

(1942) 10 MAD CK 0005
In the Madras High Court

K.R. Sankaralingam Pillai and Another	APPELLANT
Vs	
Veluchami Pillai, minor by adoptive mother and next friend, Chella Thayi alias Meenakshi Ammal and Others	RESPONDENT

Date of Decision : 08-10-1942

Acts Referred:

Citation : AIR 1943 Mad 43 : (1943) ILR (Mad) 309 : (1942) 55 LW 794 :
(1942) 2 MLJ 678

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal raises the important question whether a son adopted to a deceased coparcener is entitled to

reopen a partition of family property effected by the surviving coparceners before the adoption took place.

2. One K. Ramaswami Pillai had four sons, two of whom survived him. They are the 1st and 2nd defendants in this suit. The other two sons were

K. R. Karuppanna Pillai, the deceased husband of the 6th defendant, and K. R. Ramaswami Pillai, the deceased husband of Chellathayi, the

adoptive mother of the plaintiff, who is a minor. The father and his sons were joint in estate. Both Karuppanna and Ramaswami died without issue

in 1924. The father died in 1929 and in 1936 the 1st and 2nd defendants partitioned the family estate between themselves. Admittedly each is still

in possession of a moiety of the estate. On the 25th January, 1937, Chellathayi adopted the plaintiff and a week later Karuppanna's widow

adopted the 3rd defendant.

3. The suit out of which this appeal arises was filed by the adopted son of Ramaswami, suing through his mother as his next friend, He claimed to

be entitled to recover one-fourth of the family estate. The 1st and 2nd defendants resisted the claim. Their main contentions were that the widow had no power to adopt after the partition of the family property and that in any event the plaintiff could not claim a re-partition. The suit was tried by the Additional Subordinate Judge of Madura, who granted the plaintiff the decree which he sought. This decision was concurred in by the District Judge on appeal. Both Courts were of the opinion that the plaintiff had been lawfully adopted and that the partition did not debar him from recovering a one-fourth share as the son of his father. The 1st defendant then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who agreed with the Courts below that the partition of the estate by the 1st and 2nd defendants did not prevent the plaintiff from recovering his one-fourth share in the estate. The validity of the adoption was not challenged before Venkataramana Rao, J. The present appeal is from the judgment of the learned Judge and the sole question is whether the plaintiff has the right to demand a re-partition.

4. It has long been established that where property is taken by survivorship the widow's power to adopt is not affected. See (1876) L.R. 3 I.A.

154 (Privy Council) , Bachoo Hurkisonadas v. Mankorebai (1907) 17 M.L.J. 343 : L.R. 24 IndAp 107 : ILR 31 Bom. 373 (P.C.). , Yadao v.

Namdeo (1921) 42 M.L.J. 219 : L.R. 48 IndAp 513 : ILR 49 Cal. 1 (P.C.). An adoption does not, however, affect the rights of an alienee of

family property when the alienation is lawful, and, therefore, when surviving coparceners alienate family property, as they have the right to do, the

adoption by the widow of a deceased coparcener of a son to her husband does not defeat the alienee. For the appellant it is argued that a partition

amounts to alienation of the family properties and the surviving coparceners are in the same position as stranger alienees. We are not prepared to

accept this proposition. The partition does not mean the extinction of the family. The members of the family are still there and so are the family

assets. If the law recognises in an adopted son of a deceased coparcener the right to share in the estate as it existed before the partition, property

which has not been lawfully alienated in the meantime is still within his reach. The question which falls for decision in this appeal cannot be decided

on such a technical plea. In deciding the question whether the adopted son is entitled to demand from the erstwhile coparceners his share regard

must be had to principles of Hindu Law, and we will now proceed to examine those principles.

