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KARPAGATHACHI AND ORS.

v.

NAGARATHINATHACHI

March 10, 1965

[K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.]

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Hindu Law—Partition between co-widows—Whether right of survivorship can be relinquished—If repugnant to Transfer of Property Act, 1882 (4 of 1882) s. 6(a)—Onus.

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Two co-widows divided their husband's property and each entered into separate possession of her share. On the death of one of the widows her daughter the respondent took possession of her mother's share. The appellant the surviving widow filed a suit against the respondent claiming possession of that share. The Trial Court decreed the suit, which on appeal was set aside by the High Court. In appeal by certificate:

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HELD: (i) Under the Hindu Law the widows were competent to partition the properties and allot separate portions each, and incidental to such allotment each could agree to relinquish her right of survivorship in the portion allotted to the other. Such an arrangement was not repugnant to s. 6(a) of the Transfer of Property Act, 1882. [337 C-D].

Case law referred to.

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(ii) Mere partition of the estate between the two widows does not destroy the right of survivorship of each to the properties allotted to the other. The party who asserts that there was an arrangement by which the widows agreed to relinquish the right of survivorship must establish this arrangement by clear and cogent evidence. [338 B].

The respondent, in the instant case, had failed to discharge this onus. [338 B-C].

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 998 of 1963.

Appeal from the judgment and decree dated January 12, 1962 of the Madras High Court in Appeal Suit No. 292 of 1958.

A. V. Viswanatha Sastri, V. S. Ramaswami Iyengar and R. Thiagarajan, for the appellants.

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S. V. Gupte, Solicitor General, and R. Ganapathy Iyer, for the respondent.

The Judgment of the Court was delivered by-

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Bachawat, J. One Sivasubramania Pillai died in the year 1924 leaving him surviving his mother, two widows, Thialaiachi and Karpagathachi, and a daughter, Nagarathinathachi (respondent herein) born of Thialaiachi. The two widows inherited the properties left by Sivasubramania. In July 1927, they divided the bulk of the properties and each entered into separate possession and enjoyment of the properties allotted to her. The partition is evidenced by two partition lists called partition deeds. Exs A—1 and B—45 dated July 14, 1927 and signed by both of them. Under this partition, two *velis* of land were set apart for the maintenance:

of Sivasubramania's mother, to be enjoyed by her during her life-time, and on her death, to be taken and enjoyed by the two widows in separate portions as mentioned in the partition lists. On August 26, 1954, Thialaiachi died, and upon her death, the respondent took possession of the properties allotted to Thialaiachi under the partition of July, 1927. On December 8, 1954, Karpagathachi instituted against the respondent the suit, out of which this appeal arises, claiming possession of the suit properties. The respondent resisted the suit claiming that under the partition each widow gave up her right of survivorship in respect of the properties allotted to the other, and consequently on the death of Thialaiachi, the respondent as her daughter was entitled to take her share as her heir and to enjoy the same during the life of Karpagathachi. By his judgment dated August 18, 1958, the District Judge, East Thanjavur, rejected the defendant's contention, and held that the division between the two widows was for convenience of enjoyment only, and decreed the suit in respect of the properties held by Thialaiachi under the partition of July, 1927. On appeal, the Madras High Court by its judgment dated January, 12, 1962 held that under the partition each widow gave up her life interest in the properties allotted to the other and consequently Karpagathachi was not entitled to recover possession of the properties allotted to Thialaiachi, set aside the decree of the District Judge, and dismissed the suit. Karpagathachi and several other persons impleaded as party respondents in the appeal before the High Court now appeal under a certificate granted by the High Court to this court under Art. 133 of the Constitution.

Mr. Viswanatha Sastry appearing on behalf of the appellants contends that: (1) the right of survivorship of each widow in respect of her husband's estate is the chance of the surviving widow to take the entire estate of her husband on the death of the co-widow, and in view of s.6(a) of the Transfer of Property Act, 1882, the widows were not competent to enter into an arrangement transferring or relinquishing their right of survivorship; (2) the partition lists, Exs. A—1 and B—45 not being registered, are not admissible in evidence; (3) the partition between the widows was for convenience of enjoyment only, and the respondent has failed to establish that each co-widow gave up her right of survivorship in respect of the properties allotted to the other. The learned Solicitor-General appearing on behalf of the respondent disputed these contentions.

