A.N. Subramanian late minor by G.S. Lakshmi Ammal Vs A.S. Kalyanarama Iyer and Others

Court: Madras High Court

Date of Decision: Sept. 21, 1956

Acts Referred: Hindu Womens Right to Property Act, 1937 â€" Section 3, 3(1), 3(2)

Citation: AIR 1957 Mad 456 : (1957) ILR (Mad) 565 : (1957) 70 LW 153

Hon'ble Judges: Rajamannar, C.J; Ramaswami, J

Bench: Division Bench

Advocate: N. Sundara Iyer, for the Appellant; C.S. Swaminathan, for the Respondent

Final Decision: Partly Allowed

Judgement

Rajamannar, C.J.
This appeal against the judgment or Krishna-swami Nayudu J. in A. S. No. 484 of 1949 arises out of a suit for partition

filed by the appellant herein in the Court of the Subordinate Judge of Otta-palam, O. S. No. 55 of 1946. The plaintiff is the son of one Narayana

Ayyar. Narayana Ayyar and the first defendant herein. Kalyanarama Aiyar, were the sons of one Subramania Aiyar who died in 1945 leaving

behind him his widow, the second defendant in the case, and his two sons. It is common ground that under a deed of partition dated 4th February

1935, Ex. B-1, there was a partition between the father Subramania Ayyar and his two sons.

Separate properties were allotted to the shares of each of the three coparceners. The first question which arises in this appeal relates to the rights

of the second defendant, the widow of Subramania Aiyar, in the non-agricultural properties left by him. She claimed a share relying on the

provisions of the Hindu Women''s Rights to Property Act and her claim was accepted by the trial Judge. On appeal by the plaintiff, Krishnaswami

Nayudu J. confirmed the decision of the trial Judge on this point. Before us Mr. N. Sundara Aiyar has challenged the view taken by the trial Judge

and Krishnaswami. Nayudu J. It is sufficient to deal with the reasoning of Krishnaswami Nayudu J. for the purpose of this appeal.

2. The learned Judge held that the second defendant as the widow of Subramania Aiyar was entitled to a share in the property which he got at the

partition and which he died possessed of u/s 3, Sub-section (1) of the Hindu Women''s Rights to Property Act. That sub-section in so far as it is

material runs thus:

When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property and when a Hindu governed by any other

school of Hindu law or by customary law dies intestate leaving separate property his widow, or if there is more than one widow all his widows

together shall subject to the provisions of Sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share

as a son.

Krishnaswaini Nayudu J. held that the property which Subramania Ayyar got for his share at the partition with his sons would be separate property

within the meaning of that expression in the above section and therefore the widow would be-entitled to the benefit of that provision. Mr. Sundara

Aiyar contended that this view is opposed to the principle of the decision of the Federal Court in AIR 1945 25 (Federal Court) . In that case the

last owner of the suit properties, one Arunacha-lam Chettiar died leaving his two widows and the widow of a predeceased son, who claimed a

share basing her right on the first proviso to Section 3(1) of the Act which runs thus: :

Provided that the widow of a predeceased son shall Inherit in like manner as a son if there is no son surviving of such predeceased son, and shall

inherit in like manner as a son''s son if there is surviving a son or son''s son of such predeceased son.

When he died, Arunaphalam Chettiar was the sole surviving coparcener in the joint family which owned the suit properties. It was held by the

learned Judge of the Federal Court that the pro-perty held by a person as the last surviving coparcener of a joint family could not be regarded as

separate property"" within the meaning of Section 3(1). Krishnaswami Nayudu J. thought that the decision in that case must be held to be confined

to the case of a sole surviving coparcener and as in the present case the property was obtained by the last male holder as his share at a partition of

family property, the decision would have no direct application.

