**(1967) 07 BOM CK 0016**

**Bombay High Court**

**Case No:** S.A. No. 1148 of 1960

| | | |
|---|---|---|
| Mahadeo Gopal Mone | | APPELLANT |
| | Vs | |
| Rameshwar Sadashiv Mone | | RESPONDENT |

**Date of Decision:** July 20, 1967

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 51

**Citation:** (1968) MhLj 407

**Hon'ble Judges:** D.V. Patel, J

**Bench:** Single Bench

**Advocate:** K.V. Joshi, for the Appellant; N.S. Shrikhande, for the Respondent

**Judgement**

D.V. Patel, J.

The first question is whether the plaintiff as the adopted son will be entitled to displace the title of Rameshwar to half the house acquired by him by his purchase from Laxman his co-heir of Damodar. Mr. Joshi relied upon the decisions in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, and Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, . On the other hand, in Vishnu Pandu Yadav and Another Vs. Mahadu Baburao Yadav Patil and Others, it wan held that the alienees from the absolute owner at the date of alienation were not liable to be divested by the adopted son. Mr. Shrikhande argues that the decision in Vishnu Pandu Yadav and Another Vs. Mahadu Baburao Yadav Patil and Others, has not been disapproved or overruled by the Supreme Court and is still good law.

2. First case of this High Court in this connection is Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others, . In a joint family of three brothers, Hanmantrao was the last surviving coparcener, the two others ''Dattatraya and Krishnaji having died leaving behind them two widows Venkubai and Rukminibai. On December 6, 1932, Hanmantrao conveyed some of the family properties to his daughters by way of gift and some other portions of his property to other defendants in the suit. On

May 10, 1933, he gifted away one more property to one of his daughters. In the meantime on December 8, 1932, he had also sold some of the un-disposed property to defendants Nos. 9 to 11, and later to defendants Nos. 12 to 15. On June 25, 1935, Rukminibai, the widow of Krishnaji, adopted plaintiff Bhimji who then raised the suit as the adopted son for a declaration that the alienations made by Hanmantrao were not binding on him. Relying upon the earlier decisions in Veeranna v. Sayamma AIR 1929 Mad. 290 : (1928) I L R 52 Mad. 398, which was approved in AIR 1927 139 (Privy Council) , and also the observations in that connection in AIR 1943 196 (Privy Council) , this Court held that Hanmantrao being the sole surviving coparcener had full right to treat the ancestral property as if it was his own and that the adoption of the plaintiff subsequently would not affect the property which already had passed out of the family by alienation. It has consistently been decided that the sole surviving male member of a joint Hindu family 13 the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a pre-deceased coparcener, and such survivor can alienate all or any of the family properties absolutely and the son adopted after the alienation would not be in a position to challenge the same. This principle has been accepted by the Judicial Committee in the decisions above referred to, and it is on this principle that Mr. Shrikhande relies in this decision in support of his contention that the half property in Schedule A which Rameshwar purchased from Laxman could not be affected by the present adoption.

3. Mr. Joshi relied upon the decision in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, and the later decision in Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, .

4. Before I proceed to consider these two decisions of the Supreme Court, I should refer to the decision of the Privy Council and two decisions of this Court which came to be considered by the Supreme Court. In Anant Bhikappa Patil (Minor) v. Shankar Ramchandra Patil AIR 1943 P C 96 = I L R 1944 Bom. 116 = (1943) L R 70 I A 232 = 46 Bom. LR 1, the facts were as follows: Dhulappa had two sons Purnappa and Hanmantappa. Respondent Shankar belonged to the later branch. Purnappa died in 1907 leaving Gundappa (died 1902), Bhikappa (died 1905) and Narayan (died 1908). Bhikappa left behind him Gangubai and a son Keshav, who died in 1917. After Narayan''s death in 1918 leaving a widow who remarried, his ancestral and separate property devolved on Keshav. On Keshav''a death respondent obtained the property from the Collector as most of it was Patilki Vatan land. Gangubai then adopted the plaintiff Anant. The Judicial Committee says (p. 238):

Keshav''s right to deal with the family property as his own would Dot be impaired by the mere possibility of an adoption [of. Vatti Kuti Veeranna by adoptive mother and guardian Achamma Vs. Katuri Sayamma alias Chittamma and Others, ].

and then say (p. 240);

... It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener,

and at (p. 241):

Neither the present case nor Amarendra''a case AIR 1933 155 (Privy Council) brings into question the rule of Jaw considered in Bhubaneswari Devi v, Nilkomul Lahiri (1886) L R 12 I A 137 .. and stated by the Board to be that ''According to the law laid down in the decided cases, an adoption after the death of collateral does not entitle the adopted son to come in as heir of the collateral.

