

(1956) 12 BOM CK 0019

In the Bombay High Court

Case No : First Appeal No's. 477, 522, 523 and 676 of 1951

Krishtappa Venkappa Gadad and Others

APPELLANT

Vs

Gopal Shivaji Ramchandra Kulkarni and Others

RESPONDENT

Date of Decision : 14-12-1956

Acts Referred:

Citation : AIR 1957 Bom 214 : (1957) 59 BOMLR 176 : (1957) ILR (Bom) 588

Hon'ble Judges : Chagla, C.J.; Vyas, J.; Gajendragadkar, J

Bench : Full Bench

Advocate : P.K. Padhye, for N.M. Hungund, V.H. Gumaste, N.S. Anikhand and N.S. Anikhindi, for the Appellant; G.G. Kulkarni, for K.G. Datar, S.R. Parulekar and G.H. Desai, for the Respondent

Judgement

Chagla, C.J.—The question submitted for the decision of this Full Bench is capable of being decided on a very narrow point and the question is this :

"Whether in" re-opening a partition made between the surviving members of a joint Hindu family at the instance of a son adopted by the widow of a deceased co-parcener, the adopted son is entitled to claim that the properties alienated not for justifying necessity by the surviving co-parceners should be assigned to their shares and the adopted son should be awarded his share in the property existing at the date of his adoptive father's death and accretions thereto UK-affected by those alienations?" The matter was referred to a Full Bench because Mr. Justice Shah and Mr. Justice Vyas, felt that there was some conflict between the ratio of the decision in Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others, , and the decision in Gurupadappa v. Karishid-dappa 56 Bom LB 252 : AIR. 1954 Bom 318 (B).

2. Now, this Court laid down in the earlier decision that, when there was a sole surviving co-parcener and he made certain alienations and there was an adoption in the family subsequent to the alienations, then the alienations were binding on the adopted son because at the dates of the alienations the co-parcener had full right to treat the family property as if it was his own property, and that an

adoption which was subsequent to the alienations could not affect the property which was already disposed of by the co-parcener as a person who acted as the full owner of the property. This decision was based on the well-recognised principle in Hindu Law that an adopted son is bound by all lawful alienations; and in deciding this case, the Court also gave effect to the principle enunciated in the decision of the Privy Council in AIR 1927 139 (Privy Council) that "when a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of."

Now, the case that arises here is different because we have a case, not of a sole surviving co-parcener, but of a partition of a joint Hindu family and members of the divided family making alienations and an adoption taking place after the partition; and the question is What are the rights of the adopted son ?

3. Mr. Justice Shah and Mr. Justice Vyas felt that in the later decision decided by Mr. Justice Bavdekar and Mr. Justice Vyas reported in 56 Bom LR 252 : AIR 1954 Bom 318, a view was taken which was different from the ratio laid down in the earlier judgment. In that case the learned Judges held that, if there was an adoption after partition and one of the members of the original co-parcenary had made alienations which could not be justified by legal necessity, then on the re-opening of the partition the alienations should be allotted to the share of the alienating co-parceners and the adopted son should not be affected by the alienation; It is possible to take the view that the position of the members of the divided family is in law the same as that of a sole surviving co-parcener. Just as the sole surviving co-parcener has every right and authority to dispose of the property as if it was of his absolute ownership, so also after partition the members of the erstwhile co-parcenary have equally the right of disposing of that share which came to them on partition as if it was their property. Now, if the decision of Mr. Justice Bavdekar and Mr. Justice Vyas, in 56 Bom LR 252 : AIR 1954 Bom 318, conflicted with the extension of the view taken by this Court in *Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others*, , as applying to the case of "members of a disrupted joint family, then we would have considered which was the more correct view the view taken in *Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others*, , or the view taken by Mr. Justice Bavdekar and Mr. Justice Vyas in 56 BOM L R 252 : AIR 1954 Bom 318. But. in our opinion, the decision of Mr. Justice Bavdekar, and Mr. Justice Vyas. does not turn upon any important principle of Hindu law either relating to the question or relation-back in the case of an adoption or the question of lawful alienations made before adoption which are binding on the adopted son. It is clear from the judgment that these two learned Judges came to the conclusion which they did on the ground that, when a partition is sought to be reopened equities must be done. Now that is a "well-established principle of Hindu law. Whenever a partition is re-opened, shares must be allocated on a fair and equitable principle, "and what was uppermost in the minds of these two learned Judges was that, in giving to the adopted son his proper share, no injustice should be done to any coparcener

and the adopted son should get his own fair share.

4. Let us consider what would be the consequence if the view taken by Mr. Justice Bavdekar and Mr. Justice Vyas was not given effect to. Let us take the case of a joint family consisting of three, brothers. One brother dies and the two surviving brothers bring about a partition. One of the dividing brothers sells away the whole of his share of the joint family property coming to him and the other brother retains the whole of his share. Then the widow of the deceased brother adopts a son to her husband and he files a suit for partition. If the view taken was that the adopted son was bound by the alienations made by one of the brothers, then in allocating share to him the brother who did not alienate the property would have to part with a portion of his property in order that the adopted son should get his proper share; and the alienating coparcener, who is left with no property at all would not be called upon to make any contribution. This would be patently and palpably Inequitable and unfair. Equity could only be satisfied if, in determining the share of the adopted son the alienation made by one of the coparceners is allotted to his share and the partition is re-opened on that basis and the properties are re-allotted on that basis. As Mr. Justice Bavdekar himself observes in the judgment at page 257; "It is really a question of equity; and if the judgment proceeds on a question of equity, we entirely agree with the two learned judges that equity could only be done provided the basis adopted is the basis suggested by these two learned Judges in their judgment. We therefore, do not look upon this judgment as in any way impairing the principle which was laid down by this Court in *Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others*, . This is not a case of interfering with the right of a divided coparcener to deal with his share as his own; nor is this a case of impairing the "principle accepted by this Court over a long period that an adopted son is bound by all lawful alienations made prior to the adoption. But we look upon this case as a simple case of doing equities on the re-opening of a partition in order that the property should be re-divided on a fair and equitable basis.

5. With regard to accretions, it is clear that the adopted son must have his share in the accretions which are the accretions to the property, which remained with the dividing coparceners. He, would also have his share in any income earned: with the aid of the property which was originally joint family property.

6. We therefore, answer the question in the affirmative.

7. Answer in the affirmative.