

**Byamma Vs. Ramdev**

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**Court :** Karnataka

**Decided On :** Aug-31-1990

**Reported in :** ILR1991KAR3245; 1991(1)KarLJ221

**Judge :** B.P. Singh, J.

**Acts :** Hindu Law; Mysore Hindu Law Women's Rights Act, 1933 - Sections 8(1)

**Appeal No. :** R.S.A. No. 734 of 1979

**Appellant :** Byamma

**Respondent :** Ramdev

**Advocate for Def. :** T. Radhakrishna, Adv. for R-1 and ;P. Subba Rao, Adv. for R-4

**Advocate for Pet/Ap. :** M.V. Rangunathachar, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**B.P. Singh, J.**

1. This is a plaintiff's second appeal.

One Chowdappa had a son, by name Chikka Ramaiah. Chikka Ramaiah was married to the plaintiff Byamma. Chowdappa's daughter by name Chickkavenkatamma had a son Ramdev who is the 2nd defendant. The first defendant, Smt. Akkayamma is the widow of Chowdappa.

2. The plaintiff claimed partition of her share in the joint family properties described in the Schedule claiming that she had 1/3rd share, being the widow of a pre-deceased son. The defendants denied her claim and asserted that she had only a right to be maintained by 2nd defendant in view of the Will executed by late Chowdappa on 12-12-1949 bequeathing his interest in favour of 2nd defendant while casting an obligation upon him to maintain the plaintiff and the 1st defendant.

3. A few facts that are not in dispute may be noticed. Chowdappa and Muniyappa were brothers and they constituted a Joint Hindu Family. The husband of the plaintiff, Chikka Ramaiah son of Chowdappa died in year 1940. By two release deeds dated 6-8-1943 and 14-3-1946 there was a partition between Chowdappa and his brother. It is not disputed before me that the partition was effected through these two deeds even though they were described as release deeds. Chowdappa got separate possession of the ancestral properties that fell to his share. On 12-12-1949 Chowdappa executed a Will bequeathing his entire interest in favour of his daughter's son Ramdev, the 2nd defendant. Chowdappa died in the year 1968. The plaintiff claimed 1/3rd share in the joint family properties which was denied to her. She consequently, filed the instant suit claiming 1/3rd share in the joint family properties.

4. As noticed above the defendants had denied her claim to partition and stated that, under the WILL executed by Chowdappa, the 2nd defendant was only required to maintain the plaintiff which he was ready to do. It is not necessary to refer to all the pleadings of the parties, and the numerous submissions made by them before the Courts below.

5. The learned Principal II Munsiff, Bangalore, who tried the suit, being O.S. No. 133/1971, held that there was nothing on record to show that the suit schedule properties were joint family properties of Chowdappa and his deceased son. Consequently the plaintiff, as the widow of the pre-deceased son, had no right to a

share in the properties under Section 8 of the Mysore Hindu Law Women's Rights Act, 1933 ('Mysore Act' for short). He further held that the suit schedule properties belonged to the 2nd defendant by virtue of the Will dated 12-12-1949 executed by Chowdappa. He also held that the properties given to Chowdappa by his brother Muniyappa were given for the benefit of the 2nd defendant, except Item No. 1 of the schedule. On such findings, the learned Munsiff dismissed the suit.

6. Being aggrieved, the plaintiff preferred an appeal, being Regular Appeal No. 139 of 1978, which came to be disposed of by the learned Principal Civil Judge, Bangalore. The learned Civil Judge held that the plaintiff could not get any share in the joint family properties in view of the provisions contained in Section 8(1)(d) of the Mysore Act; that the Will had been executed by Chowdappa when he was in a sound disposing state of mind; and, that under Section 30 of the Hindu Succession Act, 1956, it was open to Chowdappa to dispose of his interest in coparcenary property by a Will. Since he had done so, Ramdev, the 2nd Defendant acquired valid title to the property bequeathed to him under the Will.

7. It is not disputed before me that Chowdappa and his brother constituted a joint Hindu family till there was a partition in the family. Under two release deeds Chowdappa had acquired separate possession of his share in the joint family properties upon partition. The properties which fell to his share were the subject-matter of the suit. It was therefore rightly not argued before me that the properties in the hands of Chowdappa were not joint family properties. There can be no doubt that coparcenary property upon partition, does not lose its character as coparcenary property in the hands of a separated coparcener. No doubt, in the case of a sole surviving coparcener, he can deal with such property as self-acquired property; but once another coparcener comes into existence either by birth or adoption, the property can be dealt with thereafter only as coparcenary property. The question that still remains to be considered is whether the plaintiff can claim partition and separate possession in those properties? For this, reliance is placed upon the provisions of the Mysore Act, particularly, Section 8, which reads thus:

'8(1)(a) At a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issue shall be entitled to share with them.

