MYSORE HIGH COURT

Somasekharappa

Vs

Basappa Channabasappa Shettar

Second Appeal No. (B) 278 of 1956, Dharwar in Civil Appeal No. 20 of 1954

(S.R. Das Gupta, C.J. and B.M. Kalagate, J.)

19.02.1960

JUDGMENT

S.R. Das Gupta, C.J.

1. This appeal raises an important question of Hindu Law; that miration being whether or not a son adopted by a widow of a deceased coparcener can claim, the joint family property in the hands of a transferee from the heir of the last surviving coparcener - even though the transfer took place before the adoption.

2. One Irappa and his son Puttappa were the joint owners of the property in question, they being members of a Hindu joint-family. Puttappa died before Irappa leaving a widow Channava who is defendant No. 3 in this case. Thereafter Irappa died in the year 1915. On the death of Irappa his collateral one Channappa became the owner of the suit property as the heir of Irappa. The said Channappa transferred the said property to the 1st Respondent on 7th November 1932. In the year 11935 the widow of Puttappa, i.e. Channava, adopted the present Appellant Somasekharappa. This suit is instituted by the transferee from Channappa. His case is that the adopted son, who is defendant 1 in the suit, had taken wrongful possession of the suit property from him. The case of defendant 1 is that he is entitled to the suit property by virtue of his adoption. The trial Court dismissed the suit holding that the plaintiff, that is, the transferee, had no title as against the adopted son, i.e. defendant 1. The said view was not accepted by the lower appellate Court. The lower appellate Court held in favor of the transferee and decreed the suit. This appeal has been filed against the said decision of the lower appellate Court by defendant 1, i.e. the adopted son.

3. The only contention urged by the learned Advocate for the Appellant in this appeal was that by virtue of the doctrine of 'relation back' his Client, who is the adopted son of Puttappa, became entitled to the suit property, which originally belonged to the family of Irappa and Puttappa, and can claim the same from the Plaintiff, the transferee from the heir of Irappa, even though the transfer in his favor had taken place prior to the date of his adoption. In support of this contention, the learned Advocate mainly relied on a decision of the Privy Council reported in *Anant Bhikkappa v. Shankar Ramchandra*[1] He further contended that the subsequent

[1] AIR 1943 PC 196
decision of the Supreme Court reported in *Srinivas v. Narayan*[2] did not dissent from the view taken by the Privy Council on the point in question.

4. The first question, therefore, which has to be examined is what is the effect of the decision of the Privy Council in AIR 1943 PC 196. What happened in that case was that one Keshav, who was the last surviving coparcener, had died in the year 1917. His widowed mother Gangabai upon the death of Keshav adopted another son to her husband, i.e. the father of Keshav in the year 1930. After the death of Keshav and before the said adoption had taken place the property had vested in Shankar as the heir of Keshav. A suit out of which the appeal before their Lordships of the Judicial Committee arose was instituted by the adopted son Anant against Shankar claiming the suit property. The question which arose for their Lordships' decision was whether or not in the circumstances of this case, Anant was entitled to divest the estate which bad vested in Shankar as the heir of Keshav on Keshav's death. Another question which arose for their Lordships' decision was whether or not the properties which Keshav had inherited from one Narayan and which were not really a part of the joint family properties and which had also devolved on Shankar would be equally divested and the plaintiff would be entitled to the same. Their Lordships came to the conclusion that the plaintiff would be entitled to get both these properties, that is to say, the properties which belonged to the joint-family of which Keshav was the owner as the sole surviving coparcener and the properties which devolved on Keshav as the heir of Narayan. In dealing with the question as to whether or not the properties which had devolved on Keshav as the sole surviving Coparcener of the joint family and which vested in Shankar would be divested in favor of Anant, their Lordships referred with approval to the observations made by their Lordships of the Nagpur High Court in *Bajirao Tukaram v. Ramkrishna*[3], which was to the following effect :-

> "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member."

