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BAI NANI & OTHERS

v.

MANILAL LALLUBHAI & ORS.

February 7, 1977

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[S. MURTAZA FAZAL ALI AND P. S. KAILASAM, JJ.]

Hindu Succession Act—Hindu Women's Right to Property Act 1937—Whether partition by metes and bounds—Whether new case can be made out in the absence of issue.

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The respondent-plaintiffs filed a suit for partition and allotment of one half share of the suit house and the moveable properties. One Faqir Chand had 3 sons, Nathubhai, Lallubhai and Nanabhai. Nanabhai was the defendant in the suit whose legal representatives are appellants. Lallubhai's heirs are the plaintiffs. According to the plaintiffs the three brothers were members of a Joint Undivided Hindu Family. According to the respondents the properties were never partitioned though the three brothers were staying and messing separately and each branch carried on its business separately. The respondents also challenged the validity of the sale deed executed by Bai Kashi the widow of Nathubhai in favour of the appellants on the ground that the sale was not for legal necessity. The appellants contended that the three brothers were separate and each branch used to do its business separately. That as far as the suit house was concerned it was divided though not by metes and bounds and that the brothers lived in separate portions of the house. The appellants claimed that they were entitled to 2/3 share on the house. The Trial Court found that the 3 brothers had separated before the deaths of Nathubhai and Lallubhai. It also found that the defendant and his brothers had separated and the suit house was also divided as alleged by the defendant. It came to the conclusion that the defendant had failed to prove that there was any legal necessity for Bai Kashi to sell the share in the suit house and that after Bai Kashi's death the respondent was entitled to one half share in the suit house. The Trial Court found that Bai Kashi became entitled to one half share of her husband in the suit house under the Hindu Women's Rights to Property Act, 1937. As her interest was only a limited interest known as Hindu Women's Estate when Bai Kashi died in January 1956, she had not become the full owner of the share under the Hindu Succession Act, 1956. The court was of the view that on the death of Bai Kashi her share would go to the reversioners. The court held that the parties were governed by Mayukh school which over-rides the Mitakshara school and, therefore, after the death of Bai Kashi the defendant and plaintiff No. 1 would inherit together to the share of Nathubhai. The court held that the claim of the plaintiff for one half share should be decreed though there was no specific claim on the plea of separation and heirship. The High Court dismissed the appeal and confirmed the findings of the Trial Court.

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In an appeal by Special Leave the appellants contended that the respondents' plea that the 3 brothers were joint and the share of Bai Kashi was inherited by the remaining two branches by survivorship having been negatived by the courts below the suit ought to have been dismissed and that the court erred in making out a new case of succession to the property of Bai Kashi without necessary pleadings.

Allowing the appeal partly,

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HELD : 1. On the question whether the respondents are entitled to one half share on her death has not been dealt with by the High Court. This Court agreed with the concurrent findings of the Trial Court and the High Court that the family was separate and that the sale deed by Bai Kashi in favour of the appellants was not for legal necessity. However, the claim of the respondent for partition and allotment of 1/3 share by metes and bounds

cannot be resisted. Though the brothers became separate admittedly there was no division by metes and bounds. There is also no dispute that the respondents are entitled to 1/3 share in the house. [924 A-C]

2. The High Court did not deal satisfactorily with the contention of the defendant that the Trial Judge erred in saying that Bai Kashi had only a widow's estate when she died in the absence of any issue as to who were heirs of the deceased Bai Kashi. On the question whether respondents are entitled to succeed to Bai Kashi's 1/2 share, the Court remitted the matter to the High Court for consideration. [924 C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1988 of 1968.

Appeal by Special Leave from the Judgment and Decree dated 12/22-3-1968 of the Gujarat High Court in First Appeal No. 760/60.

