

(1941) 08 BOM CK 0015

In the Bombay High Court

Case No : Cross Frst Appeal No's. 234 and 297 of 1939

Kantawa Basappa Patil

APPELLANT

Vs

Sangangowda Shivshankreppa Patil
 Sangangowda
Shivshankreppa Patil Vs Channappa Ayappa Rudgi

RESPONDENT

Date of Decision : 27-08-1941

Acts Referred:

Citation : (1942) 44 BOMLR 269

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Macklin, J.—These appeals arise out of a suit which is an off-shoot of the litigation ending in Basappa Dandappa v. Gurlingappa Shivshankerappa ILR (1932) 57 Bom. 74, 35 Bom. L.R. 75. Shivlingappa and Basappa were separated brothers. Shivlingappa died in 1921, and his son Shivshankreppa died in 1922. In 1923 Shivshankreppa's widow Gurlingawa adopted Shidlingappa, who was then the only son of Basappa and his wifa Kantawa. The adoption was in the dwyamushyayana form, with the result that the adopted son is to be regarded as having two fathers and two mothers. Soon after the adoption the adopted son died, and litigation then arose between Gurlingawa on the one hand and the adopted son's natural father and mother on the other as to the inheritance. It was held by this Court that the two women¹ inherited equally. Gurlingawa has now adopted the plaintiff. Basappa is now dead, and since the first litigation Kantawa has had a second son. The adoption of the plaintiff was subject to an agreement between him and Gurlingawa that he should not take Gurlingawa's property until after her death. He has accordingly sued Kantawa (defendant No. 1) and her son (defendant No. 2) for the property which went to Kantawa as the result of this Court's order, There is also a third defendant, who is an alienee. The material issue with regard to the suit in so far as it was against Kantawa and her son was whether the adoption of the plaintiff had the effect of divesting

Kantawa of the property which she took by inheritance from the son first adopted. On that issue the trial Court came to the conclusion that the plaintiff was entitled to immediate possession of that property, since Kantawa was divested of it as soon as the plaintiff was adopted. But it rejected the claim of the plaintiff with regard to the alienee. Accordingly two appeals have been presented to this Court, one by Kantawa and her son (First Appeal No. 234 of 1939) against the order divesting Kantawa of the property, and the other (First Appeal No. 297 of 1939) by the plaintiff against the order rejecting his claim against the alienee.

2. For the present I confine myself to First Appeal No. 234. The plaintiff's case at the trial, put shortly, was that as co-heiresses of Shidlingappa's property the women were no more than joint tenants of it; that the estate was an indivisible estate, so that the rights of each co-heiress were the same; that the estate inherited by the adoptive mother was a widow's estate of which she would necessarily have been divested upon her making a second adoption but for her agreement with, the adopted son ; and that the estate inherited by the natural mother Kantawa being the same as that inherited by the adoptive mother was liable to divestment as soon as the adoptive mother made a second adoption. This contention was accepted by the learned Judge. For the view that what the two women inherited was a joint and indivisible estate he relied upon the decision in *Basappa v. Gurlingawa*, where Mr. Justice Patkar said " I think therefore that the view of the lower Court that the plaintiff and defendant No. 5 succeed to the property jointly is correct". For the view that each took no more than a widow's estate he relied upon a revival of the coparcenary as one of the effects of the adoption.

3. In this appeal Mr. Thakor for the respondent-plaintiff urges that the trial Court is right in saying that the estate taken by the women was a joint estate. But in the whole judgment of the High Court there is nothing to suggest that the learned Judges who decided the case had in their minds any distinction between a joint estate and a separate estate ; indeed the jointness or separateness of the inherited estate was not then in issue. Moreover the order in appeal confirmed the order of the trial Court, and the order of the trial Court was that each took a moiety of the estate; so that if any emphasis is to be laid on the wording of this order, it would mean in effect that they each took a separate estate.

4. On the second point Mr. Thakor argues that the plaintiff was iadopted not to Gurlingawa but to Gurlingawa's husband and takes the place of his son as from his birth, with all the rights of a son subject only to certain recognised exceptions ; and he says that this means that in theory the coparcenary did not come to an end on the death of Shivshankrappa, and as it did not; come to an end it would follow that any one taking the estate took it subject to the liability of being divested of it on an adoption being made. In *Balu Sakharam v. Lahoo* (1936) 39 Bom. L.R. 382, the full bench decided that once a coparcenary has in fact come to an end, an adoption by the widow of a coparcener, though not invalid, cannot divest the estate which has vested in an heir of the last

coparcener unless that heir is the adopting widow. Mr. Thakor argues that this case is no authority against the view that in the case with which we are now dealing the coparcenary had not come to an end ; the facts of the two cases are different, the case of an adopted son with two mothers was not considered at all, and no question of inheritance by two persons falling within the same number in the so-called " Compact Series " of heirs under the Mitakshara system was then under consideration. But the decision is in general terms and is of general application. It is impossible to say that the coparcenary in the present case did not come to an end unless we imply the fiction of referring an adoption back to the birth of the adopted son or at any rate to the death of his adoptive father; and it makes no difference if the estate was inherited by two mothers or by two widows or by a widow and somebody else. The full bench undoubtedly held that the coparcenary in that case had come to an end, though if they had wished to do so it was open to them to treat the adoption as referring back to the death of the last male holder and then saying that it never did come to an end.

