
(1940) 10 BOM CK 0008
In the Bombay High Court
Case No : First Appeal No. 231 of 1939

Laxmibai Venkatrao Desai	Vs	APPELLANT
Keshavrao Lingangouda Desai		RESPONDENT

Date of Decision : 03-10-1940

Acts Referred:

Citation : AIR 1941 Bom 193 : (1941) 43 BOMLR 214

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

Wassoodew, J.—This is an appeal from a decree of the First Class Subordinate Judge of Dharwar in a suit by the plaintiff to recover, upon partition, possession with mesne profits of his half share in certain properties mentioned in the schedules to the plaint which were admittedly the joints family estate of the plaintiff's adoptive father Lingangouda and his two brothers Venkatrao alias Kenchappaya and Nilkanthagouda. The facts which have given rise to this dispute are briefly these.

2. The plaintiff's adoptive father Lingangouda died childless in 1923 leaving a widow Saraswatibai, defendant No. 5 in the case, Lingangouda was predeceased by his younger brother Nilkanthagouda in 1918 who left a widow who is defendant No. 4. Upon the death of these two brothers Venkatrao was left the sole surviving coparcener in the family. Venkatrao was thrice married and in 1928, which is an important period in the history of this litigation, only his last two wives the appellant Laxmibai, defendant No, 2, and Indirabai, defendant No. 3, were living. They had no issue. The first wife Bhagirathibai who died before 1928 had left three daughters, one of whom had a son Martand, defendant No. 1 in the case, who was then a child aged four and is still a minor. It appears that Venkatrao on July 17, 1928, executed a document (exhibit 100) described as "vyavastha-patrack" in the nature of a testamentary disposition of his estate. By that document he authorised Laxmibai to adopt his daughter's son Martand. He

also made provision for his daughters and widows and mother and also for the management of the estate during the minority of Martand and thereafter. The material provisions in that respect are contained in cls. (2) and (7) of the deed which are reproduced below:--

My second wife Laxmibai should bring up the said adopted boy and she alone should make vahiwat of the property in her independent right till her death and she alone should go on managing the household affairs (go on making vahiwat of the family). It is my wish that all the members of the family should remain in union. In case any dispute arises, then the lands as mentioned below out of our family property should be taken by the respective persons and should stay.

Laxmibai should make vahiwat of all my property. During her lifetime and after the adopted son becomes major, any dispute arises, then in the remaining income Laxmibai should take half of the net income and should manage as she wills and the remaining half only should be taken by the adopted son who should make vahiwat and enjoy the same.

3. Not long after executing that document, Venkatrao adopted Martand, his daughter's son referred to in the above deed, on August 11, 1928, The next day it appears Venkatrao died. On the date of the adoption Venkatrao executed a registered deed of adoption (exhibit 94) which is to the following effect: -

I have no male issue born of me. I am now attacked by illness. For the continuation of the line of my family, I asked your genitive parents to give you (Martand) in adoption to our family. They accordingly having agreed, gave you in adoption. And I accordingly, have taken you in adoption as per our Hindu Dharma Shashtra (according to Hindu rites). You are the absolute owner to my entire moveable and Immovable property. My wife Laxmibai herself should make vahiwat of my family moveable and Immovable properties. The arrangement and the vahiwat of my family properties (moveable and immovable) as per will executed by me on date 17th of July 1928 should be made. Such is the adoption executed by me voluntarily.

4. The document is signed by the adoptive father and is addressed to the adopted son Martand (vide exhibit 94).

5. Thereafter disputes arose between Laxmibai on the one hand and the adopted son represented by his natural father on the other, in consequence of which Laxmibai instituted a suit in 1930 for a declaration that the adoption of Martand was invalid and illegal and that she was entitled to manage and enjoy the property under the adoption deed read with the earlier document the "vyavastha-patrak" executed in her favour by Venkatrao on July 17, 1928. The trial Court held that the adoption was valid and binding on the widow Laxmibai, but that she was entitled under the deed of adoption to the management of the estate for her life in terms of the "vyavastha-patrak" to which reference has been made therein. It was held that the arrangement, which was agreed to between Venkatrao and the natural father of the adopted son, was binding on the parties

and the adoptive mother. Against that decision Laxmibai appealed to the High Court and there were cross-objections filed on behalf of the adopted son Martand. This Court on September 24, 1936, dismissed that appeal as well as the cross-objections maintaining the decree of the trial Court.

6. While that litigation was pending between Laxmibai and her adopted son Martand, the widow of the deceased Lingangouda adopted the plaintiff on February 26, 1935, and on June 28, 1937, the latter instituted this suit for partition claiming a half share in the joint family estate which his deceased father was entitled to on his death.

