BOMBAY HIGH COURT

Lingappa Rayappa Desai

Vs

Kadappa Bapurao Desai

(N.J. Wadia and Divatia, J.J.)

08.03.1940

JUDGMENT

N.J. Wadia, J.

1. The appellant claimed to be the adopted son of one Rayappa Shankarappa Desai and sued to recover from the defendant possession of the plaint properties with past and future mesne profits. The parties belong to a desai family which owns deshgat and patilki watans in several villages in the Athni Taluka of the Belgaum District and in the Jamkhandi and Kurundwad States. The plaintiff's father Rayappa Desai died in the year 1914. His senior widow Yamunabai adopted the plaintiff on October 15, 1927. Rayappa had a, brother Mallappa who died in the year 1917. In the year 1887 Rayappa applied to the revenue authorities that as he was heavily in debt and much harassed by the proceedings taken by his creditors against both his property and his person, he desired that his name should be removed from the khata and the pali, or right of service, and the name of his younger brother Mallappa Shankarappa, who was joint with him, should be entered. Mallappa consented to this, and after certain inquiries the Collector ordered on June 3, 1887, that Rayappa's application should be granted. The khata of the lands was accordingly transferred to the name of Mallappa, though Rayappa's name continued to stand in the Pali Register till his death in 1914, when the name of his younger brother Mallappa was entered. On Mallappa's death in the year 1917 the name of the defendant Kadappa Bapurao Desai was entered. The genealogy of the family is as follows:-

Havappa Desai ! _____ ! ! ! ! ! Rayappa I Siddappa Tukappa Ramappa Adreshppa | Dajiba Bapurao (by adoption) ! _____ ! ! Shankarappa Kadappa ! ! _____ ! ! ! ! Rayappa II = (1) Yamunabai Mallappa ! ! = (2) Tarabai ! Lingappa (Plaintiff) ! (alleged to have been ! adopted by Yamunabai Bapurao II the senior widow) ! Kadappa (Defendant)

2. The bulk of the properties involved in the suit which are mentioned in Sub-clauses A to R of the schedule are watan properties. The remaining properties mentioned in Sub-clauses S to V of the schedule are not watan properties. It is admitted on both sides that the watan properties are impartible and succession to them is governed by the yule of lineal primogeniture. The plaintiff's contention was that the estate being impartible and governed by the rule of lineal primogeniture, the family must be regarded as a joint family, and the plaintiff, having by adoption become the heir according to the rule of lineal primogeniture, was entitled to possession of the properties and to the right of service.

3. The defendant denied both the factum and the validity of plaintiff's adoption. According to him only the properties mentioned in Clauses A to R of the schedule were watan properties and the other properties were not watan. He admitted that the rule of lineal primogeniture applied to the watan property. His case was that in 1887 Rayappa, being heavily indebted and without issue, had relinquished entirely his rights in the property in favour of his younger brother Mallappa; there was an agreement between Rayappa and Mallappa that if Rayappa got a son of "his body the property should revert to that son, but subject to this condition he relinquished his rights entirely; from 1887 Rayappa had no interest in the property; the khata of the lands was transferred to Mallappa's name; no son was born to Rayappa; neither Rayappa nor his widow Yamunabai could take anybody in adoption, and therefore even if the plaintiffs adoption had taken place, it gave the plaintiff no right to the properties; from the terms of the agreement made between Rayappa and Mallappa it was clear that Rayappa himself had no idea of taking any one in adoption and had impliedly prohibited his widow from making any adoption; further Rayappa and Yamunabai had not been on good terms; Yamunabai had not been living with her husband for some years before his death, had obtained decrees against Rayappa for maintenance and had brought his property to sale in execution of those decrees; Rayappa had married a second wife Tarabai, and Yamunabai had therefore no authority to adopt; Rayappa had died in union with Mallappa; Mallappa died in 1917 prior to the plaintiff's adoption, and the heir to the non-watan property, namely the property in Clauses S to V of the schedule attached to the plaint, was his daughter Sundrabai, and the defendant was the heir to the watan property according to the rule of lineal primogeniture. It was further contended that the plaintiff's adoption was invalid because the parties belong to the Lingayat community and among Lingayats adoption does not confer any spiritual benefit on the person to whom the adoption is made. Yamunabai had therefore no power, nor was she under any necessity to adopt. The adoption was also invalid because it was made from a corrupt motive as Yamunabai was on bad terms with her husband and his brother Mallappa, and there was also ill-feeling between the plaintiff's natural father and the defendant, and the adoption had been made not for the purpose of conferring any spiritual benefit on the deceased Rayappa but only in order to cause harm to the defendant.

4. The learned Judge found that the plaintiff had been validly adopted to Rayappa and that Yamunabai had not been impliedly prohibited from adopting, He held however that the adoption did not confer on the plaintiff the right to divest the watan property which had already vested in the defendant. The plaintiff had contended that all the properties in suit were watan properties. The learned Judge however held, as contended by the defendant, that the houses and sites mentioned in Clause S of the schedule were not watan properties and that on Mallappa's,. death these properties had gone to his daughter Sundrabai from whom defendant had acquired them, and that the plaintiff was not entitled to them. With regard to the properties in Clauses T, U and V of the schedule he held that they were the self-acquisitions of the defendant and the plaintiff could not claim them. On these grounds he dismissed the plaintiff's suit. The plaintiff has come in appeal.

5. The learned Judge has found that the factum of the plaintiff's adoption has been satisfactorily proved. There is the oral evidence of the plaintiff's natural father and the priest who performed the ceremony as regards the formal giving and taking and the performance of the proper ceremonies, and there is also a registered deed with regard to the adoption. The factum of the adoption has not been challenged before us. The legality of the adoption has, however, been challenged on several grounds. It was contended that Yamunabai had been impliedly prohibited by Rayappa from making an adoption; that the adoption of the plaintiff had been made by her from improper motives, and finally that the right of a widow in a joint Hindu family to adopt for the purpose of conferring spiritual benefits on her husband could not be said to exist among Lingayats, the community to which the parties in the suit belong, since Lingayats do not believe in the theory that an adoption confers spiritual benefits on the ancestors of the person adopted. Before proceeding to discuss the main question raised in the appeal, I will dispose of these minor contentions with regard to the legality of the adoption.

6. Yamunabai had admittedly not been expressly prohibited by Rayappa from adopting. The evidence shows that she had not been on good terms with her husband and had obtained and executed maintenance decrees against him, and that he had married a second wife. But these facts are not in themselves sufficient to justify an inference that he had impliedly prohibited Yamunabai from adopting. Nor does the fact that Rayappa's application of 1887 for the change of the khata in Mallappa's name expressly saved the rights of any son that might be born to him but made no such provision as regards a son that might be adapted to him, justify the inference that he did not wish that any adoption should be made to him, or that he had impliedly prohibited such an adoption. In 1887 Rayappa was still a young man and evidently hoped to have a son. This accounts for the provision made at the time that in case a son was born to him Mallappa should retransfer the khata of the lands to that son. It also explains Rayappa's second marriage. Mallappa was also young and might be expected to have a son. There was therefore no reason

why the possibility of a son being adopted to Rayappa should have been expressly considered at. the time. Moreover as the law with regard to adoption was then understood in this Presidency a Hindu widow in a joint family could not adopt without the consent of her husband's coparceners. The idea of prohibiting Yamunabai would not in the circumstances occur to Rayappa, I agree therefore with the conclusion of the learned trial Judge that the evidence in the case does not show that Yamunabai had been impliedly prohibited from adopting.

