2024:BHC-AS:43314

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.593 OF 1987

Radhabai Balasaheb Shirke,]
since deceased, through her heirs & L.Rs.]
1. Sau. Kanchan Pralhad Shinde,]
2. Sau. Saroj Dileeprao Dhoble,]
3. Shri. Rohidas Chobe,]
4. Shri. Tapan Rohidas Chobe,]
5. Ms. Meghana Rohidas Chobe.] **...Appellants**

Versus

1. Keshav Ramchandra Jadhav,]
2. Nandkumar Ramchandra Jadhav,]
3. Smt. Manikbai Vasanttrao Sawant.] **...Respondents**

WITH

SECOND APPEAL NO.403 OF 1990

Anusayabai W/o. Keru @ Kerba Gore] **...Appellant**

Versus

1. Sonabai W/o. Piloba Korde]
2. Vithal Kondiba Yadav] **...Respondents**

WITH

SECOND APPEAL NO.733 OF 2004

1. Janabai Ramchandra Bhondwe]
2. Manabai Raghunath Pandmand] **...Appellants**

Versus

1. Hari Laxman Rakshe]
since deceased, through her heirs & L.Rs.]
1.A] Anjanbai Hari Rakshe (Wife)]
1.B] Sanjana Maruti Rakshe (Daughter-in-Law)]
1.C] Rahul Maruti Rakshe (Grandson)]
1.D] Rakesh Maruti Rakshe (Grandson)]
1.E] Rupesh Maruti Rakshe (Grandson)]

1.F] Bhimrao Haribhau Rakshe (Son)]
1.G] Arun Haribhau Rakshe (Son)]
1.H] Ramesh Haribhau Rakshe (Son)]
1.I] Savita Sopan Rakshe (Daughter-in-Law)]
1.J] Master Gaurav Sopan Rakshe (Grandson)]
1.K] Medha Sopan Rakshe (Grand-Daughter)]
1.L] Raju Haribhau Rakshe (Son)]
1.J and 1.L represented by Smt. Savita Sopan Rakshe (Daughter-in-Law)]
1.M] Vilas Haribhau Rakshe (Son)]
2. Tukaram Laxman Rakshe]
3. Sitabai Narhari Rakshe]
since deceased, through her heirs & L.Rs.]
3.a. Janabai Ramchandra Bhondwe]
3.b. Manabai Raghunath Panmand] **...Respondents**

Mr. S. G. Deshmukh a/w. Mr. Uday B. Nighot and Adv. Sulajja Patil for Appellant in SA/593/1987.

Mr. Ram S. Apte, Senior Advocate a/w. Mr. Mayuresh Lagu and Mr. Sagat Patil for the Appellant in SA/733/2004.

Mr. Drupad Patil a/w. Mrs. Rutuja Ambekar, Mr. Namit Pansare, Mr. Rugved Kinkar and Ms. Srushti Chalke for Respondent No.2 in SA/733/2002.

Mr. Abhijit B. Kadam a/w. Mr. Ashish Chavan for Respondent No.3.

Mr. Ashutosh A. Kumbhakoni, Senior Advocate a/w. Mr. Sarthak S. Diwan, Mr. Manoj Badgujar and Ms. Sneha S. Bhange for Respondent No.1A to 1C.

Mr. R. M. Haridas a/w. Mr. Pratik Rahade, Mr. Somnath Thengal and Mr. Sumeet Khaire i/b. Mr. Anil Shitole for Respondent No.1A to 1M.

CORAM : A. S. CHANDURKAR & JITENDRA JAIN, JJ.

Date on which the arguments concluded : 5th OCTOBER 2024

Date on which the Reference is answered : 12th NOVEMBER 2024

JUDGMENT : (Per Jitendra Jain, J.)

