

BOMBAY HIGH COURT

Bhimabai Kom Jivangouda Patil

Vs

Gurunathgouda Khandappagouda

(Blanesburgh and Atkin, J.J. Russell and Wallis, J.J. Dinesh Mulla, J.)

04.11.1932

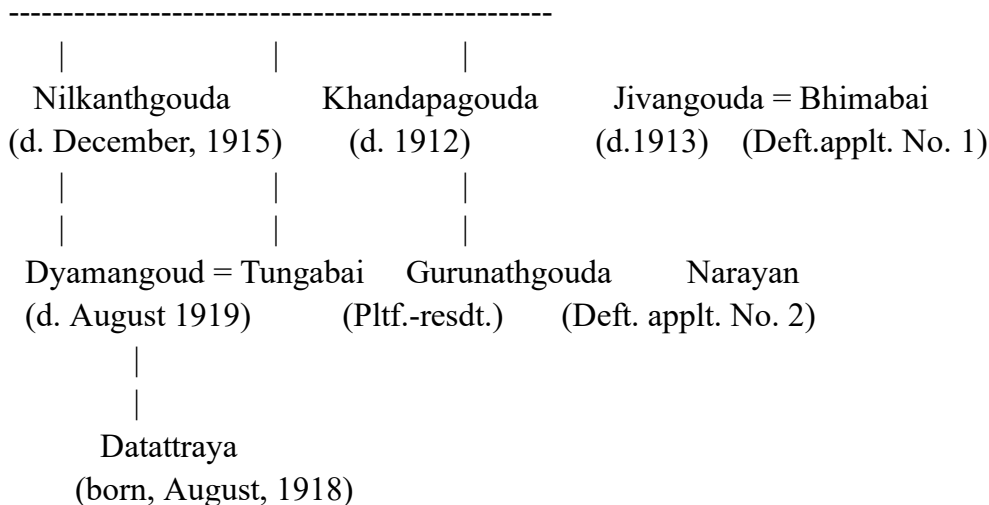
JUDGMENT

Dinshah Mulla, J.

1. This is an appeal from the decree of the High Court of Judicature at Bombay, dated February 28, 1928, which affirmed the decree of the Court of the Joint First Class Subordinate Judge of Dharwar, dated April 8, 1925,

2. The main question involved in the appeal is whether, according to the law prevalent in the Mahratta country of the Bombay Presidency, a Hindu widow, whose husband was undivided at the time of his death, and who has not the express permission of her husband, may adopt a son to him without the consent of the surviving co-parceners. The parties are governed by the Mitakshara law, and on questions on which the Mitakshara is silent, by the law as expounded in the Vyavahara Mayukha of Nilakantha.

3. The following pedigree shows the relationship between the rival claimants :-
Dyamangouda |



(died, February, 1920)

4. The facts material to the appeal are no longer in controversy between the parties. Dyamangouda and his three sons, Nilkanthagouda, Khandapagouda and Jivangouda constituted a joint Hindu family. Dyamangouda died some years ago leaving him surviving his three sons. In 1895, Khandapagouda separated from the family, but the other two brothers continued to be joint. Khandapagouda died in 1912, leaving a widow who adopted the respondent as a son to him on July 6, 1915. Jivangouda died in 1913 leaving a widow, Bhimabai who is appellant No. 1 before this Board, and a daughter Tirkava, but no male issue. On the death of Jivangouda his undivided interest in the joint family property passed to Nilkanthagouda by survivorship.

5. On May 20, 1915, Nilkanthagouda, who had no male issue, took one Dyamangouda, who was then of the age of about twenty years, in adoption. On the same day Nilkanthagouda executed a writing purporting to be a deed of adoption in favour of Dyamangouda, which will be adverted to later. Nilkanthagouda died in December, 1915, and on his death the joint family property passed by survivorship to Dyamangouda. Dyamangouda died in August, 1919, leaving a widow Tungabai and a son Dattatraya, and the joint family property passed to Dattatraya by survivorship. Dattatraya was then about a year old, and Tungabai managed the property on his behalf.

