
(1966) 11 BOM CK 0012
In the Bombay High Court
Case No : S. A. No. 278 of 1959

Babgonda Ramgonda Patil	Vs	APPELLANT
Anna Nemgonda Patil		RESPONDENT

Date of Decision : 21-11-1966

Acts Referred:

Citation : (1967) MhLj 836

Hon'ble Judges : V.S. Desai, J;K.K. Desai, J

Bench : Division Bench

Advocate : K.J. Abhyankar, for the Appellant; S.B. Bhasme, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Desai, J.—The short question which arises for consideration in this Second Appeal is whether the alienation by the sole surviving coparcener can be challenged by a subsequently adopted son to a predeceased coparcener in the family by the widow of the said coparcener.

2. One Babangonda Patil had two sons Ramgonda and Nemgonda. Ramgonda died in 1921 leaving behind his widow Satakka. Nemgonda died in 1929 leaving behind a son Appa and his widow Sonubai. Appa died a couple of years later while he was unmarried and still a minor and his mother Sonubai succeeded to the joint family property which consisted of six lands and a house at the village Samdoli in Tasgaon Taluka of the Sangli District. In 1941, Sonubai adopted Anna defendant No. 1, as son to her deceased husband. On July 26, 1945, Anna, defendant No. 1, alienated six of the seven joint family properties by exhs. 81 and 82. Thereafter, on September 19, 1945, Satakka, the widow of Ramgonda, adopted the present plaintiff and on October 28, 1946, the plaintiff filed the present suit against defendant No. 1 and the alienees challenging the alienations and claiming his half share by partition in all the seven properties which had belonged to the joint family and six out of which had been alienated by defendant No. 1. The suit was resisted by defendants on several grounds, all of

which are not necessary to be mentioned for the purposes of this appeal. One of the contentions was that defendant No. 1 being the sole surviving coparcener at the time when the alienations were effected on July 26, 1945, had the right to deal with the properties as if he was the absolute owner thereof and the plaintiff who came into the family by a subsequent adoption could have no right to challenge the said alienation. This contention was accepted by both the Courts below and they held that the plaintiff could have no right to challenge the alienation. As to the remaining property which had not been alienated, the plaintiff was undoubtedly entitled to have a half share in the interest which the joint family had in that property. It was found, however, that there were other co-sharers in the property and partition and separation of the plaintiff's share in that property could not be made in the absence of the said sharers. Since the plaintiff had not joined the other co-sharers in the said property to the suit nor was he willing to do so, the Courts could not give him a decree in respect of the said property also. In the result, both the Courts below have dismissed the plaintiff's suit.

3. In our opinion, the proposition that lawful alienations of the joint family property made by the sole surviving coparcener could not be challenged by a coparcener who has come into the joint family either by birth or adoption subsequent to the date of the alienations is well settled. In *Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others*, . it was held:

The last surviving male member of joint Hindu family is the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a deceased member; such survivor can alienate all or any of the family properties absolutely without the son adopted after the alienation, being able to question the same. The theory that, on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death, does not apply to such a case.

The same view was taken by this Court in *Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others*, . and *Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others*, . In the former case, the sole surviving coparcener had made an alienation of portions of the family property and these alienations were challenged by the adopted son of a predeceased coparcener who had been adopted by his widow subsequent to the date of the alienations. It was held that since at the date of the alienations the alienating coparcener had full right to treat the family property as if it were his own, the adoption which was subsequent to the alienations could not affect the property which was already disposed of by the coparcener as a person who has acted as the full owner of the property. In the latter case, it was held that the adopted son was not entitled to question the dispositions made by the testator of the family property which were made prior to the adoption. The same view also has been taken by the former Nagpur High Court in *Udhao Sambh v. Bhaskar Jaikrishna*. 1946 N L J 165 = A I

R 1946 Nag. 203. The view taken in these decisions is not in any way affected by the Privy Council decision in AIR 1943 196 (Privy Council) because in the said decision their Lordships of the Privy Council specifically referred to the decision in Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, . and approved of the view taken in that decision that the theory that on adoption the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death does not apply to the alienations made by the sole surviving coparcener of the joint family property prior to the date of adoption.

