BOMBAY HIGH COURT

Narayan

Vs.

Padmanabh

First Appeal No. 200 of 1948, in Special Jurisdiction suit No. 1 of 1946

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

25.11.1949

JUDGMENT

Chagla, C.J.

1. One Vishweshwar who died in 1928 made a will prior thereto dated 17th January 1926. By this will he gave a life estate to his wife, defendant 1, and gave the absolute interest to the plaintiff. Defendant 1 adopted defendant 3 to her husband on 31st December 1945. On 10th December 1944, defendant 1 executed a mortgage in favor of defendant 2 and the plaintiff filed the suit out of which this appeal arises for a declaration that his interest was not bound either by the adoption of defendants by defendant 1, or by the mortgage executed by defendant 1 in favor of defendant 2. The trial Court gave the declaration to the plaintiff which he sought.

2. In this appeal only two contentions have been urged by Mr. Murdeshwar and they relate to the validity of the will and the binding character of the mortgage executed by defendant 1. It is contended by Mr. Murdeshwar that on the adoption of defendant 3 by defendant 1 the doctrine of relation back comes into play and in the eye of the law defendant 3 must be deemed to have been in existence at the death of Viahweshwar and therefore any dispositions made by Vishweshwar by his will are not binding on the adopted son. It is not disputed by Mr. Murdeshwar that any alienations made by Vishweshwar intra vivos would be binding on his adopted son indeed, it is impossible for Mr. Murdeshwar to challenge that proposition because it has now been clearly laid down by the Privy Council in *Anant Bhikappa v. Shankar Ramchandra*[1], where their Lordships stated that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption. As we pointed out in *Bhimaji Krishnarao v. Hanmantrao Vinayak*[2], the doctrine of relation back cannot be accepted in its entirety. It is a doctrine to which certain definite exceptions have bee a engrafted and it is a doctrine with certain definite limitations, and one of the important limitations and exceptions is that the adopted son is bound by alt lawful alienations made by his adoptive father if he was the sole surviving coparcener of a joint family. The question therefore we have to consider is whether there is any difference in principle between an alienation 'intra' vivos and a disposition made by a will.

[1]43 Bom LR 1 at p. 7 : (AIR 1943 PC 196)
[2]62 Bom LR 290 : AIR 1950 Bom 271

3. Now, it is not disputed by Mr. Murdeshwar that Vishweshwar had the right to make a will and to dispose of his property. But what Mr. Murdeshwar says is that the will took effect at the death of Vishweshwar and at the death of Vishweshwar in the eye of the law his adopted son was in existence and therefore the dispositions made by the will cannot affect the rights of the adopted son. There is a clear fallacy underlying this contention, because what we have to consider is the right that the adoptive father had to make the will at the time when be made the will. The alienation is made when the will is executed, the alienation takes effect when the testator dies and the will begins to speak. The mere possibility that an adoption would take place cannot affect the right of the testator which he had to make the will and make such dispositions as he liked of his property. Therefore the point of time at which the question has to be asked as to whether the dispositions made under the will should take effect or not is undoubtedly when the will begins to speak, and the question that has got to be asked is whether the testator bad the right to make the will at the time when he made it, and in this case undoubtedly Vishweshwar had the right to make the will as he was the sale surviving coparcener of the family. Although the point did not directly arise for decision the Privy Council in Krishnamurthi Ayyar T. Krishnamurthi Ayyar, 51 IA 248 : (AIR 1927 PC 139) have expressed a clear opinion on this very question. Their Lordships feel that so distinction could be drawn between an alienation inter vivos and an alienation by a testamentary disposition, and this is what they say (p. 262) :

> "When a disposition is made inter vivos by one who has full power over property under which and portion of that property la 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 at the death of the testator there is no estate left to which the adopted son can lay a legal claim. The property has already been carried away by the disposition made by the testator, which disposition was made at a time when he had the right to make that disposition. Mt. Murdeshwar suggests that in this particular case there is an element which would distinguish this case from the principle laid down by the Privy Council is Krishnamurthi's case, (54 IA 248 : AIR 1927 PC 139); and the distinguishing feature to which Mr. Murdeshwar draws our attention is the fact that a life estate is interposed before the plaintiff can have the property absolutely. The effect of giving a life estate to the widow is to postpone possession being enjoyed by the plaintiff. The title to the property undoubtedly vests in the plaintiff on the death of the testator. He is the remainderman and only, as said, the possession is postponed during the lifetime of the widow. Therefore the disposition made by the testator is in favor of the plaintiff' and the alienation made is absolutely to the plaintiff, the possession being postponed during the lifetime of the widow. Therefore it is difficult to understand again what difference there can be in principle between a disposition which gives property immediately to a particular person and a disposition which postpones possession but vests the property absolutely in another person. The question that has got to be considered in the same question whether there was a lawful alienation in favor of the plaintiff by the testator prior to the adoption, and there can be no doubt that there was such alienation in favor of the plaintiff.