7. That claim was met by various pleas, including the plea that the adoption of the plaintiff was invalid and illegal, and in the alternative that the arrangement evidenced by the adoption deed of August 11, 1928, and upheld by the High Court in the suit between Laxmibai and defendant No. 1, Martand, was binding on the plaintiff and governed the relationship between him and Laxmibai as well as defendant No. 1. Laxmibai's principal contention was that she could not be dispossessed of this property and deprived of the enjoyment of its benefit during her lifetime, there being a disposition in her favour by her husband whilst he was the sole surviving coparcener which was acquiesced in and agreed to by the natural father of her adopted son.

8. The learned trial Judge has found that the plaintiff's adoption was proved and valid and that he was entitled to partition and possession of a share in the disputed estate. Accordingly a preliminary decree for partition was passed in his favour and an enquiry was directed upon the claim to mesne profits from the date of the suit, the plaintiff's share being fixed as half in the disputed property.

9. In this appeal by defendant No. 2 Laxmibai from that decree, two contentions have been formulated by her learned advocate, first, that the arrangement evidenced by the deed of adoption is operative as an alienation of the entire estate in favour of Laxmibai under which it was to be enjoyed and managed by her during her lifetime in terms of the "vyavastha-patruk" of July 17, 1928, and is therefore binding not only on defendant No. 1, the son adopted by Laxmibai's husband, but also on all other persons subsequently born in the family or adopted by the widows of the deceased "gotraja sapindas" who died in union; and, secondly, that the adoption of the plaintiff is illegal and invalid in view of the extinguishment of the coparcenery prior to the adoption of the plaintiff. The latter ground was not urged in the trial Court in defence to this action and no issue was claimed and no evidence directed to the question as to whether the coparcenery had come to an end either upon the death of Venkatrao or subsequent thereto prior to the adoption of the plaintiff. It is also material to note that that ground has not been taken in the memo of appeal. It is a new point raised for the first time in argument. That point necessarily involves questions not only of law but of fact. We have therefore declined to hear arguments of Mr. Jahagirdar for the appellant on that point.

10. The only issue that was therefore argued is the one involved in the first contention. The factum of adoption was not questioned for the appellant. The evidence in my opinion satisfactorily establishes the adoption of the plaintiff by the widow of Lingangouda on February 26, 1935. There is no question that the adoption to her husband by a widow of a deceased "gotraja sapinda", who was a member of a Mitakshara joint family, is valid and binding on the other members of the family so far as the creation and vesting of a coparcenary interest in the joint family property is concerned immediately upon adoption, the interest being co-extensive with that of his adoptive father. And it makes no difference to the vesting of that interest where only one member of the joint family survives at the time of adoption, for it has been held that the family continues to be joint so long as any widow remains in it with a power to adopt (see *Chanbasappa Virappa Bolagondar Vs. Huchappa Parappa Bolagondar*, and *Irappa Lokappa Vastrad Vs. Rachayya Madiwalayya*,).

11. Mr. Jahagirdar contends that the terms of the deed of adoption give effect to what he describes as a family arrangement and therefore it is binding upon all the members of the coparcenary including those born subsequent to the deed of adoption. His argument is that inasmuch as the parties to that arrangement, assuming it to be the act of Venkatrao and Martand, were absolutely entitled to the joint family estate, they could by mutual consent limit the estate of the future coparceners. His alternative contention, as have stated, is that the arrangement is tantamount to an alienation either by a sole coparcener or existing coparceners, and as such is binding on the plaintiff, the subsequently adopted son by a widow of a deceased "gotraja sapinda". The former contention involves a strange doctrine, namely, that it is in the power of coparceners in a joint family for the time being in possession of the joint family estate by an arrangement or agreement among themselves which is short of alienation or severance of their respective interests, to restrict or curtail the rights of enjoyment of the future coparceners, born or adopted in the joint family. Mr. Jahagirdar has argued that (1927) L.R. 54 I.A. 248 (Privy Council) is an authority for upholding such an arrangement. There a dispute arose between the adopted son and the widow of the adoptive father with regard to the enjoyment and management of the joint family property. An arrangement was made by the adoptive father in a will before the adoption took place, according to which his widow was allowed to enjoy his property during their lifetime, or for a less period. That arrangement was consented to by the natural father of the adopted son before the adoption. Their Lordships of the Judicial Committee after reviewing the Indian authorities which they thought were not reconcilable in so far as they could yield some principle governing the arrangements arrived at between the adoptive father and the natural father of the adopted son, came to the conclusion that the only ground on which such arrangement could be sanctioned was custom. The following observations of Viscount Dunedin, who delivered the judgment of the Board, are important (p. 263):--

They are of opinion that there is such a consensus of decision in the cases with

the exception of the case of *Jagannadha v. Papamma* (1892) ILR 16 Mad. 400, that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son, It seems part of the custom that one sine qua non of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there.

