BOMBAY HIGH COURT

Ramchandra Balaji

Vs

Shankar Apparao

(Lokur, J. Rajadhyaksha and Weston, JJ.)

13.07.1944

JUDGMENT

Lokur, J.

1. This Letters Patent Appeal against the decision of N.J. Wadia J. raises an important question of Hindu law which was regarded in this Province as settled by the full bench ruling in *Balu Sakharam v. Lahoo Sambhaji*[1] and a series of other rulings which followed it.

2. The facts are simple and undisputed. One Ramchandra Devji died in 1900 possessed of the lands in suit and the right to kulkarniki watan service in four villages. He left behind him two sons Apparao alias Gururao and Balaji. Before Apparao's name was entered in the Kulkarniki Pali Register after his father's death, he died issueless in 1904 leaving behind him his widow Bhagubai defendant No. 4. The name of Apparao's brother Balaji was then entered in the Pali Register for the kulkarniki service. Balaji adopted Ramehandra defendant No. 1 in 1919 and in 1920 he passed in his favour a deed of relinquishment in respect of both his immoveable property and the kulkarniki watan rights in the four villages. Ramchandra's name was then substituted for that of Balaji in the Pali Register by the Collector. Under the deed of relinquishment Balaji transferred all the family property to Ramehandra, defendant No. 1, on receiving from him Rs. 1,500 for his maintenance. Balaji died in 1923 and many years after that, on May 25, 1936, Apparao's widow Bhagubai took the plaintiff in adoption and the plaintiff filed this suit in 1937 against defendant No. 1 and his two sons defendants Nos. 2 and 3 asking for a partition and possession of his half share in the family property and for a declaration that he was the owner of the sixteen annas kulkarniki right of service in the said four villages and that he was " the nearer heir than defendant No. 1 for his name being entered in the Pali Register." The defendants contended that the effect of the deed of relinquishment passed by Balaji to defendant No. 1 in 1920 was to bring about a partition between them with the result that the coparcenary came to an end and that the subsequent adoption of the plaintiff by Apparao's widow, though valid, would give the plaintiff no right either to the immoveable property or to the right of service

which had already become the separate property of defendant No. 1 long before the plaintiff's adoption. They also contended that the plaintiff was not entitled to the declaration claimed by him. The trial Court upheld both these contentions and dismissed the suit with costs. In appeal the learned District Judge took a different view and held that the deed of relinquishment did not effect a partition between Balaji and defendant No. 1 and that the coparcenary did not terminate as a result of the execution of that deed. He, therefore, found that defendant No. 1 continued to be the sole surviving member of the joint family and, therefore, not only was the plaintiff's adoption valid, but it entitled him to claim a half share in the property of the family in the hands of defendant No. 1. He also held that the plaintiff was entitled by the rule of primogeniture to have his name entered in the watan register in preference to defendant No. 1 in respect of the kulkarniki service in the four villages. Although the prayer clause in the plaint did not specify to whom the plaintiff claimed to be declared the nearer heir, the learned District Judge thought that he wanted a declaration that he was the nearest heir to the deceased representative watandar Ramchandra Devji, his grandfather. A decree for partition and a declaration to that effect were granted to the plaintiff and the decree was confirmed in second appeal.

