BOMBAY HIGH COURT

Ramchandra Shrinivas

Vs.

Ramkrishna Krishnarao

First Appeal No. 299 of 1940

(Gajendragadkar and Vyas, JJ.

08.10.1951

JUDGMENT

Gajendragadkar, J.

1. The principal question which arises for our determination in this appeal at this stage relates to the quantum of the plaintiff's share in the properties in suit. This question has been raised in circumstances and on facts which make it necessary to examine some provisions of the Hindu law of adoption, and it is the consideration of these provisions which has made this question both interesting and important. The facts which give rise to the dispute are not many and most of them are true to the usual pattern of adoption cases.

2. One Shrinivas had two sons, Ramchandra and Krishnaji. Krishnaji died in 1930. After his death Shrinivas and Ramchandra continued to live as members of an undivided Hindu family. In about December 1932 Krishnaji's widow Sundrabai began to think of making an adoption to her deceased husband and it would appear that both Shrinivas and Ramchandra came to know about this intention of Sundrabai. Thereupon Shrinivas and Ramchandra effected a partition between themselves on 9-12-1932. This was followed by a registered deed of partition executed on 16-12-1932. On this day itself Sundrabai adopted Ramkrishna, who is the plaintiff before us. Shrinivas then proceeded to alienate the properties which had fallen to his share by executing two deeds of gift in favour of Ramchandra's sons Annaji and Dattatraya, and a will in favour of Ramchandra's daughter Renukabai. On 13-12-1934, Shrinivas died, and on 10-1-1936, the plaintiff brought the present suit in which he claimed to recover his half share in the properties of the family. To this suit he impleaded his own adoptive mother, defendant 1, and Ramchandra, his two sons and his daughter as defendants 2 to 5 respectively. The plaintiff's case was that the partition effected by Shrinivas and Ramchandra between themselves was intended solely to defeat his claims as an adopted son and that in fact the said partition had taken place not on 9th December but after his adoption on 16-12-1932. According to the plaintiff the family of the parties continued to be joint

on the date of his suit and he wanted his half share in the properties on that footing.

3. The defence naturally was that the adoption itself was invalid having taken place after the partition and that in any case the adopted son was not entitled to claim any share because the coparcenary between Shrinivas and Ramchandra had been terminated by a prior partition between them. The donees under Shrinivas made an additional plea that some of the properties which had been gifted to them and which the plaintiff had put in his suit were the separate properties of Shrinivas and the plaintiff was not entitled to make any claim in regard to them.

4. The learned trial Judge found that the plaintiff's adoption was valid and that the partition on which the defence was substantially based had taken place after the plaintiff's adoption. He, therefore, decreed the plaintiff's claim for a half share in the properties except those which in his opinion were not liable to be partitioned. In regard to the additional defence raised by the donees as to some of the properties in suit on the ground that they were the separate properties of Shrinivas and had been validly gifted to them, the learned Judge partly rejected that ground and held that properties Nos. 14, 15 and 16 in Schedule A and the structures on properties Nos. 1 to 4 and 7 in Schedule B formed part of the estate belonging to the joint family and as such the plaintiff was entitled to his half share in them. This judgment of the trial Court was delivered on 22-7-1940.

5. The defendants challenged this decree by their appeal preferred to this Court and their appeal substantially succeeded. It was held by Divatia, and Macklin, JJ., that the partition pleaded by the defendants had in fact been effected on 9-12-1932, with the result that though the plaintiff's adoption may be valid he was not entitled to challenge the said partition. On this view the plaintiff's claim against Ramchandra, defendant 2, was dismissed. While dismissing the plaintiff's claim against defendant 2, however, this Court held that it was open to the plaintiff to challenge the alienations made by Shrinivas admittedly after the date of his adoption. The argument which was accepted by the learned Judges was that as between Shrinivas and the adopted son the relationship of coparceners must be presumed and on that basis the question may have to be considered whether the alienations made by Shrinivas would bind the plaintiff. This Court, therefore, directed that the plaintiff's suit against defendant 2, in his personal capacity should be dismissed and the case sent back for the determination of his claim as against defendants 3, 4 and 5. This judgment was delivered on 23-3-1943.

