(1945) 11 BOM CK 0018

Bombay High Court

Case No: None

Virbhadrappa Rachappa and Others		APPELLANT
	Vs	
Babu Virbhadrappa and Others		RESPONDENT

Date of Decision: Nov. 1, 1945

Acts Referred:

- Hindu Law of Inheritance (Amendment) Act, 1929 - Section 2

Citation: AIR 1947 Bom 1

Hon'ble Judges: Lokur, J

Bench: Division Bench

Judgement

Lokur, J.

This appeal arises out of a suit filed by the plaintiffs for a partition and possession of their half share in two lands, Survey Nos. 107 and 278, in the village of Ankalgi in Belgaum Taluka. Their grandfather Virbhadrappa had two brothers, Ramlingappa and Sidramappa. Defendants 4, 5 and 6 represent Ramlingappa''s branch. Sidramappa died leaving a son Virupaxappa. On Virupaxappa''s death his widow Shivatayavva claimed that Virupaxappa and his father were separated from the branches of Ramlingappa and Virbhadrappa and filed a suit (No. 312 of 1919) in the Court of the First Class Subordinate Judge at Belgaum for her third share in certain lands situated at Jankatti and Gurlgunji. As she was then in possession of the two lands of Ankalgi, which are now in suit, they were not included in that partition suit. It was held in that suit that her husband Virupaxappa and his father Sidramappa had died in union and that on their death the branches of Ramlingappa and Virbhadrappa succeeded to the entire joint family property by survivorship. Her suit was, therefore, dismissed but she continued to remain in possession of the two lands of Ankalgi in suit. When it was held that the family was still joint, the descendants of Ramlingappa and Virbhadrappa forcibly dispossessed Shivatayavva of the Ankalgi lands also, but she filed possessory suit No. 22 of 1911 in the

Mamlatdar''s Court and the possession of those lands was restored to her. Thereafter she took Gurupadappa in adoption and put him into possession of those lands as owner. Gurupadappa made a fresh attempt to recover a third share in the other lands of the family by filing a suit (No. 186 of 1918) but that suit was dismissed on the ground that the question whether the family was joint or separate had been already decided in Shivatayavva''s suit and it could not be re-opened as it was res judicata. Gurupadappa died in 1921 leaving his widow Kallavva. Kallavva having re-married, the lands again went into the possession of Shivatayavva. It is alleged in the plaint that Shivatayavva passed a malkipatra convoying the lands in suit to her daughter Savavva, but that malkipatra is not on record and has not been relied upon, though it was mentioned in the plaint. Savavva, however, died before Shivatayavva and on Shivatayavva''s death'' in 1931, her mother-in-law Rachavva succeeded to the lands as the next reversioner. Rachavva died in 1938 and the lands are now in possession of Savavva''s song, defendants 1, 2 and 3. The plaintiffs, therefore, filed this suit to recover their half share in those lands alleging that defendants 4, 5 and 6, the representatives of Ramlingappa''s branch, were entitled to the other half. The suit was filed on 25-9-1939. The defendants contended that Shivatayavva''s possession was adverse against the plaintiffs, and that she had acquired a title to the lands by such possession for more than twelve years. Defendants 4 to 6 supported the plaintiffs'' claim,. Both the Courts below upheld the contention of defendants 1 to 3 and dismissed the suit. The plaintiffs have preferred this appeal.

2. The facts as set out above are not disputed. It is urged on behalf of the appellants that Shivatayavva''s possession was not adverse to the plaintiffs and defendants 4 to 6 as she could not be evicted by them unless some provision was made for her maintenance. As no such provision had been made, it is contended that she must be presumed to be holding the lands for her maintenance and not adversely against the coparceners of her deceased husband. This contention finds some support in the remarks of Broomfield J. in 60 Bom. 89 Shankar Vinayak v. Ramarao Sahebrao (35) 22 AIR 1935 Bom. 427 The view expressed there was that the widow in a joint Hindu family had the right to continue in possession of the property both in respect of her maintenance as well as her residence; and the coparceners of her deceased husband could not remove her or recover possession of the property without making sufficient provision for her maintenance and for her residence. In those circumstances they were perfectly justified in allowing her to continue as the widow in a joint family till her death. But those remarks cannot apply to every case in which a widow in a joint Hindu family remains in possession of some of the joint family property against the wishes of her deceased husband''s coparceners.. In 41 Bom. L.R. 497 Bhogilal v. Ratilal (39) 26 AIR 1939 Bom. 261 where the widow had thus acquired wrongful possession of the property of the joint family and claimed it in her own right, as the widow of her deceased husband, her possession was held to be adverse to the surviving coparceners from its inception, the possession not being

attributable to an arrangement between the widow and the coparceners.