5. The adoption of a son by a widow to her deceased husband is deemed to date back to the husband's death, as the Privy Council has frequently

pointed out. In *Jatindramohan Tagore v. Gnanendramohan Tagore* (1872) L.R. IndAp Supp. 47 (P.C.). Willes, J., delivering the judgment of the

Board said,

The Hindu Law recognises an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the

power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In

contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be

provided for as a person whom the law recognises as in existence at the death of a testator, or to whom, by way of exception, not by way of rule,

it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually

begotten by him.

In *Madanamohana Deo v. Purushothama Deo* (1918) 35 M.L.J. 138 : L.R. 45 IndAp 156 : ILR 41 Mad. 855 (P.C.). the Judicial Committee,

speaking of the power of a widow, remarked that by exercising the power conferred upon her, the widow of one Adikonda could establish a

direct succession to the estate of her husband which relates back to his death. In *Pratapsingh Shivsingh v. Thakor Shri Agarsinghji Rajasanghji*

(1917) 36 M.L.J. 511 : L.R. 46 IndAp 97 : ILR 43 Bom. 778 (P.C.). the Board said, "Again, it is to be remembered that an adopted son is the

continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a

retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line.

6. In *Gada Dhur Mallik v. Official Trustee of Bengal* (1940) 1 M.L.J. 834 : L.R. 67 IndAp 129 : ILR (1940) 1 Cal. 415 (P.C.). , the Judicial

Committee observed,

Apart from the case of a child en ventre sa mere or of an adopted child, the estate once vested in an heir will not be divested by the subsequent

birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner.

In *Amarendra Mansingh v. Sanatan Singh* (1933). 65 M.L.J. 203 : L.R. 60 IndAp 242 : ILR 12 Pat. 642 (P.C.). the Privy Council expressed

approval of the acceptance by Mr. Ameer Ali in *Pratap Sing's case* (1917) 36 M.L.J. 511 : L.R. 46 IndAp 97 : ILR 43 Bom. 778 (P.C.) of the

view that among Hindus the male line is not regarded as extinct, or a man to have died without issue, until the continuation of the line by adoption is

impossible.

7. In view of these very emphatic pronouncements of the Judicial Committee, an adoption must be taken to date back to the death of the adoptive

father, which means that the adopted son"" is entitled to be put into possession of his adoptive father's share of the family estate, subject, of course,

to lawful alienations in the meantime.

8. The posthumous son can claim a re-partition and so can the heir of a disqualified person and an absent coparcener. Placitum 8 of section VI of

Chapter I of the *Mitakshara* (S.S. Setlur's *Hindu Law Books on Inheritance*, 1911, page 20) says,

When brothers have made a partition, subsequently to their father's death, how shall a share be allotted to a son born afterwards?

The author replies,

His allotment must absolutely be made out of the visible estate corrected for income and expenditure.--(Yajnavalkya, ii, 123.)

With regard to the disqualified person, placitum 7 of Section 10 of Chapter I (S.S. Setlur's *Hindu Law Books on Inheritance*, page 54) says,

If the defect be removed by medicaments or other means at a period subsequent to partition the right of participation takes effect, on the same

principle on which "when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution"

(Yajnavalkya ii, 123) is based.

Placita 9 and 10 deal with the rights of the heir of such a person. Placitum 9 says,

The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds:

"But their sons, whether legitimate, or the offspring of the wife of a kinsman, are entitled to allotments, if free from similar defects.(Yajnavalkya, ii,

142.)

Placitum 10 says,

The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares;

provided they be faultless or free from defects which should bar their participation, such as impotency, and etc.

The absent coparcener's right is recognised in placita 24 and 25 of Chapter XXV of Brihaspathi (Sacred Books of the East, Volume XXXIII, page 373):

24. When a man has gone abroad, leaving the joint estate of his family, his share must undoubtedly be given to his descendant who has returned from abroad.

25. Whether he be the third or the fifth or even the seventh in descent, he shall receive the share belonging to him by right of succession, his birth and family name having been ascertained (first).