4. It is, however, argued by Mr. Abhyankar, who appears for the appellant, that the view taken in these decisions is no longer correct, having regard to the decisions of the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , Tukaram Dnyanu Gurav and Others Vs. State of Maharashtra, and Guramma Chanbasappa v. Mallappa 1964 MhLJ 133 = (1963) 66 BLR 284 (S.C.). In our opinion, the submission put forward by the learned advocate is not correct. In Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , the Supreme Court was considering the effect of adoption in a joint family subsequent to the devolution of the joint family property by inheritance on the collaterals of the last surviving coparcener in the family. In that case, it was held that the adopted son is entitled under the Hindu law to take in defeasance of the rights acquired prior to his adoption on the ground that in the eye of law his adoption relates back, by a legal fiction, to the date of death of his adoptive father, he being put in the position of a posthumous son. The principle of relation back, however, has limitations and only applies when the claim made by the adopted son relates to the estate of his adoptive father and has no application when the claim made by the adopted son relates not to the estate of his adoptive father but to that of a collateral.

5. It may be pointed out that in AIR 1943 196 (Privy Council) the Privy Council considered the effect of adoption made by the mother of the last surviving coparcener who had died unmarried and on whose death the properties had devolved upon his distant collateral. The properties which had passed on to the distant collateral consisted of properties of which the last surviving coparcener was possessed as properties of the joint family as well as properties which he had inherited as the heir of his separated uncle. In other words, the properties which had devolved upon the distant collateral on the death of the last surviving coparcener were properties of which he was possessed as the properties of his own family as well as properties which had come to him by collateral succession. The Privy Council held in that case that the adoption by the mother of the last surviving coparcener was valid and by reason of the doctrine of relation back the adopted son was entitled to divest not only the joint family property of his adoptive father but also as a preferential heir to the last surviving coparcener the property which had been inherited by him by collateral succession. In Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , the Supreme Court narrowed down the application of relation back even in cases of inheritance, to

the property of the adoptive father and it pointed out that the doctrine of relation back cannot be applied when the claim made by the adopted son relates not to the estate of the adoptive father but to that of a collateral. The Supreme Court case in *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, was a case of inheritance and the Supreme Court was concerned with the application of the doctrine of relation back to cases of inheritance. It is clear from this judgment of the Supreme Court that the doctrine of relation back has limitations even in cases of inheritance. Whilst observing about the limitations, their Lordships also pointed out, as was done by the Privy Council in AIR 1943 196 (Privy Council) , that when an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him if they were for purposes binding on the estate. This observation of the Supreme Court appears in the context of its considering the point that the theory of relation back has limitations to its application and the observation is by way of illustrating one of such limitations. The Supreme Court was not considering a case of alienations made prior to the date of adoption by a male person who was competent to make such alienations. It is impossible to read in this observation that the Supreme Court stated the law as meaning that except in cases where the alienations were made either for legal necessity or for the benefit of the estate the doctrine of relation back would enable the adopted son to challenge all such alienations. It may be pointed out that the right to challenge alienations on the ground that they are not justified either by legal necessity or for the benefit of the estate is available in cases where there is only a limited power to alienate dependent upon the existence of the conditions of legal necessity or benefit of the estate, e.g., in the case of a widow who has inherited the joint family property or where a coparcener in the family who is in the position of a manager or Karta of the family wants to alienate the family property without the consent of all the other members of the coparcenary. There is no such limit where the alienating person is the sole surviving coparcener in the family. It has been always held that the power of the sole surviving coparcener to treat the property as his absolute property and deal with it is not fettered by the contingency of an adoption being made by a widow in the family—a contingency which may not operate at all. It is also well settled that alienations of the joint family property made with the consent of all the existing coparceners who are capable of giving consent to it, even if it be without legal necessity or the benefit of the estate, are not capable of being challenged by the coparceners coming into the family subsequent to the date of the alienations. Thus, for instance, a father's alienations, if the father is the sole surviving coparcener, are not capable of being challenged by a son subsequently born to him, though the son on his birth becomes a coparcener with the father and is entitled to the joint family property along with his father as a coparcener. If a son or other member in the coparcenary born subsequently to the date of the alienations is not entitled to challenge the alienations effected prior to his birth, a son brought into the