3. In upholding the decree of the learned District Judge Wadia J. had to decide whether the deed of relinquishment effected a partition between Balaji and his son, since in view of various rulings of this Court it was fairly conceded by Mr. Madbhavi for the plaintiff-respondent that if as a result of that deed, there was a separation, between Balaji and defendant No. 1, the plaintiff's suit must fail, at least as regards the immoveable property. In Balu Sakharam v. Lahoo Sambhaji a full bench of this Court held that where a Hindu coparcenary had come to an end on the death of the last surviving coparcener and the family property had vested in his heir, a subsequent adoption by the widow of a predeceased coparcener was valid, but it did not revive the coparcenary and did not vest the coparcenary in the adopted son to the exclusion of the heir of the last holder, other than the widow herself. In Bammangouda Shankargouda v. Shankargouda Rangengouda the principle laid down by this ruling was extended to every case in which a coparcenary had come to an end, whether by the death of the last surviving coparcener or by a partition or by a severance of status. In *Hirachand v. Rowji Sojpal*[2] Rangnekar J. considered the whole law on the subject at length and took the same view. That ruling was followed by N.J. Wadia and Wassoodew JJ. in Irappa Lokappa v. Rachayya Madiwalayya , in which the facts were quite similar to those in the present case. One of two undivided brothers died leaving his widow behind him. The other brother had a son, and they made a partition of the family property between themselves. The widow of the predeceased brother then adopted the plaintiff and it was held that the adoption, though valid, did not give the plaintiff any right to the property, since the coparcenary had come to an end on the partition between the surviving brother and his son. It follows from this that if the deed of relinquishment passed by Balaji to defendant No. 1 effected a partition between them, the plaintiff's adoption, though valid, could not confer upon him any

right to the property already vested in defendant No. 1. A contrary view was taken by a full bench of the Madras High Court in *Sankaralingam v. Veluchami*[3] and by the *Nagpur High Court in Bajirao v. Ramkrishna*[4] *This* conflict of views has now been set at rest by the ruling of the Privy Council in *Anant Bhikappa Patil v. Shankar Ramchmdra Patil*[5] It expressly overruled Balu Sakharam v. Lahoo Sambhaji and approved of the decision of the Nagpur High Court in Bajirao v. Ramkrishna. In the Privy Council case one Keshav had succeeded to certain watan property on the death of his father in 1905 and to certain other property on the death of his separated uncle Narayan in 1908. Keshav died issueless in 1917 and under Bombay Act V of 1886 his watan property devolved upon his distant separated cousin Shankar in preference to his mother Gangabai. Then in 1930 Gangabai took the plaintiff Anant in adoption and he sued Shankar to recover the watan property from him. When the case came in appeal before this Court, Rangnekar and N.J. Wadia JJ., following the ruling in Balu Sakharam v. Lahoo Sambhaji, held that the adoption was valid, but the plaintiff could not divest Shankar of the watan property which had already vested in him on the death of Keshav. But the Privy Council held that by his adoption Anant was constituted as the next heir of Keshav and, therefore, the effect of the adoption was to take the watan lands out of the hands of Shankar who was more remote than Anant and pass them to Anant. Their Lordships relied upon the following passage from the judgment in the Nagpur case cited above (p. 718);We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member.

4. Their Lordships also quoted the following passage from Mr. Ameer Ali's judgment in *Pratapsing Shivsing v. Agarsingji Raisingji*[6]*:*Again, it is to foe remembered that an adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect : whenever the adoption may be made there is no hiatus in the continuity of the line. In fact, as West and Buhler point out in their learned treatise on Hindu Law [3rd edition, p. 996, note (a)], the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.

5. This view was approved of by their Lordships and the use of the words "retrospective effect" indicates that the adopted son is by a legal fiction to be regarded as born at his father's death. Mr. Datar, however, points out that this is opposed to the view expressed by their Lordships in *Bamundoss Mookerjea v. Mussamut Tarinee*[7] In that case it was argued before the Judicial Committee that a widow who had received an authority from her husband to adopt should be considered as pregnant at the date of his death and that the son adopted by her should be regarded as a posthumous son, but the Judicial Committee refused to act upon any such analogy

and held that although a son when adopted acquires the full rights of a natural born son, his rights could not relate back to any earlier period. Referring to this case the learned author of Mayne's Hindu Law (tenth edition, p. 277) observes:The rights of the boy as adopted son arise only from the date of the adoption in the sense that he is bound by such acts of the widow as would bind the heirs of the husband after her.But so far as the continuity of the line is concerned, the adoption has a retrospective effect and there is no hiatus in it.

6. In *Basawantappa v. Mallappa*[8] Wassoodew J. also has made similar observations at p. 274. He says:the rights of an adopted son do not relate back to a period earlier than the date of his adoption.