6. On September 17, 1919, Bhimabai adopted appellant No. 2 as a son to her deceased husband Jivangouda. The adoption was not made under any express authority from her husband, nor was it made with the consent of Dattatraya who was then the sole surviving co-parcener. Dattatraya, in fact, was a minor at that date, and incapable of giving his consent. It is the validity of this adoption that is in question in the appeal.

7. Dattatraya died a minor and unmarried on February 6, 1920. Shortly after his death, Tungabai delivered possession of the property to the respondent, purporting to do so under a consent decree in an arbitration proceeding between her and the respondent. Subsequently, on the application of the respondent, the Mamlatdar of Gadag ordered the property to be entered in his name in the record of rights as owner thereof, but the order was set aside by the Deputy Collector of Dharwar. Thereupon the respondent brought the suit out of which the present appeal arises in the Court of the Subordinate Judge of Dharwar against the first and second appellants, and three others who are not parties to the appeal. Therein he claimed a declaration that he was lawfully in possession of the property, and asked for an injunction restraining the defendants from interfering with his possession. The plaintiff alleged that the adoption of appellant No. 2 was not valid, and that the respondent was entitled to the property as the next heir of Dattatraya. The defence, so far as it is material to the appeal, was that appellant No. 2 was validly adopted, and that he was entitled to the property by survivorship. The property is vatan land, and it was agreed that

Tungabai had no interest in it.

8. The Subordinate Judge held, following a full bench ruling of the High Court at Bombay in *Ishwar Dadu v. Gajabai*¹ that the adoption of appellant No. 2 was invalid, and passed a decree for the plaintiff; On appeal, the High Court at Bombay (consisting of Patkar and Baker JJ.) confirmed the judgment of the Subordinate Judge, and passed a decree on February 28, 1928, dismissing the appeal with costs. It is against this decree that the present appeal has been brought to His Majesty in Council.

9. The question as to the validity of an adoption by a widow in a joint family was considered by the High Court at Bombay in *Ramji v. Ghamau*² where it was held that an adoption by the widow of a deceased coparcener, who had not her husband's express authority to adopt, was invalid, if made without the consent of the surviving coparceners. This case was considered by the Board in *Yadao v. Namdeo*³. Four years later, the same question again arose in Bombay in *Ishwar Dadu v. Gajabai*, and it was referred to a full bench. It was argued in that case that *Ramji v. Ghamau* was overruled by the Board in *Yadao v. Namdeo*, and that the Board had in that case approved an earlier decision of the same High Court in *Rakhmabai v. Radhabai*.⁴ The full bench, however, decided that *Ramji v. Ghamau* was still good law, and this was the ruling followed both by the Subordinate Judge and the High Court in the present case.

10. The main question in this appeal is whether *Ramji v. Ghamau* was overruled in *Yadao v. Namdeo* as contended by the appellants, or whether the observations of the Board with reference to that case were obiter dicta as is maintained for the respondent.

11. It will be convenient first to examine *Rakhmabai v. Radhabai* and *Ramji v. Ghamau*, and then consider whether *Ramji v. Ghamau* was overruled in *Yadao v. Namdeo*.

12. In *Rakhmabai v. Radhabai* the suit was brought by the junior widow of a separated Hindu against the senior widow for possession of her equal half share in the estate of her deceased husband. The defendant in her written statement alleged that she had adopted a son to her husband, and contended that the adopted son was entitled to the entire estate. The adoption was made without (as it was found) the permission of her husband, and without the consent of his sapindas. Two questions were raised in the case, namely, (1) whether the adoption by the defendant, having been made without the permission of her husband and without the consent of his sapindas was valid; and (2) if so, whether a senior widow had power to adopt without the concurrence of the junior widow. The trial judge passed a decree for the plaintiff. The defendant appealed, and the appeal was heard by Sir Richard Couch C.J. and Newton and Warden JJ. The learned Judges held that the adoption, though made without the permission of the husband and without the consent of his sapindas, was valid. They also held that a senior widow had power to adopt without the concurrence of the junior widow. The judgment of the Court was delivered by Sir Richard Couch.