family by an adoption made by a widow in the family would put the adopted son in a more favourable position if the doctrine of relation back is held as entitling him to challenge the alienations. Mr. Justice Odgers, one of the learned Judges who decided the case of Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, , after having exhaustively considered the position of law relating to the application of doctrine of relation back, observed as follows (p. 414):

...The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father. There are limits. We have seen some of them, but I have not discussed all the cases in this connection regarding his power of divesting, as for instance, when the succession to the property gets into a collateral line. But within these limits, he can so to speak insist on the property devolving in a direct line as far as possible from father to son or from grandfather to grandson and it is in this connexion and this alone that the doctrine of relation back and the cases I have quoted in the first category of inheritance, are to be regarded. What authority there is with regard to alienations by a male-holder, are strongly, and it seems to me conclusively, against the contention argued by the appellant.

6. This position of the law, as we have already pointed out, has been accepted with approval in AIR 1943 196 (Privy Council) by the Privy Council and we find that not only no divergence thereto has been expressed by the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, but, on the other hand, the observation that we have referred to appears to indicate that the Supreme Court is in agreement with the view taken in Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, . It may be pointed out that in Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, , even in cases of inheritance, although the learned Judges were not considering a case of inheritance, the observations indicated their view that the scope of the doctrine of relation back can have only application to the property of the adoptive father. The Privy Council in AIR 1943 196 (Privy Council) no doubt extended the scope of the doctrine even to property inherited by collateral succession, but the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, limited it once again to property of the adoptive father only and thus concurred with the view taken in Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, . We do not, therefore, find anything in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, which can be taken as going counter to Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, or to the two cases reported in Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others, . and Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others, , to which we have already referred.

7. The Supreme Court decision in Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, was again a case of inheritance. The facts of the case were that one N died in 1892 leaving him surviving two daughters, one of whom was K, and T the widow of a predeceased son B. On N's death, K and her sister succeeded to N's property in equal shares. K died in 1933 and was succeeded by her son V, who died in 1934, leaving behind his sons who were the defendants. It was thereafter that T adopted the plaintiff in 1945. The plaintiff's suit to recover the property was decreed, the Court holding that the doctrine of relation back entitled the plaintiff to recover the property. It was held that the character of the property did not change from coparcenary property to self-acquired property of K so long as T, the widow of the family, existed and was capable of adopting a son and since the plaintiff on his adoption was entitled to divest K, the claim of the defendants was also liable to be defeated since they claimed only under K. It will be seen that in this case the application of the doctrine of relation back was capable of being made within the limits within which it could operate in view of the Supreme Court decision in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, . What was claimed on adoption was the property of the adoptive family which had devolved by inheritance on an intermediate holder. The argument advanced in that case was that since the property which had devolved on K, the intermediate holder had on the death of K vested in her own heirs, the adoption made subsequently could not have the effect of divesting it and a further limitation on the application of the doctrine of relation back was sought to be propounded proceeding on the analogy of the limitation of the said doctrine to cases of collateral succession. Their Lordships pointed out that the case of an adopted son's claiming to divest the heir of a collateral who died before the adoption took place of the property inherited from the collateral is different from the case of his claiming the property which originally belonged to the adoptive father but had devolved on a collateral and after the death of the collateral which took place before the adoption devolved on the heir of the collateral. In the former case, the claim is to the property of the collateral, while in the latter case, it is to the property of the adoptive father which by force of circumstances had passed to the hands of a collateral. Mr. Abhyankar for the appellant has relied on the observations of their Lordships, to the effect that the character of the property does not change from coparcenary property to self-acquired property of the person on whom it has devolved so long as the widow of the family exists and is capable of adopting a son who becomes a coparcener. He argues that this statement of the law by the Supreme Court has the result that the character of the joint property does not change in all events even in cases where it is sought to be alienated by the sole surviving coparcener and the doctrine of relation back, therefore, which entitles the adopted son to a share in the joint family property will enable him to obtain a share in the alienated property also ignoring the said alienation, because the alienated property, in spite of the alienation, still retains the character of the joint family property. In our opinion, Mr. Abhyankar cannot press into service the observations of their Lordships of the Supreme Court in the manner in which he has sought. It is no