1. In Second Appeal No.593 of 1987, the following substantial question of law arose for consideration :

> *"Whether a daughter could acquire any right, either limited or absolute, by inheritance prior to coming into force of the Hindu Succession Act, 1956 in the property of her deceased father, who died prior to 1956, leaving behind him in addition to such daughter, his widow as well?"*

2. The facts giving rise to the aforesaid substantial question of law are that one Yeshwantrao had two wives, Laxmibai and Bhikubai – Yeshwantrao had two daughters from Laxmibai, namely Sonubai and Radhabai. From his marriage with Bhikubai, he had a daughter, Champubai. Laxmibai pre-deceased her husband in 1930. Sonubai expired in 1949 while Yeshwantrao expired on 10th June 1952. Bhikubai expired on 8th July 1973 after executing a will in favour of her daughter Champubai on 14th August 1956. Radhabai, the daughter from the first marriage of Yeshwantrao filed suit for declaration that she had half share in the properties left behind by her father and sought partition of the same. The trial Court dismissed the suit holding that Bhikubai alone inherited the suit properties in view of the provisions of the Hindu Women's Right to Property Act, 1937 *(for short, "the Act of 1937")* and she became the absolute owner in 1956 in view of the provisions of the Hindu Succession Act, 1956 *(for short, "the Act of 1956")*. The appeal

preferred by Radhabai was also dismissed thus giving rise to the Second Appeal.

3. D. B. Bhosale, J. (as His Lordship then was) was of the view that a daughter was not treated as a coparcener under the Act of 1937 and hence would not come in the scene *vis-a-vis* the undivided coparcenary interest that her father had and which her mother acquired under Section 3(2) of the Act of 1937. On behalf of Radhabai, reliance was placed on the decision of learned Single Judge, K.J. Rohee, J. (as His Lordship then was) in ***Laxman Tukaram Vs. Bendrabai Tukaram Karwate***[1] wherein it was held that in view of paragraph 72 in Chapter VI of Mulla's Hindu Law and Section 3 of the Act of 1937, a daughter was entitled to one-half share in the property of her father who died prior to the Act of 1956 coming into force. Since D.B. Bhosale, J. the learned Single Judge was unable to agree with the view taken in ***Laxman Tukaram (supra)***, this reference has been made to the Division Bench which we are now called upon to answer.

4. While deciding the present reference, we have to put ourselves to the era of pre-1956 and Pre-Independence period since we are called upon to decide an inheritance right which opened on the death of a male-member of a family who died prior to 1956. We have to go back in time to decide whether during pre-1956 period, a daughter would have

1. *2005(3) Mh.L.J. 506*

any inheritance right who had a widow-mother and no one else.

5. Mr. A. A. Kumbhakoni, learned Senior Counsel for Respondent Nos.1A to 1C in Second Appeal No.593 of 1987; Mr. Drupad Patil, learned counsel for Respondent No.2 in Second Appeal No.733 of 2002 and Mr. R. M. Haridas, learned counsel for Respondent Nos.1A to 1M in Second appeal No.733 of 2004 made submissions in support of the proposition that if father died prior to 1956, the daughter does not have any right of inheritance in the property of her deceased father in case father lives behind a widow/widows. Mr. Kumbhakoni, learned senior counsel and other counsels filed written submissions and case laws in support of this proposition.

6. Mr. R. S. Apte, learned Senior Counsel and Mr. S.G. Deshmukh, learned counsel for Appellants in Second Appeal No.733 of 2004 and Second Appeal No.593 of 1987 respectively made submissions in support of the proposition that the daughter has right of inheritance along with the widow by relying upon the Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005 *(for short, "the Amendment Act of 2005")* and also relied upon the Act of 1937 in support of their said submissions.

7. We have heard learned Senior Counsel as well as other counsel in support of their respective submissions summarised above.

We would deal with each of their submissions in the following paragraphs.

8. Before we devolve upon to answer the reference, it is apt to reproduce relevant provisions of the Acts which were relied upon by the learned counsel for the parties.