7. This remark was made by him in connection with the validity of the alienations made before the adoption took place. But it has been frequently pointed out by their Lordships of the Privy Council that the adoption of a son by a widow to her deceased husband is deemed to date back to her husband's death. In Jatindra Mohan Tagore v. Ganendra Mohan Tagore, *Ganendra Mohan Tagore v. Jatindra Mohan Tagore*[9] Willes J. delivering the judgment of the Board said (p. 397):Such (adopted) child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him.8. The same view is also expressed in *Amarendra Mansingh v. Sanatan Singh*[10]

9. It follows, therefore, that the adopted son is entitled to recover his adoptive father's share in the family property, subject of course to any lawful alienations that might have taken place prior to his adoption. This exception was recognised by the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*[11] where their Lordships observed (p. 262):

When a disposition is made intra vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of.

10. In the recent case of Anant v. Shankar also their Lordships referred to the case of Veeranna v. Sayamma (1928) I.L.R. 52 Mad. 398 and said that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption.

11. Basing his argument on this well recognized exception, Mr. Datar for the appellant contends that a partition amounts to a mutual alienation of the family properties and it cannot be affected by the subsequent adoption of a son to a predeceased coparcener In support of this contention he relies upon the ruling in Waman v. Ganpat , where it was held that a partition of joint family immoveable property between coparceners of the family operates as a transfer within the

meaning of the term as defined in Section 5 of the Transfer of Property Act, 1882, and if fraudulent, it fell within Section 53 of the Act. This does not mean that a partition is equivalent to an alienation, as contemplated by the exception with which we are concerned. It may be a transfer within the meaning of the term as defined in Section 5 of the Transfer of Property Act, but every transfer cannot be regarded as an alienation which cannot be challenged by a subsequently adopted son. A partition merely effects a change in the mode of enjoyment as between the parties to it, which, till then, was being enjoyed jointly. As observed by Leach C.J. in *Sankaralingam v. Veluchami*[12] it does not mean the extinction of the family. The members of the family are still there and so are the family assets, and, therefore, it cannot be said that a partition amounts to an alienation of the property falling within the exception mentioned above.

12. Hence as far as the adopted son is concerned, his position remains unaffected by any partition between the surviving coparceners and he is entitled to ignore that partition and claim his share. Mr. Datar, however, says that a partition is ordinarily irrevocable and that the ancient texts of Hindu law recognise a claim to re-partition only by a posthumous son or the heir of a disqualified coparcener or an absent coparcener, but there is no specific text giving a similar right to an adopted son coming into the family after the partition. It is obvious that the texts could not make any such provision as such an adoption itself was not then recognised as valid. They would not deal with cases which would not have been then in contemplation, but the principles enunciated in them have to be amplified and extended to newly arising contingencies in accordance with the spirit of Hindu law. The texts have clearly laid down the principle and there is no reason why an adopted son, whose adoption is deemed to date back to the death of his adoptive father, should not be treated on a par with a posthumous son.

13. The principle on which the Privy Council held in Anant v. Shankar that an adoption can divest an estate vested in a collateral by the law of inheritance extends for the same reason to an adoption made after the surviving coparceners have distributed the assets among themselves. On that principle the adopted son acquires all the rights that he would have possessed had he been born at the date of the adoptive father's death, subject to lawful alienations in the interval. If in that interval the other members of the family have partitioned the estate, he can claim a re-partition and recover his proper share. In Balu Sakharam v. Lahoo Sambhaji the coparcenary had come to an end by the death of the sole surviving coparcener and the property had vested in a distant relative before the adoption by the widow of a predeceased coparcener. It was doubtful whether that ruling applied even to a case where though the coparcenary was terminated by a partition among the surviving coparceners, the property had net left the family. In Hirachand v. Rowji Sojpal Rangnekar J. observed (at p. 768):

If, ...on the extinction of a coparcenary by reason of the property devolving by inheritance on the heir of the last surviving coparcener, an adoption made by the widow of a predeceased

coparcener is invalid and cannot affect that property, it is difficult to hold that, on the extinction of a coparcenary by a partition, the widow of a coparcener, who had died long before the partition, can make a valid adoption.