7. As regards the contention that the Lingayats do not believe in the Brah-minkal theory of the importance of sons for spiritual purposes and do not perform or believe in shraddha ceremonies, and therefore the adoption by a widow in a joint Lingayat family is illegal, there is in the first place no satisfactory evidence before us to show that Lingayats do not believe in the theory that an adoption confers spiritual benefits on the deceased ancestors of the adopted son. The adoption deed itself shows that the spiritual motive was not absent in the case of the plaintiffs adoption. Yamunabai says in the deed:Knowing that without issue there is no deliverance for acquisition of merit in the other world, and for the prosperous continuation of my husband's line, I asked your natural father...to give you in adoption.But even if the contention had been proved the duty which lies on the widow to provide for the continuance of her husband's line for secular purposes at least would still remain. It has been recently held by the Privy Council' in *Somasekhara Royal v. Sugutur Mahadeva Royal*[1] that the ordinary Hindu law is presumed to apply to Lingayats, except in so far as it is shown that they have superseded it by their customs. There is no evidence in the case to show that the ordinary Hindu notions with regard to adoptions do not prevail among Lingayats.

8. It has been contended that the adoption of the plaintiff by Yamunabai was not made from proper motives, that Yamunabai's object in adopting was not so much to provide a son to continue her husband's line, but to cause damage to the defendant. Evidence has been led to show that she was on bad terms with the defendant's father, but this fact alone would, not be sufficient for holding that she had made the adoption from any improper motives. In the application which she made to the revenue authorities in 1915 on the death of her husband she stated that she intended making an adoption in accordance with the permission given to her by her husband during his illness. No question of any improper motive could arise at that time since the possibility of defendant's succeeding to the estate had not then arisen at all, Mallappa being still alive. It has been held by a full bench of this Court in *Ramchandra v. Mulji Nanabha*[2] that in the Bombay Presidency, a widow having the power to adopt, and a religious benefit, being caused to her deceased husband by the adoption, any discussion of her motive in making the adoption is irrelevant; and the same view has been taken by the Patna High Court in *Raja Makund Deb v. Sri Jagannath Jenamoni* [3]There is nothing to show that Yamunabai's object in making the adoption was not the usual one in such cases, namely to provide for her husband's spiritual benefit and to

continue his line, and even if the fact that she was on bad terms with the defendant's father is proved, that would not be sufficient to show that she was not actuated by proper motives in making the adoption. We must therefore hold that the plaintiff was properly adopted.

9. The principal question involved in the appeal is the effect of what happened in 1887 when on the application of Rayappa the khata of the lands was transferred to the name of his joint younger brother Mallappa. It is not disputed that till 1887 Rayappa and Mallappa were members of a joint family. It has been very strenuously contended before us by the learned advocate for the respondent that what Rayappa did in 1887 was to relinquish completely his interest in the joint family property, and that the effect of this relinquishment was that he ceased to be a member of the joint family and that the property became in the hands of Mallappa his separate self-acquired property.

10. In order to decide this question it is necessary to consider in some detail what happened in 1887. Rayappa was admittedly very heavily involved in debt and was being constantly harassed by suits filed against him by his creditors. On February 8, 1887, he made an application to the Collector. In this application (exhibit 1166) he stated that he had incurred debts to the extent off Rs. 32,000 to Rs. 35,000; that the burden of the debts was. partly on his deshgat and patilki inam properties and partly on him personally; that decrees had been passed as regards some of the debts and that the creditors intended to execute them, by getting his inam lands sold. He mentioned that he and his younger brother Mallappa were both joint; that a warrant for his arrest had been issued and he had actually been arrested and had thereby been dishonoured, and. that he was much depressed in mind in consequence. The application then stated as follows:As my brother Mallappa told me that he would make arrangements about all: the rest of the debts and that I should get his name entered as regards all lands, khata of lands and in the Pali Register of patilki, I consented to this and have made this application. You have the power to remove my name standing against khata and pali and to enter the name of Chi. Mallappa Shankarappa Desai. I have been much worried in the clutches of debts and have made arrangements as above.A second application to the same effect was sent two days later on February 10, 1887, to the District Deputy Collector. In this application also he stated that his creditors had obtained decrees and intended getting his patilki inam lands auctioned. He pointed out that in case these lands were auctioned there would be difficulties in rendering patilki service to Government. On receipt of these applications the revenue authorities recorded the statements of both Rayappa and Mallappa on February 19, 1887. Rayappa in his statement (exhibit 118) said, after referring to his debts and to the decrees passed against him, that there was a likelihood of the patilki and deshgat inam lands which had been continued with them from the time of their ancestors being auctioned away. With regard to the arrangement which he proposed he said:Our younger brother Mallappa taking the responsibility of the debts, etc. on his head has agreed to manage. Therefore it is our

say that an order may be passed for entering the name of the said Mallappa to all the lands standing in our name and even in the Patilki Register. Regarding this statement itself as our Rajinama arrangement should be made as stated above.

11. On the same day Mallappa, who was also examined, mentioned (exhibit 115) that his brother Rayappa had contracted debts and was in great difficulties, and that some of the creditors who had obtained decrees were bringing service inam lands to sale, and then said:Therefore I have taken on myself the responsibility of the management regarding all these debts. In accordance with the consent of our elder brother his name which is at present in the Pali Register may be removed therefrom and my name may be entered. We alone are entitled to the 16 annas goudki (right of patilki service)... We two brothers are joint.

While these inquiries were going on Yamunabai, wife of Rayappa, made an application to Government (exhibit 167), objecting to the proposed transfer of the khata to Mallappa's name and pointing out that she and her husband were both young, and that if any children were born to them thereafter their interests would be seriously prejudiced. Upon this, a further statement of Mallappa was ordered to be recorded whether he would be willing to retransfer the khata to the name of Rayappa's son in case a son was born to Rayappa thereafter. Mallappa was questioned about this and the further statement which he made (exhibit 116) on March 1, 1887, was as follows:My elder brother has now no male issue. If hereafter there is any male issue to him and when that boy comes of age I have no objection to get the entry made in his name regarding him alone to be the direct heir. Knowing that day by day my brother is involving himself into greater difficulties on account of debts, this method has been adopted for managing every thing. But there is no intention of depriving in future the direct issue of Rayappa of the right that would go to him.Rayappa was also examined in the matter and he stated (exhibit 1117):If hereafter there is a male issue of my body and when he (the male issue) attains the age of discretion Mallappa should get the lands, etc., entered in the name of that issue only.The Mamlatdar thereupon reported that if Rayappa got a son thereafter Mallappa was willing to get the khata entered in the name of that son after he attained majority; that at present Rayappa was heavily indebted and that the estate had been kept in possession of Mallappa for making arrangements about the debts. The District Deputy Collector in forwarding this report to the Collector stated that there was no objection to taking action as proposed by Rayappa and that no loss would thereby be caused to Yamunabai. The Collector thereupon directed that the khata should be transferred to Mallappa's name. Mallappa's name was accordingly entered in the khata, but in the Pali Register or Register of Service Lands and Cash Allowances maintained under Section 67 of the Bombay Hereditary Offices Act, III of 1874, Rayappa's name continued, till his death in 1914.