> *"(i) THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937 :-*
>
> *3. Devolution of property -*
>
> *(1) When a Hindu governed by the Dayabhaga 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:*
>
> *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 sons son of such predeceased son:*
>
> *Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.*
>
> *(2) .....*
>
> *(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's estate, provided however that she shall have the same right of claiming partition as a male owner.*
>
> *(ii) THE HINDU SUCCESSION ACT, 1956 :-*
>
> *Prior to 2005 Amendment*

6. Devolution of interest in coparcenary property

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

(iii) THE HINDU SUCCESSION ACT, 1956 :-

Post 2005 Amendment.

6. Devolution of interest in coparcenary property.—

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his

interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

(iv) Section 8 of The Hindu Succession Act, 1956 :-

8. General rules of succession in the case of males.—

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased."

9. On a reading of the Act of 1937 and more particularly, Section 3 which provides for devolution of property, in our view, the said provision does not provide for any inheritance right in favour of the

daughter. Section 3(1) of the said Act provides that when a Hindu dies intestate leaving his separate property, his widow or if there are more than one then widows together shall be entitled to property of the deceased to the same share as a "son". First proviso and second proviso also refers to "son". Sub-section (1) of Section 3 of 1937 Act is subject to the provisions of Sub-section (3) which provides that the Hindu Widow would have limited interest on devolution and for the said limited interest, she would have the same right of claiming partition as a male owner. Therefore, in our view, if the legislature, while enacting the Act of 1937, intended to give inheritance right to a daughter, same would have been provided so in Section 3. The fact that a "son" is referred clearly indicates that the said Act did not intend to give any inheritance right to a daughter. The contention of Mr. Apte, learned Senior Counsel that "son" should be read to include a daughter is not acceptable on a reading of Section 3 of the Act of 1937. Nothing prevented the legislature at that point of time to specify "daughter" if it intended to do so. Section 3(1) provides for determining the share of a widow as that of a son. It is to determine the quantum that there is a reference to the "son". Similarly, Section 3(3) of the Act of 1937, which gives right to claim partition to a widow deems the widow as a male owner only for the limited purpose of claiming partition. If we accept submissions of Mr. Apte then it would mean that a son would be

deemed as daughter which is not permissible nor can the deeming fiction be read so since it would result into creating another deeming fiction by the Court which is certainly not permissible. Therefore, in our view, the Act of 1937 does not give any right to a daughter to inherit the property of the father if he dies prior to 1956.

10. Mr. S. G. Deshmukh, learned counsel submitted that by virtue of Sections 6 and 8 of the Act of 1956 and by adopting a progressive interpretation, a daughter would have inheritance right since she falls in Class I of the Schedule to the said Act. We are afraid that the said submission cannot be accepted for the simple reason that in the present case the inheritance opened when Yeshwantrao expired on 10th June 1952 which is prior to 1956. The Act of 1956 would apply if a person dies after 17th June 1956 when the Act of 1956 came into force. The Supreme Court in the case of ***Eramma Vs. Veerupana & Ors.***[2] held that the Act of 1956 would be applicable only to a person who dies after the commencement of the said Act. In this connection, it is relevant to reproduce paragraphs 4 and 5 of the said judgment which read as under:-

> *"4. There is nothing in the language of this section to suggest that it has retrospective operation. The words "The property of a male Hindu dying intestate" and the words "shall devolve" occurring in the section make it very clear that the property* ***whose devolution is provided for by that section must be the property of a person who dies after the commencement of the Hindu Succession Act****. Reference may be made, in this connection, to Section 6 of the Act which states :*

2 1965 SCC OnLine SC 23

> *"6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:*
>
> *Provided that if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship.*
>
> *5. It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder* ***who dies after the commencement of the Act****. It is manifest that the language of Section 8must be construed in the context of Section 6 of the Act.* ***We accordingly hold that the provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e., where succession opened before the Act, s. 8 of the Act will have no application.****"*
>
> *(emphasis supplied)*

11. Therefore, in the light of the above Supreme Court's decision, we reject the contention of Mr. Deshmukh to make the provisions of Sections 6 and 8 of the Act of 1956 applicable when the coparcener had died before 1956.