14. In holding the adoption itself invalid Rangnekar J. adhered to the view expressed by him in his dissenting judgment in Balu Sakharam v. Lahoo, but his reasoning was adopted in Irappa Lokappa v. Rachayya Madiwalayya and Bamangouda v. Shankargouda, and it was held that when the coparcenary was extinguished by partition among surviving coparceners, the adoption of a son by a predeceased coparcener, though valid, would not divest property. But now the Privy Council has held that even when the coparcenary has terminated by the death of the last surviving coparcener and the property has left the family, a subsequently adopted son of a deceased coparcener is entitled to get it back from the heir in whom it has already vested.

15. This is a much stronger case than the case of a termination of the coparcenary by a partition which still leaves the property in the family, though distributed among the surviving coparceners. Hence Balu v. Lahoo, which is the basis of the subsequent decisions in Hirachand v. Rowji Sojpal, Irappa Lokappa v. Rachayya Madiwalayya and Bamangouda v. Shankargouda, having been expressly overruled by the Privy Council, the latter also must a fortiori be deemed to have been impliedly overruled.

16. In this view it is not necessary to consider whether the deed of relinquishment passed by Balaji in favour of defendant No. 1 effected a partition between them and put an end to the coparcenary. Even assuming that it did, we hold that the plaintiff's adoption is valid and that he is entitled to claim to have a re-partition of the family property in the hands of defendant No. 1 and to recover possession of his share in it.

17. As regards the declaration claimed by the plaintiff, it is obvious that the plaintiff is not the nearest heir to the watandar whose name was last entered in the Pali Register, viz. Balaji, Balaji got the name of his adopted son defendant No. 1 entered in the Pali Register during his lifetime. It appears that after the death of Ramchandra Devji in 1900 the name of his eldest son Apparao was not entered in the Pali Register as he died within four years only, and Balaji was thereafter recognised as entitled to the right of service. The plaintiff can at the most claim that he is the nearest heir of Ramchandra Devji according to the rule of primogeniture. Section 36 of the Bombay Hereditary Offices Act saya:When any representative watandar dies it shall be the duty of the patel and village accountant to report the fact to the Collector; and the Collector shall, if satisfied of the truth of the report, and subject to the provisions of Section 2 of Bombay Act V of 1886, register the name of the person appearing to be the nearest heir of such watandar as representative watandar in place of the watandar so deceased.

18. In accordance with this section the name of defendant No. 1 has already been entered in the Pali Register as the representative watandar. The plaintiff now wants to have a declaration that he is the nearest heir, but in the plaint he has not stated to whom he is the nearest heir, because he is alive to the fact that he is not the nearest heir to the representative watandar in whose place defendant No. l's name has been entered in the Pali Register.

19. The third proviso to that section says:If any person shall by production of a, decree of a competent Court, satisfy the Collector that he is entitled to have his name registered as the nearest heir of Such deceased watandar in preference to the person whose name the Collector has ordered to be registered, at any time within six years of such order, the Collector shall subject to the foregoing provisoes, cause the entry in the register to be amended accordingly.