12. In spite of the lands having been transferred to Mallappa, the debts were not all paid, off, and

the family continued in an embarrassed condition with the result that in 1906 Mallappa and Rayappa made a joint application to Government (exhibit 130) praying that the management of the estate should be taken over by the Court of Wards. The application stated:The Desgati consists of an undivisible property, held according to the law of primogeniture; that it is held for the present by the younger brother Mallappa Petitioner No. 1 only on condition that he should resign his claims to the khata in the name of a male issue, if he shall have any, of petitioner No. 2; that in case petitioner No. 2 Rayappa dies without male issue the property should continue in the name of its present holder, and that thus they both have an equal interest in the property and hence the petition in the name of the two.In the inquiry on this application the statement of Rayappa alone was recorded. He stated in reply to questions put to him:I have produced the statement of the income of our Desgat. Formerly the khata of the desgat and patilki watan inam lands stood in my name. I got the khata transferred in the name of my full younger brother Mallappa Shankarappa Desai for the settlement (management) of the debts. My desgat has incurred heavy debts. So I say that under the Court of Wards Act the Government should take over possession of all income of desgat and that they should deliver back possession to us after the debts are paid off. We two-I and my younger brother Mallappa-are alone coparceners of an undivided family. The said Mallappa also consents to the aforesaid matter.By a Government Resolution (exhibit 131) of June 5, 1906, Government sanctioned the assumption by the Court of Wards of the Superintendence of the property of Meherban Mallappa Shankreppa and Rayappa Shankreppa Desais of Kokatnur.

13. On Rayappa's death on November 23, 11914, his widow Yamunabai applied to the Collector that her name should be entered in the Pali Register, she being the senior widow of Rayappa. She stated in this application that the estate was an impartible one and was governed by the rule of lineal primogeniture; that the name of her husband's younger brother had been entered only as a trustee in connection with the debts; that she intended to make an adoption to her deceased husband in accordance with the permission given by her husband during his illness, and that till that adoption was made her own name should be entered. In the course of the heirship inquiry which followed the statements of Tarabai, the junior widow of Rayappa, and of Rayappa's brother Mallappa were ordered to be recorded. Mallappa's statement (exhibit 123) was as follows:I and my deceased elder brother have together given over the management of our desgat to the Court of Wards. Therefore in these proceedings statement of the Court of Wards may be taken on my behalf and on behalf of Tarabaisaheb. I consent to any statement that they (the Court of Wards) give. Shrimant Tarabaisaheb is not in a position to come cat. Therefore with her consent I state that the statement of the Court of Wards may be taken on her behalf.Upon this the Deputy Collector made a report that it appeared from the inquiry that Rayappa and Mallappa were joint and sanctioned the entry of the name of Mallappa to the lands and to the pali (right of

service) in place of the deceased Rayappa. The entry in the Pali Register was changed in accordance with this order on October 5, 1915.

14. This evidence shows that Rayappa did not in 1887 relinquish entirely his rights in the patilki and deshgat inams or his right to service, and that all that happened was that in order to prevent the inam lands from being seized by creditors in satisfaction of the decrees which they had obtained, and in order to prevent the dishonour to the family resulting from Rayappa being arrested for debts, the brothers made an arrangement by which the management of the lands was transferred to the younger brother Mallappa during Rayappa's lifetime. The statements made by Mallappa himself, and by Rayappa in the course of the inquiry which followed Yamunabai's application, show clearly that it was not the intention either of Rayappa or of Mallappa that the rights of Rayappa's son, if one was subsequently born to him, should in any way be prejudiced. Mallappa's own statement shows that all that was done was to devise some method of management by which the danger to the estate could be avoided. That the rights of Rayappa's heirs were not relinquished by him, and were not intended to be relinquished, is clear from the express statements made both by Mallappa and by Rayappa, and by the report made by the District Deputy Collector to the Collector stating that no loss would be caused to Yamunabai by reason of this transfer. If there had been any idea that by reason of this arrangement Rayappa's son would be deprived of his rights, it is clear that Government would not have sanctioned the arrangement. But the subsequent conduct of the parties principally concerned, Rayappa and Mallappa, in 1906 and in 1914 shows further that not merely had Rayappa not relinquished the rights of his heirs to succeed to the estate, but that he had not relinquished even his own rights, and that Mallappa himself understood this to be the position and fully acknowledged that Rayappa's rights continued till his death in 1914. On no other theory can one understand the Joint application made by Mallappa and Rayappa to Government asking that the management of the estate should be taken over by the Court of Wards. The application was not merely signed by Rayappa as well as Mallappa, but stated in so many words that both had equal interest in the property and had therefore joined in the petition. That Rayappa was still regarded as having rights in the estate would appear also from the fact that Government recorded his statement only, and not that of Mallappa, on this application, and that Rayappa in that statement consented on behalf of himself and his younger brother Mallappa to the taking over of the management of the estate by the Court of Wards. He expressly stated in this application that he and Mallappa were coparceners of an undivided family and asked that the estate should be delivered back to him and his brother after the debts had been paid off. If he had relinquished the estate in 1887, Mallappa would never have joined him in making this application, nor would he have consented to Rayappa alone being examined in the matter, nor would Government for the purposes of their inquiry have been satisfied with the statement of Rayappa alone. In the Government resolution

by which the taking over of the management by the Court of Wards was sanctioned the property was referred to as the property of Mallappa and Rayappa. It is impossible to regard this resolution, and the application and statements which preceded it, as being mere matters of form1. The inclusion of Rayappa's name in all these shows clearly that he still regarded himself, and was regarded by Mallappa and by Government, as being the holder of the estate.

15. The same conclusion follows from a consideration of what happened on Rayappa's death in 1914. When Yamunabai applied that on her husband's death her own name should be entered to the lands and in the Pali Register, Mallappa did not contend that Rayappa at the time of his death was not in possession of the estate and of the right of service. On the contrary he himself stated that he and Rayappa had jointly handed over the management of the estate to the Court of Wards, and on behalf of himself and of Rayappa's junior widow Tarabai he agreed to abide by any statement that the Court of Wards might make in the matter. As Rayappa at the time had no son, Mallappa's name was entered in the Pali Register.

16. It has been argued for the respondent that after the arrangement of 1887 Mallappa dealt with the property as his own, and in support of this reference has been made to certain mortgage deeds, exhibits 105, 106 and 107, dealing with the suit property which were executed by Mallappa in 1890 and 1893. The first of these documents (exhibit 105) mentions that a part of the consideration for the mortgage, which was a simple one, was a sum of Rs. 1,000 which had been borrowed by Rayappa from the mortgagee. The lands which were given in mortgage are described as standing in Mallappa's khata. The document mentions that the lands mortgaged had already been previously mortgaged to the same mortgagee by Rayappa and were already in the mortgagee's possession. The second document (exhibit 106), which is also a simple mortgage, also refers to the lands mortgaged as stand-'ing in the khata of Mallappa. The third document (exhibit 107) is a possessory mortgage deed with regard to certain lands which are described as standing in the khata of Mallappa. I do not think that there is anything in the execution of these mortgage deeds by Mallappa which would necessarily show that Rayappa had relinquished all rights in the estate. Under the arrangement which had been made between the brothers the khata of the lands was to be transferred to the name of Mallappa with a threefold object; firstly, in order that Rayappa's creditors might not proceed against the inam property of the family in execution of the decrees which they had obtained against him; secondly, in order to prevent Rayappa, who was admittedly of dissolute and spendthrift habits, from further burdening the family estate; and, thirdly, in order that Mallappa by his more efficient management might pay off some of the existing debts. The mortgages effected by Mallappa therefore merely carried out the purpose for which the arrangement of 1887 had been entered into, and it cannot be said that in mortgaging the lands Mallappa was doing something which necessarily implied that Rayappa had given up all his interest in the property. The same remarks would apply to the evidence which has been

adduced to show that in certain execution proceedings which were started by Yamunabai to execute the maintenance decrees which she had obtained against her husband, Mallappa raised objections to the attachment of some of the lands, and the attachment was raised. There is therefore nothing in Mallappa's conduct with regard to these transactions which necessarily supports the view that Rayappa had relinquished all interest in the property. On the other hand, Mallappa's own conduct and statements from 1887 till Rayappa's death in 1914 are not merely inconsistent with Rayappa's having relinquished all interest in the property, but definitely show that Rayappa had retained his rights in the property and that Mallappa had on more than one occasion expressly acknowledged these rights.