12. If the contention of Mr. Deshmukh, learned counsel is accepted then it would amount to giving retrospective effect to the Act of 1956 in a case where the succession opens prior to 1956. Section 6(1) of the 1956 Act confers on a daughter, co-parcenary rights on and from the commencement of the Amendment Act of 2005 w.e.f. 9th September 2005. Therefore, this supports the case that prior to the said

amendment and more particularly in the facts of the present case where the succession opened prior to 1956, Section 6(1) cannot come to the rescue to contend that a daughter would have the right of inheritance in the case of death of her father who died prior to 1956.

13. Mr. Deshmukh submitted that prior to the 1956 Act, a widow had limited interest and, therefore, succession which opened up on the death of a person prior to 1956 would continue to remain open till 1956 since such widow had no vested right prior to the 1956 Act. We cannot accept this submission because opening of succession has to be seen at the point of time when a male member dies and it gets freezed on that date. If the contention that succession continues to remain open till the enactment of the 1956 Act is accepted then it would lead to uncertainty since the succession right cannot be kept in suspension, but has to be frozen on date when a person dies.

14. The next submission made by Mr. Deshmukh is that Section 4 of the 1956 Act overrides any text, rule or interpretation of Hindu law or any custom or usage before the commencement of the said Act shall cease to have effect with respect to matters for which provision is made in the 1956 Act or which is inconsistent with the 1956 Act and since a daughter is now included in Class-I heir, enunciation prior to 1956 Act would not be applicable. In our view, this argument proceeds on a

footing that succession to the estate of a deceased person who died prior to 1956 continues to remain open till the enactment of 1956. We have already observed above that same is not the correct reading of the law and, therefore, this argument also is to be rejected. Furthermore, this argument also runs contrary to the decision of the Supreme Court in the case of ***Eramma (supra)*** and ***Arshnoor Singh (supra)*** which states that the provisions of the 1956 Act would not be applicable to a person who died before the commencement of the 1956 Act.

15. The Hon'ble Supreme Court in the case of ***Arshnoor Singh Vs. Harpal Kaur & Ors.***[3] observed as under:-

> *"If succession opened under the old Hindu law, i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-a-vis his male descendants upto three degrees below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act, 1956."*

16. The above observation of the Hon'ble Supreme Court in ***Arshnoor Singh*** clearly shows that if the succession opens prior to 1956, the provisions of the Act of 1956 would not be applicable.

17. Mr. Kumbhakoni, learned Senior Counsel is justified in relying upon paragraphs 71 and 129 of the judgment of the Hon'ble Supreme Court in the case of ***Vineeta Sharma Vs. Rakesh Sharma & Ors.***[4] which

3 (2020) 14 SCC 436
4 2021 (1) Mh. Law Journal 121

supports the submission that if any partition or testamentary succession had taken place before 20th December 2004, then same would be saved and would not be governed by the Amendment Act of 2005. The relevant para reads as under:

> *"71. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to Section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary* ***to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20.12.2004. A daughter can assert the right on and from 9.9.2005, and the proviso saves from invalidation above transactions.****"*
>
> *"129. Resultantly, we answer the reference as under:*
>
> *(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.*
>
> *(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.*
>
> *(iii) ……..……..…*
>
> *(iv) ……..……..…*
>
> *(v) ……..……..…"*

18. The above decision of the Supreme Court supports the view that if, like in present case, succession opens prior to 1956, the provisions of the Amendment Act of 2005 cannot be made applicable.