6. The plaintiff challenged this judgment by an appeal to the Privy Council and in this appeal the plaintiff succeeded. In fact, before this appeal was heard by the Privy Council the well-known judgment of their Lordships in *Anant Bhikappa v. Shankar Ramchandra*[1], had been already delivered and the appellant had obviously an easy task in winning this appeal. It was conceded by the respondents that in view of the decision of the Privy Council in *Anant Bhikappa v. Shankar Ramchandra*, it was no longer open to them to deny the plaintiff's share in the properties in suit. They, however, argued before the Privy Council that certain other aspects of the matter

may have to be considered before decreeing the plaintiff's claim. It was urged that though the partition between Shrinivas and Ramchandra effected in December 1932 may not be binding on the plaintiff and can be ignored by him, the said partition must nevertheless be deemed to have disrupted the joint family, so that after the said disruption Shrinivas would be entitled to an undivided share of the family property as a tenant-in-common and it would be competent for him to dispose of the said undivided share either by a will or by a deed of gift. Though these aspects of the matter had not been urged in the Courts below, their Lordships felt that it would not be fair to rule them out on that account; in fact, their Lordships observed that in

[1] 46 Bom LR 1 (PC)

the memo of appeal to this Court a ground had been taken that the plaintiff would be entitled to no more than 1/3rd share in the suit properties, and their Lordships thought that the respondents should be given liberty to urge all points in support of this ground. That is why their Lordships of the Privy Council sent the case back to this Court, and while doing so observed that it would be necessary for us to determine whether the joint family was disrupted, and if so, at what date; whether after such disruption Shrinivas was competent to dispose of by will his undivided third share in the joint family property; and if so, whether he effectively did so. The respondents also raised their objection against the findings of the trial Court that the properties covered by items Nos. 14, 15 and 16 in Schedule A and the structures on items Nos. 1 to 4 and 7 in Schedule B were not the self-acquired property of Shrinivas. Their Lordships thought that it would be better to leave the decision of these questions also to this Court after remand. This judgment was delivered on November 14, 1949. In delivering this judgment of remand, their Lordships made it clear that we had to determine to what share in the suit property the plaintiff is entitled on the basis that by his adoption he became entitled to the share of his adoptive father Krishnaji in the coparcenary property. It would thus be clear that the several points mentioned in the judgment of the Privy Council were not argued before them and have not been considered by them at all. The only argument urged before the Privy Council was whether these points should be allowed to be agitated by the respondents, and the Privy Council decided that the respondents were entitled to urge them. But, with very great respect, in dealing with these points the judgment delivered by the Privy Council does not afford any assistance to us for the simple reason that their Lordships of the Privy Council expressly left these points to be determined by this Court. Their Lordships gave effect to their judgment in *Anant Bhikappa v. Shankar Ramchandra* and held that the plaintiff was entitled to the share of his adoptive father and that the property in suit in which he claimed his share must be deemed to be the coparcenary property. It is on this basis that we must proceed to consider the question of the plaintiff's share in these properties.

7. Now, the case for the plaintiff, is that his adoptive family must be deemed to be joint at the date of his adoption and that his share in the properties of this family must be determined on that basis. His contention is that at the date when the suit was commenced the family consisted of two coparceners, himself and his adoptive uncle Ramchandra, and according to him there can be no doubt that he is entitled to a half share in the properties. An alternative argument has been urged