17. After the revenue authorities had agreed to transfer the khata to Mallappa's name, Rayappa executed a document called an agreement of maintenance on June 18, 1887 (exhibit 126). The document is peculiar. In this document Rayappa, after reciting the facts with regard to the consent given by him to transfer the khata of the lands to the name of Mallappa, stated that it had been settled that Mallappa should pay him Rs. 500 every year for maintenance and clothing, and that Mallappa had agreed to this arrangement. The document further stated that as the estate was heavily indebted and it would not be possible to pay the amount in cash, Rayappa had in lieu of the cash amount taken possession of lands in certain villages by way of maintenance. The deed went on to say:Under any circumstances I shall not at all demand any thing more from you in addition to this. You should manage all the remaining patilki and desgat and should take steps that the sansthan is freed from the clutches of debts. You are mukhtyar for this purpose. I shall not under any circumstances interfere with the management in any way and I shall not incur fresh debts. The lands mentioned above are with creditors in mortgage. You should redeem these lands within two months from to-day and should hand over possession of the same to us. Until the time I obtain possession of these lands, you should go on paying me every month the amount due at the rate of Rs. 500 as above. After me the aforesaid lands are to be included in the sansthan. These lands are by way of maintenance and so I have no right to dispose of the same in any way.

The fact that Rayappa when transferring the management of the estate to Mallappa provided for his own maintenance out of it also shows that he had not completely relinquished his interest in the property.

18. It has been argued that what Rayappa did amounted to a rajinama with regard to his interest in the lands, and that the effect of the rajinama was to put an end completely to Rayappa's interest in the property. Under Section 74 of the Bombay Land Revenue Code as it stood in 1887, an occupant of land could, by giving written notice to the Mamlatdar, relinquish his occupancy, either absolutely or in favour of ai specified person, provided that such re-linquishment applied to the entire occupancy or to whole survey numbers, or recognized shares of survey numbers;

and the person in whose favour the occupancy was relinquished had to enter into a written agreement to become a registered occupant, and on his doing so his name was to be substituted for that of the previous registered occupant. Under Rule 74 of the rules framed under the Code the notice of relinquishment required by Section 74 had to be in a certain specified form. It does not appear that Rayappa gave a formal rajinama in the manner required by Section 74 of the Bombay Land Revenue Code, nor does it appear that Mallappai passed a kabulayat or agreement as required by that Section. The mere fact that in his statement (exhibit 118) Rayappa said that that statement should be taken as his rajinama is not, in my opinion, sufficient. Nor can it be assumed, merely because the khata of the lands was transferred in the name of Mallappa, that Mallappa had passed a kabulayat or agreement to become the registered occupant as required by Section 74. But even assuming that there was a proper rajinama by Rayappa and a proper kabulayat by Mallappa, the effect of such rajinama and kabulayat would not necessarily be to extinguish completely the rights of Rayappa in the property. In Rachappa v. Ningappa , in which the previous decisions on the effect of a rajinama and kabulayat were reviewed, it was held by this Court that the passing of a rajinama and kabulayat did not necessarily by itself amount to a transfer of the property, and that the effect must in each case depend upon its own facts. In the present] case the facts are such as leave no room for doubt that Rayappa did not relinquish completely his interest in the estate. His subsequent conduct over a long period of years, the conduct of Mallappa to whose name the khata had been transferred, and the action taken by Government, are absolutely irreconcilable with the theory that there was a complete relinquishment of his rights by Rayappa.

19. It has been contended before us that the effect of the relinquishment of the estate by Rayappa in favor of Mallappa in 1887 was to bring about a complete separation between Rayappa and Mallappa, and that Rayappa by relinquishing his rights in the estate went out of the joint family. It is necessary to consider this question in some detail in order to decide what the effect of plaintiff's adoption so far as the property is concerned would be. It is not disputed that the estate is an impartible one governed by the rule of lineal primogeniture. In such an estate the right to claim partition does not exist. It is now well-settled that although in the case of an ancestral impartible estate there is no right to claim partition or maintenance or to restrain alienation oil the estate, these rights being inconsistent with the custom of impartibility and lineal primogeniture, nevertheless the estate is joint family property in all matters not affected by the custom of impartibility: *Baijnatk Prashad Singh v. Tej Bali Singh*[4] *Konammal v. Annadmc*[5] *and Shiba Prasad Singh v. Prayag Kummi Debi*.[6] It is not disputed that up to 1887 Rayappa and Mallappa were joint, and there is ample evidence to show that they continued joint till Rayappa's death in 1914. In the statement made by Mallappa on February 19, 1887; (exhibit 1115), he stated that he and Rayappa were joint. In the joint application made by Mallappa and Rayappa in 1906 to

Government praying that the estate should be taken under the management of the Court of Wards, as well as in the statement of Rayappa recorded in connection with that application, it was stated that the brothers were joint. Again in the statement of Mallappa recorded on April 23, 1915 (exhibit 123), in connection with the heirship inquiry consequent on Rayappa's death, Mallappa stated that he and Rayappa had together handed over the management of the deshgat to the Court of Wards. The order made by the District Deputy Collector in the heirship inquiry (exhibit 124) on October 5, 1915, stated that Mallappa and the deceased Rayappa had been joint. In the written statement filed by the defendant in the present suit it has been admitted in more than one place that the brothers had been joint. In paragraph 3 it is stated that the properties belong to the family of Rayappa Desai and of his joint family brother Mallappa Desai. In paragraph 8 it is stated that:Rayappa at the time of his death had no interest or right in the suit property. Even assuming that his right of ownership had not been lost, as Rayappa and Mallappa were members of a joint family at that time, and as Rayappa died in union Mallappa became full owner of that property, by right of survivorship.

20. Again in paragraph 11 dealing with the question of Yamunabai's right to make an adoption after her husband's death, it is stated:As Rayappa died while he was joint with Mallappa, Yamunabai had no right to make any adoption after his death.

21. The defendant Kadappa had filed suit No. 424 of 1926 against one Krishtappa to recover possession of certain lands alienated to Krishtappa by Rayappa in 1886. In his statement in that suit he said:

Mallappa bin Shankreppa... died in 1917. After his death I inherited the desgat and patilki watan as the heir. Mallappa had inherited it as the heir after the death of his elder brother Rayappa. Rayappa died in 1914. He (i.e. Mallappa) inherited it in 1014.... Rayappa died while he was joint with his brother Mallappa.

22. It is clear, therefore, both on the evidence and on the admissions of the defendant himself, that in spite of what happened in 1887 Rayappa lived and died in union with his brother Mallappa.

23. It still remains to consider the question whether the junior branches of the family had separated. It has now been settled by the decisions of the Privy Council in Baijnath Prashad Singh v. Tej Bali Singh, Konammal v. Awna-dana, Shiba Prasad Singh v. Prayag Kumari Debi, *and Collector of Gorakhpur v. Ram Sundar Mal*[7] that an impartible estate, though in the sole enjoyment of the holder for the time being, and though alienable by him, must be regarded as the joint property of the holder and his family and as passing by survivorship.