20. It is now well settled that the plaintiff can merely ask for a declaration that he is the nearest heir of the deceased representative watandar and not that he is entitled to have his name entered in the watan register *Shankar Babaji v. Dattatraya Bidwaji*[13] and *Hanmant v. Secretary of State*[14] The claim of the plaintiff to be declared to be the owner of the sixteen annas kulkarniki right of service in the four villages is barred under Section 4 of the Revenue Jurisdiction Act, 1876 as held in *Basangouda v. Basalingappa*[15] He has, however, been given a declaration that he is the nearest heir of the represent tative watandar Ramchandra Devji and entitled to have his name entered in the watan register in preference to Ramchandra in respect of the four villages. The latter part of this declaration cannot be granted in view of Section 4 of the Bombay Revenue Jurisdiction Act, 1876. Even as regards the first part, the third proviso to Section 36 of the Bombay Hereditary Offices Act contemplates the declaration of the heirship to the representative watandar on whose death another's name has been entered under that section. But, in the present case, after Ramchandra Devji's death, the name of defendant No. l's father Balaji was entered after 1904 and the plaintiff's adoptive father Apparao does not appear to have ever been recognised as a representative watandar. In these circumstances the plaintiff cannot get a declaration that he is the nearest heir of the last representative watandar who in fact was Balaji. Moreover he has not been able to produce a decree before the Collector within six years after the name of defendant No. 1 was entered in the Pali Register. But if it is open to the Collector to do so, he may in his discretion alter the entry if he thinks it proper to do so and if he is satisfied that the plaintiff is entitled to have his name registered in the Pali Register. There is, however, no doubt that the plaintiff's adoption is valid and it is not disputed that the plaintiff's father Apparao was the eldest son of Ramchandra. If such a declaration be regarded as sufficient to serve the plaintiff's purpose, there is no reason why the plaintiff should not be granted that declaration without mentioning the fact that he is the nearest heir of the representative watandar.

21. We modify the decree under appeal by substituting the following for the declaratory part in it:

22. It is declared that the plaintiff is the validly adopted son of Apparao, the eldest son of Ramchandra Devji.

23. In other respects the decree under appeal is confirmed. The appellants shall pay the costs of the respondents and bear their own.

Weston. J.

24. I agree and have nothing to add.

Rajadhyaksha, J.

25. I agree. But as the main point arising in this appeal is of some importance, I wish to add a few words.

26. Assuming in this case in favour of the defendants that the deed of relinquishment executed by Balaji in favour of his son Ramchandra in the year 1920 did, in fact, bring about a partition between himself and his son, the question arises what is the effect on this partition of the subsequent adoption of the plaintiff by defendant No. 4 Bhagubai in the year 1936. In the year 1919, Balaji and his son Ramchandra were the only two members of the coparcenary, and it is the contention of the defendants-appellants that by reason of this partition, the coparcenary came to an end,, and that the subsequent adoption by Bhagubai, the widow of the deceased coparcener, could not be valid, and even if valid, could not have the effect of enabling the adopted son, the plaintiff, to reopen the partition. The point thus arising was covered by the direct authority of this Court in Irappa v. Rachayya . There was in that case an undivided family consisting of two brothers. One of them died leaving his widow behind him. The other brother, who had a son, partitioned the family property between themselves, and the son took upon himself the obligation of maintaining the widow who had obtained a decree for her maintenance against both of them. The widow thereafter adopted the plaintiff. The plaintiff having sued to recover half share in the family property, it was held that "the adoption though valid did not give the plaintiff any right to the property inasmuch as the coparcenary had come to an end on partition between the surviving coparceners." That case is practically on all fours with the facts of this case, and it was for this reason that when this appeal came up before Mr. Justice Wadia, Mr, Madbhavi on behalf of the plaintiffs-respondents conceded that if, as a result of the deed of relinquishment of 1920, there was separation between Balaji Ramchandra and his son, defendant No. 1, the plaintiff's suit must fail. It has now, however, been contended that since then that ruling cannot be regarded as good law in view of the Privy Council decision in *Anant v. Shankar (1943) 46 Bom. L.R. 1 P.C.(Supra)* The question for consideration, therefore, is whether the decision in Irappa v. Rachayya can be regarded as overruled by necessary implication in view of the Privy Council decision in Anant v. Shankar.