(b) At a partition of joint family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.

(c) Sub-sections (a) and (b) shall also apply mutatis mutandis to a partition among other coparceners in a joint family.

(d) Where joint family property passes to a single coparcener by survivorship, it shall so pass subject to the right to share of the classes of females enumerated in the above sub-sections.

2. Such share shall be fixed as follows:

3 to 5 xxx xxx xxx'

8. Referring to Section 8(1)(d) it is contended on behalf of the appellant, that in the instant case it must be held that the joint family properties passed to a single coparcener by survivorship, namely, to Chowdappa. That being so, the plaintiff, who was the widow of a predeceased son, was entitled to a share, as provided by Section 8(2) of the Mysore Act, namely, one half of the share to which her husband would have been entitled had he been alive.

9. On the other hand, it is contended on behalf of the respondents/defendants that Chowdappa cannot be said to be the sole surviving coparcener. It is vehemently contended that, when a partition was effected between Chowdappa and his brother Muniyappa, Chowdappa, though the only male member in his branch, could not be said to be the sole surviving coparcener. The reason was that upon partition, the properties which came to his hands must be deemed to be his separate self-acquired property as distinct from coparcenary property. Further more, it is contended that such property came to his hands not by operation of the

Rule of Survivorship but because there was a partition. It was therefore contended that Chowdappa was neither the sole surviving coparcener nor did the properties pass to him by operation of the Rule of Survivorship.

10. It is well settled that devolution of joint family property, which come to the hands of a son from his father or grand-father or great-grand-father as unobstructed heritage is governed by the Rule of Survivorship. A male coparcener acquires right to such property by birth. This is different from property that may come to the hands of a coparcener in which he has no right by birth. This is what is known as obstructed heritage, and such property devolve by succession and not by survivorship. Such a distinction is well known in Hindu Law. Therefore, when Section 8(1)(d) of the Mysore Act refers to the properties passing on to a single coparcener by survivorship, it has reference to the ancestral properties which come to his hands upon partition or otherwise.

11. It is also well settled that if a coparcener dies, his interest devolves upon other coparceners by survivorship. As long as the joint family is in existence, all the coparceners jointly own all the properties. Each coparcener is a full owner of each property owned by the joint family. The effect of partition is severance of status and, as a consequence, each coparcener becomes entitled to separate possession and enjoyment of his share in the joint family properties. Partition by itself does not create a right because the right of a coparcener existed even before partition. It only brings about demarcation of his interest with a right to separate possession and enjoyment. It is therefore, not correct to state that when a coparcener, upon partition, gets his share in the joint family properties, it does not come to him by survivorship. The right which accrues to the coparcener is by operation of the Rule of Survivorship and the partition only demarcates his share in the joint family properties. As observed earlier, unobstructed heritage always devolves by operation of the Rule of Survivorship and there is no exception to this Rule. It has therefore been held that where a father disposes of by a Will, his interest in the joint family properties in favour of his son, the properties in the hands of the son still retain the character of coparcenary property, and not self-acquired property.

12. I, therefore, hold that the properties to which Chowdappa became entitled, upon partition passed on to him by survivorship. I find no substance in the contention raised on behalf of the respondents that it passed on to him by reason of partition and not by survivorship.

13. The next contention raised by the respondents is that Chowdappa was not the sole surviving coparcener. Section 8(1)(d) of the Mysore Act, uses the words 'property passes to single coparcener by survivorship.' As observed earlier the use of the words 'by survivorship' is only to distinguish it from properties passing on to a coparcener by succession.

14. The learned Counsel for the respondents submitted that Chowdappa cannot be said to be the sole surviving coparcener. According to him the sole surviving coparcener is one who can be said to be the only member of the coparcenery remaining alive and who becomes the sole surviving coparcener by reason of death of all other coparceners in due course. Logically, therefore as long as any coparcener is alive, even if he be a separated coparcener, there can be no sole surviving coparcener.