24. Oral evidence has been led by the defendant to show that the junior branches of the family had divided so far as the partible property of the family was concerned, that they had separate dealings, had erected houses at their own expense, and that the senior branch did not contribute towards the expenses of marriages and other ceremonies among the junior branches. But something more than separation in food and worship1 and separate dealings as regards the partible property of the family is necessary to prove separation as regards the impartible estate. The only right which the junior members of a family holding an impartible estate, the succession to which is governed by the rule of lineal primogeniture, have is the right of succession by survivorship, and before it can be held that an impartible estate has ceased to be joint family property for the purposes of succession, there must be reliable evidence to prove an intention, express or implied, on the part of the junior members of the family to give up their chances of succession. For the respondent reliance is placed on the decision of the Privy Council in the Telwa case, Thatkurain, *Tara Kumari v. Chaturbhuj Narayan Singh*[8]. In that case the holder of an impartible estate of a joint Hindu family descending by primogeniture made a mokurari grant to his younger brother for maintenance. The grantee built a separate house divided from his brother by a wall, established therein; a tulsi pinda and a thakurbari and lived there separately from his brother. He defrayed the marriage expenses of his daughter subsequent to the grant. It was held on these facts by their Lordships that there had been a complete separation between the brothers and that the impartible estate consequently became separate property in which the widow of the last male holder was entitled to a widow's estate. The decision in this case was considered by their Lordships in Konammal v. Annadana (1927) L.R. 55 I.A. 114: s.c. 30 Bom. L.R. 802(Supra) and it was held that the Telwa case could not be regarded as laying down any general preposition of law. Their Lordships said (p. 125): In the former case [Tara Kumari's] it was held that an impartible estate had become the separate property of one branch of the family by reason of a number of facts showing that the two branches had become separate. This case cannot now, in their Lordships' opinion, be treated as laying down, any proposition of law for the purposes of the present case, as it does not deal with the question whether an impartible estate is to be treated for purposes of succession as joint family property or with the legal consequences that follow if it is.

25. In the later case of Collector of Gorakhpur v. Ram Sundar Mal *(1934) L.R. 61 I.A. 286: s.c. 36 Bom. L.R. 867 (Supra)* there was a dispute with regard to the succession t6 the impartible raj of Majhauli. Indarjit Mal the representative of the junior branch (referred to in the judg-ment as the Dharamner branch) claimed the raj on the death of the holder in the senior branch, in preference to the widow of the last holder. The decision turned on whether there had been separation, between the junior and senior branches. The evidence showed that the junior branch was separate in food and residence from the senior branch, that the Babus of Dharamner never

visited Majhauli and were never invited by the Raja on any occasion; that various other Babus connected with the Majhauli raj family in the same manner as the Babus of Dharamner paid visits to Majhauli and were invited on ceremonial occasions; that monetary assistance was given by the Raja to Bisen Chhattries in general, and to some of the other Babus also, but never to the Babus of Dharamner; that the Raja used to have several Bisen courtiers, but he never allowed any of the Babus of Dharamner to be one of them; that villages of the raj were often given out on lease to other Babus, but never to the Babus of Dharamner; that the Raja would not, allow any Babus of Dharamner to be ever employed in his raj in any capacity; that there was a well-known tradition of old enmity between the Babus of Dharamner and the Majhauli family; that the junior branch had alienated several portions of the village of Dharamner which had been given to them; and that on, the occasion of a marriage in the junior branch that branch had sold some of its properties to defray the expenses and had received no help from the senior branch. In spite of this evidence, which in their Lordships' opinion went far to establish that for many years before the death of Indarjit Mal the condition of jointness in general status between the two branches of the family had been lost, their Lordships agreed with the conclusion arrived at by the High Court that it was " not established that Raja Kaushal Kishor was separate from Indarjit Bahadur in the sense that the latter had lost all right to succession in case the former died without a child and without having disposed of the estate in his lifetime." In commenting upon the contrary conclusion which had been arrived at. on the question of separation by the District Court, their Lordships said (p. 300):-

Now when this suit was before the District Court the case of *Baijnath Prashad Singh v. Tej Bali Singh*[9] had been decided by this Board, but the full implications of the judgment there delivered by Lord Dunedin and later to be stated, were not perhaps fully appreciated.Again, the Telwa case (1915) L.R. 42 I.A. 192: s.c. 17 Bom. L.R. 1012 upon which the learned Judge placed final reliance, while already questioned as a case of general application, had not then been described as it was by this Board in *Konammal v. Annadana (1927) L.R. 55 I.A. 114: s.c. 30 Bom. L.R. 802 (Suupra)*as a case laying down no general proposition of law, for the purpose of that case or, as may now be added, of this case.

26. The rule deducible from the decisions of the Privy Council in Baijnath Prashad Singh v. Tej Bali Singh, Konammal v. Annadma and *Shiba Prasad Singh v. Prayag Kumari Debi*[10] was stated by their Lordships to be that (p. 301):In order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to7 prove an intention, express or implied, on the part of the junior members of the family; to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship.The evidence relied on in the present case to prove the separation of the junior branches is not as strong as that relied on' in *Collectior of Gorakhpur v. Ram Sundar Mal (1932)*

L.R. 61 I.A. 286: s. c 36 Bom. L.R. 867(Supra). I agree therefore with the conclusion arrived at by the learned Judge that there has been no separation, between the branches of Rayappa and the junior branches. Plaintiff therefore by his adoption became a member of the joint family to which the defendant belongs.

27. It is contended for the respondent that Rayappa, as the holder of an impartible estate governed by the rule of lineal primogeniture, had the power to alienate the estate or to relinquish it so as to extinguish completely all rights in the estate on the part of his descendants; that he did so relinquish the estate in 1887; that the effect of that relinquishment was to extinguish completely his own rights in the estate and that of any son adopted to him; and that the estate in the hands of the next holder Mallappa became his separate self-acquired estate to which the plaintiff by virtue of his adoption could acquire no title, In support of the last proposition reliance is placed on the decisions of the Privy Council in Periasami v. Periasami: Ramasami Chetti v. Periasami: *Kosainrama Pillai v. Periasami*[11] and Ulagalum Perumal v. Rani Subbulakshmir

28. The right of the holder of an impartible estate, the succession to which is governed by the rule of lineal primogeniture, to alienate it by will or gift, which was held established by the Privy Council in Rani Sartaj Kuari v. Rani Deoraj Kuari (1888) L.R. 15 I.A. 51, has since been reaffirmed in a large number of cases: *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkata Kumari Mahipati Surya Rao*[12] *(the first Pittapur case) (Baijnath Prashad Singh v. Tej Bali Singh* [13]*Praiap Chandra deo v. Jagadish Chandra Deo*[14] *and Collector of Gorakhpur v. Ram Sundar Mal (1934) L.R. 61 I.A. 286: s.c. 36 Bom. L.R. 867 (Supra)* There can be no doubt therefore that Rayappa had the power to relinquish or alienate the estate. But the facts proved in the present case show clearly that he did not exercise that power in 1887, and that all that he did was to make an arrangement by which during his lifetime the management of the estate was transferred to Mallappa so as to save the estate from being seized by creditors and to prevent it from being further encumbered by Rayappa himself. In spite of this arrangement his name continued to stand in the Pali Register till his death, and he exercised rights of ownership over it e.g. by applying to the Court of Wards for the management being taken over toy it; and the exercise of this right by him was with the full knowledge and consent of Mallappa. There is no similarity between the facts in this case and those in Periasami's case or in Ulagalum Perumal v. Rani Subbulakshmi. In the former case the holder of the impartible raj Muthu Vaduganadha Tewar, conceiving that he was entitled to succeed to the more important zamindari of Shivagunga, had renounced for himself and his offspring all interest in the small and dependent Palaiyam of Padamattur thus manifesting his intention to separate himself and his descendants completely from the Palaiyam. Both the motive for the separation and the manner in which it was effected were such as to leave no room for doubt that there was a complete renunciation of all interest in the smaller estate. In the second case, Ulagalum Ferumal v. Rani