13. On the first question, the learned Chief Justice observed that the Mitakshara was silent on the point, and that it was therefore necessary to resort to the Mayukha by which the parties were governed. He then quoted pl. 17 and 18, Section 5, ch. iv, of the Mayukha, which relate to adoption by a widow, and considered the earlier Bombay decisions on the subject and the opinions of Pandits which had been given in those cases, and said (p. 191) :-Upon the review which we have made of the authorities applicable in this part of India, we are of opinion that in the Mahrata country, wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive.

14. The clause printed in italics represented the Madras view which was held in a later case to be inapplicable in Bombay: see *Ramchandra v. Mulji Nanabhai*⁵ Omitting that clause, the rest of the passage quoted above represents the construction put upon the Mayukha by the Court. The case, no doubt, was one of an adoption by a widow in a divided family, but it was not suggested there that the Mayukha draws any distinction between an adoption by a widow in a divided family and an adoption by a widow in a joint family.

15. In *Ramji v. Ghamau*, the case which the appellants contend was overruled by the Board, in *Yadao v. Namdeo*, the widow of a deceased coparcener adopted a son to her husband without his express permission and without the consent of the surviving coparceners. The case was heard by a full bench consisting of Sir Michael Westropp C.J. and Melvill and Kemball JJ. The learned Chief Justice, who delivered the judgment of the Court, said (p. 503) :-Accepting, however, the view which the oases seem to establish, viz., that the widow, whose husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband, (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction of his kindred, we are not (as has been previously said in this Court (2), disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents.

16. The Court held that the decision in *Rakhmabai v. Radhabai* was confined to the case of an adoption by a widow in a divided family, and concluded that a widow, whose husband was undivided at the time of his death, and who has not his express authority to adopt, cannot make a valid adoption to him without the consent of his co-parceners. It is nowhere suggested in the judgment that the construction put upon the Mayukha in *Rakhmabai v. Radhabai* was not correct.

17. Their Lordships will now proceed to consider whether *Ramji v. Ghamau* was disapproved by the Board in *Yadao v. Namdeo*. The family in that case was a joint family consisting of Pundlik, his cousin Namdeo and Namdeo's two sons, Pandurang and Rambhau. Pundlik died childless in January, 1905. In March 1905, his senior widow, Champabai, adopted Pandurang under an authority from him. That adoption was not disputed. In April 1905, Namdeo executed a deed of

adoption in which he stated that he and Pundlik were members of a joint family, and that the adopted boy was "sole heir of half the entire property on the authority of the deed of adoption, and half the property belongs to me." The deed further provided: "My half share in the movable and immovable property may be kept as joint," if the widows of Pundlik approved-Pandurang died a minor and unmarried in 1907, and in 1908 Champabai adopted Yadao as a son to her husband without the consent of Namdeo. It was this adoption that was contested by Namdeo. Pundlik and his family had settled in the Central Provinces, but they were governed by the law applicable to Mahrathas in the Presidency of Bombay.

