

## **BOMBAY HIGH COURT**

Bahubali Vasant Katage

Vs.

Gundappa Tatyra Duge

First Appeal No. 457 of 1951, Sangli in Special Civil Suit No. 157 of 1949

(Chagla, C.J., Dixit and Shah, JJ.)

19.01.1954

### **JUDGMENT**

**Gajendragadkar, J.**

1. This appeal raises the vexed question of Hindu law as to the character and effect of the act of surrender on the part of a Hindu widow. We have had occasion to refer this question to a Full Bench in - *Tandu Lote v. Shrimati*<sup>1</sup>, along with another question. While dealing with the questions referred by us to the Full Bench, the Full Bench considered and answered the first question, but they held that it was unnecessary to answer the second question, and it is the second question which arises for decision in the present appeal. It is perfectly true that, though in this judgment the learned Chief Justice has said that it is unnecessary to consider the point raised by the second question submitted to the Full Bench, he has indicated the view which the Full Bench were likely to take if they had felt it necessary to decide this point. Perhaps if the matter had stood with the decision of the Full Bench alone, we might have proceeded to deal with this appeal in the light of the assistance available from the observations made by the learned Chief Justice as to the second question. But the position, has been somewhat complicated by reason of the fact that Mr. Jahagirdar for the respondents contends that the validity even of these observations must be taken to be considerably impaired by the recent judgment of the Supreme Court in - *Natwarlal Punjabhai v. Dadubhai Manubhai*<sup>2</sup>,

2. It would be convenient to mention a few material facts leading to the point which we are referring to the Full Bench. The property in suit consists of two houses and two pieces of land. This property originally belonged to one Balappa. Balappa died in 1908 leaving behind him surviving his widow Shrimati and his daughter Ratna. Shrimati was defendant No. 1 to the present suit when it was filed. Pending the suit, Shrimati died on 10-9-1950. Prior to her death and long before the present suit had been filed, Shrimati had adopted a son on 15-9-1935, who was defendant No. 2 to the suit. Balappa's daughter Ratna was married to Chintaman. Chintaman

died in 1908 and Ratna herself in 1911. Their son Vasant survived them. On 24-6-1920, Shrimati executed a deed of gift in favour of Vasant. On 1-7-1935, Vasant died leaving behind him his widow Rajubai. Rajubai adopted the plaintiff on 4-3-1936. Thereafter she died on 31-1-1942. It would appear that

<sup>1</sup> AIR 1953 Bom 428

<sup>2</sup> AIR 1954 SC 61

it was after Vasant died that Shrimati thought of adopting a son to herself and she did so on 15-9-1935. In the present suit filed by the adopted son of Vasant, he claims to recover possession of the properties on the ground that they have been validly surrendered in favour of Vasant by the limited owner Shrimati. Shrimati's adopted son resisted this Claim on several grounds. He alleged that the deed of gift had not been executed, that it was obtained by undue influence, that it was not acted upon and that it did not cover all the properties of which Shrimati was possessed as a limited owner. All these pleas have been rejected by the trial Court. But defendant No. 2 has succeeded on the ground that, as the adopted son of Shrimati, he is entitled to divest the estate which had vested in Vasant as a surrenderee from Shrimati and on Vasant's death would have devolved on the present plaintiff. In upholding this plea, two decisions were cited before the learned Judge. The first decision is reported in '*Shantaram Abasaheb Powar v. Kern Krishna*<sup>3</sup>', and the second in '*Vishnu Pandu v. Mahadu Baburao*<sup>4</sup>', Since these two decisions took; a contrary view on the point which the learned Judge had to decide, he preferred to follow the latter ruling of this Court and held that the adopted son would divest the estate which may have vested before his adoption in the surrenderee by reason of the surrender on the part of his adoptive mother. It is this finding which is challenged before us by Mr. Datar.

