hear and decide the questions referred to it, carry with it an implied or ancillary power to send back a case to the referring Bench if the order of reference does not contain such reasoned criticism or an alternative to the view of the earlier Bench?

13. Where there is already a decision of a Division Bench of this Court on a question of law and a similar Bench doubts its correctness and refers such question to a Full Bench, there can be no doubt that it is desirable that the order of reference should contain the reasons which persuaded the referring Bench to doubt the correctness of the other similar Bench. The following observations of Hidayatullah, J., (as he then was), who spoke for the Division Bench in

Gourishanker v. Raja Azamshah, which have been quoted by Govinda Bhat, J., who delivered the majority opinion of the Full Bench in this case are apposite.

"It is hardly fair to the Bench called upon to consider the correctness of a decision that they should not be made aware of the reasons which impelled the referring Judge, to doubt its correctness. We venture to state, with all due respect, that, in the absence of conflict of authority, a reference, casting a doubt on the correctness of a reported decision of the Court, but not formulating a reasoned criticism of the view accepted therein or offering an alternative to it, disturbs the comity of the Court, but not formulating a reasoned criticism of the view accepted therein or offering an alternative to it, disturbs the comity of the Court. This would only lead to an uncertainty of the law and with all due respect should be avoided."

14. As stated earlier, even Venkataramiah, J., has not, in his minority opinion, doubted the desirability of formulation of such reasoned criticism or offering an alternative to the view the correctness of which has been doubted by the referring Bench. But the question is whether there is a legal obligation on the referring Bench, to do so. It is well known that not everything that is desirable to be done or to be refrained from being done, necessarily creates a legal obligation to do it or to refrain from doing it. There are many things which are merely in the region of desirability, expediency or propriety, but outside the sphere of legal rights and obligations. We find it difficult to say that where a Bench doubts the correctness of an earlier decision of a similar Bench or feels that it is desirable that the question decided in such earlier decision, should be re-examined and refers such question to a Full Bench, the referring Bench is under a legal obligation to formulate the reasons for doubting the correctness of the earlier decision or for saying that a question decided earlier by a similar Bench required re-examination. As stated earlier, Sub-section (1) of Section 7 does not expressly state that the referring Bench should do so; nor can such an obligation be, in our opinion, said to be necessarily implied from the provisions of Sub-section (1) of Section 7.

15. In spite of the omission by a referring Bench to formulate such reasons or to indicate such alternative view, the order of reference made by such Bench to a Full Bench, is, in our opinion, a valid reference. It follows that the Full Bench cannot decline to hear and answer the questions so referred to it by a Division Bench merely on the ground that the order of reference does not contain such reasons or indicate an alternative view. It also follows that the Full Bench cannot send back the case to the referring Bench, with a direction to give the reasons for doubting the correctness of an earlier decision of a similar Bench or for saying that a question decided by a similar Bench requires re-examination.

16. For the purpose of this reference, it is not necessary to express any opinion on the question whether a Full Bench has or has no power to send back a case to the referring Bench without answering the questions referred to it (Full Bench), where such question is not a question of law or usage having the force of law at

all or where such question is not intelligible or suffers from ambiguity and requires clarification by the referring Bench. For the reasons stated above, our answer to the question referred to us is as follows:--

On the ground that no reasons are stated in support of the order of reference, it is not open to a Full Bench to decline to answer the questions referred to it by a Division Bench u/s 7 of the Mysore High Court Act, 1961, and to send back the case to the referring Bench without answering the questions referred to it (Full Bench) and to direct the referring Bench to state reasons in support of the order of reference.