

BOMBAY HIGH COURT

Bhimaji Krishnarao

Vs.

Hanmantrao Vinayak

First Appeal No. 87 of 1945, in civil Suit No. 2 of 1942

(Chagla, C.J. and Gajendragadkar, J.)

27.06.1949

JUDGMENT

Chagla, C.J.

1. The facts leading up to this first appeal are that one Vinayak Bothe had three sons, Dittatraya, Hanmantrao and Krishnaji. Vinayak and Dittatraya died long before 1923. Kriahnaji died in 1923 leaving Hanmantrao as the sole surviving coparcener of the joint and undivided Hindu family, Krishnaji's widow Rukhminibai adopted the plaintiff on 25th June 1935 and the plaintiff filed this suit for his half share in the joint family properties. The learned Judge gave relief to the plaintiff with regard to some properties, but in the main held that the alienations made by Hanmantrao were binding on him and he could not challenge those alienations and therefore refused to give the plaintiff relief. All the alienations challenged which were made by Hanmantrao were prior to 25th June 1935, and really the only question that has been agitated before us in this first appeal is whether Hanmantrao as the sole surviving coparcener was entitled to alienate joint family properties and whether those alienations are binding on the adopted son.

2. Mr. Shah relies on the principle enunciated by the Privy Council that an adoption relates back to the death of the adoptive father and he particularly relies on a passage appearing in the judgment of Mr. Ameer Ali in *Pratapsing Shivsing v. Agarsigji Raisingi*¹, and the passage appears at p. 107 :

"Again, it is to be 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."

It is to be noted that what was emphasised by the Privy Council when giving retrospective effect to the adoption was that the continuity of the line was not in any way interfered with and there was no hiatus. The Privy Council did not say that an adoption had retrospective effect in all respects and that an adopted son was put in the same position as an aurasa son. This statement of

the law was reiterated in *Anant Bhikippa v. Shanker Ramchandra*², and their Lordships at that page

¹46 IA 97 : (AIR 1918 PC 192)

²46 Bom LR 1 at p. 8 : (AIR 1946 PC 196)

set out the passage in the judgment of Me. Ameer Ali to which I have just referred. The decision in *Anant v. Shanfar*³, was that a title based on inheritance could be displaced if the property had gone out by inheritance from the last surviving coparcener and the widow of a deceased coparcener adopted and the adopted son came into the joint family and as it were revived the joint family. Therefore, what is urged before us is that as the joint family never came to an end and as the adoption had retrospective effect, and it must be considered that the adopted son was in existence in the eye of the law at the death of the adoptive father, therefore the surviving coparcener could not alienate properties to the detriment and prejudice of the adopted son. If the joint family was constituted by Hanmantrao and the adopted son, undoubtedly Hanmantrao would have no power to alienate. The mere fact that when the alienation took place the plaintiff was not adopted would make no difference to the position in law, because the adoption must be given retrospective effect and it must be deemed as if at all material times the joint family consisted of Hanmantrao and the plaintiff. We frankly confess that logically it is very difficult to resist in force of this argument. But we are faced by a decision of the Privy Council which has considered this very point and has come to a contrary conclusion, and that is in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*⁴, At p. 262, their Lordships carefully considered all the decisions bearing on this point and then they considered the matter on principle and came to the conclusion that :

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried, away before the adoption takes place."

Therefore, the test which the Privy Council asks us to apply is whether when the alienations were made Hanmantrao had full power over the property which he was alienating. The answer to that question must be in the affirmative. He was the sole surviving coparcener and he had full right to treat the ancestral property as if it was his own property. The adoption was subsequent to the alienation and therefore that adoption cannot affect the property which was already disposed of by a person who acted as the full owner of the property.

3. The same principle was re-enunciated by the Privy Council in *Anant v. Shanker*⁵, and their Lordships state that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption. Nothing could be clearer than this statement of the law. At the time when Hanmantrao alienated the property there was undoubtedly a possibility of an adoption. There was a possibility of the co-parcenary not being disrupted, but that possibility would not prevent Hanmantrao exercising his right as the sole surviving coparcener and alienating the property, in enumerating this proposition of law, their Lordships referred to a decision of the Madras High Court in *Veeranna v. Sayamma*⁶, and the statement of the law laid down in that case that (p. 398) :

"The last surviving male member of a joint Hindu family is the full owner of all
³(16 Bom LR 1 at p. 8 : AIR 1943 PC 196) ⁵46 Bom LR 1 at p. 7 : (AIR 1943 PC 196)
⁴54 IA 248 : (AIR 2927 PC 139) ⁶62 Mad 398 : AIR 1929 Mad 296

the family properties in spite of an unexercised power of adoption possessed by the widow of a deceased member; and such survivor can alienate all or any of the family properties absolutely (e.g., even by gift) without the son adopted; after the alienation, being able to question the same."

And they further laid down (p. 398) :

"The theory that, on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death does not apply to such as case."

Therefore, in this case the Madras High Court clearly recognized a limitation to the doctrine of relation back as applied to an adoption and that limitation was approved of by the Privy Council in *Anant v. Shanker*⁷,

4. There is a decision of this High Court to which we should also like to refer, and that is the decision in *Ramchandra Balaji v. Shankar*⁸, At p. 131 Lokur, J. states the law in the following terms :

"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."

It is interesting to note that in this case Lokur, J. was at pains to hold that the particular alienation that he was considering was not really an alienation but merely a partition, and he came to the conclusion that a partition was not an alienation in law. It was necessary to consider this, because otherwise Lokur, J. would have had to hold that if the alienation was lawful it would have been binding on the adopted son. Therefore, what we have to consider is whether a particular alienation made of joint family property prior to the deed of adoption is or is not a lawful alienation. It must be lawful, not in relation to the rights of the adopted son, but in must be lawful at the date when the alienation was made, and there can be no doubt that when Hanmantrao made the alienations, there being no adoption, the alienations made by him were lawful. If they were lawful, they cannot be questioned or challenged by the adopted son whose adoption was subsequent to these alienations. Therefore, in our opinion, the learned Judge below was right in coming to the conclusion that the alienations challenged by the plaintiff, and which alienations were made by Hanmantrao prior to his adoption in his capacity as sole surviving coparcener were valid and binding on the plaintiff. [The rest of the judgment is not material for the purposes of reporting-Ed.]

Appeal dismissed.

⁷(46 Bom LR 1 : AIR 1943 PC 196)

⁸47 Bom LR 121 : (AIR 1945 Bom 229 (FB))