3. In 'Pandu Lote's case, similar questions had arisen for decision and we had referred two points for the decision of the Full Bench. The first question was whether the relinquishment of watan properties resulting from a Hindu widow's surrender was valid in view of the provisions of Sections 5(1) and 7 of the Watan Act. The second question was, if prior to his adoption a valid surrender has been effected by his adoptive mother, can the subsequently adopted son divest the property which has already vested in the surrenderees. The first question was answered by the Full Bench in the negative. Broadly stated, the Full Bench have taken the view that in dealing with surrenders under Hindu law, it would be legitimate to distinguish between surrenders which have been brought about by documents of transfer and those which are effected otherwise. If the surrender is the result of a document which purports to be a transfer on a deed of alienation, then the surrender itself may partake of the character of an alienation. If the surrender is effected without having recourse to a deed of transfer, it merely accelerates succession and cannot be treated as an alienation. In his judgment, the learned Chief Justice has in fact indicated that they would have answered the second point in the light of this distinction; and as I have already mentioned, we would perhaps have proceeded to deal with this appeal in the light of the observations made by the learned Chief Justice in the penultimate paragraph of his judgment. However, Mr. Jahagirdar relies upon several observations made by Mukherjea, J. who delivered the judgment of the Supreme Court in 'Natwarlal's case'. This case itself had gone before the

Supreme Court from a judgment of the Full Bench of this Court in '*Natvarlal Punjabhai v. Dadubhai Manubhai*<sup>3</sup>', and it is true, as Mr. Datar contends, that in the result the decision of the Full Bench has been confirmed by the Supreme Court and the appeal has been dismissed with costs. Even so the question of surrender, its character and its effects has been considered exhaustively both on principle and in the light of judicial decisions by Mukherjea, J., and Mr. Jahagirdar contends that these observations would indicate that a distinction cannot now be drawn between a surrender which is effected by a deed of transfer or otherwise. In

<sup>3</sup> AIR 1948 Bom 381

<sup>5</sup> AIR 1950 Bom 55 (FB)

<sup>4</sup> AIR 1951 Bom 170

every case, the surrender must be treated as an act of self effacement which only accelerates the succession in favor of the reversioner and in law and in fact it does not partake of the character of an alienation. We do not propose to express any opinion on this contention. Both the learned advocates have suggested, that it would be better if this part of the argument is left to be decided by a larger Bench. We also take the view that it would be more satisfactory if the question as to whether the distinction made by the Full Bench in 'Pandur Lote's case' between two kinds of surrender resulting in two different characteristics of surrender can be taken to have been overruled by the judgment of Mukherjea, J., on which Mr. Jahagirdar relies.

4. We would accordingly refer to the Full Bench the question which was not fully considered or finally decided by the Full Bench on the earlier occasion. The question is :

"If, prior to his adoption a valid surrender has been effected by his adoptive mother, can the subsequently adopted son divest the property which has already vested in the surrenderee ?"

#### ORDER OF THE FULL BENCH

#### **Chagla, C.J.**

5. One Balappa died in 1908 leaving a widow Shrimati and a daughter Ratna who died in 1911. On 24-6-1920, Shrimati executed a deed of surrender by which she surrendered the whole estate of her husband to Vasant, son of Ratna. Vasant died on 1-7-1935, leaving a widow Rajubai. Rajubai adopted the plaintiff on 4-3-1936. Shrimati adopted defendant No. 2 on 15-9-1935, and the plaintiff filed this suit claiming the property which had been surrendered by the widow under the deed of surrender. The trial Court dismissed the plaintiff's suit. The plaintiff appealed to this Court. The first appeal came before Gajendragadkar, J., and Vyas, J., and they have referred to the full bench the following question :

"If, prior to his adoption a valid surrender has been effected by his adoptive mother, can the subsequently adopted son divest the property which has already vested in the surrenderee ?"

6. Now, do not think it can be disputed that the adoption of defendant No. 2 by Shrimati on 15-9-1935, was a valid adoption. '*Amarendra Man Singh v. Sanatan Singh*<sup>6</sup>', laid down that in considering the validity of adoption the Court has to give importance to spiritual and not temporal considerations; and it cannot possibly be suggested that Shrimati was not a potential widow who had the right to adopt, which right she exercised on 15-9-1935. The real question that we have to consider is, what is the effect of this adoption upon the deed of surrender executed by the widow on 24-6-1920, and upon the right of Vasant who got the property as the heir of his grandfather Balappa ? In order to decide this question, one has got to determine the true nature of a surrender under Hindu law. A widow, stands between her husband's estate and her husband's heirs and by an act of self-effacement or of civil death she destroys her own life estate, removes the obstacle that exists between her husband's estate and her husband's heirs, accelerates the succession, and makes it