18. Subsequently, Yadao brought a suit for partition against Namdeo in the Court of the Additional District Judge at Akola, The trial Judge held that the adoption was valid, and made a preliminary decree for partition. Namdeo appealed to the Court of the Judicial Commissioner, Central Provinces, which allowed the appeal and dismissed the suit. The learned Judicial Commissioners held (as would appear from the record of the case printed for the Board), first, that the adoption had been prohibited by Pundlik, secondly, that the deed of adoption did not show that Pandurang had separated from Namdeo and Rambhau, and, lastly, that the family being still joint at the death of Pandurang, and the adoption having been made without the consent of Namdeo, it was invalid according to the ruling in *Ramji v. Ghamau*. From that decree Yadao appealed to His Majesty in Council. Three points were argued before the Board on behalf of Yadao. First, it was argued on the authority of *Rakhmabai v. Radhabai*, that according to the law applicable to the parties, the widow had power to adopt to her husband without his permission and without the consent of his kinsmen, whether the husband was divided or undivided at the time of his death, and that the limitation sought to be imposed on that power—namely, that it could only be exercised when the estate was separate and vested in the widow—rested solely on the judgment in *Ramji v. Ghamau*, and was not supported by any text or commentator. Next, it was argued that the adoption had not been prohibited by Pundlik either expressly or by necessary implication. Lastly, it was contended that if the widow's power depended upon the estate not being joint, it was not joint at the time when the adoption was made, as a separation had already been effected by the deed of adoption. On the other hand, it was argued on behalf of Namdeo that the adoption had been prohibited ; that the deed of adoption neither effected nor evidenced a separation ; and that in any case Pundlik having died joint, if at his death his widow had not power to adopt without his authority, the fact of a subsequent partition could not give her authority, and reliance was placed on *Ramji v. Ghamau*.

19. The Board held that the deed of adoption showed that there was a separation between Pandurang and Namdeo, so that the estate of Pandurang passed to Champabai on his death as his heir. The Board also held that Pundlik had not prohibited the adoption. The estate being vested in her, and there being no prohibition to adopt, she was free to adopt another son to her husband without the consent of Namdeo, and she adopted Yadao. An adoption made in these circumstances was obviously valid, and required no further consideration, But both sides invited the Board to decide whether, even if Pandurang had not separated from Namdeo, Namdeo's

consent was necessary to the adoption, and this question was considered in the latter part of the judgment.

20. The judgment of the Board on this part of the case begins with an examination of *Ramji v. Ghamau*. The Board first stated what the question to be decided in that case was, and after quoting some passages from the judgment and commenting on them, expressed its opinion thus (p. 526):-There does not appear to their Lordships to be any sound reason why in the Mahratta country of the Presidency of Bombay the Hindu law as to the power of a Hindu widow who has not the authority of her deceased husband to adopt a son to him, should depend on the question whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question whether the property which was vested in her when she made the adoption was or was not vested in her as his heir.

21. Their Lordships are of opinion that in the passage quoted above the Board expressed its disapproval of the decision in *Ramji v. Ghamau*.

22. The Board then examined the judgment in *Rakhmabai v. Radhabai*, and said (p. 529):

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That decision was not based upon the fact that the deceased husband was a separated Hindu, nor was it based upon the fact that at the time of the adoption, the widow who made the adoption had vested in her the whole or any part of the property which had belonged to her husband. Their Lordships regard it as equally applicable to an adoption by a Hindu widow of the Mahratta country of the Province of Bombay, whether her husband at the time of his death was joint or separate, and whether his property was or was not vested in her as his heir at the time when she made the adoption, and consider that it is a decision to be applied in this appeal.

23. This, their Lordships think, was a clear approval of the decision in *Rakhmabai v. Radhabai*.

24. In the result the Board held that the adoption of Yadao was valid. This conclusion was based on two grounds : (1) that there was a separation between Pandurang and Namdeo, in which case Champabai could undoubtedly adopt without the consent of Namdeo; and (2) that even if there was no separation, Champabai had the right to adopt Yadao without the consent of Namdeo.