Their Lordships of the Privy Council then held as follows :-

> "Taking first the simpler case where the adoption has been made by the widow of a pre-de-ceased collateral of the last surviving coparcener, then Lordships find it difficult upon the foregoing principles to discover in the death of the latter before the adoption any ground for denying that the interest of the adoptive father or any part of if passes to the adopted son ..... In the present case, the adopting widow was the mother of the last surviving coparcener. Her power to adopt could not have been exercised in his life-time and if exercised after his death, cannot, as their Lordships think, be given any less effect than would have attached to an adoption made after his death by the widow of a pre-deceased collateral. It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener."

[2] AIR 1954 SC 379

[3] ILR (1941) Nag 707 : AIR 1942 Nag 19

With regard to the properties inherited by Keshav from Narayan, their Lordships came to the conclusion that if the effect of an adoption by the mother of the last male owner is to take his estate out of the hands of a collateral of his who is more remote than a natural brother would have been and to constitute the adopted person, the next heir of the last male owner, no distinction can, in this respect, be drawn between the property which had Come to the last male owner from his father and any other property which he may have acquired. On this view, their Lordships held that the properties which Kesav had inherited from Narayan would also by virtue of the doctrine of 'relation back' be divested from the hand of Shankar and would devolve upon Anant.

5. This decision of the Privy Council came up for consideration before their Lordships of the Supreme Court in AIR 1954 SC 379. The view taken by their Lordships was that the doctrine that the adoption in the eye of law relates back by legal fiction to the date of the death of the adoptive father applies only when the claim made by the adopted son relates to the estate of his adoptive father. But it hag no application to the case where the inheritance is claimed from collaterals. Their Lordships, after referring with approval to the view taken by the Privy Council in the case reported in AIR 1943 PC 198 so far as it related to tin; properties which devolved on Keshav as the sole surviving coparcener of the joint-family, observed as follows :-

> "Thus far, the scope of the principle of relation back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. The point for determination now is whether this doctrine of relation back can be applied when the claim made by the adopted son relates not to the estate of his adoptive father but of a collateral. The theory on which this doctrine is based is that there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, can apply only to him and not to his collaterals."

In other words, their Lordships dissented from the view taken by their Lordships of the Judicial Committee in the case reported in AIR 1943 PC 196 with regard to the properties which Keshav inherited from Narayan and which on the death of Keshav devolved on Shankar.

6. This being, in my opinion, the true effect of the decisions of the Privy Council reported in AIR 1943 PC 196 and of the Supreme Court in AIR 1954 SC 379, what remains to be seen is whether or not the present question which is now before us is covered by either of the said two decisions.

7. In my opinion, neither in the Privy Council decision nor in the decision of the Supreme Court, to which I have referred, the present question, which we have to consider in this appeal, arose for their Lordships' consideration. As I mentioned before, the present question is whether or not the theory of relation back can be extended even to a case where the heir of the last surviving coparcener had already transferred the property before the adoption and whether the estate in the hands of the transferee is divested by virtue of that theory. This question, though in an indirect

manner, was gone into in other decisions to which I shall presently refer. Before I do so, I shall try to determine the principle on which the decision on this question should rest.

8. It appears that in the case reported in AIR 1943 PC 196, their Lordships of the Privy Council had clearly laid down that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption and for that purpose they referred with approval to a decision of the Madras High Court reported in *Veeranna v. Sayamrna*[4], But their Lordships further observed :

> "in his life-time adoption by the widow of a collateral coparcener would have divested him of part of his interest and the same right to adopt subsisting after his death must, in their Lordships' view, have qualified the interest which would pass by inheritance from him."

