

(1993) 06 KAR CK 0022

In the Karnataka High Court

Case No : Regular First Appeal No. 182 of 1986

Vokkaligara Kalappa (Dead) by L.Rs.

APPELLANT

Vs

Parvathamma (Dead) by L.Rs.

RESPONDENT

Date of Decision : 24-06-1993

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Citation : (1993) 4 KarLJ 340

Hon'ble Judges : R. V. Vasanthakumar, J;K. Shivashankar Bhat, J

Judgement

K. Shivashankar Bhat, J.-This appeal is by the legal representatives of the defendant Vokkaligara Kalappa. The respondents are the legal representatives of the original plaintiff. The parties are referred hereinafter either as the plaintiff or the defendant for the sake of convenience.

The plaintiffs suit is for partition and separate possession of half share in the plaint schedule properties under the following circumstances: Kalayya was the original owner who died in the year 1941. He had two wives, Ponnamma and Gowramma. Ponnamma died earlier to Kalayya. Gowramma died, according to the plaint, in the year 1958. Plaintiff is the daughter of Kalayya and Gowramma. Kalayya had two other children through Ponnamma, Nanjappa, who died in the year, 1952 and Kalappa the defendant. Nanjappa had a daughter, however she is not a party to the present litigation and it seems that her claim in the family properties were satisfied by settlement between the said lady and the present defendant in O.S. 20 of 1979. The present suit was filed in the year 1980. According to the plaintiff, on the death of Kalayya, Gowramma succeeded to the interest of Kalayya by virtue of Hindu Women's Rights to Property Act, 1937 (hereinafter referred as the 1937 Act"). This interest stood enlarged and Gowramma inherited an absolute interest under the provisions of Section 14 of the Hindu Succession Act, 1956 (for short "H.S. Act, 1956"). The plaint proceeds on the assumption that the properties were inherited by the surviving son Kalappa and widow Gowramma. There is no reference to the other son of Nanjappa in the plaint. The defendant denied the right of the plaintiff. He

asserted that he was in possession of the property throughout. According to him there was some negotiation between the parties in which the plaintiff and her son-in-law agreed to recognise the exclusive ownership of the defendant in the properties. The defendant further asserted that Gowramma died in the year 1954. The defendant further asserted that he has been asserting exclusive right since the year 1942 and 1960 and that he perfected his title over the suit properties by adverse possession also. The defendant pleaded that he had a brother by name Nanjappa and the said Nanjappa had a daughter Muddamma; Nanjappa used to wear a garb of sanyasi but he was not completely disassociated from all worldly affairs. However he was being called as a sanyasi as he was wearing the dress of a sanyasi and was a little more interested in prayer and meditation when compared to other persons. It is in this written statement there is a reference to the suit filed by Muddamma as per O.S. 20 of 1979 against Kalappa and ultimate settlement between them, where under defendant paid Rs. 10,000/- to Muddamma in full settlement of the claim. It is unnecessary to refer to other averments in the written statement. The trial court framed the following issues for consideration:

"1. Whether plaintiffs prove that the suit properties were inherited both by Gowramma and defendant after the death of Kalayya on 19-7-1941?

2. Whether plaintiffs prove that Kalayya's second wife Gowramma died in the year 1958 (Amended)

or

Whether defendant proves that she died in the year 1954?

3. Plaintiffs prove that deceased Gowramma till her death and thereafter her daughter Parvathamma were in joint possession and enjoyment of the suit properties along with defendant?

4. Whether plaintiffs prove that in recognition of the right of Parvathamma, the names of her sons have been entered in the jamabandy register?

5. Whether defendant proves that the demand for partition made by deceased Gowramma in 1940 and by Parvathamma in 1962 were refused?

6. Whether defendant proves that he had made necessary arrangement for Gowramma's separate residence and maintenance?

7. Whether defendant proves that he acquired his brothers daughter's right in the suit properties by paying Rs. 10,000/- in a suit filed by her for partition?

8. Whether defendant proves that he improved the suit properties by borrowing 3.5 lakhs rupees?

9. Whether plaintiffs are liable for contribution for the said debt in case it is held that they are entitled for a share in the suit properties?

10. Whether defendant proves that, in any case, Gowramma was entitled for a

limited estate and the same was lapsed on her death?

11. What order or decree? Later one additional issue has been framed as follows:

12. Whether the defendant has perfected his title to the suit schedule properties by adverse possession or by ouster?" The trial court affirmed the claim of the plaintiff and decreed the suit. Hence this appeal.