<sup>6</sup> AIR 1933 PC 155

possible for her husband's heir to succeed to her estate. It is very important to note that the title of the next reversioners does not depend upon any act of transfer or conveyance by the widow. As soon as the widow effaces herself and destroys her life interest by operation of law, the next reversioners succeed to the husband's estate. Therefore, the title of the next reversioners depends not upon any conveyance or transfer by the widow, but it depends upon their inheriting to the estate of the husband. Therefore, title which is vested in the next reversioners is a title by inheritance and not by a conveyance or transfer executed by the widow. It is also pertinent to bear in mind the vital distinction between an alienation by a widow for legal necessity and a surrender by a widow. In the case of legal necessity, the widow alienates the property of her husband and the title of the alienee depends upon the alienation by the widow supported by justifying necessity; whereas in the case of a surrender it is not the alienation which is the foundation of the title of the next reversioner, but, as already pointed out, it is the 'fact that he is the heir of the husband and the fact that the succession has opened up by operation of law that constitutes the foundation of his title. If, therefore, the title of the next reversioner is based upon, inheritance, the question is, what is the effect of a subsequent adoption by the widow ?

7. Now, it is well settled that a subsequent adoption has a retrospective effect in the sense that in the eye of the law the widow must be deemed to be enciente and the adopted son must be deemed to be in existence at the death of the husband. It is true that any lawful alienations made by the limited owner would be binding upon the adopted son. It is equally true that a last male holder would be entitled to deal with the property as his own without taking into consideration the possibility of a future adoption and in such a case the adopted son would take the property subject to the alienations made by the last male holder. But it is equally well established that an adopted son would be able to displace any title which arises by reason of inheritance. If in this case the title of Vasant arose by reason of inheritance, the question is whether the adopted son could displace that title by reason of the fact that he was adopted by Shrimati. There is no doubt that if the adopted son was in the eye of the law in existence at the death of Balappa, he was a preferential heir to Balappa's daughter's son, Vasant, and there seems to be no reason in principle

whatsoever why defendant No. 2 as the adopted son of Balappa should not in law be entitled to displace the title vested in Vasant by inheritance. Once the distinction between title by alienation and title by inheritance is borne in mind, this case presents no difficulty whatever. The decisions that have taken a contrary view with respect, have proceeded on an erroneous assumption that Vasant's title depended upon an alienation made by the widow and not upon the succession opening up by operation of law and Vasant succeeding as the heir of Balappa. If the act of surrender on the part of Shrimati was an alienation, then only the further question would arise whether the alienation was lawful alienation which was binding upon the adopted son in law. But if the act of Shrimati was self-effacement and a voluntary destruction of her own life estate, then no question of alienation arises.

8. Now, we had occasion to consider the nature of surrender in Hindu law in a full bench in 'AIR 1950 Bombay 55', and there we pointed out that "Under Hindu law a surrender by a Hindu widow is not so much a transfer or an assignment of her life interest to the next reversioners as a renunciation in favor of the next reversioners. The basic principle of surrender is the destruction by the widow by her voluntary act of her life interest in her husband's estate. The act of transfer or the act of conveyance is a subsidiary thing to which the same importance cannot be attached as the destruction of the life estate."

This view has found favour in a recent decision, of the Supreme Court in- ' AIR 1954 Supreme Court 61'. As pointed out by Mukherjea, J. at p. 66,

"..The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favor of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance."

Further on, the learned Judge says (p. 66) :

"Thus surrender is not really an act of alienation by the widow of her rights in favor of the reversioner. The reversioner does not occupy the position of a grantee or transferee, and does not derive his title from her. He derives his title from the last male holder as his successor-in-law and the rights of succession are opened out by the act of self-effacement on the part of the widow which operates in the same manner as her physical death."

