

Sau Ashabai Kate

Vs

Vithal Bhika Nade

Civil Appeal No. 1846 of 1974

(L. M. Sharma, Dr. T. K. Thommen JJ)

17.10.1989

JUDGMENT

SHARMA, J. –

1. This appeal by the plaintiff-appellant is directed against the decision of the Bombay High Court dismissing her suit for possession of the properties detailed in the plaint.
2. The disputed properties belonged to a joint Hindu family governed by Mitakshara law of which one Bhiku and his son Balu were coparceners. Bhiku died on June 6, 1942 leaving behind his widow Parvati, defendant 2 in the present suit, and Balu who died soon after his father's demise on July 24, 1942. In November 1942 Balu's widow Lilabai gave birth to a posthumous daughter who is the present appellant. Some time later Lilabai remarried and thereupon Parvati adopted Vithal, defendant 1 in the present suit, in the year 1949. After attaining majority, appellant Ashabai filed the present suit for a decree for money for Rs. 3000 as expenses of her marriage. She challenged the power of her grandmother to adopt defendant 1 on the ground that her right to adopt was lost on the death of Balu leaving behind his widow Lilabai.
3. The trial court accepted the defence case, upheld the adoption of defendant 1 as valid, and dismissed the suit. The plaintiff, Ashabai, challenged the decision by an appeal which was heard by the Extra Assistant Judge, Poona, who allowed the same and passed a decree for possession of the suit properties along with mesne profits. Now, it was the turn of the defendants to question the decree of the first appellate court before the High Court under Section 100 of the Code of Civil Procedure. After considering a number of Privy Council and Supreme Court decisions, the High Court ruled that a Hindu widow's power to adopt is revived the moment there is nobody to continue the line, and since Lilabai incapacitated herself in doing so by her remarriage, the right of her mother-in-law to adopt a son to her husband revived. The adoption of defendant 1 was, thus, found legal and valid. Accordingly the decree in favour of the plaintiff was set aside and her suit dismissed. The appellant then moved this Court under Article 136 of the Constitution and special leave has been granted.
4. The case comes from Maharashtra where a Hindu widow may adopt even without any authority. The contention of the plaintiff is that on the death of Balu his mother Parvati lost this power which vested in Balu's widow Lilabai and on Lilabai's and on Lilabai's remarriage Parvati's power did not revive. The adoption of defendant 1 was, therefore, illegal. Reliance was placed on several decisions of the Bombay High Court including that in Ramchandra Narayan Badale v. Murlidhar Y. Khambekar ((1937) 39 Bom LR 599 : AIR 1938 Bom 20). In similar circumstances the Division Bench held that the mother's power to adopt a son was permanently extinguished on the death of her

natural son leaving a widow. The High Court in the present case refused to follow the said decision on the ground that the same must be held to have been impliedly overruled by the judgment of this Court in *Gurunath v. Kamalabai* ((1955) 1 SCR 1135 : AIR 1955 SC 206). In our view the High Court has not correctly appreciated the decision in *Gurunath* case ((1955) 1 SCR 1135 : AIR 1955 SC 206).

5. The relevant facts in *Gurunath v. Kamalabai* ((1955) 1 SCR 1135 : AIR 1955 SC 206) may be briefly put thus. The disputed property belonged to *Krishtarao* who died leaving behind two widows - *Radhabai* and *Gangabai* - and a son *Dattatraya*. *Dattatraya* died in 1913 leaving behind his widow *Sundarbai* and a son *Jagannath*. *Sundarbai* died soon after the death of her husband and a year later *Jagannath* also died. *Gangabai*, the junior widow of *Krishtarao*, adopted *Gurunath*, the appellant before this Court, who filed a suit claiming certain rights as the adopted son of *Krishtarao*. One of the issues arising in the case related to the validity of *Gurunath's* adoption. A bench of seven learned Judges of this Court examined several decisions of the Privy Council including the judgment in *Amarendra Mansingh v. Sanatan Singh* ((1933) LR 60 IA 242 : AIR 1933 PC 155) and said that the rule,