19. The law has been progressive from 1937, whereby limited rights were given to the widow which were converted into full rights on enactment of the Act of 1956 and which further progressed and gave right as a coparcener to a daughter under the Amendment Act of 2005. However, that would not mean that in case of a death prior to 1956, daughter would have any right when the succession opened prior to 1956.

20. Under Hindu customs, a daughter when born, on reaching marriageable age is married and sent to her in-laws house. Therefore, a daughter was never considered as a part of the family in the era when 1937 Act was in operation. It is also important to note that the 1937 Act is a Pre-Independence enactment. During that period, a widow had to be protected on the death of her husband since she could not go back to her parents house and at the same time, her husband could not take care of her since he was no more. With a view to get over such a situation that limited rights were conferred on a widow by the Act of 1937. A daughter was however excluded from claiming any inheritance right prior to the enactment of the Act of 1956.

21. It is important to observe that provisions of Section 6 of the Act of 1956 which provides for devolution of interest of co-parcenary property begins with the phrase "when a male Hindu dies after the

commencement of this Act….", his interest in the property shall devolve by survivorship upon the surviving members of co-parcenary …… This indicates the intention of the legislature that provisions of the Act of 1956 would not be applicable in case of a person who expired prior to the enactment of the 1956 Act. Section 6(3) post amendment of 2005 also provides that same would apply to a Hindu who dies after the commencement of the Amendment Act of 2005. In the present case, we are concerned with the issue of inheritance qua a coparcener who died before 1956. Therefore, the contention of Mr. Deshmukh on this count is to be rejected that a daughter would have inheritance right in her father's property who died prior to 1956.

22. Section 6 post amendment Act of 2005 provides that a daughter shall have a right in the co-parcenary property as she would have had if she had been a son. If the intention prior to the enactment of the Hindu Succession Act was to give inheritance right to a daughter then the provisions similar to Section 6(1) of the 2005 Amendment Act would have been incorporated in the Act of 1937. The fact that Section 3 of the 1937 Act expressly provides only for a "widow" to be treated as a "son" for computing her limited interest to share and to seek partition as a male owner clearly shows that at the relevant time prior to 1956, a daughter would not have any inheritance right if her father died prior to 1956.

23. Our view in this regard is fortified by the Notes on Clauses while introducing Bill No.XIII of 1954 to amend and codify the law relating to intestate succession among Hindus which ultimately got enacted as the Act of 1956. Clauses 8 to 10 of Notes on Clauses shows the intention of the Legislature that for the first time, a daughter would be added in Class I of the preferential heirs in the Schedule to the existing list of simultaneous heirs. The said clause also indicates that under the Act of 1937 only a widow was to have limited right of inheritance. Clauses 8 to 10 of Notes on Clauses read as under:-

> *"Clauses 8 to 10 – Before 1937, the "simultaneous heirs" of a male Hindu dying intestate comprised only son, the son of a pre-deceased son and the son of a pre-deceased son of a pre-deceased son. The Hindu Women's Rights to Property Act, 1937, added to the list the widows of the first two as well as the intestate's own widow. Class I of the preferential heirs in the Schedule now adds to the existing list of simultaneous heirs, the daughter, and further seeks, as far as possible, to treat the other grandchildren of an intestate, whose parent has pre-deceased the intestate, on the same footing as the son of a pre-deceased son, except that in the former case the share to be divided among the children will be less than in the latter case."*

24. In the case of ***Gurudayalsing Vs. Basant Singh***[5] the learned Single Judge after discussing Hindu Law relating to the inheritance and succession which was in existence prior to the Act of 1956 coming into force observed in paragraph no.30 as under :-

> *"The order of succession of males in cases governed by Mitakshara is given in para 72 and it shows that widow gets along with son. It can be said that due to the provisions of Hindu Women's Rights to Property Act, 1937 the widow is*