9. There was another full bench constituted recently which had also to consider the question of surrender, and the judgment is reported in 'AIR 1953 Bombay 428 (FB)'. There we were considering the specific case of a surrender being effected through a document, and the only question that we considered and decided was that the document on which reliance was placed by

the defendant for his title was a document which contravened the law and was therefore void. We pointed out that as the document itself was void, no further question arose as to whether the surrender itself was valid or not valid according to Hindu law. It may be, as we pointed out in that judgment, that a Hindu widow may embody her act of self-effacement in a document, may get the document registered, and the question may arise whether such a document is valid or void, in law. But it would be fallacious to suggest that the title of the next reversioner would arise by reason of this document. The document would merely embody the transaction as far as the widow herself was concerned, viz., the act of self-effacement or the act of extinguishing her own life estate. If the document was valid and if the act of the widow was done according to law, then the law would operate and the title of the next reversioner would arise, not as a result of the document, not as a result of any transfer or conveyance made by the widow, but as a result of the succession opening up and the next reversioner succeeding to the estate of the last male owner. In that full bench the question as to the right of the adopted son to challenge the surrender was also referred to us, but we expressly left that question open, and although we may have expressed some tentative opinion we did not decide the question which has now arisen and for the decision of which this full bench has been constituted.

10. Now, Mr. Datar is right when he urges that there is a long line of authorities of this Court which has taken the view that a subsequent adoption will not divest the title created in the next reversioners as a result of the surrender, and this long line of authorities owes its validity and its force to the decision of Sir Norman Macleod and Crump, J., in- '*Rama Nona v. Dhondi Murari*'<sup>7</sup>, In that case the learned Chief Justice points out (p. 436) :

"As soon as we get rid of the notion of constructive pregnancy in the case of a widow with power to adopt, the result of an adoption upon prior alienations by the widow can be determined without any difficulty."

Unfortunately, this notion of constructive pregnancy is the very notion which was subsequently accepted by the Privy Council and which revolutionized the whole law of adoption as understood by this High Court. Therefore with respect, the very basis of the judgment of the learned Chief Justice is that an adoption cannot have retrospective effect, that it is wrong to assume that the adopted son was in existence at the death of the husband, and therefore the adoption cannot disturb titles which were created prior to the adoption; and when we turn to the judgment of Crump, J., at p. 437 he points out :

"..The effect of the surrender by the widow was that the then reversioner took an absolute estate and as the surrender was an act which is by Hindu law within the competence of the widow it is not easy to see any ground on which the adopted son can challenge it."

..... With respect to the learned Judge, what we have to consider is not the competence of the widow to surrender the estate of her husband. What we have to consider is, what is the title which

the surrenderee gets, and that the learned Judge has not considered. Therefore, in our view '*Rama Nana v. Dhondi Murari*',, was wrongly decided and does not state the correct law as to the right of an adopted son when there is a prior surrender by his adoptive mother. This case has been followed in- '*Yeshvanta v. Antu*<sup>8</sup>'. '*Pandurang v. Ishwar*<sup>9</sup>', and- '*Krishna Mhatarba v. Baban*<sup>10</sup>', We find in these judgments no reason given for the principle enunciated and the learned Judges have merely followed the judgment in - '*Rama Nana v. Dhondi Murari* .

11. Then we come to a recent decision of a division bench in 'AIR 1948 Bombay 381'. That is a judgment of Sen, J. and Mr. Justice Gajendragadkar. That has taken the same view as - '*Rama Nana v. Dhondi Murari*',, and the ratio of that judgment is to be found in the judgment of Sen, J. (p. 383) :

"..Though a surrender operates by accelerating the reversion, i.e., the succession, it would appear to operate not as a case of succession but an act of alienation.

With respect, as we have already pointed out, it is not an act of alienation on the part of the widow that results in title being conferred upon the next reversioner, and therefore once we accept the position that the basic feature of a surrender is not alienation but extinction of the life estate of the widow and the succession opening up there from by operation of law, it is clear that the case just referred to must be held to have been erroneously decided.

12. Then there is a later judgment in - 'AIR 1951 Bombay 170' of Rajadhyaksha, J., and

<sup>7</sup> AIR 1923 Bom 432

<sup>9</sup> AIR 1939 Bom 79

<sup>8</sup> AIR 1934 Bom 351

<sup>10</sup> AIR 1945 Bom 24

my brother Shah, J., and in this judgment the learned Judges took a view contrary to the view taken - in 'Rama Nana's case' and the view which is acceptable to us, and in the judgment Shah, J., points out (p. 171) :

"..It was not, strictly speaking an alienation of the estate by Bayaja but a voluntary act of extinction of her own estate. Consequently the relinquishment would not have the effect of bringing the present case within the rule that where an heir to the estate of a sole surviving coparcener has alienated property for a lawful purpose, the alienee acquires an indefeasible title and is entitled to retain the property contrary to the claim of an adopted son by a widow of the joint family."