We are of opinion that the first contention of Mr. Viswanatha Sastry should be rejected. Under the Hindu law as it stood in 1924, two widows inheriting their husband's properties took together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment. They were entitled to enforce a partition of those properties so that each could separately possess and enjoy the portion allotted to her, see *Bhugwan Deen Doobey v. Myna Bae* (1),

(1) [1867] 11 M.L.A. 487

A *Gauri Nath Kakaji v. Gaya Kuar*⁽¹⁾. Neither of them could without the consent of the other enforce an absolute partition of the estate so as to destroy the right of survivorship, see *Commissioner of Income-tax v. Smt. Indira Balakrishna*⁽²⁾. But by mutual consent they could enter into any arrangement regarding their respective rights in the properties during the continuance of the widow's estate, and could absolutely divide the properties, so as to preclude the right of survivorship of each to the portion allotted to the other. See *Ramakal v. Ramasami Naickan*⁽³⁾, *Sudalai Ammal v. Gomathi Ammal*⁽⁴⁾. Likewise, two daughters succeeding to their father's estate as joint tenants with rights of survivorship could enter into a similar arrangement. See *Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty*⁽⁵⁾ *Subbammal v. Lakshmana Iyer*⁽⁶⁾, *Ammani Ammal v. Periasami Udayan*⁽⁷⁾. Such an arrangement was not repugnant to s.6(a) of the Transfer of Property Act, 1882. The interest of each widow in the properties inherited by her was property, and this property together with the incidental right of survivorship could be lawfully transferred. Section 6(a) of the Transfer of Property Act prohibits the transfer of the bare chance of the surviving widow taking the entire estate as the next heir of her husband on the death of the co-widow, but it does not prohibit the transfer by the widow of her present interest in the properties inherited by her together with the incidental right of survivorship. The widows were competent to partition the properties and allot separate portions to each, and incidental to such an allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other. The first contention of Mr. Viswanatha Sastry must be rejected.

F The second contention of Mr. Viswanatha Sastry must also be rejected. A partition may be effected orally. By an oral partition, the two widows could adjust their diverse rights in the entire estate, and as part of this arrangement, each could orally agree to relinquish her right of survivorship to the portion allotted to the other. In the trial Court, the suit was tried on the footing that the partition was oral, and that the two partition lists were merely pieces of evidence of the oral partition, and no objection was raised with regard to their admissibility in evidence. In the High Court, the appellants raised the contention for the first time that the two partition lists were required to be registered. The point could not be decided without further investigation into questions of fact, and in the circumstances, the High Court rightly ruled that this new contention could not be raised for the first time in appeal. We

(1) [1928] L.R. 55 I.A. 299.

(2) [1960] 3 S.C.R. 513, 517.

(3) [1899] I.L.R. 22 Mad. 522.

(4) [1912] 23 M.L.J. 355.

(5) [1897] I.L.R. 24 Cal. 329.

(6) [1914] 26 M.L.J. 479.

(7) [1923] 45 M.L.J. 1.

think that the appellants ought not to be allowed to raise this new contention. A

We think that the third contention of Mr. Viswanatha Sastry is sound and should be accepted. Mere partition of the estate between the two widows does not destroy the right of survivorship of each to the properties allotted to the other. The party who asserts that there was an arrangement by which the widows agreed to relinquish the right of survivorship must establish this arrangement by clear and cogent evidence. The respondent has failed to discharge this onus. It is common case that the partition is evidenced by Exs. A—1 and B—45. Exhibit B—45 is the list showing the properties allotted to Thialaiachi. The relevant portion of Ex. B—45 reads :— B

“In accordance with the chit cast, Theiyalai Achi, wife of Sivasubramania Pillai, residing at Karuppur, shall take the nanja, punja, house and ground, cattle-shed, cattle, pathway for men, cattle and cart and shed where dried dung cakes are stored mentioned in the list and shall pay the Government kist for the aforesaid properties from the current fasli 1337 and enjoy them.” C