Mr. G.S. Visveswara advanced the following contentions in support of the appeal:

(I) The 1937 Act is inapplicable to Coorg as it was not part of British India.

(II) The interest created in favour of a widow under Section 3 of the Act 1937 was an inchoate and uncertain interest which did not enlarge into an absolute right under Section 14 of the Hindu Succession Act, until a definite claim for a share is made by the widow, and therefore, on her death, the statutory right created by the 1937 Act withered away without leaving any trace of right for her heirs to succeed.

(III) The plaintiffs share could have been only 1/3rd and not half, in the properties, because, Kalayya had another son Nanjappa who died in the year 1952 and his share devolved on the defendant.

(IV) The finding of the trial court that Gowramma died in the year 1958 is not correct.

(V) Trial court should have held that the plaintiff was liable to share the burden of the debts.

Re. Contention I:

According to the learned counsel for the defendant, the 1937 Act was not extended to Coorg, which was a Chief Commissioner's Province; and that there was no law adopting the said Act by Coorg's legislative Assembly; according to the learned counsel, Coorg was not part of British India, at all.

The assumption of the learned counsel that Coorg was not part of British India is factually incorrect.

Section 3(11) of the 1937 Act defines "British India" as all territories for the time being comprised within the Governor's Provinces and the Chief Commissioners' Provinces. As per Section 94, Coorg is included in the Chief Commissioner's Provinces. Section 99 provides that, Federal Legislature may make laws for the whole of British India. In these circumstances, it is not possible to uphold the contention advanced by the learned counsel for the defendant. In fact, no such plea was raised in the written statement and no issue governing this contention was framed in the suit.

We reject the contention.

Re. Contention IV:

According to the defendant, Gowramma died in the year 1955, while, the plaintiff asserted that Gowramma died in the year 1958. Evidence on record is overwhelming to establish the year of Gowramma's death as 1958. In fact, the learned counsel for the defendant was not able to point out as to how the trial court erred in giving the finding that the year of death was 1958. Evidence of P.W. 5 read with Ex. P. 12 conclusively show that Gowramma was alive as on 21-9-1957. The date of death as the year 1958 is further proved by her membership of the Death Fund Society (P.Ws. 3 to 5 and Exs. P. 1 and P. 5). We do not consider it necessary to refer to the evidence in detail, in this regard, as we are in agreement with the finding of the trial court.

Re. Contention II:

The learned counsel contended that the statutory right vested in Gowramma was not crystallised as there was no demand by her at any time claiming a share; and that she did not assert a right in the properties during her life time; therefore the said right created in her by the 1937 Act withered away or vanished without leaving any trace for the benefit of her daughter; such a right did not become an absolute right under Section 14 of the Hindu Succession Act.

As per Section 14 of the Hindu Succession Act, any "property possessed" by a female Hindu, whether acquired before or after the commencement of the Hindu Succession Act, shall be held by her as full owner thereof and not as a limited owner.

It was argued that Gowramma did not "possess" any property and she had only an uncertain and inchoate interest created by the 1937 Act, which could have been converted into an identifiable and definite right by demanding a share in the properties. The learned counsel sought to justify his contention by relying on the following decisions:

- (i) *Satrughan Isser v Sabujpari and Others*, AIR 1967 SC 272;
- (ii) *Mt. Khatrani Kuer v Smt. Tapeshwari Kuer*, AIR 1964 Patna 261; and (iii) *Jiwanandan Singh v Sia Ram Prasad Singh*, AIR 1961 Patna 347,

The learned counsel also tried to distinguish the decision of the Supreme Court rendered in *Sukh Ram and Another v Gauri Shankar and Another*, AIR 1968 SC 365.

In *Satrughan Isser*'s case, the widow claimed a share by filing a suit in the year 1949, tracing her claim to the provisions of the 1937 Act; the Supreme Court had no occasion to consider the effect of Section 14 of the Hindu Succession Act, on the right created by the 1937 Act. It was held that by virtue of the 1937 Act, "the interest of the widow arises not by inheritance, nor by survivorship, but by statutory substitution" and her interest is the limited interest known as Hindu Woman's estate. The said interest devolved on the heirs of the last full owner on extension of the estate of that female. At p. 274, the court observed, referring to the 1937 Act:

"By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener; though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property: The interest acquired by her under alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property. But if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition of her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by Section 3(2) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve upon her husband's heirs. To assume as has been done in some decided cases that the right of the coparceners to take her interest on the determination of the widow's interest survives even after the interest has become definite, because of a claim for partition, is to denude the right to claim partition of all reality."