on his behalf before us by Mr. Jahagirdar. He argues that if Ramchandra insists upon giving effect to the partition between himself and Shrinivas, then in law the only effect would be that in December 1932 Ramchandra left the family with the result that on his adoption the plaintiff and Shrinivas constituted the coparcenary; on this view the share of Ramchandra would be reduced to 1/3rd and Shrinivas and the plaintiff would between them be entitled to 2/3rds. If that is so, in the present suit the plaintiff would be entitled to claim the whole of this 2/3rds share by survivorship. The plaintiff has, however, not claimed 2/3rds share in the present suit and Mr. Jahagirdar has frankly conceded that he has put this alternative argument merely as a matter of academic importance and incidentally in support of his claim that he is entitled at least to a half share in the properties as set out in the plaint. On the other hand, Mr. Datar for the donees has contended that though the plaintiff may not be bound by the partition which took place between Shrinivas and Ramchandra, the partition does bind those two parties themselves and the only right which the plaintiff gets on his adoption is to claim the 1/3rd share in the properties of the family to which his adoptive father was entitled. Mr. Datar argues that the partition between Shrinivas and Ramchandra irrevocably caused disruption of jointness between them, that both of them thereafter held their properties as separate owners or at least as tenants-in-common and as such Shrinivas was entitled to alienate his 1/3rd share in the properties during his lifetime and even by a will. On this view the plaintiff would be entitled to no more than a 1/3rd share in the properties in suit.

8. In dealing with this question, it is necessary to remember that in the branch of Hindu law dealing with adoptions and their effect legal fictions abound and their sway is supreme. Some of these fictions are based upon a very liberal interpretation of the texts, while some others claim authority only on grounds of equity, justice and good conscience. But these fictions have for some time past been so consistently and so emphatically laid down by their Lordships of the Privy Council that it is not now open to inquire whether they should be given full effect. Besides, we apprehend that such an inquiry may even be inexpedient. Their Lordships of the Privy Council have considered the relevant provisions of the Hindu law of adoption and have clearly stated what according to them is the effect of the spirit and the letter of these provisions. In dealing with the present question, therefore, it is necessary to find out the effect of the legal fictions which have been and must now be judicially recognised. If these legal fictions give rise to anomalies in the administration of this branch of Hindu law, the only remedy is for legislature to step in and codify the law.

9. Since the decision of the Privy Council in *Amarendra Man Singh v. Sanatan Singh*[2], it must be taken to be settled that

> "The foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the spiritual welfare of the souls of his ancestors by the continuance of the line and the solemnisation of the necessary rites. Accordingly, the validity of the adoption must be determined by spiritual rather than temporal

> considerations, the consequent devolution of property on the adopted son being a mere accessory to it and altogether a secondary consideration."

It must be conceded that this view in part is based upon a literal construction of some of the Sanskrit texts. Now, it would be irrelevant to suggest that this theoretical aspect of the doctrine of adoption plays a very minor part in most of the adoptions that come before the Courts. It may be that judicial experience in these matters has been uniformly to the contrary ; because in most of the cases the parties arrayed against each other run a race not for conferring spiritual benefit, but for obtaining or withholding a share in the properties in dispute. But as I have said in administering the law of adoption Courts must assume that the basis of the adoption is the spiritual benefit conferred upon the adoptive father.

10. The acceptance of this spiritual basis of adoption inevitably leads to the conclusion that Courts should be astute to uphold rather than defeat adoptions; and when adoptions

[2]35 Bom LR 859 (PC)