He felt himself therefore free to take the view that property obtained by a member of a joint family at a partition would be separate property within

the meaning of Section 3(1) of the Act. We cannot agree with him. The principle of the Federal Court decision would, in our opinion, equally apply

to the case of property taken by a member of the joint family at a partition of family properties. Indeed, throughout the judgment of Vara-dachariar

J. who delivered the leading Judgment, property held by a sole surviving coparcener and property which a coparcener is allotted at a family

partition are mentioned together as standing on the same footing (vide pages 115, 116 and 117 (of Mad LJ): (at pp. 31, 32, 33 of AIR)). The

reasoning is to be found in the following observations of varadachariar J.:

.....judged by the teat of power of disposition, two other Kinds of property held by a Hindu governed by that law, viz., property obtained as his

share at a partition and property held by him as a sole surviving coparcener may, in some measure, resemble self-acquired properly. There is,

however, this difference between them, viz., that in the case of self-acquired property, the owner''s power of disposition will continue to remain

undiminished throughout his lifetime unless he chooses voluntarily to throw it in the joint family stock, whereas in the case of the other two kinds of

property his power of disposition will be-come qualified and his interest reduced the moment a son is born to him or the widow of a predeceased

coparcener takes a boy in adoption. It would not therefore be right to place these three kinds of property on the same footing merely on the

ground that at a particular point of time, the owner may enjoy unrestricted powers of disposition over them.

3. We therefore cannot accept as correct the distinction which Krishnaswami Nayudu J. draws between the present case and the case decided by

the Federal Court on the ground that in one case it was property held by a sole surviving coparcener and in another case it was property obtained

by a coparcener at a family partition. Differing from him we hold that the widow, the second defendant cannot obtain any right u/s 3(1) of the Act.

4. We, however, think that as a consequence of the reasoning of the Federal Court in the above case, the second defendant would be entitled to

the benefit of Sub-s. (2) of Section 3 which is as follows:

When a Hindu governed by any school of Hindu law other than the Dayabhag 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.

5. If the property which a coparcener obtains at a family partition is not separate property within the meaning of Section 3(1) of the Act, it must be

deemed to be an interest in Hindu joint family property within the meaning of Sub-section (2) of Section 3. If the fact that on the birth of a son,

such son would have a right by birth in the property obtained by a coparcener at a partition prevents us from holding that such property is separate

property; it follows from the very fact that it should be deemed to be joint family property. As point-ed out by the Privy Council in AIR 1943 196

(Privy Council) , a coparcenary must be held to subsist so long as there was in existence a widow of a coparcener capable of bringing a son into

existence by adoption.

In that very case, their Lordships of the Judi cial Committee refer to the property held by a surviving coparcener as joint family property in his

hands. Likewise it should be held that the property which a coparcener obtains at a parti- tion is joint family property though the copar cener may,

after the partition have absolute powers of alienation so long of course there is no son born to him after the partition, who would on birth be

entitled to a share in such property. We find that the Orissa High Court has construed Section 3(2). of the Act in the same manner as we have

indicated above in the case of Tayi Visalamma Vs. Tayi Jagannadha Rao and Another, . In that case the learned Judges held that where a Hindu

has effected a partition with his only son and the parties are governed by the Madras school of Hindu law the properties which fell to the share of

the father are not his separate proper ties for the purpose of Section 3(1) but are joint fa mily properties within the meaning of Section 3(2) of the

Act.

6. The more difficult point which however does not fall for decision in this case is what is the share to which the widow would be entitled in a case

like the present? Will she be entitled exclusively to the property left by her husband or should she share them with the two divided sons? In the

Tayi Visalamma Vs. Tayi Jagannadha Rao and Another, , the learned Judges held that the widow would be entitled to the entire interest to the

exclusion of the divided son. It may be a matter of argument that if the property held by the divided member of the family is deemed to be joint

family property, the other members of the erstwhile copar-cenary must also be deemed to have an interest-in them.

We refrain from expressing our final opinion on this matter because the trial Judge awarded to the second defendant only a third share along with

the plaintiff and the first defendant and there has been no appeal by the second defendant claiming the entire property. In the result we confirm the

decree of the trial judge declaring that the second defendant was entitled to a third share in the non-agricultural properties left by Subramania

Aiyar. Actually this finding becomes in the main academic, because the second defendant died after the decree of the trial court. The finding will be

material only for. deciding the question of mesne profits.