doubt true that the alienated property is the joint family property. But what the adopted son can claim to have a share in is the property which continues to be the joint family property and that would mean such joint family property as remains after any lawful alienations thereof. The mere circumstance that the property alienated was joint family property will not help the adopted son to get the share of the property unless he is in a position to challenge the alienation and have it ignored. If the doctrine of relation back can avail him to challenge the said alienations, then only he can claim that in spite of the alienations the property still retains the character of the joint family property and he is entitled to claim a share therein. Where property has devolved by inheritance, the law is that the said devolution can have no effect against the adopted son because of the doctrine of relation back. In the cases of alienations, however, as we have already pointed out, the settled law has been that the doctrine of relation back does not apply to challenging the lawful alienations which have taken place before the date of adoption. We do not, therefore, think that there is anything in Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, which can be taken to depart from the law as to the application of the doctrine of relation back to the cases of alienations.

8. The last case to be considered is the Supreme Court case in *Gvramma Chanbasappa v. Mallappa* 1964 Mh L J 133 = (1963) 66BLR 284 (S. C). In that case, one C died on January 8, 1944, leaving behind three widows, viz. N, G and V, and two widowed daughters. V was pregnant at the time of C's death and gave birth to a son on October 4, 1944. N adopted her sister's son on January 30, 1944, N then filed the suit for partition and possession. The two other widows G and V were made defendants Nos. 1 and 2 to the said suit. N's adopted son was made defendant No. 3. V's son was defendant No. 4 and defendants Nos. 5 to 18 were the alienees from C prior to his death. We are not concerned with the other points involved in that case excepting the challenge to the alienations made by C on the 4th and 5th of January 1944 which was the period during which defendant No. 4 was conceived and in the womb of V, the wife of C. The alienations were challenged both on behalf of defendant No. 3, the son adopted by N on January 30, 1944, as well as by defendant No. 4 who was born on October 4, 1944. It was held by the Supreme Court that defendant No. 3 who was adopted on January 30, 1944, was not entitled to challenge the alienations because he was not in existence on the date on which the alienations were made. Since they were made on the 4th and 5th of January 1944, C had died on January 8, 1944 and the adoption was made only on January 30, 1944. As to defendant No. 4, the posthumous son of C, it was held that he having been conceived at the time when the alienations were made had to be regarded as if he was born on the principle that a son conceived is a son born and he was, therefore, a coparcener with the father at the date of his alienations, and inasmuch as with the existence of the son the father alone could not have the power to alienate the entire interest in the joint family property, defendant No. 4 was entitled to challenge the said alienations. We do not see how this case can

support Mr. Abhyankar. It is not only that this case does not support Mr. Abhyankar, but we find that some of the observations in this case are against the position that he has contended. Dealing with the question of alienations in the joint family, their Lordships observed (p 290):

... A coparcener, whether he is natural born or adopted into the family, acquires an interest by birth or adoption, as the case may be, in the ancestral property of the family. A managing member of the family has power to alienate for value joint family property either for family necessity or for the benefit of the estate. An alienation can also be made by a managing member with the consent of all the coparceners of the family. The sole surviving member of a coparcenary has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family. If another member was in existence or in the womb of his mother at the time of the alienation, the power of the manager was circumscribed as aforesaid and his alienation would be voidable at the instance of the existing member or the member who was in the womb but was subsequently born, as the case may be, unless it was made for purposes binding on the members of the family or the existing member consented to it, or the subsequently born member ratified it after he attained majority. If another member was conceived in the family or inducted therein by adoption before such consent or ratification, his right to avoid the alienation will not be affected.