are thus upheld, they must be made effective. It is this approach that gives rise to the second fiction which has been recognised by the Privy Council and by which it is held that every adoption made by a Hindu widow relates back to the death of the adoptive father; therefore, it can be no valid answer to the claim made by the adopted son that the coparcenary which he seeks to enter by reason of his adoption had already ceased to exist. It is well known that in ordinary course the status of a joint Hindu family including the coparcenary can be determined by means of partition. In other words, if all the coparceners constituting the coparcenary divide the properties of the family, the coparcenary and with it the joint family come to an end. Similarly, it is also well settled that if any coparcenary is represented by a sole surviving coparcener and he dies leaving behind him no heir except his widow, in the ordinary sense the coparcenary comes to an end and the estate which then remains in the hand of the limited owner ultimately goes by succession to the reversioners. In *Anant Bhikappa v. Shankar Ramchandra*[3], their Lordships of the Privy Council were dealing with the extinction of the coparcenary resulting from the death of the sole surviving coparcener. Anant, who was adopted in 1930, purported to enter the coparcenary of which Keshav was the last survivor. He had died in 1917 and the property vesting in him during his lifetime had in fact devolved by succession on Shankar. Anant by his adoption claimed to be the adoptive brother of Keshav and as such he demanded that the properties which Shankar had obtained by succession on Keshav's death should be returned to him. This claim made by the plaintiff was decreed by their Lordships of the Privy Council. In order to appreciate the effect of this decision it would be necessary to refer to the view which this Court had taken on questions of this type which were raised in many cases after the decision in *Amarendra's case*[4], In *Balu Sakharam v. Lahoo*[5], the majority of the Full Bench took the view that (p. 414)

> "......Where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest

property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her."

In coming to this conclusion the majority judgment principally relied upon an earlier decision of this Court in the well-known case of *Chandra v. Gojarabhai*[6], The view thus expressed in the majority judgment was examined by two other Indian High Courts and both of them differed from the Bombay view. In *Bajirao v. Ramkrishna*[7], the Nagpur High Court had to consider the defence raised against the adopted son on the ground that the status of the joint family had been terminated by a prior partition between the surviving coparceners and this defence was sought to be supported principally on the majority view accepted in *Balu Sakharam v. Lahoo.* Gilbert Stone, C.J., and Bose, J., of the Nagpur High Court did not agree with the majority judgment of the Bombay High Court and held that despite the partition effected by the surviving coparceners between themselves prior to the plaintiff's adoption, he would be entitled to his share in the family properties as if the said partition had not taken place because in their opinion the family must be deemed to continue to be joint so far as the adopted son is concerned. Similarly, in *Sankaralingam v. Veluchami*[8], a Eull Bench of the Madras High Court dissented from

[3]46 Bom LR 1 (PC) [5]39 Bom LR 382 (FB) [7] ILR (1941) Nag 707
[4]35 Bom LR 859 (PC) [6]14 Bom 463 [8] ILR (1943) Mad 309 (FB)

the majority view of the Bombay High Court and preferred to accept the Nagpur view. When this question was argued before the Privy Council in *Anant Bhikappa v. Shankar Ramchandra*[9], their Lordships of the Privy Council had to consider these conflicting views and in the judgment delivered by Sir Gerorge Rankin it has been clearly stated that their Lordships thought that the view taken by the Nagpur High Court was a broader and a more adequate view. That is why their Lordships ultimately allowed Anant's claim to recover the watan properties which had gone to Shankar after the death of Keshav. It is necessary to emphasise that in dealing with Anant's claim their Lordships made it perfectly clear that they did not rest their decision on the ground that by his adoption Anant became a nearer heir of Keshav than Shankar. As the judgment points out (P. 9) :

"- If the adoption constitutes the person adopted the nearest heir of the last male holder, that is an alternative or additional ground of claim and one which proceeds on a different basis."

The principal ground on which the decision was based was that (p. 6) :

". . . . The plaintiff by adoption was invested with the rights of a male member of the family in the family property as though he was a natural son of Bhikappa, and that his adoption, though made after the death of a sole surviving coparcener, took effect as the happening of a contingency to which Keshav's rights as sole owner had always been subject, in like manner as an adoption would have had effect if it had seen made in Keshav's lifetime by the widow of a predeceased coparcener other than his father."