15. He also submitted that when the property comes to the hands of a coparcener upon partition, even if he is the only coparcener, he cannot be described as the sole surviving coparcener. It is difficult to agree with this submission, but having regard to the language used in Section 8(1)(d) of the Mysore Act, it is not necessary to go into the merits of the submission. The statute uses the words 'a single coparcener' and not 'sole surviving coparcener'. It cannot be disputed that Chowdappa was the only male coparcener in the family of which he was a member, his son having pre-deceased him.

16. In my view, therefore, in the facts and circumstances of this case, the provisions of Section 8 of the Mysore Act clearly apply. There can be no dispute as to the nature of the right conferred upon a widow of a pre-deceased son under the provisions of the Mysore Act, since the legal position is quite clear in view of the Decision of the Supreme Court in NAGENDRA PRASAD AND ANR. v. KEMPANANJAMMA. Their Lordships, after referring to various provisions of the Mysore Act, held thus:

'(19) Clause (d) applies to a case when the family property passes by survivorship to a sole surviving coparcener. In such a case, there can be no partition, as is the case under Clause (a) or (b) or (c). Indeed, the property becomes incapable of partition and but for Clause (d) provides that the rights of the female relatives should not be lost only by reason of the property passing to the sole surviving coparcener. Sub-section (5) further more, gives such female relatives as fall under Sub-section (1) a right to have their shares separated and thus makes them co-sharers subject to whose rights the sole surviving coparcener takes the property. Therefore, whereas under Clauses (a), (b) and (c) the rights fluctuate according to the position of the female relatives in the family when the partition takes place there is no such uncertainty in the case falling under Clause (d) as the sole surviving coparcener takes the property subject to the right to shares of female relatives falling under the provisions of Clause (a) or (b) or (c). Such is the scheme of Section 8(1).'

17. In view of Section 8(1) of the Act, there can be no doubt that a single coparcener such as Chowdappa took the ancestral property, subject to the right to shares of female members of the joint family enumerated in Clauses (a), (b) or (c) of Section 8(1) of the Mysore Act. The plaintiff, being a widow of a pre-deceased son, was entitled to a share equal to one half of the share to which her husband would have been entitled if he were alive [vide Section 8(1) (a) of the Mysore Act]. I therefore hold that the plaintiff is entitled to claim one half of the share which her husband could have claimed if he was alive. In the instant case her husband would have got half share in the properties in a partition between his father and himself in the year 1946 when Chowdappa became a single coparcener. Consequently, she is entitled to 1/4th share in the suit schedule properties.

18. It was then contended before me that Chowdappa having executed a Will, the interest in the suit property devolved upon 2nd defendant under that Will. It was submitted that even though the Will was executed in the year 1949 when Hindu Succession Act did not permit disposition of undivided share of coparcenary property by Will, in view of the Hindu Succession Act, particularly, Section 30 thereof, the Will must be held to be a valid Will since Chowdappa died in the year 1968 and the Will took effect in that year i.e., after Section 30 of the Hindu

Succession Act had come into force. This submission has neither been controverted nor is it necessary, in the instant case, to pronounce upon the validity of the Will when the same has not been challenged. What is relevant is that Chowdappa could have disposed of by Will only his interest in the joint family properties. In view of the provisions of Section 8 of the Mysore Act, his interest in the properties must be worked out after providing for the share of the female members of the family enumerated in that Section. Chowdappa, therefore, could not dispose of, by Will any interest which was not his, and which rightly belonged to the plaintiff. The Will will operate as a valid Will only in respect of the interest of Chowdappa, i.e., on the remaining interest after providing. 1/4th share in the suit property for the plaintiff. This is because the widow of Chowdappa has not claimed a separate share for herself and has fully supported the 2nd defendant.

19. I therefore conclude that the Courts below erred in law in holding that the interest that passed on to Chowdappa did not pass by survivorship, since he came in possession of the suit property by virtue of a partition. Having regard to the provisions of the Mysore Act, the plaintiff was entitled to claim partition of her 1/4th interest in the schedule properties.

20. In the result, this Appeal is allowed and the suit of the plaintiff is decreed to the extent that she is held entitled to claim partition and separate possession of one-fourth share in the suit schedule properties. Consequently, the Judgments and Decrees passed by the Courts below are set aside. The suit is decreed to the extent indicated above. A preliminary decree shall be drawn up accordingly. There will be no order, as to costs.