Subbulakshmi, a Hindu zamindar held an impartible estate governed by the Mitakshara. He had a son by his first wife. The first wife was dead and the second wife was pregnant. The zamindar wished to defeat the prospect of succession of his eldest son with whom he was displeased. In exercise of his power of alienation, which was in danger of becoming restricted within a few days by the coming into force of the Madras Impartible Estates Act II of 1902, he settled the whole estate on himself for life with remainder absolutely to the child with whom his second wife was then enceinte, if such child should be born alive and a male. If the child should not be born alive and a male, or, being born alive and a male, should die before the settlor without leaving male issue, the Zamindari was to go to his second wife absolutely. A son was born of the second wife. The eldest son and the second wife died and the Zamindar married a third wife by whom also he had a son. On the Zamindar's death his second son succeeded to the estate. On the second son's death his widow brought a suit to establish her right to succeed to the property as against her husband's younger half-brother. It was held by their Lordships of the Privy Council that the property descended to the second son's widow in accordance with the rules governing succession to separate property, since there was no rule of law to prevent the settlor from giving or the second son from taking the estate as separate self-acquired property. Here again the facts are clearly distinguishable from those before us. The Zamindar who made the settlement was expressly exercising his power of alienation so as to alter the succession and to deprive the eldest son of his rights. The provision made by him, that should the child to be born to him not be a male, or should that child die in his lifetime, the estate was to go absolutely to his second wife, makes it clear that it was his intention to terminate the coparcenery so far as he was concerned. As I have already pointed out, no such intention can be inferred in our case either from what Rayappa and Mallappa did in 1887 or from their subsequent conduct. So far as Rayappa's descendants were concerned he expressly saved the rights of any son that might be born to him, and the provision that in case a son was born to him Mallappa was to hand over the estate to that son, not on that son's birth, but as soon as he attained; majority and became capable of managing the estate, makes it clear that the whole object of the arrangement made by Rayappa and Mallappa was to save the estate from Rayappa's creditors and from being further encumbered by new debts which Rayappa might incur. The idea that there was any alienation outright in favour of Mallappa is clearly negatived by this provision. The decisions therefore in the two cases relied on by the respondent have no application to the facts of this case and it is unnecessary to discuss what the nature of the estate in Mallappa's hands would have been if Rayappa had completely relinquished all his interest in the estate for himself and his descendants.

29. On the view which I have taken of the case the plaintiff was validly adopted to Rayappa, Rayappa had not completely renounced his own interest in the family estate, much less had he relinquished the interest of his heirs. He died in union with his brother Mallappa, and the junior

branches of the family, including the branch of the defendant Kadappa, have not separated. At the time of the plaintiff's adoption in 1927 there was therefore a copar-cenery in existence, and the plaintiff by his adoption became a member of that coparcenery. As the estate is impartible and succession to it is governed by the rule of lineal primogeniture, the plaintiff, as the representative of the senior branch, is entitled, to succeed to all the impartible property of the family and to divest the estate which had already vested in the defendant prior to the plaintiff's adoption: [*Amrendra Mansingh v. Sanatan Singh (1933) L.R. 60 I.A. 242: s.c. 35 Bom. L.R. 859(Supra);* Vijaysingji Chhatrasingji v. Shivsingji Bhimasingji (1935) L.R. 62 I.A. 161: s.c. 37 Bom. L.R. 562(Supra) and B*alu Sakharam v. Lahoo*[15]

30. The plaintiff's suit related not merely to the impartible properties included in Clauses A to R of the schedule attached to the plaint, but also to the properties mentioned in Clauses S, T, U and v. The learned Judge has found that the wadas and houses in Clause S of the schedule are not watan properties. On Mallappa's death his daughter Sundrabai had obtained a declaratory decree from the Court that she was entitled to succeed to this property as not being watan property. The plaintiff has failed to prove that the wadas and houses are watan properties. The findings of the learned Judge, that the properties mentioned in Clauses T, U and V, namely the properties acquired from the income of the deshgat lands, the profits of the money-lending business carried on by the defendant, and the sum of Rs. 3,000 taken by the defendant from the Court of Wards, are the self-acquisitions of the defendant, have not been challenged before us. The plaintiff is therefore entitled to a decree for possession with regard to the impartible properties in the suit, namely those mentioned in Clauses A to R of the schedule.

31. The plaintiff had claimed mesne profits at the rate of Rs. 20,000 a year for six years. The defendant had admitted that the income of the deshgat properties for the last four or five years has been Rs. 9,000 to Rs. 10,000 a year. As the learned Judge has pointed out there is no reliable evidence to show that there had been any demand for possession made by the plaintiff prior to the filing of the suit. Following the ruling in *Sri Raghunadha v. Sri Brozo Rishoro*[16] we do not think that the plaintiff is entitled to mesne profits prior to the suit. We direct that an inquiry should be made under Order XX, Rule 12, of the Code of Civil Procedure, as regards the mesne profits from, the institution of the suit until delivery of possession to the plaintiff or the expiration of three years from the date of the decree, whichever event first occurs.

32. The appeal will therefore be allowed, the decree of the lower Court set aside and the plaintiff's suit decreed with costs both in this Court and in the lower Court. The defendant shall deliver over possession of the properties mentioned in Clauses A to R of the schedule attached to the plaint to the plaintiff. Inquiry under Order XX, Rule 12, of the Code of Civil Procedure, to be made as regards future mesne profits from the institution of the suit until the delivery of

possession to the plaintiff or the expiration of three years from the date oi1 the decree, whichever event first occurs.

33. The plaintiff will be entitled to his costs from the respondent in both the Courts on the amount of his claim excluding the sum of Rs. 1,20,000 for mesne profits and the valuation of the properties in Clauses S, T, U and V of the schedule. The respondent will pay the court-fees to Government in both Courts on the valuation of the watan properties A to R of the schedule and the appellant on the rest of his claim.

Divatia, J.

1. I concur. The principal point in the appeal is whether the property in suit is vested in the defendant so that it could not be divested on the adoption of plaintiff by the widow of Rayappa. The question arises in this form on account of the recent full bench decision of our High Court in *Balu Sakharam v. Lahoo Sambhaji*[17] which lays down, among other things, two propositions:-

(1) Where a coparcenery exists at the date of the adoption, the adopted son becomes a member of the coparcenery, and takes his share in the joint property accordingly. The principle applies although the coparcenery is a zamindari having the peculiar feature of being governed by the rule of lineal primogeniture.

(2) Where the adoption takes place after the termination of the coparcenery by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a predeceased' coparcener has not the effect of reviving the coparcenery, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her.