We are of the opinion that that statement correctly sets out the principle underlying the act of surrender on the part of the widow.

13. Mr. Datar also relied on a judgment of Sir Leonard Stone and Divatia, J. in - '*Babanna Gurusangappa v. Channapoa*<sup>11</sup>', and the learned Chief Justice says (p. 143) :

"..... the law is that a surrender or release by a widow of the whole of her estate and

interest in the property of her deceased husband to the person or persons entitled in reversion operates to defeat a subsequently adopted son, because the widow has, so to speak, voluntarily operated her own death and thereby accelerated the interest of the reversioners."

With respect to the learned Chief Justice, if what the widow has done is to accelerate the interest of the reversioners by inheritance, then in view of the law as now settled by the Privy Council that is an interest which can certainly be displaced by the subsequently adopted son.

14. It has been argued by Mr. Datar that the widow had the right in law to surrender her husband's estate to the next reversioners and that surrender cannot be defeated by the mere possibility of an adoption taking place subsequently. Mr. Datar asks us to apply the principle accepted by the Privy Council as laid down in the case of - '*Veeranna v. Sayamma*<sup>12</sup>', that the validity of an alienation has to be determined at the date of the alienation and not by a subsequent adoption. This argument again proceeds on the basis that the act of the widow constitutes an alienation. In the case of - '*Veeranna v. Sayamma*, what was emphasised was that the mere possibility of a subsequent adoption cannot prevent the last male holder from treating the property as his own, alienating it, and giving a good title to the alienee. It is difficult to understand how that principle can apply to the case of a widow who surrenders her husband's estate. In the first place, she is not alienating the property of her husband; in the second place, she is not conveying any title to an alienee. The adopted son is not seeking to defeat the title of an alienee; he is seeking to displace the title which arises by reason of inheritance.

15. Mr. Datar has also relied on the expression used in some of the Privy Council cases which seem to suggest that their Lordships looked upon the act of surrender as an alienation or a transfer or a conveyance. For instance, reference was made to the case of –

<sup>11</sup> AIR 1947 Bom 140

<sup>12</sup> AIR 1929 Mad 296

*'Behari Lal v. Madho Lal Ahir Gayawal*<sup>13</sup>', At p. 32 this is what their Lordships say :

"..... .it may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate."

And what is emphasised is the expression used by their Lordships "conveying absolutely." But in the very next paragraph their Lordships go on to say :

"It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

It must be borne in mind that in this case the Privy Council was not considering the right of the adopted son to divest the title of the next reversioner which arose as a result of surrender, and with respect to their Lordships, it is clear that in some of these cases, e.g., - '*Rangasami Gounden v. Nachiappa Gounden*<sup>14</sup>', at p. 201 the expression "alienation" has been loosely used. The expression "alienation" is not used in the sense of a lawful alienation made by the widow which the adopted son cannot challenge as accepted by the authorities to which attention has already been drawn.

16. It is indeed rather curious that no case of an adoption subsequent to a surrender has arisen for consideration in any other High Court than this Court, nor has the Supreme Court had occasion to consider this question and Mr. Datar has strongly pressed upon us not to depart from the view almost consistently held by this Court on the question of the right of the next reversioner as against the adopted son. Now, there is always force in the argument of 'stare decisis' and a Court of law should never be in a hurry to alter well settled law which may result in disturbing titles based upon the law as understood by the litigant. But in reversing the decision in 'Rama Nana's case' and in taking the view that an adopted son can divest a title which the next reversioner had we are not really altering the law, but on the contrary we are bringing the law into conformity with the recent decisions of the Privy Council. As already pointed out, 'Rama Nana's case' was decided at a time when the law of adoption was understood to be something very different from what ultimately the Privy Council expounded it to be, and therefore far from disturbing well settled law we are giving effect to principles which have been enunciated by the Privy Council in recent decisions and which are now accepted as the correct principles of Hindu law.

17. The result, therefore, is that we must answer the question submitted to us in the affirmative.

Reference answered.

<sup>13</sup>19 Ind App 30 (PC)

<sup>14</sup> AIR 1918 PC 196