5 2014 (6) Mh.L.J. 186

> *placed in the same category as that of son. The first category excludes the second and so on. In the past widow was listed in separate category and she was not placed along with son. Act of 1937 changed this position and widow came to be listed to the category of sons. Daughter remained in next category. In view of the provision of Hindu Law as mentioned in paragraphs 43 and 72 son and widow of the deceased started inheriting simultaneously. Only if nobody from that category was available then the daughter was to inherit. U**nder this Hindu Law which was in existence prior to 1956 daughters did not inherit until all the widows were dead."***
>
> *(emphasis laid)*

25. We may also refer to the decision of the Supreme Court in the case of ***Kasabai Tukaram Karwar and Ors. Vs. Nivruti (Dead Through Legal Heirs and Ors.***[6]. The Supreme Court in paragraph No.16 observed that the inheritance has to be examined when the succession opens and since in that case the succession opened in the year 1948, it was held that the daughter would have no right. Thus, when the death of a male member has taken place prior to 1956, the succession would open prior to 1956 and in view of the Act of 1937, a widow is recognised as heir and the daughter would have no right.

26. The decision in the case of ***Pranjivandas Tulsidas and Jagmohandas Jamnadas Vs. Devkuvarba wd/o Ramdas Hirchand***[7] is also important to be noted for coming to the conclusion that during the period prior to 1956, a daughter would not have any inheritance right, if the widow survives on the death of her husband. The relevant observations of the said decision are re-produced:-

6 2022 SCC OnLine SC 918
7 (1859) 1 Bom 130

> *"The widow, then, not having an absolute estate in the immovable property, it remains to determine who are entitled to the absolute interest subject to the estate taken by her. In this case there are daughters. Now, according to all the authorities, the daughters take next after the widow. What then is the nature of the estate they take? Here, again, there are differences of opinion, but, dealing with the question according to the three books I have mentioned, it appears to me that the daughters take an absolute estate. We find quoted in the Mayukha a passage from Manu: "The son of a man is even as himself, and the daughter is equal to the son; how then can any other inherit his property, but a daughter, who is as it were himself." With reference to this point also I consulted the Shastris both here and at Puna, and inquired whether daughters could alienate any, and what, portion of the property inherited from a father who died separate. The answer was that daughters so obtaining property could alienate it at their will and pleasure, and in this the Shastris of both places agreed, both also referring to the above text in the Mayukha as their authority for that position.* ***On reviewing all accessible authorities, I have come to the conclusion that daughters take the immovable property absolutely from their father after their mother's death.****"*
>
> *(emphasis suppiled)*

27. We are conscious that the views expressed by experts in their Commentaries on the subject of inheritance should not be read as a statute but same can certainly be referred to ascertain the practice prevailing during the period prior to the law being codified on inheritance. The views of experts on the said field have been considered by the Supreme Court in the case of ***Arunachala Gounder Vs. Ponnusamy & Ors.***[8]. In the said decision, it has been observed as under :

8 (2022) 11 SCC 520

A "Treatise on the Hindoo Law of Inheritance" by Standish Grove Grady published in 1868 by Gantz Brother Mount road, Madras at page 165 states:-

> *"Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on failure of male issue and a widow, the daughter would take."*

28. It may also be relevant to refer to commentaries and annotations from "The Principle and Elements of Hindu Law" in the form of a digest by Shyama Charan Sarkar Vidya Bhushan, known as "Vyavastha Chandrika", a digest of Hindu Law. Section II of the said digest deals with Daughters' right of Succession.

In Clause 118 of Section 11 of the Commentary, it is stated as under :

> *"In default of the widow, the daughters inherit the estate of the man who died separated (from his coparceners) and not re-united (with them)."*
>
> It also quotes "Vishnu" and "Vrihaspati" as under:
> *"Vishnu: The wealth of a man who leaves no male issue goes to his wife; on failure of her, to his daughter.*
>
> *Vrihaspati: The wife is pronounced successor to the wealth of her husband; in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs."*

Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on the failure of male issue and a widow, the daughter would take.