Mr. Visveswara laid emphasis on two observations found in the above passage, it was pointed out that the interest acquired by the widow under Section 3(2) could be made definite by making a demand for partition; if she does not seek partition, her interest will merge into the coparcenary property, on the termination of her interest and that the interest created by Section 3(2) is not an interest inherited by the widow.

These observations, in no way would advance the wider proposition advanced by the learned counsel; the court was considering the nature of the interest created by the 1937 Act, without reference to the provisions of Hindu Succession Act. In the instant case, we are concerned with the effect of Section 14 of the Hindu Succession Act, on the interest of the widow created under Section 3 of the 1937 Act. Here, before the termination of the said interest by the death of the widow,

Section 14 of the Hindu Succession Act intervened, which, in our view, enlarged the earlier limited interest into one of absolute right. The observations at page 275 was referred to by the learned counsel to contend that under Mitakshara Law when the family estate in a Hindu joint family is divided, a wife or a mother is entitled to a share, but she is not recognised as the owner of such share "until the division of the property is actually made, as she has no pre-existing rights in the estate save a right of maintenance." This observation is found in the context of a decision of the Privy Council rendered prior to the 1937 Act. In fact the subsequent sentence refers to the 1937 Act, and says; "But a Hindu widow acquires under Section 3(2), even before division of the property, an interest in property and that interest gets defined as soon as an unequivocal demand for partition is made by her". The words italicised by us clearly show that under Section 3(2) by the 1937 Act, an interest in property was created. The question is, whether the said "interest in property" is a "property possessed" by the widow; only because the "interest in property" created by the 1937 Act did not get "defined" by a demand for partition, can it be said that the said interest is only a vapour in unidentifiable thin air or whether it is an interest capable of being blossomed into an absolute right by virtue of Section 14 of the Hindu Succession Act?

The right created by Section 14 of the Hindu Succession Act is not the enlargement of a pre-existing inchoate right; it purports to enlarge an identifiable (though of indefinite quantity) interest into an absolute right; the limited character of the earlier interest is enlarged into an absolute interest under Section 14 of the Hindu Succession Act. The word "possessed" in Section 14 of the Hindu Succession Act is used in a broad sense and comprises within its scope, the state of owning or having in one's hands or power. If the widow had a "power" in her to obtain possession of a part of the estate, then that "power" is equated to "possession".

In *Gummalapura Taggina Matada Kotturuswami v Setra Veerauva and Others*, AIR 1959 SC 577, at page 581, it was observed:

"It is sufficient to say that "possessed" in Section 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power." There cannot be any doubt that the widow possessed a power to seek a share by virtue of Section 3 of the 1937 Act; such a power, necessarily has to be held as a property possessed by her.

The invocation of the power to realise a part of the estate, would result in defining her interest, in the sense of quantification of her share in the family estate. Until a demand for partition is made, the interest of the widow is liable to fluctuation, in the sense, the quantum or proportion of her share is liable to increase or decrease depending upon the variation in the number of coparceners in the family. The moment a claim for share is made, this fluctuation would get stabilised and the share to which the widow is entitled to gets crystallised and definite. Only because, the widow did not seek to enforce or did not seek to

demand her share by invoking the 1937 Act, it cannot be said that she had no recognisable interest in the family property; the right was there, dormant, all along.

In *Jiwanandan Singh*'s case referred to above, it was held at page 350:

"Next it was contended that admittedly the defendant's mother is alive who is entitled to an interest which her deceased husband, namely, the father of the defendant would have got on partition. In view of Section 14 of the Hindu Succession Act, 1956 she would be an absolute owner of that interest, and, as such would not be bound by the suit agreement. On that basis no decree should be passed for specific performance.

There is a fallacy in this contention. In the first place, without partition she could not be taken to be possessed of the property without which the absolute ownership as provided in Section 14, would not come to her benefit. Secondly, she being a member of the joint family was bound by the act of the managing member which has been found to have been for legal necessity and consideration."

Mr. Visveswara's proposition finds support in one of the sentences quoted above, wherein it is stated that without partition the widow could not be taken to be possessed of the property without which the absolute ownership as provided in Section 14 would not come to her benefit. With utmost respect to the learned Judge, we cannot agree with this observation. *Mt. Khatrani Kuer v Smt. Tapeshwari Kuer* (supra) is a Full Bench decision of the Patna High Court. In the said case, the court had no occasion to consider the provisions of Hindu Succession Act; the court was concerned with the widow's right that case into existence in the year 1953. The observations of the Full Bench, were, with reference to the provisions of 1937 Act only. The Full Bench, inter alia, pointed out that the interest of the widow created under Section 3 of 1937 Act was fluctuating, which means, that so long as she does not claim partition, her interest is liable to increase or decrease on the death or birth of a coparcener. If she does not seek partition, then the interest held by her would pass on to other coparceners by survivorship.