In other words, Anant's claim to the properties was decreed not on the ground that he was a preferential heir of Keshav, but on the ground that he was entitled to the properties by survivorship. Thus, in our opinion, the effect of this decision is that though by the death of the sole surviving coparcener the coparcenary may appear to have been terminated, such termination is not effective or complete so long as there is any potential mother in the joint family. On the death of Keshav in 1917, to all appearances the only person in the family left behind was Keshav's widowed mother Gangabai, and when Gangabai adopted Anant in 1930, the joint family and in fact the coparcenary was revived by such adoption and the adopted son entered this coparcenary by reason of his adoption. That appears to be the principal ground on which Anant's claim was decreed. The position with regard to the disruption of the joint status brought about by a partition between surviving coparceners would be just the same as the disruption brought about by the death of the sole surviving coparcener. This is implicit in the decision of the Privy Council in Anant's case, because in terms their Lordships have expressed approval of the view which had been accepted by the Nagpur High Court and the Madras High Court. Indeed, what was thus implicit in the said decision has been expressly decided by the Federal Court in *Tatya Shantappa v. Ratnabai*[10], To the same effect is the Full Bench decision of this Court in *Ramchandra Balaji v. Shankar*[11], Therefore, in our opinion, it must now be taken to be well settled that the rights of an adopted son are not affected by reason of the fact that the joint status of the family which he seeks to enter by his adoption has been terminated either by a prior partition between the surviving coparceners or by the death of

[9] 46 Bom LR 1 (PC)
[11] 47 Bom LR 121 (FB)
[10] 1949 FCR 258.

the sole surviving coparcener. In either case the adopted son is entitled to enter his adoptive family on the basis that the family is a joint and undivided Hindu family and his rights in the property of the family must be decided on that basis. It may be that this result has been achieved by taking resort to legal fictions which are not based on any direct Hindu texts. But that, in our opinion, cannot affect the validity of the rule laid down by judicial decisions, and it is this rule which we must apply in dealing with the question before us.

11. It is, therefore, clear that by his adoption the plaintiff enters the family of Shrinivas on the basis that the family is joint and undivided and the disruption of the coparcenary sought to be effected by the earlier partition is of no avail so far as the plaintiff is concerned. As soon as the adoption is made, the coparcenary is virtually revived and the shares of the parties must be determined on that basis. The same position may also be considered in another way. If the plaintiff's adoption relates back to the death of his adoptive father, it must be held that the partition between Shrinivas and Ramchandra was invalid and can be reopened at his instance. It is true that under Hindu law partition is made only once. But the Hindu texts recognise some exceptions to this rule. It is well settled that the posthumous son can claim a repartition and so can the heir of a disqualified person and an absent coparcener. This is what the Mitakshara says about a posthumous son :

> "When brothers have made a partition subsequently to their father's death, how shall a

> share be allotted to a son born afterwards? " The author replies,
> "His allotment must absolutely be made out of the visible estate corrected for income and expenditure. " (Yagnavalkya, II, 123). (Chap. I, Section 6, placitum 8; S. S. Setlur's Hindu Law Books on Inheritance, 1911, Edn., p. 20).

As to the disqualified person this is what the text says :

> "If the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' (Yagnavalkya, II, 123) is based." (Chap. II, Section 10, placitum 7; Setlur's book, p. 54).
> "The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds :
> 'But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects' ".

(Yagnavalkya, II, 142). (Chap. II, Section 10, placitum 9, P 54.)

> "The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency andc." (Chap. II, Section 10, placitum 10, p. 54).

The right of an absent coparcener to reopen partition is recognised by Brihaspati in these words :

> 24. When a man has gone abroad, leaving the joint estate of his family, his share must undoubtedly be given to his descendant who has returned from abroad.
> 25. Whether he be the third or the fifth or even the seventh in descent, he shall receive the share belonging to him by right of succession, his birth and family name having been ascertained (First)." (Brihaspasti, ch. XXV, placita 24, 25, Sacred Books of the East, Vol. XXXIII, p. 373)