3. In this case Shivatayavva did not purport to be in possession of Ankalgi lands for her maintenance. On the other hand she definitely claimed that her husband had died separated from the other two branches and that she was entitled to his share in the property as his heir after his death. She did fail to prove that her husband was separated but in spite of that finding she persisted in remaining in possession of the Ankalgi lands. Even then it might have been contended that the plaintiffs and defendants 3 to 6 allowed her to remain in possession of the lands for her maintenance. But in fact there was no such arrangement and the plaintiffs and defendants 3 to 6 forcibly evicted her and took possession of the lands. She, however, got possession of those lands restored to her by filing a suit in the Mamlatdar''s Court. It cannot, therefore, be presumed that the plaintiffs allowed her to remain in possession of those lands as a widow of their deceased coparcener in order to provide for her maintenance. They knew that she was claiming possession of those lands in her own right as the widow of a separated member of the family. Hence, her possession became adverse at least since she put forward her claim in her suit of 1909 that she was the widow of a separated member of the family. In the Record of Eights also her name was entered as occupant of the lands in the capacity of a widow of such separated member. She continued in such adverse possession till she took Gurupadappa in adoption in 1917. By that time she had completed 12 years of her adverse possession and had acquired a title of the widow of a deceased separated member of the family. Gurupadappa took possession of the lands as the adopted son of such separated member of the family,and therefore, he held them as a separated member and not as a coparcener of the plaintiffs and defendants 4 to 6. When he died, the lands devolved upon his widow Kallavva, and again upon Shivatayavva after her (Kallavva''s) re-marriage. On Shivatayavva''s death, Rachava took the lands. At every one of these stages of devolution, the plaintiffs and defendants 4 to 6 might have put forward their claim for possession. But they allowed Shivtayavva, Gurupadappa, Kallavva, Rachavva and then defendants 1 to 3 to remain in possession until they filed a suit in 1939. After Rachavva''s death succession had to be traced to Gurupadappa since he was the last male holder. Shivatayavva''s daughter Savavva had already died before her, and in 1938, when Rachavva died, the reversioners were Savavva''s sons who had the right to succeed to Gurupadappa as his sister''s sons.

4. The learned District Judge has referred to this line of succession and it was not disputed that the sister''s sons were the next heirs under the Hindu Law of Inheritance (Amendment) Act II [2] of 1929. Section 2 of the Act provides that a son''s daughter, a daughter''s daughter, sister, and sister''s son shall, in the order so specified, be entitled to rank in the order of succession next after a father''s father and before a father''s brother. Hence under that section Gurupadappa''s sister''s sons, that is to say, defendants 1 to 3 were his heirs in preference to his agnates, plaintiffs 1 to 3 and defendants, 4 to 6.

5. Mr. Belavadi, however, drew my attention to the head-note in Bai Mahalaxmi Vs. The Deputy Nazir, District Court, " which says that the Hindu Law of Inheritance (Amendment) Act, 1929, does not apply to the Province of Bombay. In that case sister''s sons would come in only as bandhus and therefore plaintiffs 1 to 3 and defendants 4 to 6 would be the preferential heirs. But the statement in that head-note is rather too wide, since in that case the position of a sister in the list of heirs was under consideration. In this Province a sister is recognised as an heir under the Mitakshara law, her place in the order of succession being immediately after the father''s mother and before the father''s father. In 57 Bom. 377 Shidramappa Nilappa v. Neelawabai (33) 20 AIR 1933 Bom. 272 it was held that her (sister''s) place in the order of succession was not affected by the Act of 1929, since that Act contemplated succession only after the father''s father, while her place as determined by a series of decisions in this province was immediately after the father''s mother. That view was approved of in Bai Mahalaxmi Vs. The Deputy Nazir, District Court, and it was held that the Act of 1929 did not alter the order of succession to males governed by the Mitakshara law in the Province where sister''s place was after father''s mother and before father''s father. In Mayne''a Hindu Law (Edn.10 of 1938), para. 554,p. 681, it is remarked that the Act of 1929 on the face of it must be taken to alter the Mitakshara law in the Bombay Presidency as well. It Is not necessary to consider in the present case whether the sister''s position is affected by that Act. It has been held by two Division Benches of this Court that it is not affected. But those rulings will not apply to cases of other persons for whose benefit the Act of 1929 was enacted. Section 1, Sub-section (2), of the Act expressly provides that the Act extends to the whole of British India, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provision therein enacted. As a distinct benefit is conferred upon the daughter''s daughter and the sister''s son in the order of succession, it cannot be said that they cannot get that benefit in this Province. It must, therefore, be held that the Act does apply to this Province also, but in the case of a sister, her position cannot be made worse by the provisions of Section 2 of that Act. It follows that on the death of Rachavva, the lands in suit devolved on Gurupadappa''s heirs, viz.,defendants 1,2 and 3. The plaintiffs'' claim is, therefore, rightly thrown out. Before concluding I must endorse the remarks made by the learned District Judge in para. 2 of his judgment regarding the delay, in the disposal of this suit by the trial Court. The evidence was closed on 25-10-1940, and the case was adjourned for argument to 20-12-1940. The roznama shows how it was put off from time to time for no adequate reasons for nearly 9 months and finally the judgment was delivered on 28-7-1941. The judgment does not fully consider the points arising in the case and it shows that many points, which must have been argued, were apparently lost sight of owing to the long interval between the hearing of the arguments and the disposal of the case. The appeal is dismissed with costs.