27. Since the Privy Council decided in the case of *Bhimabai v. Gurunathgouda Khandappagouda*[16] that a widow of a deceased coparcener in a joint family had a right to adopt, the question has arisen before this Court as to what exactly the effect of such an adoption is on the devolution of the joint family property. The Privy Council have in the case of *Amarendra Mansingh v. Sanatan Singh*[17] laid down that the power of a Hindu widow to adopt a son. to her deceased husband is not dependent on the question of her husband's estate vesting in her or on the fact of the adopted son divesting the said estate vested in any person other than the adopting widow. At p. 255 of the report Sir George Lowndes observes as follows:their Lordships think, ...that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another co-parcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption.

28. In view of, this ruling, it had to be held that the power to adopt which a widow in a joint family possessed under the ruling in Bhimabai v. Gurunathgouda was independent of the question of vesting or divesting the property, and the true principle of the right of adoption was founded upon the religious side of the Hindu doctrine which enables an adopted son to confer spiritual benefit upon the adoptive father. It was also observed that a widow's power was not exhausted or become extinct until it was shown that the deceased had left a son who was capable of continuing the line either by giving birth to a natural son or by his leaving a widow who could continue the line by means of adoption. On this authority even though a widow was held entitled to adopt, the question still remained as to what effect it had on the divesting of the joint family estate which at the time of the adoption was held by an heir of the sole surviving coparcener and had on his death devolved by succession on his heir. In the case of *Chandra v. Gojarabai*[18] which was decided as early as 1880, this Court has held that such an estate could not be divested, and the question arose in the full bench case of *Balu Sakharam v. Lahoo*[19] as to whether the authority of Chandra v. Gojarabai was shaken by the decision in Amarendra's case. It was held by a majority that although the adoption was valid it did not have the effect of divesting the estate which had gone to an heir of the sole surviving coparcener on his death and that Chandra v. Gojarabai was still good law. Mr. Justice Rangnekar was of opinion that the adoption itself was invalid, but expressed the view that if it was valid, it was valid for all purposes and had the effect of divesting such an estate. That, however, was a case where the coparcenary was said to have come to an end by the death of the last surviving coparcener. The applicability of this ruling to a case such as the one that we have to consider now, viz. where the coparcenary is said to have come to an end by a partition of the property amongst the then surviving coparceners, and the effect of a subsequent adoption by a widow of the deceased coparcener on the validity of such a partition arose for consideration in subsequent cases. Mr. justice Rangnekar in *Hirachand v. Rowji Sojpal*[20] considered the real nature of the coparcenary status and the coparcenary property

and the effect thereon of a partition among the coparceners. He was of opinion that the partition of the property brought about a complete destruction of the coparcenary and of the original rights of the coparceners and held that in such an event on the extinction of the coparcenary by partition, the widow of a predeceased coparcener had no right to adopt; and at p. 769 he observed:

But assuming that the principle of Amarendra's case applies to the facts of this case, and that defendant No. 19 had an unlimited right of adoption...it seems to me that, on the principle laid down in *Balu Sakharam v. Lahoo*[21] whatever my own view may be on this part of the judgment in that case, the adoption cannot affect the property in the hands of defendants Nos. 1 to 18.For this conclusion he relied on the analogy of cases where the coparcenary was held to come to an end on the death of the sole surviving coparcener. He referred in this connection to the full bench decision of Balu Sakharam v. Lahoo and observed as follows (p. 768):If, therefore, on the extinction of a coparcenary by reason of the property devolving by inheritance on the heir of the last surviving coparcener, an adoption made by the widow of a predeceased coparcener is invalid and cannot affect that property, it is difficult to hold that, on the extinction of a coparcenary by a partition, the widow of a coparcener, who had died long before the partition, can make a valid adoption. A coparcenary can go on for ever. It can only come to an end either by partition or by the deaths of all the coparceners and on principle I am unable to see what difference there is between the case of the extinction of a coparcenary by reason of the deaths of all the coparceners or the case of the extinction of a coparcenary by partition among themselves qua the divided members inter se.A case almost exactly on all fours with the case which we have to decide arose in *Irappa Lokappa v. Rachayya Madiwdayya*[22] which was decided by Mr. Justice N.J, Wadia and Mr. Justice Wassoodew. That was a case of an undivided Hindu family which consisted of two brothers. One of them died leaving his widow behind him. The other brother, who had a son, partitioned the family property between themselves, and the son took upon himself the obligation of maintaining the widow who had obtained a decree for her maintenance against both of them. The widow thereafter adopted the plaintiff. The plaintiff having sued to recover half a share in the family property, it was held that "the adoption though valid did not give the plaintiff any right to the property inasmuch as the coparcenary had come to an end on partition between the surviving coparceners." After quoting the relevant passage in Balu Sakharam v. Lahoo Mr. Justice N.J. Wadia observed as follows (p. 1302):In principle I am unable to see any distinction between the extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition, so far as the rights of an adopted son adopted after the extinction of the coparcenary are concerned.Mr. Justice N.J. Wadia also referred to an unreported case which was decided by him and Mr. Justice Sen, viz. Shivappa *Jayappa Kumatagi v. Yagappa Shiddappa Kumatagi*[23] where it was held that:where a coparcenary had come to an end whether by the death of the last surviving coparcener or by partition, a son adopted subsequent to such termination of