12. There can be no doubt upon that authority that the arrangement evidenced by the deed of August 11, 1928, could be upheld on the ground of custom. And that arrangement has been upheld by this Court in the appeal between defendant No. 1 and defendant No. 2. But according to their Lordships of the Privy Council that arrangement is binding in so far as it regulates the right of the widow as against the adopted son. The question is whether the rule of custom could be extended to regulate by such an arrangement the rights of persons in the position of the plaintiff or other coparceners born in the family. If, for instance, after the arrangement was concluded a son were born to the adoptive father in his lifetime or after his death, would his interest be bound by the terms of that arrangement to which he was not a party actually or fictionally? Similarly, would the interests of a person adopted by a widow of a deceased coparcener of the joint family entitled under ordinary law to a share in the coparcenary property be affected by it? No authority has been cited before us to show that the rule of custom can be extended to affect other interests referred to. In my opinion it does not seem right that such an arrangement, which regulates the rights of the: adoptive mother vis-a-vis the adopted son, should affect the other coparceners in the joint family acquiring that status by birth or adoption.

13. But Mr. Jahagirdar has argued that inasmuch as Venkatrao, who was the sole surviving coparcener prior to the adoption, could make a disposition inter vivos of his property in his wife's favour which would be binding on the son adopted or born subsequently, the arrangement in question should be similarly treated and given effect to. The assumption underlying that argument is that the arrangement must be looked upon as governed by a special equity or as an alienation. It is certainly not a family arrangement, as ordinarily understood implying a settlement of a doubtful claim by agreement to attract the special rule of equity to it. Nor could it be regarded as an alienation or disposition inter vivos, for obviously under the two deeds the adoptive father so long as he lived lost nothing or rather contracted to lose nothing of his interest in the entire estate. An alienation inter vivos implies the voluntary resignation of an estate by one man and its acceptance by another. The deed was to come into operation after Venkatrao's death. So that the argument based on a supposed alienation by a sole surviving coparcener prior to the adoption is not well founded. But Mr. Jahagirdar contends that it could still be regarded as a joint disposition by the father and the adopted son. That argument is obviously unsound. It could not be regarded as a disposition by the son prior to his adoption, for he had not acquired any right which he could dispose of through his natural father. In point

of fact it is not a joint act of the adoptive father and the adopted son. The latter after his adoption could not being a minor effect an alienation himself. Upon his adoption his natural father could not on the minor's behalf agree to an alienation in favour of the adoptive mother except within the limits of the rule of custom recognized in Krishnamurthi Ayyar's case. The consent of the natural father would not be effectual in law or by custom to validate the disposition of Venkatrao according to his will, for that would take effect after the lifetime of the adoptive father and curtail the rights of the adopted son as a co-sharer. I do not therefore think on principle that the rights or claims of persons subsequently adopted in the family who are not parties to the arrangement would be affected by it. In that view of the matter, it is unnecessary to deal with the other cases referred to which have very little bearing upon the question in dispute. I would therefore confirm the decree of the lower Court and dismiss this appeal with costs (one set).

Broomfield, J.

14. Mr. Jahagirdar does not rely on the will of Venkatrao and it is clear that the adoption of a son by the testator renders the will as such invalid. The main argument before us on behalf of the appellant is that the agreement between Venkatrao and the natural father of the adopted son before the adoption, providing that Venkatrao's widow, defendant No. 2, should have a life estate may be regarded as an alienation of joint family property inter vivos analogous to an alienation by a sole surviving coparcener or by a coparcener in excess of his share, and should be similarly held binding on a person like the plaintiff, not then in existence as a member of the family. As my learned brother has pointed out, however, it is extremely difficult to see how the transaction can be regarded as an alienation. Mr. Jahagirdar says that it was an alienation by the father Venkatrao or by Venkatrao and the adopted son together. But if it be treated as an alienation by the father, it was obviously not inter vivos. The terms of the agreement were not to take effect until his death. On the other hand, if it were to be treated as an alienation by the son, it was not by a coparcener, for until he was adopted he was not a coparcener. That being so the principles laid down in *Basawantappa v. Mallappa* (1938) 41 Bom. L.R. 268 and the cases referred to in the judgment in that case have no application.

15. Defendant No. 2's right to a life interest is really based on custom and nothing else--the custom recognized in (1927) L.R. 54 I.A. 248 (Privy Council) , which regulates the right of a widow and mother of the adopted son as against the adopted son. But in the absence of authorities,--and it is admitted that there is no authority--this custom cannot be extended so as to make the pre-adoption agreement binding on parties other than the adopted son. Defendant No. 2 by virtue of the agreement, which has been recognized in the previous litigation, got a right as against defendant No. 1 to enjoy defendant No. 1's property during her lifetime. She still has that right. But defendant No. 1 being a member of the joint family, although for a time after Venkatrao's time he was the sole surviving

coparcener, his interest in the estate was liable to be diminished in case one of the widows of a deceased coparcener adopted a son, and in that event defendant No. 2's right was liable to be diminished to the same extent. I agree therefore that the appeal fails and must be dismissed.