S. T. Desai, I. N. Shroff and *H. S. Parihar* for the Appellants.

J. B. Nagarsett and *A. G. Ratnaparkhi* for the Respondents.

The Judgment of the Court was delivered by

KAILASAM, J. This appeal is by the legal representatives of the defendant in the suit by special leave against the judgment and decree of the High Court of Gujarat. The suit was filed by Manilal Lallubhai and his widow Bai Mani against Nanabhai Fakirchand for partition and allotment of one-half share of the suit house and the moveable properties mentioned in the plaint. One Fakirchand had three sons, Nathubhai, Lallubhai and Nanabhai. Nanabhai is the defendant whose legal representatives are the present appellants in this Court. Lallubhai's son, Manilal, was the first plaintiff and his mother and widow of Lallubhai, Bai Mani, was the second plaintiff. The second plaintiff is since dead and his legal representatives are respondents 2(b) and 2(c) in this appeal. Nathubhai, Lallubhai and Nanabhai were originally the members of a joint Hindu family.

The case of the plaintiffs, respondents in this appeal, is that the three brothers Nathubhai, Lallubhai and Nanabhai were members of a joint undivided Hindu family and when they were joint in the year 1940 Nathubhai died leaving his widow Bai Kashi. Subsequently in the year 1942 Lallubhai died. On 24th January, 1956 Bai Kashi, the widow of Nathubhai, died while the family continued to be a joint undivided Hindu family. According to the respondents the properties were never partitioned though the three brothers were staying and messing separately and each branch carried on its business separately. The family immoveable and moveable properties were never divided. The respondents also questioned the validity of a sale deed executed by Bai Kashi on 25th April, 1955 in favour of the appellants of her share in the immoveable property as it was not for legal necessity.

In the written statement the appellants denied that the three brothers were members of a joint family. They pleaded that the brothers were separated and each branch used to do its own business keeping their earnings separately and messing separately. So far as the suit house was concerned it was divided though not by metes and bounds and the

A brothers lived in separate portions of the house. The appellants claimed that they were entitled to $\frac{2}{3}$ share in the house as Bai Kashi the widow of Nathubhai had sold her share by registered deed 25th April, 1955 to the appellants.

On these pleadings 9 issues were framed of which three are relevant for the purpose of this appeal. They are : (1) Does the defendant prove that he and his two brothers—Nathubhai and Lallubhai had separated and the suit-house was also divided (through not by metes and bounds) at the time of the death of Nathubhai ? (2) Does he further prove that the sale-deed executed by Bai Kashi in respect of the one-third share of the suit-house was for legal necessity and to satisfy her debts ? and (3) Do the plaintiffs prove that after Bai Kashi's death they become entitled to a one-half share in the whole of the suit-house ? The trial court found that the three brothers had become separate in status before the deaths of Nathubhai and Lallubhai. It also found that the defendant and his brothers had separated and the suit-house was also divided as alleged by the defendant and recorded the finding in favour of the defendant. Regarding the second issue it found that the defendant had failed to prove that there was legal necessity for Bai Kashi to sell away the share in the suit-house. On the third issue the trial court recorded a finding that after Bai Kashi's death the respondents became entitled to $\frac{1}{2}$ share in the whole of the suit-house.

On appeal the High Court confirmed the findings of the trial court on three issues and dismissed the appeal.

E The findings of both the courts below that the defendant and his two brothers had separated and the suit-house was also divided by metes and bounds was not challenged before us by the counsel for the respondents. So also the finding that the sale deed executed by Bai Kashi in respect of her $\frac{1}{3}$ share of the suit-house was not proved to have been for legal necessity. The only point that was raised by the counsel for the appellants is that the respondents' plea that the three brothers were joint and the share of Bai Kashi was inherited by the remaining two branches by survivorship having been negatived by the courts below the suit ought to have been dismissed and that the courts erred in finding a new case of succession to the property of Bai Kashi without the necessary pleadings. It may be observed that on the accepted finding of the courts below that the sale in favour of the appellants by Bai Kashi is not supported by legal necessity if on the death of Bai Kashi the other two branches i.e. that of the appellants and the respondents, are entitled to share equally the decree granted by courts below would be right even though the claim to the $\frac{1}{2}$ share is not based on succession.

H The contention of the counsel for the appellants is that the courts below have found an entirely new case on the basis of succession which is contrary to the claim made in the plaint. The averment in the plaint is that on 24th January, 1956 Bai Kashi the widow of Nathubhai died and Nanabhai continued as the member of the joint Hindu family.

