

**(2000) 09 KAR CK 0013**

**In the Karnataka High Court**

**Case No : Regular First Appeal No. 451 of 1994**

Sri. Irappa

APPELLANT

Vs

Gurusiddappa and Another

RESPONDENT

**Date of Decision : 29-09-2000**

**Acts Referred:**

Hindu Succession Act, 1956 — Section 4, 6

**Citation : (2000) 4 KCCR 2786**

**Hon'ble Judges : Tirath S. Thakur, J;K. Sreedhar Rao, J**

**Bench : Division Bench**

**Advocate : T.N. Raghupathy, for the Appellant; Jayakumar S. Patil, for Respondents 1 and 2(a), for the Respondent**

**Final Decision : Dismissed**

## Judgement

K. Sreedhar Rao, J.—This appeal pertains to the partition of family estate between the Mother and two sons. The mother joined by her younger son, filed a suit against the eldest son seeking partition and separate possession of their 2/3rd share in the suit properties.

2. The Appellant who is the Defendant in the trial Court, contested the Suit that the properties, a shop premises bearing No. 129 obtained on lease from Municipality situate in Lal Bahadur Shastri Market, Bijapur Town, by the first Plaintiff and a plot bearing No. 11 situate at Mahalbagayat, Bijapur, standing in the name of the son of Plaintiff No. 1 are also joint family properties which are to be taken into account for partition. The Plaintiffs, subsequently, by an amendment, set up a plea that the plot bearing No. 52 situate in KSRTC Employees' Co-operative Housing Society Limited, Bijapur, standing in the name of the Defendant is also available for partition. The trial Court rejecting the plea of the Defendant claiming partition in Shop premises bearing No. 129 and Plot No. 11, decreed the suit and also rejected the claim of the Plaintiffs for a partition in Plot No. 52 which stands in the name of the Defendant. Being aggrieved by the judgment and decree, an Appeal is filed by the Defendant. The

second Defendant died during the pendency of the Appeal and she has executed a Will bequeathing her share in favour of the son of Plaintiff No. 1 and he has been brought on record as the L.R. of the deceased second respondent.

3. The trial Court granted a decree declaring share to each of the Plaintiffs and the Defendant in the suit properties which are held to be joint family properties. The Counsel for the Appellant raised a contention that the grant of 1/3rd share to the second Plaintiff who is the mother equal to that of her sons is illegal and that the properties have to be divided 1/3rd each in favour of the Plaintiffs and Defendant and 1/3rd share notionally to the father. Out of the father's share of 1/3rd equally the same is to be shared between the parties, wherein, the second Plaintiff gets only 1/3rd of 1/3rd and as such, assailed the decree as being illegal.

4. The uncodified personal law relating to Partition and Succession was not rather uniform to all the places in India. It is only after the passing of the Hindu Succession Act, to a very great extent, the uniformity in principles and practice has been achieved. In uncodified law, there are two major schools of thought - one is Dayabhaga School followed in Bengal Area and the other Mitakshara School followed in the rest of India.

5. In Hindu Law by Mulla (Sixteenth Edition) at page 43, it deals with the territorial operation of different schools in Mitakshara thus:

The Mitakshara is sub-divided into four minor schools:

Benares School; Mithila School; Maharashtra or Bombay School (Western India); and Dravida or Madras School (Southern India);

Again at page 49, it reads thus:

The Maharashtra or Bombay School, also known as the School of Western India, claims in respect of certain matters to be the most liberal of the different schools of Hindu Law. In Western India, sometimes mentioned as the Bombay Presidency, the pre-eminence of the Mitakshara is generally admitted. The relative position of the Mitakshara and the Vyavahara Mayukha which are proximate authorities as well as of the other works accepted as authorities in the old Bombay Presidency and in other parts of Western India is discussed in several cases decided by the Bombay High Court.

While the parental authority of the Mitakshara is never questioned; some of the rules there stated have not been accepted and preference has been given to those put forward in the Vyavahara Mayukha in certain parts of Western India. The Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. But in Gujarat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara. The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize them with each other wherever and so far as that is reasonably possible.

Obviously, the litigation pertains to the area which is a part of Bombay Presidency governed by Bombay School of thought.

6. In *Sidrapa alias Shidramappa Bhagappa Patil v. Laxmi Bai and Ors.* 1965 (1) MLJ 625, a question arose before this Court about the right of a mother entitled to a share equal to that of a son at a partition, when the parties are governed by Bombay School of thought. The said custom was analysed in the context of the provision of Sections 4 and 6 of the Hindu Succession Act and was held that, Section 4 does not abrogate the said rule of Hindu Law which was in force in the State of Bombay, entitling the mother to a share equal to that of a son at a partition.

7. In the State of Karnataka, except the Bombay-Karnataka area, old Mysore Area, Hyderabad-Karnataka Area follow the Madras School of Hindu Law, where, a mother is not entitled to receive a share equal to that of a son at a partition (1988) 2 KLJ 155 para 29, unlike in the Bombay-Karnataka Area where Bombay School of thought prevails.