It will be clear from these observations that where an alienation of the joint family property is made by a managing member with the consent of all the other coparceners in the family or by the sole surviving coparcener who has an absolute power to alienate the property, there being no other member whose consent he must take, such alienations whether or not they are for legal necessity or benefit of the estate are binding on the joint family. Where, however, an alienation is made by a managing member in the family without the consent of other coparceners, it can only be binding on the family if it is for legal necessity or benefit of the estate. It is in such cases where the alienations in order to be binding have to be for legal necessity or benefit of the estate that the right of the adopted son to challenge them on his adoption would arise. In cases, however, where there is a power in the alienor to deal with the property as an owner, e. g. in the case of a sole surviving coparcener, there is no need of the conditions of either legal necessity or benefit of the estate to exist in order to make the alienations binding on the family. In our opinion, therefore, this case also cannot be pressed into service by Mr. Abhyankar to support his submission that the view taken in *Vatti Kuti Veeranna* by adoptive mother and guardian *Achamma Vs. Katuri Sayamma alias Chittamma and Others*, and followed by this Court in *Bhimaji Krishnarao v. Hanmantrao Vinayak* AIR 1850 Bom 271 = (1949) 52 BLR 290. and *Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others*, in the cases to which we have already referred is affected by this case.

9. Mr. Abhyankar then has invited our attention to two decisions of the Mysore

High Court in *N. Paramanna v. S. Ningappa* AIR 1964 Mys. 217 and *Mahadevappa v. Chanabasappa* A I R 1966 Mys. 15. It is no doubt true that in both these cases the adopted son's right to challenge the alienations made by the sole surviving coparcener of the family prior to his adoption has been upheld. The view taken by the learned Judges in these decisions appears to be that the Supreme Court decisions in *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, , *Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj*, and *Guramma Chanbasappa v. Mallappa* 1964 Mh L J 133 = (1963) 66 B L R 284 (S. C) are to the effect that the doctrine of relation back can extend even to cases of alienations and that unless the alienations are justified by legal necessity or benefit of the estate so as to be binding on the family, the adopted son is entitled to challenge the said alienations. With respect, we are not in agreement with the view taken by the learned Judges of the Mysore High Court in these two cases for the reasons which we have already discussed sufficiently.

10. Mr. Abhyankar has invited our attention to a decision of a single Judge of this Court in *Vinayak Gopal Phadnis v. Shankar Basapa Ghugare* (1964) Second Appeal No. 907 of 1955 decided by Patel J., on November 16, 1964 (unrep.). In this case also, the learned Judge appears to be inclined to take a view of the law similar to that taken by the Judges of the Mysore High Court. It may, however, be pointed out that the decision of the case proceeded on the basis that the so called alienations were in fact not the alienations at all and after having taken the view, the learned Judge proceeded to consider what the position would be on the assumption that the transactions were alienations as was contended. In the case before him, the two decisions of this Court in *Bhimaji Krishnarao v. Hanmantrao Vinayak* AIR 1850 Bom 271 = (1949) 52 BLR 290. and *Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others*, were pointed out. The learned Judge, however, was pleased to take the view that the said decisions were affected by the Supreme Court decisions in *Shrinivas Krishnarao v. Narayan Devji* A I R 1966 Mys. 15. and *Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj*, . In our opinion, the Supreme Court decision, for the reasons, which we have already stated, do not affect the view taken by this Court in *Bhimaji Krishnarao v. Hanumantrao Vinayak* AIR 1850 Bom 271 = (1949) 52 BLR 290. and *Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others*, .

11. There is no other point which has been urged in this appeal.

12. The result, therefore, is that the appeal must fail and must be dismissed. We order accordingly. There will be no order as to costs.