There is no alternate claim that in the event of the partition being negated the plaintiff would be entitled to 1/2 share of Bai Kashi by succession. The 3rd issue that was raised was whether on Bai Kashi's death the appellants became entitled to 1/2 share in the whole suit-house. The trial court on that issue found that Bai Kashi became entitled to 1/2 share of her husband in the suit-house under the Hindu Women's Rights to Property Act, 1937. As her interest was only a limited interest known as Hindu Women's Estate when Bai Kashi died in January 1956 she had not become the full owner of the share under the Hindu Succession Act, 1956. On this basis the trial court was of the view that on the death of Bai Kashi her share would go to the reversioners. On the question as to who the heirs of Nathubhai are at the time of the death of Bai Kashi the trial court held that as the parties were in Gujarat the Mayukh school will govern the inheritance and in Gujarat the Mayukh school overrules the Mitakshara school and therefore full brothers inherit along with sons of full brothers who are dead and therefore after the death of Bai Kashi the defendant and plaintiff No. 1 would inherit together to the share of Nathubhai. The court held that the claim of the plaintiff for 1/2 share should be decreed though there is no specific claim on the plea of separation and heirship. The defendant, present appellants, in their appeal to the High Court submitted that the trial Judge erred in saying that Bai Kashi had only a widow's estate when she died and that the trial court failed to appreciate that no issue was framed as to who were the heirs of the deceased Bai Kashi and that the parties to the suit had not gone to the trial on the basis of the succession. The High Court has not dealt with this issue satisfactorily. The High Court after referring to the pleadings observed that the plaintiffs claimed 1/2 share in the suit properties on the ground of survivorship and that at the time of the arguments it was contended before the trial court that even if the brothers had separated the defendant and the plaintiff No. 1 inherited together to Nathubhai after Bai Kashi's death and therefore the plaintiff would be entitled to 1/3 share. After making these observations the High Court has referred to the plea in the written statement that the three brothers were separated and has observed that the trial Judge had framed the issue as to whether the defendant proves that he and his two brothers Nathubhai and Lallubhai had separated and the suit-house was divided and concluded that this issue which was raised by the learned trial Judge clearly arose out of the contention which was raised by the defendant to the plaintiff's suit and a specific issue was raised on that point by the learned trial Judge and therefore there is no prejudice to any of the parties because the issue was framed and evidence was led by both the parties on that point. This reference, we are afraid, does not relate to issue No. 3 which is about the succession to Bai Kashi's share after her death. In the Memorandum of Grounds in the appeal to the High Court as well as in the special leave petition the ground that is taken specifically is that the plaintiff has not proved how he became entitled to the share of Bai Kashi. In fact, the contention is that on the death of Nathubhai his widow Bai Kashi inherited under the Mayukh law Nathubhai's 1/3 share in the suit-house absolutely. It was also contended before the High Court that the trial Judge was in error in saying that Mayukh school of Hindu law would override the Mitakshara school in Gujarat. We find that the question

- A that arose mainly whether the respondents are entitled to succeed to Bai Kashi's 1/2 share on her death has not been satisfactorily dealt with by the High Court especially when the point was specifically raised on behalf of the appellants. While we agree with the concurrent finding of the trial court and the High Court that the family became separated and that the sale deed by Bai Kashi in favour of the appellants is not for legal necessity we are satisfied that the claim of the respondents for partition and allotment of 1/3 share by metes and bounds cannot be resisted. Though the brothers became separate admittedly there was no division by metes and bounds. There is also no dispute that the respondents are entitled to 1/3 share in the house. Therefore though they became separated in status the suit-house was not divided by metes and bounds and therefore they will be entitled to division and separate possession of 1/3 share in the house. To this extent the decree of the courts below will be modified.
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- But so far as the 1/3 share of Bai Kashi is concerned as the courts below have not considered the appellants' plea that the respondents are not entitled to succeed to Bai Kashi's 1/2 share the question is remitted to the High Court for consideration. The High Court will consider as to whether the respondents are entitled to succeed to 1/2 of the 1/3 share of Bai Kashi and pass a decree accordingly. To this extent the appeal is allowed and the decree of the trial court and the High Court modified. The parties will bear their own costs in this appeal.
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P.H.P.

Appeal allowed.