29. In the commentary titled as "Hindu Law and Judicature"- from the "Dharma-sastra of Yajnavalkya" by renowned authors Edward Roer, PhD, MD and W.A. Montriou, in Clause 135, it is stated as under:

> *"135. If a man depart this life without male issue; (i) his wife, (ii) his daughter, (iii) his parents, (iv) his brothers, (v) the sons of his brothers, (vi) others of the same gotra, (vii) kindred more remote, (viii) a pupil, (ix) a fellow-student these succeed to the inheritance, each class upon failure of the one preceding. This rule applies to all the caste."*

30. The Privy Council in the case of ***Rajah ShivaGunga***[9] case observed that according to Mitakshara Law, property of a male deceased descenced to widow/widows and thereafter, to daughters in default of male issue.

31. In the case of ***Arunachala Gounder (supra)***, it has been further observed in paragraph 58 as under:-

> "*58. A Full Bench of the Allahabad High Court, in Ghurpatari v. Sampatia, While considering the question whether a custom under which daughters are excluded from inheriting the property of their father can by implication exclude the daughters' issues both males and females, also from such inheritance, made the following observations in respect of Right of Inheritance of a widow or a daughter of a male Hindu dying intestate: (SCC OnLine All para 17)*
>
> > *"17. The rules relating to inheritance by widow and daughter were enunciated in the ancient past by various sages and were ultimately elaborated by Vijnyaneshwara in Mitakshara. We may quote from Colebrooke's translation.*

9 1863 SCC OnLine PC 11

Katyayan said 'let the widow succeed to her husband's wealth, provided she be chaste; and in default of her let the daughter inherit if married. Brihaspati stated, 'the wife is pronounced successor to the wealth of her husband; and in her default the daughter; as a son so does the daughter of a man proceed from his several limbs, how then shall any other person take the father's wealth'? Vishnu laid down, 'if a man leaves neither son, nor son's son, nor wife, nor female issue, the daughter's son shall take his wealth, for in regard to the obsequies of ancestors, daughter's son is considered as son's son. ….."

32. Mulla on "Principles of Hindu Law, 18th Edition" is relevant to throw some light on the issue under consideration. The relevant clauses of the said commentary are reproduced:-

> *"42. SUCCESSION IN THE BOMBAY STATE*
>
> *The rules of inheritance in force in the Bombay state differ in some respect from those in force in the Benares, Mithila and Madras schools. Again, in those parts of the Bombay state, where the Mayukha is the prevailing authority, that is, the island of Bombay, Gujarat and the North Konkan, the rules of inheritance are in some respects different from those prevailing in other parts of the state. The order of succession in the Bombay state is given separately in chapter VI (§§ 71-77).*
>
> *43. ORDER OF SUCCESSION AMONG SAPINDAS*
>
> *The sapindas succeed in the following order:*
>
> *1-3 Son, grandson (son's son) and great-grandson (son's son's son), and (after 14 April 1937) widow, predeceased son's widow, and predeceased son's predeceased son's widow.*
>
> *4A Predeceased son's widow, widow of predeceased son of predeceased son (see § 35).*
>
> *5. Daughter*

(1) Priority Among Daughters

Daughters do not inherit until all the widows are dead. As between daughters, the inheritance goes first to the unmarried daughters, next, to daughters who are married and 'unprovided for', ie, indigent, and lastly, to daughters who are married and are 'enriched', i.e. possessed of means. A married daughter may be a widow. No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence. The rule about one married daughter excluding the other married daughter from inheritance comes into operation, only if one daughter is indigent and the other is possessed of wealth. It does not apply where both the daughters are financially well off and well placed in life. The rules of preference are those stated above and there is no rule of preference that a daughter who is without issue is to be preferred to one with issue. Nor is there any rule that a daughter who is married to an idol and leads the life of a prostitute is to be preferred to her married sisters.