In my opinion, the effect of these observations is that if there is an adoption by the widow of a deceased coparcener, then the surviving coparcener, if alive, would be divested of part of his interest. If, however, the said estate has devolved by inheritance on a collateral, then the adoption will have' the effect of divesting that estate in the hands of the said collateral. But the right of the surviving' coparcener to deal with the family property as his own would not be impaired by the mere possibility of adoption. The learned Advocate laid stress on the words, "as his own" and contended before us that this expression shows that Keshav who was the surviving Coparcener had the right to deal with the property as an absolute owner; the necessary effect of the same being that an absolute title would be conferred on his transferee. I am inclined to accept that contention. If therefore, a sole surviving: coparcener has the right, notwithstanding the fact that there is a qualification on his right, as laid down by their Lordships of the Privy Council, to give an absolute estate by way of transfer to his transferee, then I see no reason on principle why the heir of the said coparcener would not also get the same right to transfer and to confer on the transferee full title to the property in question. It is undoubtedly true that both the surviving coparcener and the heir who gets his property or his death are liable to be divested if an adoption, takes place, the coparcener being divested of half of his interest and the heir being divested of the whole interest therein. But that fact does not debar either the coparcener, or his heir, who has got the property on inheritance, from transferring the property and if such a transfer is made, the transferee gets full title to the property. In other words, the doctrine of relation back will not extend to a case where a transfer has already been made either by the sole surviving coparcener or by his heir.

9. This view finds clear support in the observations of Chief Justice Chagla made in the Full Bench decision of the Bombay High Court reported in *Ramchandra v. Balaji*[5], The facts in that case, shortly stated, were as follows :- One Balaji was

[4] ILR 52 Mad 398 : AIR 1929 Mad 296

[5] AIR 1955 Bom 291

separate from his brother Ramachandra. The said Balaji predeceased Ramachandra. Thereafter Ramachandra died and his widow Tarabai also died Ram a chandra had a sort, and the said son had predeceased his father. On Ramachandra's death his property, therefore, devolved on the son of Balaji by name Dattu. Dattu died in the year 1916 and on Dattu's death the said property devolved of his adopted son Balaji. In 1945 the widow of the predeceased son of Ramchandra

adopted the plaintiff and the question which arose for decision of their Lordships was whether or not the plaintiff was entitled to claim the property of Ramadandra which had devolved in the manner as indicated before from Balaji, that is to say whether the estate of Ramachanara in the hands of Balaji would be divested in favour of the adopted son of the pre-deceased son of Ramachandra. In dealing with that question, Chief Justice Chagla, who delivered the judgment in that case, clearly observed that although it is true that Dattu inherited this property subject to defeasance, the defeasance coming into operation in the event of the potential mother Sitabai adopting a son into the family of Ramachandra, but, it is equally true that subject to this defeasance Dattu had an absolute interest in the property which he inherited. His Lordship further observed that as an absolute owner he could alienate the property and the alienation would be binding upon any son adopted subsequent to the alienation. This observation, covers the question which is now for consideration before us and supports the view which is taken by the as mentioned above.

10. There is another principle involved in this decision of the Full Bench of the Bombay High Court which also lends support to that view. I shall deal with that matter a little later. Before I do that I shall refer to certain other decisions which though not directly, support the view which I have so far expressed.

11. In *Krishnamurthi v. Krishnanmrthi*[6], their Lordships laid down the principle which would govern the question relating to validity of the transfers made prior to the date of the adoption in the following terms :-

> "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. The same is true when the disposition is by will and the adoption is subesquently made by a widow who has been given powers to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself vi propria affect them."

The facts which gave rise to the question which their Lordships of the Judicial Committee in that case bad to decide were as follows :- The surviving owner of the ancestral property, one Ramakrishna Ayyar had made an adoption. On the very date of the adoption, but prior thereto, he executed a will whereby he made certain