5. In further support of his contention that the estate inherited by each of the women was a widow's estate, Mr. Thakor has referred us to the Compact Series of heirs under the Mitakshara system. He says that it can only have been under this list that Kantawa succeeded to the estate at all. The list, while admittedly covering the case of two widows, does not in terms provide for two mothers, " mother " being used in the singular and not including a " step-mother", who appears lower down in the list. The most natural explanation is that a man cannot have two mothers unless one of them is an adoptive mother ; and the ordinary rule is that on adoption the natural mother ceases to have any right of inheritance at all. But Mr. Thakor stresses the use of " mother " in the singular and says that the mothers take as one and take a single inheritance jointly as joint tenants just as in the case of two widows of the same last male holder [see *Gauri Nath Kakaji v. Gaya Kuar* (1928) L.R. 55 IndAp 399. He even goes further and says that widows take as a single heir, for which latter proposition he relies upon a passage in Mayne's *Hindu Law*, 10th ed., at p. 652 (that passage and others like it, though they have been cited without disapproval, do not seem to be supported by actual judicial authority) ; and he argues that the two mothers in this case must be treated as being in every respect on the same footing as two widows, because it is unreasonable to treat them as one for the purpose of inheritance but as two for the purpose of divestment of property after an adoption has been made. But the argument clearly cannot survive if in fact they do not take a single inheritance; and that they do not take a single inheritance is in this case perfectly clear. It is true that the question of joint tenancy or tenancy in common was not considered by either of the Courts. But the judgment of the trial Court (confirmed in appeal) ordered that each should take a " moiety " of the estate. In the absence of any qualifying words, that means a separate estate, and there is no reason for interpreting it as a joint estate passing from one to the other by survivorship on the death of the first or for treating it as separable only for the convenience of the women. And merely because the adoptive mother

would divest herself of the estate upon adoption, that is no reason either on the authorities or in logic for her divesting also the natural mother, especially when Kantawa's consent to the adoption was presumably not taken.

6. The rule laid down by the full bench in *Balu Sakkaram v. Lahoo* (1936) 39 Bom. L.R. 382 F.B. has since been applied in *Anandibai Pandurangrao Bhide Vs. Vasudev Narsingrao Bhide*, , where an adoption by the widow of a predeceased son was held not to divest the widow of that son's father (the last coparcener) of property which she got from the latter as his heir. Thus the rule, while giving no protection to Gurlingawa, who admittedly would have divested herself of the property on adoption but for her agreement with the plaintiff, nevertheless does protect Kantawa once it is decided that the nature of the estate taken by Kantawa is not to be regarded as merely a widow's estate.

7. In support of his appeal Mr. Kane for Kantawai and her son referred us to certain cases which he says are weaken in their facts than the facts of the present case and yet support the view which he takes, so that a fortiori there can be no question of Kantawa being divested of her property. In *Radhabai v. Rajaram* (1937) 40 Bom. L.R. 559, F.B., the full bench held that an adoption made after the death of the last male holder by a widow of his gotraja sapinda would not have the effect of altering the succession to the widow's reversioners even though the estate had not yet vested in the reversioners. A fortiori it is argued that an estate which has actually vested will not be divested. Then there is *Anandi-bai v. Kashibai* (1904) ILR 28 Bom. 461 (a case of mother and step-mother), where it was held that even with co-widows an adoption by one will not have the effect of divesting the other of property which she has inherited from some one other than her husband, in that case her own son. So too in *Hirabharthi Jamnabharthi Vs. Bai Javer*, , where there was an express power given by the husband to adopt but the adoption was held to be invalid because the estate had devolved at the time of the adoption on a, co-widow from her son. Mr. Thakor argues that these last two cases must be taken to have been overruled and cannot therefore be regarded as authorities even with regard to the question of the divestment of property. In the present state of the law they probably should be held to be wrongly decided as to the invalidity of the adoptions with which they dealt. But the divestment of the property was clearly a question at issue in them, and the view which the Court took in each case as to the divestment of the property was the ground of the decisions that the adoptions were invalid. These decisions were made at a time when the connections between the religious duty of adopting and the devolution of property consequent upon an adoption was regarded as inseparable. But the connection is no longer regarded as inseparable; and merely because the conclusions reached as to the invalidity of the adoptions can no longer be accepted, it would certainly not follow that the rest of the decisions was wrong. Indeed in *Radha-bai v. Rajaram*, at page 570 it was expressly stated that the authority of cases dealing with the power of the widow of a gotraja sapinda to adopt so as to defeat the rights of reversioners ought not to be disturbed unless

it were really necessary to do so.