4. This question has been considered by the Nagpur Judicial Commissioner's Court as well as the Nagpur High Court and in two cases we find that there was a disposition by a will and there was

a life estate interposed. The first is rather an early judgment of the Nagpur Judicial Commissioner's Court reported in *Parashram v. Shriram*[3], where a Divisional Bench of that Court consisting of Additional Judicial Commissioners Jackson and Subhedar considered Krishnamurthi's case, (54 IA 248 : AIR 1927 PC 139) and came to the conclusion that a subsequent adoption made by a widow in virtue of a power to adopt given under the will cannot affect the dispositions made under the will, and by that will the testator gave a life estate to his widow and after her to her widowed daughter-in-law absolutely. In a subsequent case reported in *Udhoo v. Bhaskar*[4], the same principle was given effect to. There the testator left his property to his brother's wife for her life and after her to his daughter. There was a subsequent adoption and it was held that the adopted sort would not be entitled to claim the properties which were bequeathed under the will. We may point out that Krishnamurthi's case (64 IA 248 : AIR 1927 PC 139) was considered by the Madras High Court in *Veeranna v. Sayamma*[5], where the High Court emphasises the fact that the last surviving male member of a joint Hindu family can alienate all or any of the family properties absolutely and the subsequently adopted son cannot question these alienations' and they point out that the theory of relation back does not apply to such a case. and their Lordships of the Privy Council in *Anant Bhikappa Patil v. Shankar Ramchandra Patil*[6], have expressly approved of this decision of the Madras High Court having laid down the principle to which we have already referred earlier that the right to deal with the family property as his own by the sole surviving coparcener could not be impaired by the mere possibility of an adoption.

5. Mr. Murdeshwar has drawn our attention to certain oral evidence which goes to show that after Vishweshwar had made the will he expressed a desire that his wife should make an adoption after his death. Apart from the fact that obviously this evidence is interested evidence because she was supporting the claims of the adopted son, even if it were true, in law any desire of Vishweshwar that his widow should adopt, after his death would not in any way affect the testamentary dispositions made by him. It was open to Vishweshwar to revoke the will and thereby put as end to his intended alienation. But so long as the will stood, any intention on his part could not in law affect the dispositions which he had validly and legally made, and therefore when the will began to speak at the death of Vishweshwar, the dispositions made by him took effect notwithstanding his expressed intention that his widow should take a boy in adoption, and the fact that the widow gave effect to that intention and adopted defendant 3 again cannot make any difference in law.

6. In our opinion, therefore, the learned Judge below was right in coming to the conclusion that the plaintiff's rights in the property were not in any way affected by the adoption.

7. The other question urged by Mr. Murdeshwar is with regard to the mortgage executed by defendant 1 in favor of defendant 2. Mr. Murdeshwar concedes that if the plaintiff's rights cannot be affected by the adoption, then the plaintiff is entitled to a declaration with regard to the mortgage. The mortgage cannot affect his right because it is a mortgage by a

[3] AIR 1929 Nag 321 : (26 NLR 88)
[4] ILR (1946) Nag 425 : AIR 1946 Nag 203
[5] 52 Mad 398 : AIR 1929 Mad 296
[6] 46 Bom LR 1 : (AIR 1943 PC 196)

limited owner of property which absolutely belongs to the plaintiff. But Mr. Murdeshwar has drawn our attention to the fact that the learned Judge has given a finding that there was no legal necessity for the widow to effect this mortgage and he also has come to the conclusion that the widow received no consideration for the mortgage. In our opinion, both these findings were entirely unnecessary. The plaintiff is not concerned with what the widow does with her life

interest. He is only concerned with safeguarding his own absolute interest, and if he gats a declaration with regard to his absolute interest, it is entirely irrelevant as to whether the widow executed the mortgage for legal necessity or whether she received any consideration for the same.

8. The result, therefore, is that the appeal fails and must be dismissed with costs.
Appeal dismissed.