[6] AIR 1927 PC 139

dispositions some in favor of the adopted son and others in favor of other relations of Ramakrishna Ayyar. On the same day the natural father of the adopted son executed a deed wherein lie agreed that the adopted son would get only those properties which had been bequeathed to him under the said will and will not contest the other dispositions. The question which arose for their Lordships' consideration was whether or not this agreement was binding on

the adopted son who subsequently challenged the effectiveness of these dispositions. In dealing with this question their Lordships laid down the principle to which I have just now referred. In my opinion, though on the facts of that case the question which is now before us did not directly arise for consideration of their Lordships but their Lordships laid down the principle which would govern the present question, viz., whether or not the adopted son by the theory of relation back can get the properties of his ancestors in the hands of a transferee from a collateral, who had inherited the said properties from the last surviving coparcener. That principle, in my opinion, is 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, no rights of a son who is subsequently adopted can affect the portion which is disposed of. Some dispute has no doubt been raised before us on the question as to whether or not the collateral who had inherited the property from the last surviving coparcener, can be said to have full power over the property' including the power to transfer the property. So far as this question is concerned, I agree with the view taken by Chief Justice Chagla in the Full Bench decision of the Bombay High Court to which I have already referred. The heir from the sole surviving coparcener has full right to transfer the property and the said transfer would be binding upon the adopted son, provided, of Course, the adoption had taken place subsequent to the date of the said transfer. This view, in my opinion, is also in consonance with the view expressed by their Lordships of the Privy Council in AIR 1943 PC 196, viz. that Keshav, the last surviving coparcener, had full power to transfer the property as his own and the theory of relation back would not deter him from making such transfer.

12. In another decision of the Judicial Committee reported in *Pratapsing Shivsing v. Agarsinghjj Raisinghji*[7]. an observation almost to the same effect was also made. Their Lordships in the concluding portion of the judgment observed as follows :-

> "It may be that if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such case totally different considerations would arise."

13. In AIR 1929 Madras 296 : ILR 52 Mad 398 (the case which was referred to by their Lordships of the Judicial Committee in AIR 1943 PC 196), their Lordships held as follows :-

> "....the only case in which it can be said that the adopted son can, on the theory of relation back object to alienations made before his adoption, is confined to the case of alienations by a widow. It is well known that a reversioner may object successfully to widow's alienations except for family necessity while

[7]46 Ind App 97 : AIR 1918 PC 192

> the estate of her husband is in her hands, she possessing a Hindu widow's estate in the same. It is of course well known that since *Vaidya Nathasastri v. Savithri Ammal*[8], an adopted son can set aside alienations by the widow not made for necessity during her lifetime, his cause of action having arisen from the date of adoption. He is thus in a better position than the ordinary reversioner with regard to a widow's alienations and it is perhaps significant that in Sarkar's learned exposition on the law of adoption, to which we

have been referred, in his paragraph on page 416 on the relation back of adoption and alienations made by a widow before adoption, his discussion is entirely confined to the rights and acts of the widow. As Sir Arnold White, C.J., said in *Sinnachami v. Ramaswamy Chettiar*[9], the question of the effect of an alienation by a man holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption does not seem to have been considered in any reported case. That case is of importance because it is a clear authority for the decision that when an estate is divested by subsequent adoption, the adopted son's rights date only from his adoption and therefore he takes the estate subject to alienations by the holder for the time being."

If there is any direct case on the point in question, this, in my opinion, is the one. As I mentioned before, this case was referred to by their Lordships of the Judicial Committee while stating that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption.