8. We think that there is a distinction between the nature of the estate taken by Kantawa and that taken by Gurlingawa and that the adoption of the plaintiff will not have the effect of divesting Kantawa of her property. The plaintiff put in an additional prayer for a declaration of his right to take the property on Kantawa's death in "the event of its being decided that he . could not take immediate possession. The trial Court held that any declaration in that respect would be premature, and we agree. The result is that the appeal succeeds and the suit as against defendants Nos. 1 and 2 fails as a whole and must be dismissed with costs throughout.

Broomfield, J.

9. A son adopted in the dwyamushyayana form inherits in both families. It may be said to follow naturally from that and it has been so held in *Basappa v. Gurlingawa* ILR (1932) 57 Bom. 74 that both families inherit to him. In what way they inherit there are no texts and few cases to show. Had it not been for *Basappa v. Gurlingawa* it would have been possible to take the view that property derived from the adoptive family would go to the nearest heir in that family and vice versa. But that case settles that the adoptive mother and the natural mother at any rate take jointly and equally as coheiresses. What happens then if the adoptive mother, after the inheritance has passed in this way, adopts another son?

10. The learned trial Judge's view is that the adoption divests the estate of both mothers. As far as I am able to make out from the judgment, the reasoning seems to be this : (1) A mother succeeding to her son takes a limited estate like a widow succeeding to her husband. (2) If there are two or more co-widows, an adoption by one divests the estate of both. (3) If a mother who has succeeded as heir to her son adopts a son to her husband, her own estate is divested. So far the learned Judge is right, though I may point out that the reason why the mother's estate is, divested under the circumstances is by no means clear. In that connection I may refer to *Rudrappa Yellappa Sattennanavar Vs. Mallappa Malleshappa*, . The learned Judge seems to think that it follows from these propositions, which are not necessarily connected, that if two mothers?the adoptive and the natural?have inherited the estate of their son, a subsequent adoption by one of them divests the estate of both. He makes a somewhat dogmatic assertion that what applies to co-widows must necessarily apply to co-mothers, if that expression may be used. But he gives no reason for it except a somewhat vague reference to "other considerations and general principles of Hindu law".

11. Moreover he thinks that his view is fortified by the decision in *Basappa v. Gurlingawa*. The report of that case in 35 Bom. L. R. 75 states that the trial Court there had awarded the estate to the two mothers in equal moieties, and as this Court confirmed" the decree of the trial Court, that would dispose of the

matter. But Mr. Thakor has produced the record of the case which shows that Gurlingawa had claimed the whole estate and she was awarded by partition an equal share. The learned counsel is no doubt right in his contention that the fact that the partition was made would not necessarily show that the parties were regarded as tenants-in-common. However that may be, it is quite clear that there is nothing in the judgments in that case to show that this Court decided or even considered the question whether the property was taken by the two mothers as joint tenants or as tenants-in-common. It is not correct to say therefore that the decision supports the view taken by the trial Judge.

12. Mr. Thakor has contended that there was here only a single indivisible inheritance because in the texts which deal with what is called the " Compact Series " of heirs the word " mother " like the word " wife " is in the singular. On the other hand the texts provide for " daughters " in the plural. In my opinion however no stress can properly be laid on this grammatical point. The authors of the texts in all probability did not foresee then the possibility of or the necessity for providing for the very rare case of this particular form of adoption, in which case alone there can be two mothers. But though cases of dwyamushyayanal adoption are rare, it is not correct to say that there is any fiction about the matter. In this kind of adoption, the adopted boy really has two mothers, quite distinct persons belonging to different families, and I can see no reason why these two distinct persons should by any fiction be merged into a single person, or why it should be held that they take a single indivisible estate.

13. Mr. Thakor like the trial Judge says that there must be an analogy between co-widows and co-mothers. But I am unable to see why the ordinary rule (which is, as pointed out in Sir Dinshah Mulla's Principles of Hindu Law in Section 31 that " According to the Mitakshara school two or more persons inheriting jointly take as tenants in common") should not apply. Some exceptions are given, including the case of two or more widows. But the rare case of two mothers is not mentioned, and for my part I am unable to understand why it should be brought in under an exception rather than under the general rule.

14. Reliance has also been placed upon the doctrine of Hindu law that the adopted son is to be treated as having been a member of his adoptive family from the time of his birth. Mayne in his Hindu Law, para. 196, says :

As soon as the widow's power is exercised, the adopted son stands exactly in the same position as if he had been; born to his adoptive father, and his title relates back to his father to: this extent, that he will divest the estate of any person in possession of the property to which he would have had a preferable title, if he had been in existence at his adoptive father's death.