Mr. Rajah Aiyar has contended that as there is no specific text dealing with the right of the adopted son to claim a re-partition it must be assumed

that there is no such right. Ancient texts are, however, not exhaustive, and in order that justice shall not be defeated, the Courts have from time to

time had to amplify them in accordance with the spirit of Hindu Law. The texts just quoted indicate a principle and we can see no reason why an

adopted son should be placed in a position inferior to the posthumous son, the heir of a disqualified coparcener and the absent coparcener,

especially as the adoption dates back to the date of the death of the adoptive father.

9. Further reasons can be given in support of the opinion that an adopted son has the right to demand a re-partition. In the judgment in Krishna v.

Sami ILR (1885) Mad. 64. which was decided by a Full Bench of five Judges of this Court (Turner, C.J., Kernan, Muttuswami Aiyar, Hutchins and Brandt, JJ.,) there is this statement,

Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has

been made by B, D and E (sons of C). When she exercises her power we apprehend that the adopted son would be entitled to call upon his

uncles to make over to him a portion of the wealth equal to that which would have been taken by his father.-- (1876) L.R. 3 I.A. 154 (Privy Council)

Mr. Rajah Aiyar has asked us to ignore this statement of the law as being obiter dictum. The statement may fall within that category; but it is the statement of a learned Chief Justice delivering the judgment of a Full Bench and is therefore entitled to great weight.

10. The question arose directly in a case decided by a Bench of the Nagpur High Court, *Bajirao v. Ramakrishna* ILR 1941 Nag. 707. , where it

was held that while a partition may affect the coparceners inter se, it will not affect the subsequent rights of a son adopted by a widow of a

deceased coparcener. So far as the adopted son is concerned, the family will be deemed to continue to be joint, and. he will be entitled to a share

in the family property, as if the partition had not taken place.

11. In Sir Thomas Strange's ""Hindu Law"" (Third edition, Volume I, page 232) we have this statement,

Wherever, from any cause not understood at the time, the division proves to have been unequal or in any respect, defective, it may be set to rights,

notwithstanding the maxim that, "once is partition of" inheritance made" (Manu Chapter IX, 47--3, Dig. 214) a position, that supposes it to have

been fair, and made according to law.

Until the Privy Council delivered the judgment in *Amarendra Mansingh v. Sanatan Singh* (1933) 65 M.L.J. 203 : L.R. 60 IndAp 242 : ILR 12 Pat.

642(P.C.). , it was generally understood that the vesting of an estate on inheritance defeated the widow's power to adopt. See *Mussamat*

Bhoobun Moyee Debia V. Ramakishore Achari Chowdhry (1865) 10 M.I.A. 279 (P.C.). , (1881) L.R. 8 I.A. 229 (Privy Council) . , (1889) ILR

17 122 (P.C.) (Privy Council) . , *Madana Mohana Deo v. Purushothama Deo* (1918) 35 M.L.J. 138 : L.R. 45 IndAp 156 : ILR 41 Mad. 855

(P.C.). In *Amarendra Mansingh v. Sanatan Singh* (1933) 65 M.L.J. 203 : L.R. 60 IndAp 242 : ILR 12 Pat. 642(P.C.). , after reviewing the

previous decisions having bearing on the point, the Judicial Committee decided that the devolving of an estate of inheritance did not defeat the

widow's power. Emphasis was laid on the peculiar religious significance which the Hindu Law attaches to the son. In that case the facts were

these. On the 20th July, 1898, Raja Brojendra, the holder of an impartible estate, being then without issue, executed a deed authorizing his widow to adopt should he die without leaving a son, or if he did, the son should die. In 1902 a son was born to Raja Brojendra, who died in 1903. The son died on the 10th December, 1922, unmarried. A week later his mother adopted Amarendra the appellant. The validity of the adoption was challenged by Banamali, a distant cousin of Raja Brojendra, who filed a suit to establish his right to the estate as the heir of Raja Brojendra. Both Courts in India held that Amarendra's adoption was invalid and decreed Banamali's suit. As the result he became entitled to the possession of the estate. The Judicial Committee held that the adoption of Amarendra was valid and that he was entitled to succeed to the estate notwithstanding that it had devolved on Banamali.