Finally the Judicial Committee held that the adopted son would also take the two parcels of land which Keshav inherited from Narayan. The first case of the Bombay High Court is Jivaji Annaji Vs. Hanmant Ramchandra, . In this case two propositions were formulated: (i) that any lawful alienation made by the last absolute owner is binding on the adopted son and (ii) that if the property goes by inheritance to a collateral and the adoption takes place after the death of the collateral, the adoption cannot divest the property which has vested in the collateral. In this case the decision of the Privy Council in Anant Bhikappa Patil (Minor) v. Shankar Ramchandra Patil (1) was explained and distinguished. The second decision is Ramchandra Hanmant Vs. Balaji Dattu Kulkarni, . In this case the Full Bench held that if on the death of a last surviving coparcener or male owner his property has devolved upon his heir by inheritance and on his death has vested in his own heir, a subsequent adoption in the family of the surviving coparcener the last holder will not divest it from the last heir.

5, The facts in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, are as follows; A Branch of the Kulkarni family consisted of two male members S. and K. The other branch was represented by Sw. K, died in 1897 and S. died in 1899. K. left surviving him a widow and S. left surviving him son G., who also died in 1901 leaving a widow. G''s widow adopted D. on December 16, 1901. Sw., the member of the other branch, died in 1903 and thereafter died his widow, and his estate devolved on B. D died on May 6, 1935, leaving three sons and a widow. The plaintiff was adopted by the widow of K. on April 26, 1944. The plaintiff then raised the suit and claimed not only the estate which belonged to S. and K.., but the estate of Sw. which had vested in D , and after his death in his heirs. The Court, having held that so far as the joint family property was concerned, the plaintiff was entitled to a share in the same, proceeded to consider the question how far the estate which the successor i.e. D of such collateral i.e. Sw. had taken, be affected by the adoption. The respondent in the Supreme Court relied upon Jivaji Annaji v. Hanmant Ramchandra AIR 1060 Bom. 360 = (1949) 52 Bom. L R 527 (FB) which, had decided that the doctrine of relation back does not extend to properties which are inherited from a collateral. The appellants before their Lordships contended that the observations of the Privy Council in AIR 1943 196 (Privy Council) : 46 Bom. L R 1 : I L R 1944 Bom. 116. were contrary to the decision of the Full Bench, and the decision therefore was

erroneous in respect of the above proposition. Only the correctness of this proposition was considered by the Supreme Court. Similarly, AIR 1943 196 (Privy Council) . L R 1 : I L R 1944 Bom. 116. was also examined only in connection with this proposition. This becomes clear from the passage where their Lordships say (p. 693):

...We are of opinion that the decision in Anant Bhikappa Patil (Minor) v. Shankar Ramchandra Patil (2) in so far as it relates to properties inherited from collaterals is not sound, and that in respect of such properties the adopted son can lay no claim on the ground, of relation back.

It is no doubt true that prior to this observation, in the same paragraph they have said:

...When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus, transferees from limited owner, whether they be widows or coparceners in a joint family, are amply protected.

However having regard to the contention which was being canvassed before their Lordships and the specific terms in which the question was posed and decided, these observations, in my view, should be confined only to the question which was being discussed. It is hardly possible to say that their Lordships intended to overrule a long series of decisions, in which it was held that the surviving coparcener had full powers of alienation; There is no reference to the decision in Veeranna v. Sayamma AIR 1029 Mad. 296 : (1928) I L R 52 Mad. 398, to the decision in AIR 1927 139 (Privy Council) , and the second proposition in Anant v. Shankar (2) before it, nor is there any reference to the two decisions of the Bombay High Court which had taken that view.

6. The facts in Krishnamurthi v Dhrmvaraj 1961 NLJ 530 : A I R 1902 S C 59 : (1961) 64 Bom. L R 165 were these. N died in 1892 leaving two daughters one of whom was K, and T widow of B, predeceased son. K and her sister took the property as heirs equally. K having died in 1933, her son V succeeded to the property. V died in 11)34 leaving defendants her heirs. T adopted the plaintiff who sued for possession. Defendants contended that K being full owner, became fresh stock of descent and they had inherited the property from V. After citing the passage which I have quoted from Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, Mr. Justice Raghubar Dayal says (p. 168):

...It follows from these observations that if A is an owner of property possessing a title defensible on adoption, not only that title but also the title of all persons claiming under him will extinguish on the adoption.

What I have said in respect of the decision in Shrinivas Krishnarao''e case AIR 1954 8 C 379 = (1954) 57 Bom. L R 678 applies here equally well. It is not possible, therefore, to hold that even alienations by sole surviving coparcener could be affected by a later adoption.