15. This rule is subject to exceptions, e.g. the adopted son cannot challenge alienations made by his father or in some circumstances by his mother. Nor can he reopen a partition if his adoptive father has taken a share for himself. But what is important for our purpose is to note that this rule only applies if the

coparcenary is still in existence. The learned trial Judge took the view that the coparcenary estate was revived by the adoption. In this case Kantawa who became an equal heir to the estate on the death of the first adopted son was never a member of the same joint family as Gurlingawa. I find some difficulty therefore in understanding what in the circumstance can be meant by reviving the coparcenary estate. In any case the doctrine of revival seems to me to be contrary to the decision of the full bench in *Balu Sakharam v. Ldhoo* (1936) 39 Bom. L.R. 382. It was urged on behalf of the respondent that the rules laid down by the full bench in that case do not apply because the facts here are not the same. But this Court has not accepted the view that these rules should be limited to the precise facts of the case then before the Court. The full bench was laying down principles and not merely disposing of the particular case out of which the reference arose : see *Anandibai Pandurangrao Bhide Vs. Vasudev Narsingrao Bhide*, and *Rudrappa Yellappa Sattennanavar Vs. Mallappa Malleshappa*, .

16. I therefore agree with my learned brother that the plaintiff's suit fails and should be dismissed.

Macklin, J.

17. The other appeal is concerned with the plaintiff's claim against defendant No. 3. Defendant No. 3 sold survey No. 14 of Angadgeri in the year 1920 to Shivlingappa, the father-in-law of the widow Gurlingawa. It is his case that the sale was accompanied by an oral agreement of re-sale on payment of the consideration money, which was Rs. 1,000. At the same time, according to him, Shivlingappa lent defendant No. 3 Rs. 400 on a promissory note, and this loan and the sale of the land formed¹ part of the same transaction. After the decree of the High Court in the former litigation the whole of this survey number was allotted to the share of Kantawa. But in the meantime Basappa, who appears to have been the de facto manager of all the property which was then in dispute in the earlier litigation, had the promissory note renewed in his own name and eventually sued upon it in 1929. Defendant No. 3 in that litigation contended (as here also) that the promissory note was part of the transaction of sale. The result, according to him, was that the parties compromised the suit upon defendant No. 3 paying Rs. 1,000 for the land and Rs. 500 for the promissory note. As the land was then the subject of litigation, it was recognised that defendant No. 3 could not get it at once ; and accordingly a document (exhibit 67) was executed in the form of a receipt for Rs. 1,000 by Basappa in which Basappa acknowledged that the sale of 1920 was accompanied by an oral agreement of reconveyance according to what he was told not only by defendant No. 3 but by the panchas of the village also, and that having received Rs. 1,000 he would hand back the land if the result of the litigation between the two women permitted of that being done and to the extent to which it might be permitted. And he further agreed that in the event of Kantawa being declared to have no right in the land, the entire sum of Rs. 1,000 would be refunded. Nevertheless the plaintiff contends that no such agreement of reconveyance ever

took place. According to defendant No. 3 the receipt (exhibit 67) in respect of Rs. 1,000 and another receipt (exhibit 72) in respect of Rs, 500 said to be due under the promissory note were passed at the same sitting.

18. On behalf of the plaintiff Mr. Datar argues that there is no reasonable explanation of interest being charged, since according to the defendant the transaction of sale and the promissory note were all part of the same transaction and the vendee was to be in possession of the land. He also contends that Basappa in 1929 had no recognizable authority to deal with the property at all, since the High Court litigation then pending did not end until the year 1932. A receipt (exhibit 72) in respect of interest paid on Rs. 1,400 by defendant No. 3 in the year 1921 (actually the receipt mentions 1922) is on the record, and Mr. Datar suggests that possibly this refers to a different transaction altogether. But the authority of Basappa to receive money from defendant No. 3 on these terms and also the questions whether interest was or was not payable, and on what amount, are really beside the point. What we are concerned with is whether there was in fact such an oral agreement at the time of the sale in 1920 as defendant No. 3 sets up. If there was such an agreement, then Kantawa as the result of the High Court litigation received the land subject to that oral agreement. The facts relating to the consideration of Rs. 1,000 are set out in the receipt (exhibit 67) for Rs. 1,000, and there is no good reason for disputing the genuineness of that receipt. It is proved not only by defendant No. 3, whose word by itself might be considered to be interested, but also by the writer ; and it provides strong evidence of the agreement. There is no legal impediment to the proof of such an oral agreement, and we agree with the trial Court that the agreement is in fact proved. That being so the appeal fails and must be dismissed with costs in two sets.