the coparcenary should not be allowed to reopen the partition or to divest the property already vested in others.

29. In all these decisions, cases of termination of coparcenary by the death of the sole surviving coparcener and by extinction of the coparcenary by partition among the coparceners were placed on exactly the same footing, and on the authority of the full bench in Balu Sakharam v. Lahoo it was held that the adoption by a widow of a predeceased coparcener did not give the adopted son the right to the property. The same principle was extended by Mr. Justice Divatia in Bammangouda Shankargouda v. Shankaragouda Rangmgouda where there was a partition as a result of an unequivocal intention to separate being expressed by the coparceners. He observed (p. 1029):It is contended that although that principle [i.e. principle enunciated in Baloo Sakharam v. Lahoo] which was enunciated in a case where the property went to an heir, has been extended to a case where the coparcenary has terminated by partition, it should not be further extended to a case where it is alleged that the coparcenary had come to an end not by a partition but by the mere expression of an intention to sever status from the family. It is true that full bench case of *Balu Sakharam v. Lahoo (1936) 39 Bom. L.R. 382 F.B.(Supra)* was the case of a sole surviving coparcener dying and his property going to his heir, but in the subsequent case of Irappa Lokappa v. Rachayya Madiwalayya that principle has been applied in a case of a partition, because the real question is not how or in what manner the coparcenary had come to an end but whether it had ceased to exist at the date of adoption. A coparcenary can come to an end in various ways, either by the death of the last surviving coparcener or by a partition or by severance of status. There is, therefore, nothing illogical in extending the principle of the full bench case of Balu Sakharam v. Lahoo to a case where the coparcenary has come to an end by severance of status and not by partition by metes and bounds. It is not therefore an improper extension of the principle of Balu Sakharam v. Lahoo to apply it to a case where the coparcenary has come to an end by severance of status and not by partition by metes and bounds.Now the full bench decision in *Balu Sakharam v. Lahoo and the decision in Chandra v. Gojarabai*[24] have been expressly overruled by the Privy Council in the recent case of *Anant Bhikappa Patil v. Shankar Ramchandra Patil*[25] and as a logical consequence it seems to me that the decision in the case of Irappa v. Rachayya must be held to be impliedly overruled. It is true that their Lordships of the Privy Council were considering a case where the coparcenary was said to have come to an end by the death of the sole surviving coparcener. But they considered the case from the point of view of the nature of the property held by a coparcener in a joint Hindu family. After referring to the case of *Approvier v. Rama Subba Aiyan*[26] they observed (p. 7);the fraction which is at any time employed to describe the quantum of the interest of a male member of the family does not represent his rights while the family is joint, but the share which he would take if a partition were then to be made. His interest is never static but increases by survivorship as others die and lessens as others enter the family by birth or adoption.If the right of a coparcener was always subject to a fluctuation by

births or deaths in the joint family and if the adopted son was invested with the rights of a natural son, "the adoption must take effect as the happening of a contingency to which the rights of the coparcener were always subject." They then formulated1 the question at p. 7 as follows:If then the plaintiff's adoption was; valid, can it be held that it does not take effect upon the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption?The question raised in these terms applied with equal cogency to the extinction of the coparcenary at the date of the adoption not only as a result of the death of the sole surviving coparcener but also of the coparcenary coming to an end as a result of partition of the property among the coparceners. The answer of their Lordships was that it must take effect upon the property which had belonged to the joint family.