In *Sukh Ram and Another v Gauri Shankar and Another* (supra) the husband died in the year 1952; his widow sold a half share in the property in December 1956. Question was whether she had the requisite right to effect the sale. It was undisputed that the widow acquired a right by virtue of Section 3(2) of the 1937 Act, on the death of her husband. Supreme Court held that in view of Section 14 of the Hindu Succession Act, the said right got enlarged on coming into force of Hindu Succession Act and therefore the widow had every right to sell a part of the property. At p. 366, it was observed:

"The interest to which Kishan Devi became entitled on the death of her husband under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, in the property of the joint family indisputably her "property" within the meaning of

Section 14 of the Act 30 of 1956, and when she became "full owner" of that property she acquired a right unlimited in point of user and duration and uninhibited in point of disposition."

The learned counsel sought to distinguish this decision on the ground that the widow exercised her right herself during her life time, unlike the present case before us. This is a distinction without substance. The question pertains to the quality of the widow's interest created by the 1937 Act and the effect of Section 14 of Hindu Succession Act on the said right.

In *Kanuri Sri Sankara Rao v Kanuri Rajyalakshamma*, AIR 1961 A.P. 241, a learned Judge expressed a definite view that the interest of the husband devolved on the widow under the 1937 Act, is not inchoate till she claims partition and that "the mere fact that the widow did not claim partition does not mean that she was not in joint possession of her husband's interest along with the surviving coparceners"; she becomes absolute owner of the said interest under Section 14 of Hindu Succession Act. To the same effect is the decision of a Bench of Madras High Court in *M.V. Chockalingam Pillai and Others v Alamelu Ammal and Another*, AIR 1982 Mad. 29. The basic facts in the Madras case are similar to the facts of the case before us; the daughter filed the suit for partition after the death of the widow; the widow died after the coming into force of Hindu Succession Act. The court held that by the time of her death, the widow had become absolute owner of the interest given to her by Section 3 of the 1937 Act.

We reject the second contention of the appellant.

Re. Contention III:

Nanjappa, the other son of Kalayya died in the year 1952; he had no male issue. Under Hindu law, his interest goes by survivorship. Nanjappa was undivided and therefore he did not have any definite share to be inherited by any one else. Gowamma was not a coparcener but she was holding the same interest which her husband Kalayya had as a coparcener. As already noted, this interest possessed by Gowamma was liable to get increased or decreased depending upon the birth or death of other coparceners. The share of Gowamma, if she had claimed a partition, after the death of her step son Nanjappa, would have been half, because the other half would go to the defendant. Position was the same when the present suit was filed by the daughter of Gowamma. Since Nanjappa died prior to the Hindu Succession Act, his daughter was not entitled to any share in the family properties. The payment by the defendant to the daughter of Nanjappa would not create a larger interest in the defendant. Therefore, the trial court rightly decreed the plaintiffs claim for a half share.

Re. Contention V:

It was contended that a co-owner making improvements on the joint properties without the concurrence of the other co-owner cannot recover contribution for the improvement when the other co-owner claims his share by partition. This

principle was stated by a learned Judge of this court in *Jethruse D'Souza and Others v Catherine D'Souza*, 1982(2) Kar. L.J. 110. In the said case, parties were not members of a Hindu undivided family and court was not concerned with the powers of a manager of a Hindu family. Further, finding was that it was unnecessary to effect the improvements and improvements were costlier than the value of the share of the coparcener; it was a case of creating an undue burden on the rights of the co-sharer by the person in possession to defeat the rights of the surviving co-owner to seek his share.

Basavalingamma by L.Rs. v Sharadamma, 1983(2) Kar. L.J. 20, was the decision arising out of a suit filed by the daughter-in-law of the deceased and the plaintiff claimed an independent right to claim a share under Section 6 of the Hindu Succession Act. Court had no occasion to consider the power of the manager of the Hindu undivided family to make prudent improvements. The improvements were effected during the pendency of a suit wherein plaintiff had sought a share already; the actual finding was that there was no evidence of the actual improvements. Thus both the decisions relied upon by the trial court rested on the peculiar facts of those cases and cannot be applied to govern the debts incurred by the manager of a Hindu undivided family to effect bona fide improvements of the family properties.