"That the interposition of a grandson, or the son's widow, competent to continue the line by adoption brings the mother's power of adoption to an end;"

was being followed for a very long time and has become a part of Hindu law. They also approved the observation of *Chandavarkar, J.*, who delivered the judgment of the Full Bench of the Bombay High Court in *Ramkrishna Ramchandra v. Shamrao Yeshwant* ((1902) ILR 26 Bom 526 : 4 Bom LR 315) to the following effect :

"Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

They also quoted with approval another part of the judgment of *Chandavarkar, J.*, stating that when a son dies before attaining full legal competence and does not leave either a widow or a son or an adopted son then the power of the mother which was in abeyance during his lifetime revives but the moment he hands over that torch to another, the mother can no longer take it. In view of these observations in the judgment in *Gurunath* case ((1955) 1 SCR 1135 : AIR 1955 SC 206) there does not appear to be any scope for holding that on the remarriage of the son's widow the power of the son's mother to adopt revives. The matter does not stop here. Reliance was placed by the appellant on the decision of the Nagpur High Court in *Bapuji Ramji Patel v. Gangaram M. Deshpande* (ILR 1941 Nag 178 : AIR 1941 Nag 116) where the facts were identical to those in the present appeal. The Nagpur High Court had held that the power of the mother revived on the remarriage of the son's widow. This Court discussed the Nagpur judgment at some length at pages 1148 and 1149 and disapproved it. This part of the judgment does not leave any room for doubt that this Court in *Gurunath* case ((1955) 1 SCR 1135 : AIR 1955 SC 206) has affirmed the decisions of the Bombay High Court in *Ramkrishna Ramchandra v. Shamrao* ((1902) ILR 26 Bom 526 : 4 Bom LR 315) and *Ram Chandra v. Murlidhar* ((1937) 39 Bom LR 599 : AIR 1938 Bom 20) as laying down the correct law and rejected the rule of law similar to the plea of the present respondent, recognised by Nagpur High Court in identical facts and circumstances. We accordingly hold that on the death of the *Balu* the responsibility for the continuance of the family line fell on his widow *Lilabai* by the power of adoption vesting in her, and the power of *Parvati* to adopt was extinguished permanently and did not

revive even on Lilabai's remarriage. Consequently the adoption of defendant 1 was invalid in the eye of law and he did not get any interest in the suit properties.

6. Now remains the next question as to the relief which the plaintiff is entitled to get in this suit. As has been observed earlier, the properties belonged to the joint family of which Bhiku was a coparcener. On his death in 1942 his wife Parvati got under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, the same interest as Bhiku had in the joint family properties. If a partition had taken place Bhiku would have got half share in the properties, which on his death devolved on Parvati. Parvati is still alive and is defending the claim of her grand-daughter. She cannot, therefore, be deprived of her half share in the properties. The interest which initially devolved on Parvati, however, was limited in nature known as Hindu woman's estate. On the passing of the Hindu Succession Act, 1956, she became full owner thereof. Likewise the remaining half share of Balu in the properties, devolved on the appellant on her mother's remarriage and she got a Hindu woman's estate therein which ripened in full ownership under Section 14(1) of the Hindu Succession Act. She is thus entitled to a decree for half share in the suit properties, as prayed for by way of an alternative relief in the plaint. She has also asked for a decree for partition in case of a partial decree which she is entitled to get. The first appellate court had also granted a decree for mesne profits, pendente lite and future, which should be restored but only in respect of her half share. Accordingly, an inquiry shall be made under Order XX, Rule 12, CPC. Her claim for a money decree for Rs. 3000 was not allowed even by the first appellate court and stands finally rejected.

7. In the result, the decision of the High Court is set aside and the plaintiff's suit for half share in the suit properties with mesne profits as also for partition is decreed. The appeal is accordingly allowed in part, but the parties are directed to bear their own costs throughout.

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