25. Counsel for the respondent contended that the question at issue in *Yadao v. Namdeo* did not turn on the actual decision in *Ramji v. Ghamau*, but on a single passage in the judgment, that "the widow of a Hindu, dying without leaving any male issue, may, if her husband were separated from his family in estate (or, in other words, where she is his heir), adopt without any express authority from him...and without the consent of his relatives." He maintained that the whole question before the Board was whether Champabai, having the estate vested in her, not as her husband's heir, but as heir of her son, could make a valid adoption without the consent of

Namdeo, and that the Board held that she could. Their Lordships are unable to adopt this view. The Court of the Judicial Commissioner had held that Pandurang having died undivided, and his interest having passed by survivorship to Namdeo, the decision in *Ramji v. Ghamau* applied, and that the adoption having been made without the consent of Namdeo, it was invalid. The very first argument on behalf of Yadao, as appears from the report, was that *Ramji v. Ghamau* was wrongly decided, not that any particular proposition in it was incorrect, and *Rakhmabai v. Radhabai* was cited as laying down a rule of law directly contrary to the decision in *Ramji v. Ghamau*. That is what was argued before the Board, and that is the argument that was accepted by the Board.

26. Counsel for the respondent also relied upon some passages in the judgments of the Board in the Ramnad case (*The Collector of Madura v. Mootto Ramalinga Sathupathi*⁶ and in *Sri Raghunadha v. Sri Brozo Kishoro*⁷ in support of his contention that the Board could not have intended to overrule *Ramji v. Ghamau*. In the Ramnad case the Board held that in the case of an undivided family, the father of the husband was competent, by his sole assent, to authorise an adoption by a widow and if the father was not then living, "the consent of all the brothers who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." In *Sri Raghunadha v. Sri Brozo Kishoro* a widow in an undivided family adopted without the consent of the husband's co-parceners and with the consent of a distant and separated sapinda. The Board observed that "there seem to be strong reasons against the conclusion that for such a purpose as that now under consideration, she can, at her will, travel out of the undivided family and obtain the authorization required from a separated and remote kinsman of her husband." The Board also observed that "there are grave social objections to making the succession of property dependent on the caprice of a woman, subject to all the pernicious influence which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property," and that it was the duty of the Courts to keep the power strictly within the limits which the law had assigned to it.

27. Now both these cases were from Madras, and according to the law as stated in the commentaries of that school, a widow, who has not the express authority of her husband, cannot adopt a son to him without the consent of his kinsmen. The commentaries, however, do not specify all the kinsmen. All that they say is that the consent to be obtained must be the consent of "the husband's father, etc." In both the cases the High Court at Madras considered that, in the absence of the husband's father, the consent of any kinsman was sufficient, but the Board intimated its dissent from that view. The Board held that the consent-to be obtained, when the family was undivided, must be the consent not of a Separated kinsman who had no interest in the property, but of his (the husband's) co-parceners to whom his interest had passed on his death by survivorship, and it was in this connection that the observations of the Board quoted above were made. These observations cannot apply to an adoption by a widow in Bombay, *The Mayukha* and the *Kaustubha*, which govern the Mahratta school, regard adoption by a widow as a religious

duty, which does not require the authority either of the husband or of his kinsmen. If no consent is required, no question of injustice or hardship to the kinsmen can arise.

28. For the reasons stated above, their Lordships are of opinion that *Ramji v. Ghamau* was overruled by the Board in *Yadao v. Namdeo*, and that the opposite view taken by the full bench of the High Court at Bombay in *Ishwar Dadu v. Gajabai* is wrong. Their Lordships may add that they agree with their predecessors that *Ramji v. Ghamau* was wrongly decided, and that the correct view of the law is that expressed in *Rakhmabai v. Radhabai*.

29. Their Lordships are, therefore, of opinion that the adoption of appellant No. 2 was not invalid on the ground that it was made by *Bhimabai* without the express permission of her husband and without the consent of the surviving coparcener.

30. It was pressed on their Lordships that *Ramji v. Ghamau* had been accepted and acted upon in the Presidency of Bombay since 1879, and that the decision should not be disturbed. But this is a belated appeal. It should have been made when *Yadao v. Namdeo* was before the Board. *Yadao v. Namdeo* was decided so far back as 1921, and if the High Court at Bombay, after that decision, followed *Ramji v. Ghamau*, it was wrong in so doing.