We think that the case of an adopted son must be included in the list of these exceptions by analogy. It may be that the writers of Hindu texts may not have contemplated the case of an adopted son as falling within the class of these exceptions. But in view of the legal fictions to which I have just referred it seems to us necessary to include he case of the adopted son amongst these exceptions because the position of an adopted son, like the plaintiff in the present case, is clearly analogous to that of a son who was in his mother's womb at the time of the partition, but who is born thereafter. There is no doubt that such a son is entitled to a share as if he was in existence at the time of partition. A distinction is made under Hindu law between such a son and a son who is both begotten and born after partition. In our opinion, the plaintiff, whose adoption

relates back to the date of his adoptive father's death, must be taken to have been in his mother's womb at the time of the partition in 1932. In that view, the present suit must be treated as a suit for reopening partition, and in reopening partition the shares of the parties must be determined as on the date when the partition is reopened. Normally, if there has been no death or birth in the family subsequent to the partition which is being reopened such reopening of partition may not adversely affect any of the parties, unless alienations have been effected by the separating members in the meanwhile. In the present case, however, Shrinivas has died before the date of the suit and consequently the share of the plaintiff has increased from 1/3 to 1/2, just as the share of Ramchandra has similarly increased. We are free to confess that we find it somewhat difficult to decide what would be the status of Ramchandra qua, Shrinivas and his joint family in consequence of the partition effected by them both in December 1932. But we do not feel any such difficulty in determining the status of Shrinivas himself. If we treat the plaintiff's case, as we must, as that of a son who was in the womb of Sundrabai at the time of the partition, we must hold that he and Shrinivas remained undivided despite the partition between Shrinivas and Ramchandra. It is impossible to conceive that a son who whilst in his mother's womb was a member of an undivided family was born in a family which was divided even quae his grandfather. By his adoption the plaintiff claims to enter the undivided family of his adoptive father.

In the present case the plaintiff is the grandson of Shrinivas, and whatever may be the legal relationship between Shrinivas and Ramchandra, we feel no doubt that between Shrinivas and the plaintiff a coparcenary must be presumed to exist. If this be the true position, then it may perhaps be that Ramchandra would be entitled only to 1/3rd share in the property and the remaining 2/3rds would vest in the coparcenary consisting of Shrinivas and the plaintiff. In that case on the death of Shrinivas the plaintiff may be entitled to the whole of this two-thirds share by survivorship. That, however, is not the plaintiff's claim in the present case. But on the whole we would prefer to take the view that the coparcenary which had been determined by the partition between Shrinivas and Ramchandra was in effect revived by the adoption of the plaintiff and that the plaintiff's claim made in the present suit should be treated as a claim for reopening a partition which had been made without recognising his share in the family properties. It is true that in view of the partition deed both Shrinivas and Ramchandra must be deemed to have expressed their desire to separate and that normally would be enough to cause disruption of the joint status. But such disruption must in law be taken to be provisional and not final or fully effective so long as it can be undone by the adption of a new son in the family; and it seems to us that in adjusting the claim of the plaintiff in such circumstances it would be fair, equitable and in consonance with the principles laid down by judicial decisions to hold that the coparcenary as a whole revives after such an adoption leaving it open to each coparcener again to effect a partition if he chooses so to do. We do not think we would be justified in accepting Mr. Datar's contention that we should assign to the plaintiff his 1/3rd share of the properties of the family on the basis that he would have got no more if he had joined the partition in 1932. That would introduce yet another fiction in this discussion by which at the very moment of his birth in his adoptive family the plaintiff would become a separated member. Such a fiction, in our opinion, would be neither logical nor

just; and it would, we apprehend, be opposed to the spirit of Hindu law of adoption. As we have indicated, the position of Srinivas does not present much difficulty. He must be taken to be the manager of the coparcenary consisting of himself and his grandson the plaintiff and as such it would clearly not be open to him to alienate any of the properties so as to bind the plaintiff unless such alienations are justified by the provisions of Hindu law. We are not prepared to hold that Shrinivas was entitled to deal with this 1/3rd share on the basis that he was a separated member quae the plaintiff. Therefore, in our opinion, the plaintiff is entitled to claim a half share in the properties in suit.

12. [The rest of the judgment is not material to the report.]

13. The result is First Appeal No. 299 of 1940 preferred to this Court by the defendants will be dismissed with costs.
Appeal dismissed.