8. The case in *Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others*, also pertaining to the parties governed by Bombay School of Law. The Supreme Court interpreting the effect of Explanation-I of Section 6 has explained the formula for working out a share of a mother or wife at a partition thus:

9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the Plaintiff has a  $\frac{1}{6}$ th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that 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. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the Plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his two sons, she would be entitled to receive, a share equal to that of a son. (see Mulla's Hindu Law, Fourteenth Edition, page 403, para 315). In a partition between Khandappa and his two sons, there would be four sharers in the co-parcenary property, the fourth being Khandappa's wife, the Plaintiff. Khandappa would have therefore got a  $\frac{1}{4}$ th share in the coparcenary property on the hypothesis of a partition between himself and his sons.

10. Two things are thus clear: One, that in a partition of the coparcenary property Khandappa would have obtained a  $\frac{1}{4}$ th share and two, that the share of the Plaintiff in the  $\frac{1}{4}$ th share is  $\frac{1}{6}$ th, that is to say,  $\frac{1}{24}$ th. So far there is no difficulty. The question which poses some-what difficult problem is whether the Plaintiff's share in the coparcenary property is only  $\frac{1}{24}$ th or whether it is  $\frac{1}{4}$ th plus  $\frac{1}{24}$ th, that is to say,  $\frac{1}{24}$ th. The learned trial Judge, relying upon

the decision in *Shiramabai Vs. Kalgonda Bhimgonda and Others*, which was later overruled by the Bombay High Court, accepted the former contention while the High Court accepted the latter. The question is which of these two views is to be preferred.

11. We see no justification for limiting the Plaintiff share to 1/24th by ignoring the 1/4th share which she would have obtained had there been a partition during her husband's lifetime between him and his two sons. We think that in overlooking that 1/4th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the Plaintiff's husband and his sons. Whether a partition had actually taken place between the Plaintiff's husband and his sons is besides the point for the purpose of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

In view of the aforesaid position of Law, it is not open to the Appellant to contend that the second Plaintiff is not entitled to a share equal to that of a son at a partition by virtue of the provision contained u/s 6 of the Hindu Succession Act and that she is only entitled to a share in the notional share allotted to her husband. In fact, the second Plaintiff, in the instant case, would be entitled to a share, independently, equal to that of her son and further would be entitled to an equal share in the share allotted to her husband, thereby, as there are only three heirs entitled to inherit the properties, they would get 1/3rd each. Accordingly, the trial Court has properly granted the share.

9. The plea set up by the Appellant that, during the lifetime of their father, they were doing jointly dry-chilly business and after the death of the father, the first Plaintiff continued business, although, the Appellant is the eldest male member, on account of he being in service, he could not manage the affairs of the business and therefore, the first Plaintiff was managing the same. It is also submitted that, when they were doing dry chilly business, they had taken the shop premises No. 129, on lease from the Municipality and for a period of 99 years the renewal of lease has been obtained by the first Plaintiff in his name, which is also said to be available for partition. Repelling the said contention, the first respondent contends that, the family business was discontinued during his father's time and his son started the business separately. The lease obtained from Municipal authority has nothing to do with the erstwhile joint family business and that the plot purchased by his son is out of his own funds and as such, not available for partition.

10. In this regard, the trial Court has carefully evaluated the evidence placed on record in the case. As a matter of fact, it has been found that, the joint family chilly business was discontinued in the year 1969 itself and the father died on 14.1.1994. No effort has been made by the Appellant to produce any evidence to show that the joint family business was continued without interruption. On the

other hand, the material placed by the first respondent discloses that, the chilly business is done by his son on his own since the year 1982 corroborated by the Sales Tax Registration Certificate and the Municipal Licence granted in that behalf. The material only discloses that the lease of shop premises is for a period of 5 years from 20.5.1993 to 1998 as per Ex.P2 which belies the contention of the Appellant that the lease is for 99 years. The lease in question has been granted subsequent to the filing of the suit. On the question of legal presumption, in respect of joint family business, the trial Court has rightly appreciated the position of Law, with reference to the commentaries and Hindu Law by Mulla, (16th Edition), wherein, it is held at page 226 thus:

(4) Presumption as to business carried on by a member.-There is no presumption that a business carried on by a member of a joint family business. Nor is there any presumption that a business carried on by such a member in partnership with a stranger is joint family business. There is no presumption that a business standing in the name of or started by even a manager is joint family business, but if the joint family funds are utilised in opening a new branch then the new branch will be regarded as part of the old business.

In the instant case, excepting the oral assertions, no material is placed by the Appellant to show that, the business was continued as a joint family activity. Further, the Appellant has also failed to prove miserably that the plot No. 11 is purchased from out of the nucleus of the joint family funds. Existence of nucleus is not established. On the other hand, the title stands in the name of the son of the first respondent and the Appellant has failed to produce any material with regard to nucleus to enable the acquisition of plot No. 11, to invoke the initial presumption in his favour. In the circumstances, we do not find any merit in the Appeal.

Accordingly, the Appeal is dismissed with costs.