31. Their Lordships will now turn to the other contentions raised on behalf of the respondent.

32. The first of these rests on the decision of the High Court at Bombay in *Chandra v. Gajarabai*⁸ and other cases following it. The question in that case was whether an adoption by the widow of a coparcener, after the death of the last surviving coparcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not. The reason for the decision was thus stated by Telang J. : "When the inheritance devolved from Nana [the last surviving coparcener] upon his widow, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption." Relying on this decision, it was argued that the last surviving coparcener at the date of the death of *Jivangouda* was *Nilkanthagouda*, and that the adoption of appellant No. 2 having been made after the death of *Nilkanthagouda*, it was invalid, But *Nilkanthagouda* was not the sole surviving coparcener at the date of his death which, according to the decision cited above, would be the material date. Nor did the estate pass to *Dyamangouda* by inheritance as his heir. The coparcenary at the death of *Nilkanthagouda* consisted of himself and *Dyamangouda*, and the estate passed to *Dyamangouda* by survivorship. The adoption of appellant No. 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being *Dattcatraya*. Their Lordships are, therefore, of opinion that the principle of the decision mentioned above does not apply.

33. Another argument for the respondent against the validity of the adoption was that if the

adoption of appellant No. 2 were upheld, the result would be that while a paternal grandmother could not adopt, a grandaunt could adopt. It is true that Nilkanthagouda having died leaving a son, and that son having himself died leaving a son, Nilkanthagouda's widow could not have adopted a son to her husband. But that is because her power to adopt came to an end the moment Dyamangouda died leaving a son : [see *Ramkrishna v. Shamrao*⁹ F.B.]. It was not so in the case of Bhimabai. Her power to adopt, when she adopted appellant No. 2, had not come to an end ; it was still subsisting. Their Lordships think that there is no force in this argument.

34. The last argument for the respondent was founded on the deed of adoption executed by Nilkanthagouda in favour of Dyamangouda. The material portion of the document is as follows :-

35. So I have this day taken you in adoption according to our religion. (But the conditions that have been made are mentioned below :-) During my lifetime I alone am to carry on vahivat of my entire movable and immovable property which has been in my possession from before the time of my taking you in adoption. You should live and be taken care of in my home. And after my death you should take my movable and immovable property into your possession and should carry on vahivat thereof as a son born of my loins.'

36. It was argued for the respondent that on a true construction of this document, Dyamangouda did not take any interest in the property on adoptions that the property was given to him by way of gift which, was not to take effect until after the death of Nilkanthagouda, and that all that Dyamangouda was entitled to during Nilkanthagouda's lifetime was maintenance. On this construction of the document, it was contended that Dyamangouda did not enter the family as a coparcener, and that the coparcenary came to an end on the death of Nilkanthagouda. Their Lordships do not think that that is the true meaning of the document. Dyamangouda was an adult at the date of adoption, and all that Nilkanthagouda intended to do by this writing was to exclude Dymangouda from the possession and management of the property in his life-time, and to retain sole control thereof in his own bands.

37. In the result, their Lordships are of opinion that appellant No. 2 was validly adopted by Bhimabai as a son to her husband.

38. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated February 28, 1928, and that of the Subordinate Judge, dated April 8, 1925, should be set aside, and that the suit should be dismissed. The respondent must pay the appellants' costs in the Courts below and before this Board.

Cases Referred.

1(1925) I.L.R. 50 Bom. 468 s.c. 26 Bom. L.R. 782, F.B

2(1879) I.L.R. 6 Bom. 498. F.B

3(1921) L.R. 48 I.A. 513, s.c. 24 Bom L.R. 609

4(1868) 5 B.H.C.R. (A.C.J.) 181
5(1896) I.L.R. 22 Bom. 558, F.B.
6(1868) 12 M.I.A. 397)
7(1876) L.R. 3 I.A. 154
8(1890) I.L.R. 14 Bom. 463
9(1902) I.L.R. 26 Bom. 526. s.c. 4 Bom. L.R. 315