2. It is common ground that the suit property is impartible watan property governed by the rule of lineal primogeniture and that the plaintiff's adoptive father Rayappa, who died in 1914, and his brother Mallappa constituted a joint Hindu family. The defence to the suit was that Rayappa, who was the eldest male in the branch and as such the owner of the property, voluntarily relinquished all his right, title and interest in the property in 1887 in favour of his brother Mallappa with the condition that it should revert to his natural born son, if any, on his attaining majority. That condition having not occurred, the property vested in Mallappa and on his death without male issue in 1917, it devolved on and. vested in his heir, the defendant who is the son of his first cousin. The plaintiff's adoption in 1927, therefore, could not divest the property from the hands of the defendant who, being separate from the branch of Rayappa's father, took it, on the termination of copar-cenery in that branch, by heirship and not survivorship. Two main questions, therefore, arise on these pleadings: (1) Whether Rayappa absolutely relinquished his interest in the property for himself as well as for his heirs, and (2) whether the coparcenery had

come to an end at the date of the plaintiff's adoption.

3. On the point of relinquishment, the weight of evidence supports the plaintiff's case that Rayappa did not intend to cease as a member of the joint family and to absolutely convey all his rights to Mallappa so as to make it his separate property. As the evidence on this topic has been exhaustively discussed by my learned brother, and I agree with his conclusion, I need only deal with its salient features. The first question which naturally strikes one is why should Rayappa completely surrender his interest in the property and what was the dominating motive in his mind when he applied for the change of khata in Mallappa's name? Rayappa's application, exhibit 166, his statement, exhibit 118, and Mallappa's statement, exhibit 115, make it clear that Rayappa who had heavily encumbered the estate by his mismanagement and was arrested for his debts wished to transfer the management to Mallappa with the double object of saving the estate from further encumbrance and of freeing himself from personal liability for past debts. That there was no intention to vest the property in Mallappa absolutely appears definitely from what followed the application (exhibit 167) of Rayappa's wife, Yamunabai, who complained that her husband, being addicted to debauchery and vices, yielded to the misrepresentations of Mallappa and that the khata should be entered in her name, and not Mallappa's, as a male child may be born to her in future. Thereupon statements of both the brothers were taken. Mallappa in his statement, exhibit 116, admitted that " if hereafter there is any male issue to him (Rayappa) and when that boy came of age, I have nol objection to get (the entry) made in his name regarding him to be alone the direct heir." He, however, made it clear that the change of khata had been made for managing the property as Rayappa was involving himself into greater difficulties and that there was no intention to deprive in future the direct issue of Rayappa of the right that would go to him. Rayappa in his statement, exhibit 117, said that it had been settled between them that if a male issue was born of his body, Mallappa: should get the lands entered in his name on his attaining the age of discretion. The Mam-latdar sanctioned the change of khata and observed that as the two brothers were living together and Mallappa consented to transfer the property in the name of Rayappa's son, if any, there was no objection to the change and no loss could be caused to Rayappa's wife. The khata was, therefore, allowed to be changed in the name of Mallappa who began to manage the estate. But his management did not prove successful in reducing the debts, and nearly twenty years later the brothers applied to the Government to entrust the management of their estate to the Court of Wards. If Mallappa was made the separate owner in 1887, one would have expected that he alone would apply to the Government. But, instead, we find both the brothers joining in the application, and still more, Rayappa's statement clearly shows that he had not intended to give the property in absolute gift to Mallappa. In their application, exhibit 130, both the brothers state that the estate was held for the present by Mallappa on condition that he should resign his claim to the khata if a son was born to Rayappa and that in case the latter

died without male issue it should continue in the name of Mallappa and that therefore both had an equal interest in the property, It was further stated that by entrusting the management to the Court of Wards they would be relieved from their debt. In those proceedings Rayappa made a statement (exhibit 128) on oath that the khata was transferred in Mallappa's name for the settlement of debts and the Court of Wards should deliver back possession of the estate to them after the debts were paid off and that they alone were the coparceners of an undivided family. It is significant that no statement was taken, from Mallappa because Rayappa was considered to be the principal person having interest in the estate. The Government Resolution (exhibit 131) granting the application describes the property as of Mallappa as well as Rayappa. Lastly, the name of Rayappa was not struck off from the revenue record relating to inam lands (exhibit 127) at the time when the mutation was effected in 1887, but it was only after Rayappa's death in 1914 that Mallappa was shown as a khatedar having acquired the lands by heirship.

4. The evidence, therefore, does not establish that Rayappa relinquished his rights absolutely in Mallappa's favour in 1887 and made an alienation of his property so as to make him the sole and separate owner thereof. The arrangement was only this, that Mallappa was to manage the property, during Rayappa's lifetime; in the ordinary course, ifi a son was born to Rayappa, he would take it by right of primogeniture, but if no son was born, Mallappa would undoubtedly take it by survivorship. There was, therefore, neither the necessity nor the intention to surrender all claims of Rayappa and his line and to make Mallappa the separate owner of the property even after the former's death. Nor does the evidence show, as has been contended before us, that there was an absolute gift of the property to Mallappa in 1887 subject to its defeasance on the birth of a son to Rayappa. Moreover, the fact that the property was to be transferred to Rayappa's son only when he attained the age of majority would be against the contention that it was to be divested on the birth of a son. The real intention was the protection of the estate and not the absolute surrender of his rights by Rayappa for himself and his successors. The formal agreement under which Mallappa was to maintain Rayappa during his lifetime had got to be passed as the khata was formally transferred in the former's name and the property had to be protected from being attached and sold by the latter's creditors. In fact Mallappa succeeded in raising the attachment by one creditor of Rayappa on this ground, but that does not affect the real nature of the agreement.

5. The next question is whether the coparcenary was extinct at the date of the plaintiffs adoption so as to fix the property in the defendant without liability of divestment. So far as the two brothers were concerned, there is no doubt that the coparcenary between them was not extinct and they considered themselves as members of a joint Hindu family. In fact it is stated in the defendant's own written statement in the present suit that as Rayappa died while he was joint with Mallappa, Yamunabai had no right to make any adoption after his death. This is a clear

admission as to the existence of a coparcenary, although the point sought to be made was that according to the law as it then stood, the adoption would be bad in law as the family was joint. But not only was the coparcenary between the two brothers not extinct, but the other junior branches of the main family were also joint with the branch represented by Rayappa and his brother. The present defendant has admitted this in his deposition (exhibit 159) in a previous suit filed by him against two members of the other branches. He admitted that Rayappa died while he was joint with Mallappa and that the other members of the main family had merely a right of maintenance. This deposition was given in a suit which terminated in a decision by our High Court in Kadappa v. Krishtappa . It is there observed as follows (p. 602):-Under the custom prevailing in this family, which in our opinion has been established on the evidence, the plaintiff's bhaubands are entitled to maintenance out of these patiliki lands, and must, therefore, be said to have interest of an hereditary nature in this property. Besides, even though this watan property may be impartible and governed by the rule of lineal primogeniture, the family of the plaintiff and the defendants did not for that reason necessarily cease to be a joint Hindu family, and the defendants, therefore, have a right by survivorship to this property even apart from the right of maintenance. This proposition is supported by the recent decision of the Privy Council in the case *of Shiba Prasad Singh v. Prayag Kumari Debi (1932) L.R. 59 I.A. 331: s.c. 34 Bom. L.R. 1567(Supra)*