7. In this connection, I may also point out two of the decisions of this Court in the same volume which have a bearing to some extent on the question at issue. They are: Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others, and Narayan Vs. Padmanabh, . In these cases the adoptive father had made a will bequeathing his entire property to his other close relations. His widow after his death made an adoption and in both these cases the Court, relying upon the earlier Privy Council decisions, held that the property having been carried out of the family, could not be taken by the adoptive son. If this principle applies to the alienation by the adoptive father himself, it is difficult to see why the principle cannot apply to the alienation by a sole surviving coparcener who takes the property as absolute owner. of course, there is this distinction that the adoption relates back to the time of death of the adoptive father and the father''s alienation is deemed to be prior to the adoption even if it be by a will; while in the case of adoption after his death the alienation by the successor would technically be after his coming into existence though the adoption is made later by reason of the doctrine of relation back. Admittedly, the doctrine has its limitations. It seems to me, therefore, that the observation on which reliance is placed cannot apply to cases of alienation by the sole surviving coparcener. The learned District Judge, in my view, was right in holding that in so far as the property purchased by Rameshwar from Laxman is concerned, i. e., half share in the house, he cannot be divested by the plaintiff.
8. It was then argued that, in any event, even if Rameshwar spent his money, he was not entitled to get the amounts spent for improvement of the property. It is argued that section 51 of the Transfer of Property Act has no application to a case like the present one. In support of that contention the decision of the Calcutta High Court in L.A. Creet Vs. Firm Gangaraj-Gulraj and Others, , to the effect that a trespasser is not covered by section 51 was cited before me. That case is entirely different and it is erroneous to say that section 51 applied as if Rameshwar was in the position of a trespasser.

9. Apart from this, in order to decide the question whether the defendant is entitled to compensation for the improvements effected by him, the preliminary consideration is what is the plaintiff entitled to. The adoption of the plaintiff, according to the authorities, relates back to the date of death of his father and he is entitled to displace the titles acquired by inheritance, by the successors. That, however, does not mean that the successors who inherited the property took the estate as trespassers. They only took the estate subject to a contingency that by an adoption they may be divested. They were not trustees for the future adopted son. It is well-known that adoptions mostly are made for the estate involved and not for

the spiritual benefit of the departed which at one time was the essential purpose. It is also recognised that divesting of the estate after a long lapse of time sometimes as much as thirty or fifty years of the inheritance having gone to third persons did great injustice to others for no fault of theirs. Judicial decisions, therefore, tried to prevent to some extent the injustice consistently with the doctrines of Hindu law. Unless, therefore, there is anything in the Hindu law, Rameshwar ought to get compensation for improvements.

10. What the plaintiff is entitled to would be the properties as at the date of the death of Damodar. As the learned appellate Judge has observed, there was not much other property which came to Rameshwar from the income of which large amounts could have been spent by Rameshwar on the improvement of the property. The learned Judge has held that the amount spent by Rameshwar was out of his own earnings. If this is so, on the principle that the plaintiff is not entitled to an account of the management of the estate from Rameshwar, and the further fact that he is entitled to the estate as left by Damodar, the plaintiff must make good the amount spent by Rameshwar on the property.

11. It is impossible to agree with the contention of Mr. K. V Joshi that the defendant may take away the broken bricks and mortar after demolishing the improvements if he wants to. He argues that at best, he is entitled to take away the improvements. That puts him exactly in the position of a trespasser who has made an encroachment on the property of another. It is impossible in the absence of any binding authority to hold that there is any principle of Hindu law which compels me to take this view. The authorities clearly indicate that the holder of the property is a full owner and if so he is entitled to deal with the property. I see no reason to hold that Rameshwar is not entitled to the costs of the improvement. I also do not see any reason why the order regarding payment of compensation should be set aside. Even in the case before the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , as to the joint family property, this is what the Supreme Court says (p. 688):

...In the result, it must be held that the plots, survey Nos. 634 and 635, survey Nos. 639, 640 and 641 and survey Nos. 642, 644 and 645 are ancestral properties, and that the plaintiff is entitled to a half share therein. As substantial superstructures have been put thereon, the appropriate relief to be granted to the plaintiff is that he be given half the value of those plots as on the date of the suit.

It clearly shows, therefore, that the Court, while decreeing the adopted son''s suit for possession of the share in the joint family property, is entitled to make such equitable orders as justice demands. In the present case, the appellate Judge has given option to the plaintiff to choose whether he will pay compensation of Rs. 3,600 to Rameshwar for obtaining the share or take the value of the half share in the house as at the date of the suit.