"(iv) In the Bombay State

Rules (ii) and (iii) do not apply in the Bombay state (see § 72, No 7). A has two daughters B and C. B has a daughter D. On A's death, his estate will go to B and C. In places other than the Bombay state, they each take a 'woman's estate' with rights of survivorship. Therefore, on B's death, her interest in the estate will go, not to her daughter D, but her sister C by survivorship. In the Bombay state, however, it is different. There on A's death, B and C will each take an absolute interest in a moiety of the estate so that on B's death, her moiety will go to her heir D, and on Cs death, her moiety will go to her own heirs."

"72. ORDER OF SUCCESSION IN CASES GOVERNED BY MITAKSHARA

The following is the order of succession to males among sapindas in the Bombay state in cases governed by Mitakshara:

1-6 Son, son's son (whose father is dead) and son's son's

> *son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1947, the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognised as heirs (see § 43). See notes to § 43 nos 1-4.*
>
> *7 Daughter*
>
> *See § 43, no 5, notes (i), (iv)-(vii).*
>
> *In the Bombay state, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a daughter in that state does not take a limited estate in her father's property, but takes the property absolutely: Thus, if a Hindu governed by the Bombay school dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death her share will pass to her own heirs as her stridhana (§ 170)."*

33. Coming to the decision in ***Laxman Tukaram (supra)***, it can be seen that reference therein has been made to paragraph 72 in Chapter VI of Principles of Hindu Law by Mulla. Said Chapter relates to the law with regard to the order of succession to males in the Bombay State. It is however necessary to note that paragraph 43 of the same work refers to the order of succession among Sapindas. A daughter is shown entitled to inherit only after the death of a widow. The learned Single Judge in ***Laxman Tukaram (supra)*** failed to notice paragraph 43 while determining the rights of parties therein which resulted in giving an equal share to the daughter along with the widow.

In our view, to the above extent, ***Laxman Tukaram (supra)*** does not lay down the correct proposition wherein it holds a daughter entitled to an equal share with that of the widow. The judgment in the

case of ***Gurudayalsing (supra)*** in paragraph No. 35 also refers to decision in ***Laxman Tukaram (supra)*** and observes that the position of law prevailing prior to coming into force of the Act of 1956 was not considered by the Court while deciding the case of ***Laxman Tukaram (supra).***

34. Mr. Apte, learned Senior Counsel relied upon paragraphs 63 to 77 of the decision of the Supreme Court in the case of ***Vineeta Sharma (supra)***, in support of his submission that a daughter would have inheritance right in the father's property even if the father died prior to 1956. We fail to understand how these paragraphs referred to are of any assistance in the present context. The said paragraphs deal with the provisions of Section 6 post the 2005 Amendment, whereby a daughter was treated as equal co-parcenary. On the contrary, the said paragraph expressly states that the amended provision giving equal rights to a daughter would apply only to a situation where death occurs after the date of amendment. Thereby implying that if a person dies prior to 1956 then certainly these paragraphs cannot be of any assistance to ascertain the daughter's right since the issue of inheritance opened up prior to 1956 on the death of such person.

35. In view of above, we answer the question referred to us by holding that a daughter would not have any right, either limited or absolute, by inheritance prior to coming into force of the Act of 1956 in

the property of her deceased father who died prior to 1956 leaving behind him in addition to such daughter, his widow as well.

36. The Second Appeals be now placed before learned Single Judge to be decided on merits.

37. Before parting, we may note that the order of reference was made on 28th February 2007. The reference could not be decided earlier for one reason or the other. On our suggestion, all the learned counsel readily agreed to canvass their submissions on a non-working day. We acknowledge the useful assistance rendered by all the learned Counsel that has enabled us to decide the reference.

[JITENDRA JAIN, J.] [A. S. CHANDURKAR, J.]

Signed by: Sayyed Saeed Ali
Designation: PA To Honourable Judge
Date: 12/11/2024 19:39:07