14. I now pass on to the other principle mentioned in the judgment of the Bombay High Court reported in AIR 1955 Bombay 291. On this principle also it should be held that the transferee from the heir of the last surviving coparcener is protected as against the claim of an adopted son, adopted after the date of the transfer. Chief Justice Chagla in his judgment in the said case took the view that the doctrine of relation back will not extend to the case of the heirs of the collateral who had succeeded to the last surviving coparcener. From the facts of that case it would appear that Dattu inherited the property of Ramachandra, there being no other coparcener of Ramachandra. After Dattu's death the said interest devolved on his son Balaji. Chief Justice Chagla held that although the adoption of the plaintiff would have divested the property of Ramachandra in the hands of Dattu, it would not so divest the said property in the hands of Balaji who on the death of Dattu became the owner of the said property as the heir of Dattu. His Lordship made the following observation covering this point :- The matter may be looked at in this way. Balaji has succeeded to the estate of his father Dattu and what the plaintiff is really claiming is not the property of Ramchandra but the property of Dattu which Balaji has inherited as his son. If the property had been with Dattu, the result of the plaintiffs adoption would have been that the doctrine of relation back would have come into force and by legal fiction it would have been assumed that the plaintiff was alive at the date when Ramachandra died. Therefore, really, the plaintiff would have displaced Dattu as the preferential heir to his own grandfather. But it is difficult to understand how that principle can apply when we are dealing with property in the hands of Dattu's heir. It cannot be said that 'quae' the estate of Dattu, the plaintiff is an heir preferential to

[8] ILR 41 Mad 75 : AIR 1918 Mad 469 (FB)
[9]22 Mad LJ 85

Balaji, and really what the plaintiff is claiming is to displace Balaji and to contend that lie is the heir of Dattu." Thus, the view taken in the said Full Bench decision of the Bombay High Court was that the doctrine of relation back will stop only with the heir of the last surviving coparcener and will not extend to his heirs. In coming to that conclusion their Lordships interpreted the decision of the Privy Council reported in AIR 1943 PC 196 as holding that Anant's right to claim back the family property could only be allowed as against Shankar. The Privy Council, according to their Lordships, did not extend the said doctrine to the case of the heir of Shankar. In support of that view their Lordships referred to that part of the judgment of the Privy Council wherein

their Lordships observed as follows :-

> "It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener."

According to their Lordships the importance of the words "based merely on inheritance" qualifying the words "from the last surviving coparcener" should not be overlooked. These words showed that it is only the right of the person who had inherited from the last surviving coparcener which would be displaced by the application of this doctrine. The said doctrine would not extend to his heirs. I am in agreement with this view. This view finds support from the observations made in another part of the judgment of their Lordships of the Privy Council in AIR 1943 PC 196 wherein their Lordships stated as follows :-

> "But in his lifetime adoption by the widow of a collateral coparcener would have divested him of part of his interest and the same right to adopt Subsisting after the death must, in their Lordships' view, have qualified the interest which would pass by inheritance from him."

Their Lordships refer only to "the interest which would pass by inheritance from him" (that is, last surviving coparcener), meaning thereby that it is only the heir who obtains the property by inheritance from the last surviving coparcener whose interest would be divested by the application of this doctrine. Their Lordships did not say that the interests of all subsequent heirs would also be subject to this qualification.

15. In the result, therefore, I agree with the view taken by their Lordships of the Bombay High Court in the Full Bench decision AIR 1955 Bombay 291 and I also hold that the doctrine of relation back cannot be extended beyond the case of an heir to the last surviving coparcener.

16. If that is the position, then, in my opinion, it follows that the doctrine of relation back would not apply also to the case of a transferee from the heir of the last surviving coparcener. On principle I find no difference between the position of an heir of the last surviving coparcener and that of a transferee from the heir of the last surviving coparcener. In both cases the property of the heir of the last surviving coparcener devolves on such persons; in one case it devolving by inheritance and in the other case by transfer. The right of the heir of the last surviving coparcener in either case is extinguished and that being so there is no more scope for the application of the doctrine of relation back. This view also find support from the following observations of Chief Justice Chagla made in the said Full Bench decision :-

> "It cannot be suggested that there is any higher equity in favor of a done or a legatee than there is in favor of Dattu's heir."

I, therefore, hold that defendant 1 in the present case is not entitled to defeat the right of the plaintiff on the basis of the doctrine that his adoption relates back to the date of the death of his adoptive father.

17. In the result, therefore, this appeal fails. The decision of the lower appellate Court is

confirmed and this appeal is dismissed with costs.

Kalagate, J.

18. I agree.

Appeal dismissed.