

(1919) 10 BOM CK 0005
In the Bombay High Court
Case No : Second Appeal No. 565 of 1917

Mallappa Bharmappa

APPELLANT

Vs

Hanmappa Mardeppa

RESPONDENT

Date of Decision : 21-10-1919

Acts Referred:

Citation : (1920) 22 BOMLR 203 : 55 Ind. Cas. 814

Hon'ble Judges : Norman Macleod, J;Heaton, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—The plaintiffs sued for possession of a house and a one-fifth share of the lands as described in para 1 of the plaint with mesne profits.

2. The first plaintiff is the adopted son of the 2nd plaintiff who is the widow of one Bharmappa. Bharmappa admittedly died in union with his brothers defendants 1 to 3 and the husband of defendant 4, leaving a minor son Mahadevappa. Thereafter there was a partition between Mahadevappa and his uncles. He died unmarried in 1907 leaving his mother the 2nd defendant as his heir. In 1908 she demanded her share which the defendants refused in 1908, since when they have been in possession against her. In 1909 she adopted the 1st plaintiff.

3. The 2nd and 3rd defendants in their written statement contended inter alia that the adoption was invalid, and this is the only question which has been argued before us in second appeal. The trial Court decided in plaintiff's favour. The lower appellate Court, however, modified the decree of the trial Court holding that the adoption was invalid and awarded possession to the 2nd plaintiff only. It must be considered now as settled law that a widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband provided that her son has not attained ceremonial competence: Verabhai Ajubhai v. Bai Hiraba

I.L.R(1903) I 27 Bom. 492 : 5 Bom. L. R. 534, P. C..

4. The principle of such recognition is that the act of adoption is derogatory of no other vested right than those of the adopting mother: see *Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakahmi Narsayya* (1876) L. R. 4 I. A. 1; *Gavdappa v. Qitimallappa* I.L.R (1894) 19 Bom. 331, and *Payapa v. Appanna* I.L.R(1895) 23 Bom. 327. But it has been contended, that because Bharmappa died in union, and thereafter his widow could not adopt without the consent of his coparceners, her right to adopt came to an end at the separation and could not be revived. No authority which is really in point has been cited for such a proposition. Reliance was placed on the decision in *Ramkrishna v. Shamrao* I.L.R(1902) 26 Bom. 526 : 4 Bom. L. R. 315. but what was decided in that case was, that when the inheritance of the son has vested in some other heir than the mother herself, her power of adoption comes to an end and cannot be revived. Nor is the case of *Datto Govind v. Pandurang Vinayak* I.L.R(1908) 32 Bom 499 ;10 Bom. L. R. 692 of any assistance to us. There A and S were two joint brothers. S died leaving a widow, who on A's death succeeded to the estate. She adopted a son to her husband and the reversioners objected. The question whether a widow, who succeeds to an estate not her husband's but as Gotraja Sapinda of the last male holder, in consequence of the absence of nearer heirs such as the mother and grand-. mother, could make a valid adoption was answered in the negative.

5. That is not the question before us in this case, which, as far as I can gather, has never arisen before, and must be decided on general principles. In this Presidency no express authorization by the husband to the widow to adopt is necessary. Only if he is a member of a joint family the consent of the coparceners is necessary. In this case there could be no talk of adoption as long as Mahadevappa was alive, but it is not correct to say that the power to adopt must be in the widow at the time of her husband's death, and if it is not, that it cannot arise afterwards. If Bharmappa had died separate the power to adopt remained suspended, at any rate as long as Mahadevappa did not marry or attain ceremonial competence. Until the separation her power still remained suspended, and if Mahadevappa had died in union she could have adopted with the consent of defendants 1 to 3. I see no reason, therefore, why after the separation the power of adoption did not remain suspended, the only change being that if events happened which enabled it to be exercised there were no longer any coparceners whose consent was necessary. The rights of reversioners are not vested, so that her adoption of the 1st plaintiff was not derogatory of any vested right. That, and the condition that the son's estate has not vested first in some one other than herself, are the only two conditions which in my opinion stand in the way of the widow's right to adopt even if her husband died in union.

6. Therefore the appeal must be allowed and the decree of the trial Court restored with proportionate costs on the defendants 2 and 3 throughout, except that only Rs. 400 are allowed as mesne profits.

Heaton, J.

7. I agree.