7. The next question relates to the rights of the plaintiff in two items items 29 and 30 of Schedule A to the plaint. Item 29 is a kudiyiruppu on which

there was a house at the time of the family partition. In the partition deed, item 29 was set out in schedule B. It was described as Madham

Kudiyiruppu in tiled house etc., existing therein. The scheme of the partition in respect of this property was that an undivided half was allotted to

the father and the other half to the first defendant. Clause 6 of the partition deed makes this clear. What has given rise to the controversy between

the parties is as part of clause 11 which runs as follows:

It has been agreed and settled that though-the madham kudiyiruppu mentioned in the D schedule belonged equally to individuals Nos. 1 and 3

(Subramania Aiyar and defendant 1) as described in paragraph 6 above, No, 1 and his wife Lakshmi Ammal mother of Nos. 2 and 3 have full

right and liberty to reside in that madham Kudiyiruppu and that on the death of the aforesaid persons the said madham Kudiyiruppu will devolve

upon No. 2 exclusively and that No. 3 has no right in it.

8. No. 3 is the father of the plaintiff in the suit. By virtue of this provision, the learned Judge Krishnaswami Nayudu J. held that on the death of

Subramania Aiyar, the first defendant became exclusively entitled to the entire property subject only to the right of residence of his mother. Mr,

Sundara Aiyar''s contention was that the clause expressly provides for the devolution of Subramania Aiyar''s share on the first defendant only on

the death of both Lakshmi Ammal and Subramania Aiyar and till the death of both there is no vesting of Subramania Aiyar''s share in the first

defendant and thus there is a vacuum as it were during the period between the death of Subramania Aiyar and the death of Lakshmi Ammal.

Legally such a vacuum is not permissible and therefore the provision is not valid and the property should be divided between the two sons,

plaintiff''s father and the first defendant, as divided sons of the father; and now that we have held that Subramania Aiyar''s widow is also entitled

she will also be entitled to a share likewise. Though there is force in this contention, we think that on a reasonable construction of this clause, the

intention pf the parties is clear, viz, that Subramania Aiyar''s share should devolve on the first defendant subject only to the reservation of the right

of residence in favour of the widow of Subramania Aiyar.

The widow had no proprietary right in her husband''s share of the property and all that she was entitled was only to a right of residence. The clause

only provides for the continuance of the right of residence conferred on the widow even after the death of Subramania Aiyar. Till her death the first

defendant may not be said to be exclusively entitled to the property because there would be this burden of his mother''s right of residence. We

agree with Krishnaswami Nayudu J. in his construction of this clause and hold that on the death of Subramania Aiyar, the first defendant became

entitled to his half share in item 29.

9. Item 30 is a house admittedly built subsequent to the partition and it has been now found that the house was built with the separate funds of

Subramania Aiyar, Obviously clause 11 of the partition deed did not, and could not, relate to the house which came into existence after the

partition. But Krishnaswami Nayudu J. constru-ed that no distinction could be made between the old house in item 29 and the new house built

subsequent to the partition. But we think otherwise. Clause 11 cannot possibly affect the rights of the parties under the general law, to the house

which admittedly was not in existence at the date of the partition. Take for example, the right of residence. It cannot be said that Subramania Aiyar

and his wife would have a right of residence in the new house built by him only because of the provision in clause 11. Subramania Aiyar and his

wife would be entitled to reside in the new house built by the former in his own right.

Item 30 must, therefore, be treated as the separate property of Subramania Aiyar which devolved on his heirs in accordance with Hindu law read

with the provisions of the Hindu Women''s Rights to Property Act. We set aside the decree and judgment of Krishnaswami Nayudu J. so far as

item 30 is concerned and direct that the value of the building, which is item 30, be included among the partible properties in which the plaintiff will

have a third share. How exactly the division should be made between the parties must be left to the final decree proceedings. As the widow has

died, the plaintiff and the first defendant would now be entitled each to a moiety in item 30. The preliminary decree will be drafted accordingly.

(10) The appeal is allowed in part and dismissed otherwise in accordance with the above findings. There will be no order as to costs either in this

appeal or before Krishnaswami Nayudu J.