Exhibit A—1 showing the properties allotted to Karpagathachi contains similar words. Now the two lists show that each widow is to “take and enjoy” the properties allotted to her. The corresponding Tamil words are “*adainthu anubavithu.*” These words do not either expressly or by necessary intendment exclude the right of survivorship of the other widow. The Tamil words “*Sarva Swantantra Badyamayum*” and “*Santhathi pravesamayum*” and other words indicating relinquishment of the right of survivorship are conspicuous by their absence. The words used in the two partition lists are wholly insufficient to show that the two widows relinquished their right of survivorship *inter se*. The fact that two separate partition lists were drawn up and each was signed by the two widows does not carry the matter any further. The two partition lists show that the two *velis* of land kept separately for the maintenance of the mother-in-law were to be divided by metes and bounds on her death between the two widows. The division of the two *velis* on the death of the mother-in-law was agreed upon to avoid future disputes. The fact that Thialaiachi had a daughter and was older than Karpagathachi by 20 years does not show that Karpagathachi must have agreed that Thialaiachi’s daughter should enjoy the properties allotted to Thialaiachi after her death. After the partition, the pattas in respect of all the lands continued to be in the joint names of both the widows. If there was an absolute partition between the two widows, it is not explained why there was no separate mutation in the name of each widow in respect of the lands allotted to her. D

The deeds executed by Thialaiachi, Exs. B—3, B—4, B—6, B—7 and B—8 to B—43 recite the partition, but they do not use words indicating that there was an absolute partition. The sale E

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A deeds, Exs. A—3, A—4, and A—6 executed by both the widows are in respect of undivided properties and throw no light on the question at issue. The evidence on the record does not show clearly whether the sale deed, Ex. B—44, executed by both the widows relates to undivided properties, or whether it relates to properties as separately allotted to Thialaiachi. From time to time, Thialaiachi executed three wills, Exs. B—1, B—2 and A—5 giving to the legatees and particularly the respondent certain properties absolutely with full powers of alienation. The first two wills, Exs. B—1 and B—2, refer separately to Thialaiachi's separate properties and to the properties obtained by her on partition. The recitals in the two wills do not indicate that Thialaiachi obtained her husband's properties on partition with absolute rights. The third will, Ex. A—5, does not purport to dispose of specifically the properties obtained by her on partition. Karpagathachi knew that Thialaiachi had executed the wills, but it is not shown that she knew of the contents of the wills. By Ex. A—2, both Thialaiachi and Karpagathachi made a free gift of some of the properties allotted to Thialaiachi. D.W. 1 is unable to explain why Thialaiachi joined in this deed. By sale deed, Ex. B—5, Thialaiachi sold absolutely some of the properties allotted to her and a notice, Ex. A—22, regarding the proposed transfer of the *patta* in the name of the vendee was served upon Karpagathachi. It is not clear if the *patta* was actually transferred in the name of the vendee. The explanation of Karpagathachi that she protested against the transfer and ultimately received one half of the sale price has not been believed. But assuming that Karpagathachi did not object to the transfer, this single circumstance does not establish that at the time of the partition, she had agreed to give up her right of survivorship in respect of the properties allotted to Thialaiachi.

F Karpagathachi (P.W. 1) denied that there was an absolute partition. She was not shaken in cross-examination. Nataraja Pillai (P.W. 2) said that there was no talk that each should take the properties absolutely and it was agreed that each would enjoy separately. We find nothing in the evidence of P.W. 2 to show that the widows agreed to partition the properties absolutely so as to destroy the right of survivorship. Manickam Pillai (D.W. 1) said that at the time of the partition, Thialaiachi said that she had a daughter and if what was allotted for her share was given to her absolutely she would agree to the partition and Karpagathachi also wanted to have absolute rights. The District Judge rightly rejected evidence of D.W. 1. The partition lists were drawn up after consulting lawyers. D.W. 1 is unable to explain why words indicating absolute partition were not used in the partition lists. D.W. 1 had been in management of the properties of the respondent, yet he falsely denied this fact. He had intimate dealings with Thialaiachi and the respondent. On a meticulous examination of the oral and documentary evidence, the learned District Judge rejected the respondent's case that the widows had orally agreed to relinquish their

right of survivorship. We think that this finding is correct, and the High Court was in error in reversing this finding. **A**

In the result, the appeal is allowed, the decree and judgment passed by the High Court are set aside and those of the trial Judge restored. In all the circumstances, we direct that the parties will pay and bear their own costs throughout, in this Court and also in the Courts below. **B**

Appeal allowed.