12. In *Amarendra Mansingh v. Sanatan Singh* (1933) 65 M.L.J. 203 : L.R. 60 IndAp 242 : ILR 12 Pat. 642 (P.C.). the arguments for the

contesting respondent were twofold and are stated by Sir George Lowndes, who delivered the judgment of the Board, in these words:

First it was said that treating Banamali as a separated sapinda claiming strictly by inheritance--the basis upon which the claim was laid in the plaint--

-the authorities established that when once the estate had vested in an heir of the last male holder, other than the adopting ""widow, the power of

adoption was at an end. If this were the true view, inasmuch as the Rani was precluded by the custom from inheriting to her son Bibudendra, she

could no longer adopt.

In the second place, it was said that where the husband from whom the power to adopt was derived left a son to succeed him, and that son

attained full legal capacity to continue the line, the power of his mother was equally at an end, and that this would be the case whether the family

was separate or joint.

Both these contentions were expressly negatived by the Board. If an adoption can divest an estate acquired by the law of inheritance it is difficult to

see why the adopted son should be deprived of his share when the rule of survivorship applies simply because the other members of the family

have distributed the assets among themselves.

13. The arguments in favour of a right in the adopted son to demand his share in

the family estate, notwithstanding that the other coparceners have already partitioned it, may be summarized as follows:

(1) It is a rule of Hindu Law that an adoption dates back to the date of the death of the father; (2) There is no reason why an adopted son should be placed in an inferior position to that of the posthumous son, the heir of a disqualified person and the absent coparcener; (3) The right of the adopted son- to demand re-partition has been recognized in two cases, *Krishna v. Sami* ILR (1885) Mad. 64. and *Bajirao v. Ramakrishna* ILR 1941 Nag. 707 (4) There is support to be found for the proposition in *Strange*; (5) As an adoption divests an estate of inheritance it would be unjust to deny to the adopted son the right of claiming a re-partition when the rule of survivorship applies.

14. We consider that there is ample authority here to support the judgments of the Courts below, but as Mr. Rajah Ayyar has quoted the decisions

of the Bombay High Court in *Hirachand Gangji v. Sojpal* ILR 1939 Bom. 512 and *Irappa Lokappa v. Rachayya Madivallayya* ILR 1940 Bom.

42 , we will refer to them. In the former case, Rangnekar, J., expressed the opinion that the coparcenary became extinct on partition and therefore

the power of the widow to adopt was gone. The basis of this decision was that there was no undivided family into which the adopted son could be

admitted by virtue of his adoption. In the second of these cases, a Bench of the Bombay High Court concurred in this decision. With great respect

for this opinion we are unable to agree with it. After partition the coparcenary may be extinct as between the members who were parties to the

partition, but the rights of others are not affected unless they claim under or through them. This is shown by the right of the posthumous son, of the

heir of the disqualified person and of the absent coparcener to demand a re-partition. Moreover, it runs contrary to the well settled rule of Hindu

Law that an adoption dates back to the death of the adoptive father. It is to that date, we must have regard, not, of course, for the purpose of

deciding the validity of the adoption, for *Amarendra Mansing v. Sanatan Singh* (1933) 65 M.L.J. 203 : L.R. 60 IndAp 242 : ILR 12 Pat. 642

(P.C.) has done away with the distinction between devolution by survivorship and devolution by inheritance, but for the purpose of determining the

rights of the adopted son. The existence of a coparcenary at the date of the

adoption is no longer material. The adoption is the overriding factor and restores the position so far as the adopted son is concerned, subject to lawful alienations in the meantime.

15. We hold that the case was rightly decided below and consequently the appeal will be dismissed with costs in favour of the 1st respondent.