In the instant case, improvements were effected to a considerable extent of lands, into coffee growing lands; loans were borrowed from a co-operative society or a scheduled Bank. Loans were obtained to develop the agricultural lands; it cannot be said that improvements of the lands were to defeat the claim of the plaintiff. The trial court observed that the loans must have been incurred to burden the right of the plaintiff; we cannot agree with this observation. The loan outstanding as on 31-1-1985 is Rs. 2,77,721.15 (inclusive of the interest upto that date) as can be seen from Ex. D. 11; this loan incurred in connection with developing the estate which measures about 40 acres, cannot be considered excessive and disproportionately large. This loan should be considered as a loan incurred by the manager of a Hindu Joint Family in the course of his management of the properties and the availment of the loan was prior to the demand made seeking a share in the properties by the plaintiff, though the loan stood renewed from year to year either directly or indirectly.

Therefore, we hold that the plaintiff has to share the burden of the above loan reflected in Ex. D. 11 to the extent of her half share; this shall be taken note of and appropriate adjustments shall be made while taking accounts of the income received by the defendant from the date of the suit till the date of delivery of plaintiffs share in the suit properties.

In the result, the decree of the trial court is partly modified to the extent of declaring that the plaintiff is liable to share the burden of the debt reflected in Ex. D. 11. The plaintiffs suit for partition is decreed. Plaintiff shall be entitled to half share in the suit schedule properties and that the plaintiff is entitled to have the accounts in respect of the income from the said properties from the date of

the suit till delivery of the half share, which shall be ascertained in the final decree proceedings; while taking the accounts, plaintiffs liability towards half of the debts reflected in Ex. D. 11 also shall be taken into consideration.

The plaintiff is entitled to the costs, in the trial court only; in this appeal parties to bear their respective costs.

Appeal is disposed of accordingly.

1993(4)kar.l.j.353

COORG LAND REVENUE REGULATIONS, 1899 - Repealed by Karnataka Land Revenue Act, 1964, Regulation 127 - Whether after the enactment of the Karnataka Land Revenue Act, 1964 by which the Coorg Land and Revenue Regulations, 1899 were repealed an application can still be filed under Regulation 127 - Application filed by appellants 18 years after the said Regulation was repealed - Whether maintainable?

HELD: Reading Regulation 127 read with Regulation 145(xv), it becomes clear that both these provisions dealt with the question as to whether the Revenue Officer acting under the Coorg Land and Revenue Regulations, 1899, could be approached for resolving a dispute and whether such dispute was outside the jurisdiction of the civil court. It, therefore, can be easily seen that Regulation 127 was purely a procedural provision and if that procedural provision is applied for resolving a given dispute, then the logical corollary of exclusion of the jurisdiction of civil court under Regulation 145 would follow, but not otherwise. Therefore, the moot question is whether the procedural provision under Regulation 127 could be invoked after the repealing of the main Regulation itself. As noted earlier, the said Regulation got repealed by the enactment of the Karnataka Land Revenue Act, 1964. . . It is nobody's case that any application under Regulation 127 was earlier filed during the time the Coorg Regulation was in force and any order was passed therein. All that was sought to be done was that an application for the first time was moved under Regulation 127 on 24-6-1982, 18 years after the said Regulation was repealed by the Karnataka Act of 1964. Such an application, which sought to invoke the procedural provision which no longer existed, could obviously be not maintainable. . . All that Section 79(2) says is that the privileges that are being enjoyed either by custom or under any order such as privileges in respect of Kumki lands, Bane lands, etc., shall continue. The thrust of this provision is that whatever privileges were enjoyed by an erstwhile Bane land holder would not be affected by the passing of the Karnataka Act of 1964 and that they would continue. But that does not mean that the procedural provision of the Coorg Regulation would continue. That is not the scope and ambit of the said section. Therefore, with respect, more is read in this connection by the learned single Judge who decided the case reported in (1979)2 Kar. L.J. page 22, when the learned single Judge held that a civil suit for partition is not maintainable because of Section 79(2) of the Karnataka Act. The said decision, in our view, does not lay down correct law on the point. Once this conclusion is

reached, it becomes obvious that the judgment under appeal cannot be sustained and it must be held that after the repeal of the Coorg Regulation by the Karnataka Act of 1964, the procedural provisions like Regulation 127, do not survive any further and cannot be resorted to by any of the parties. (paras 5 and 7)