30. It was argued by Mr. Datar that on the partition having taken place there was extinction of the coparcenary and that there was no joint family into which a son could be introduced as a coparcener by means of an adoption. But when a sole surviving coparcener dies and the estate vests in his heir, there is no coparcenary as such, and yet it was held by their Lordships of the Privy Council that a widow could not only adopt but the adopted son could divest the property which had vested in his own heir on his death. The Privy Council quoted with approval the observations of the Nagpur High Court in *Bajirao y. Ramkrishna*[27] and the observations of Mr. Justice Ameer Ali in Pratapsing Shivsing v. Agarsingji Raisingji (1918) L.R. 46 I.A. 97 : S.C. 21 Bom. L.R. 496(supra). In the former case it was observe ed that (p. 718):a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member.

31. It seems to me that the case where there is said to be an extinction of the coparcenary by the death of the sole surviving coparcener is a far stronger case than the one where the extinction of coparcenary is alleged as a result of partition among the surviving coparceners. In the former case, no male member of the joint family is living, and the property is vested in a collateral as a result of inheritance. Even in such a case the Privy Council held that the adopted son could divest the estate. In the so-called extinction of the coparcenary by partition, the coparceners or persons claiming through them are still there, and the property, such as has not been validly alienated, is also still with them. On the principles enunciated by the Privy Council, there should be far less difficulty in holding that an adopted son's rights are not affected by partition. It seems to me, therefore, not only on the reasoning adopted by the Privy Council but also by reason of the fact that the full bench case of Balu Sakharam v. Lahoo, on the authority of which the subsequent decisions in Irappa v. Rachayya and Bammanagouda Shankargouda v. Skankargouda Rangangouda were based, has been overruled by the latest Privy Council case of Anant v. Shankar, it must be considered that those decisions are no longer good law.

32. On all other points I agree with the judgment given by my learned brother.

Cases Referred.

1[1937] Bom. 508 : S.C. 39 Bom. L.R. 382
2(1938) 41 Bom. L.R. 760
3[1943] Mad. 309 F.B
4[1941] Nag. 707
5(1943) 46 Bom. L.R. 1 P.C
6(1918) L.R. 46 I.A. 97 : S.C. 21 Bom. L.R. 496 (p. 107)
7(1858) 7 M.I.A 169
8(1938) 41 Bom. L.R. 268
9(1872) 9 Beng. L.R. 377 P.C.
10(1933) L.R. 60 I.A. 242 : S.C. 35 Bom. L.R. 859
11(1927) L.R. 54 I.A. 248 : S.C. 29 Bom. L.R. 969
12[1943] Mad. 309 F.B
13(1915) I.L.R. 40 Bom. : S.C. 17 Bom. L.R
14(1929) 32 Bom. 155
15(1935) 38 L.R. 593
16(1932) L.R. 60 I.A. 25: S.C. 35 Bom. L.R. 200
17(1933) L.R. 60 I.A. 242 : S.C. 35 Bom. L.R. 859
18(1890) I.L.R. 14 Bom. 463
19(1936) 39 Bom. L.R. 382 F.B
20(1938) 41 L.R. 760
21(1936) 39 Bom. L.R. 382 F.B
22(1939) 41 L.R. 1300
23(1938) F.A. No. 247 of 1935
24(1890) I.L.R. 14 Bom. 463
25(1943) 46 Bom. L.R. 1 P.C
26(1866) 11 M.I.A. 75
27[1941] Nag. 707, 718