6. In a recent decision of our High Court in Sahebgouda v. Basangouda (1930) 33 Bom. L, R. 580(Supra) it is held that watan property, such as we have here, stands on the same footing as ancestral impartible estate in a joint Hindu family passing by survivorship from one line to another according to primogeniture. It has been recently held by their Lordships of the Privy Council in a number of cases that such property is governed by the Mitakshara law of joint Hindu family. The first of these decisions is in Baijnath Prashad Singh v. Tej Bali Singh (1921) L.R. 48 I.A. 195: s.c. 23 Bom. L.R. 654(Supra) where it is held that the successor to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara is designated by survivorship, although he will hold the estate according to the custom of impartibility. It was observed that notwithstanding the decision in Rmi Sartaj Kuari v. Rani Deoraj Kurni (1888), L.R. 15 I.A. 51 which held that there was no co-ownership between the person holding the impartible property and members of the family, the other incidents of the joint property, especially the right of survivorship, do remain. This principle was re-affirmed in the subsequent decisions *in Kmammal v. Annadma (1927) L.R. 55 I.A. 114: s.c. 30 Bom. L.R. 802(Supra); Shiba Prasad Singh v. Prayag Kumari Debt (1932) L.R. 59 I.A. 331: s.c. 34 Bom. L.R. 1567(Supra); and Collector of Gorakhput v. Ram Sundar Mal. (1934): L, R. 61 I.A. 286: s.c. 36 Bom. L.R.* 867(supra) In the last mentioned case the effect of the previous decisions has been summarized as follows (p. 303):-The recent decisions of the Board constitute a further landmark in the

judicial exposition of the question at issue here. While the power of the holder of an impartible raj to dispose of the same by deed (*Hani Sartaj Kuari v. Rani Deoraj Kuari*[18] or by will [Sri Raja Rao Venkata Surya Mahipati Rama Krishna, Rao Bahadur v. Court oj Wards and Venkata Kumari Mahipati Surya Rao: the first *Piltapur cas*[e19] *Protap Chandra Deo v. Jagadish Chandra Deo (1927) L.R. 54 I.A. 289: s.c. 29 Bom. L.R. 1136(Suupra)]* remains definitely established, the right of the junior branch to succeed by survivorship to the raj on the extinction of the senior branch, has also been definitely and emphatically reaffirmed. Nor must this right be whittled away. It cannot be regarded as merely visionary.

7. It is, therefore, clear that the whole family continues to be a joint Hindu family with the right of survivorship among its members, and the coparcenary, therefore, cannot be said to have come to an end.

8. But Mr. Coyajee on behalf of the respondent has urged a new argument in this Court which was not advanced in the lower Court. He says that he does not rely on the coparcenary having come to an end, and he, therefore, concedes that the adoption is not invalid on the ground that at the time of the adoption the coparcenary was extinct. But he urges that although the adoption is good, the plaintiff would be entitled to the suit property only if he inherits it as an heir in case the defendant Kadappa died without his own heir. In other words, his argument is that the property having once gone in Kadappa's line before the plaintiff's adoption, it must remain in that line so long as it is not exhausted, and the plaintiff can take it only if and when his line becomes extinct. This argument is urged on the basis that once the property goes into another branch, it becomes the separate property of that branch, and although it would toe governed by the rules of joint Hindu family, it cannot be divested on any adoption made after the property has come into the possession of another branch. According to Mr. Coyajee, that is the effect of the recent decisions of their Lordships of the Privy Council, especially the decisions in *Thakurani Tara Kumari v. Chaiurbhuj Narayan Singh*[20] *Shiba Prasad Singh v. Prayag Kumari Debi (1932) L.R. 59 I.A. 331: s.c. 34 Bom. L.R. 156(supra)7* and other cases. The former decision depended on its own peculiar facts, and it is emphasized in the later decisions that that case cannot be treated as laying down any general proposition. Mr. Coyajee relies upon the observations of their Lordships in the latter case of Shiba Prasad Singh v. Prayag Kumari Debi that the impartible estate, though ancestral, was clothed with the incidents of self-acquisition and separate property. The context shows that this expression applied only to those cases where the general law of the Mitakshara had been superseded by custom with regard to the right of partition, the right to restrain alienations, etc. But their Lordships, however, emphasized that the right of survivorship is not inconsistent with the custom of impartiality and that right, therefore, still remains and to that extent the estate would retain its character of joint family property. Mr. Coyajee has urged that according to the decision in that case the last holder becomes a fresh stock of descent and is the

holder of separate property. But that is not the effect of the decision in that case. If that were so, it is difficult to see why the three widows of Raja Durga Prasad Singh did not succeed to him after his death instead of Shiba Prasad Singh when the custom of exclusion of females in that family was not proved.

9. Mr. Coyajee further relies upon two decisions of the Privy Council in Periasami v. Periasami; Ramasami Chstti v. Periasami: Kosalarama Pillai v. Periasami (1857) L.R. 5 I.A. 61(supra), and Ulagalum Perumal v. Rani Subbulakshmi. The first decision would not apply to the facts found in the present case that Rayappa did not make a complete surrender of his rights in the family property and make it the separate property of Mallappa. The second decision in Ulagalum Perumal v. Rani Subbulakshmi also does not apply for the same reason. There it was proved that the settlor intended that the estate should not continue to be joint family property as he definitely wanted to exclude his eldest son, and it was, therefore, held that the property ceased to be the property of the joint family. Their Lordships specifically observed (p. 724): " They say nothing here as to family arrangement or the power of a grantor to impose conditions." In the present case it is quite clear that Rayappa did not intend that the estate should not continue to be joint family property. On the contrary the fact that his son was to succeed after his death and that Mallappa was to take in absence of the son was only consistent with his treating the family as joint. The facts of the present case are more similar to those in Naraganti Achammagaru v. Venkatachalapati Nayanivaru Venkalachalpati Nayanivaru v. Gopal Nayanivaru: Chellammagaru v. Gopal Nayanivaru (1881) I.L.R. 4 Mad 250 (supra) than to the cases relied upon on behalf of the respondent.

10. In the result, therefore, it must be held that the family constituted a joint Hindu family with the incidence of survivorship and that the coparcenary was not extinct at the date of the plaintiff's adoption. The adoption of the plaintiff, therefore, is not only valid but that it has the result of vesting the suit property in him from the date of the adoption.

11. I agree, therefore, that the appeal should be allowed and the suit decreed as proposed by my learned brother.

Cases Referred.

1(1935) 38 Bom. L.R. 317, P.c
2(1896) I.L.R. 22 Bom. 558, F.B
3(1923) I.L.R. 2 Pat. 469
4(1921) L.R. 48 I.A. 195: s.c. 23 Bom. L.R. 654
5(1927) L.R. 55 I.A. 114: s.c. 30 Bom. L.R. 802
6(1932) L.R. 59 I.A. 331: s.c. 34 Bom. L.R. 1567
7(1934) L.R. 61 I.A. 286: s.c. 36 Bom. L.R. 867
8(1915) L.R. 42 I.A. 192: s.c. 17 Bom. L.R. 1012
9(1921) L.R. 48 I.A. 195: s. c 23 Bom. L.R. 654

10(1932) L.R. 59 I.A. 331, 345: s.c. 34 Bom. L.R. 1567
11(1878) L.R. 5 I.A. 61
121899) L, R. 26 I.A. 83: s. C. 1 Bam. L.R. 277
13(1921) L.R. 48 I.A. 195: s.c. 23 Bom. L.R. 654
14(1927) L, R. 54 I.A. 289: s. C. 29 Bom. L.R. 1136
15(1936) 39 Bom. L.R. 382: s. C. [1937] Bom. 508, F.B
16(1876) L.R. 3 I.A. 154
17[1937] Bom. 508, 382: s.c. (1939) 39 Bom. L.R. F.B
18(1888) L.R. 15 I.A. 51)
19(1889) L.R. 26 I.A. 83: s.c. 1 Bom. L.R. 277
20(1915) L.R. 42 I.A. 192: s.c.A. I. R. 17 Bom. L.R. 1012