Privy Council Appeal No. 42 of 1939

Appa Trimbak Deshpande and another – – – *Appellant*

v.

Waman Govind Deshpande and others – – – *Respondents*

FROM

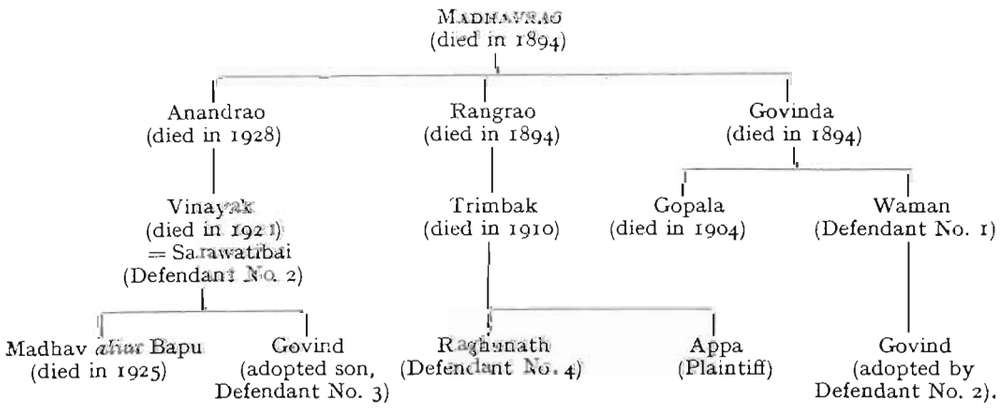
THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* SIR GEORGE RANKIN]



This appeal has been brought in forma pauperis by the plaintiff and the fourth defendant, who are brothers. No one has appeared at the hearing to represent the respondents but Mr. Parikh has presented the case for the appellants with great care and fairness. In the result their Lordships are of opinion that the case should be remanded upon two points and they will say only what seems necessary to explain the scope and purpose of the remand.

In 1865 the appellants' grandfather Rangrao was given by his father Madhavrao to the widow of one Vishnu in adoption to her deceased husband. Madhavrao had two other sons, Anandrao and Govinda and by a deed dated 18th May 1868 to which the father and all three sons were parties the terms upon which the adoption had been made were expressed. A main term was to the effect that upon Madhavrao's death the total income from his ancestral immoveables should be divided—

not into thirds or shares of 5 annas 4 pies—but in proportions as follows:—to Rangrao notwithstanding his adoption 4 annas 8 pies and to each of his brothers 5 annas 8 pies: and that as regards certain property expected to come to Rangrao from his new family, the income from the immoveables should be divided so that Rangrao should get a 6 annas 8 pies share, and the share of each of his brothers should be 4 annas 8 pies. Rangrao was during his father's lifetime to live with him. By the eighth clause of the deed his share of the income from his father's property was to continue to his descendants save that it should not go to any adopted son unless he had been taken from among the issue of Anandrao or Govind. This clause is here mentioned because it has some bearing upon the question whether upon a true view of the effect of the deed Rangrao's interest in his father's property was an interest in income only or whether it extended to the capital or corpus of the property—a question which may become important.

Rangrao did not succeed in obtaining possession of any of the properties of Vishnu and he was equally unsuccessful when in 1890 Vishnu's brother Keshavrao died, in obtaining recognition as his heir. Rangrao died in 1894 without having brought the validity of his adoption to the test of a civil suit. His father Madhavrao and his brother Govind died in the same year, leaving Anandrao as the senior member of that branch of the family.

In 1894, also, Anandrao as next friend brought a suit (No. 97 of 1894) in the court at Wai, on behalf of Trimbak (only son of Rangrao and father of the present appellants) laying claim to the properties of Vishnu and his brothers Keshavrao and Ganpat on the footing that they had all been joint and that the two latter had died without leaving issue. This suit was dismissed by the trial court (19th June 1897) and on first appeal (3rd August 1898) and by the High Court on second appeal (1st March 1899). The ground upon which these decisions proceeded was that as Vishnu was joint with his brother Keshavrao, his widow could not validly adopt a son to him unless she had either his permission or the consent of Keshavrao. This was at the time and had been since 1879 at least the rule of Hindu law accepted as prevailing in the Mahratta country of the Bombay Presidency and thus applicable to the parties. Upon the questions of fact, whether Vishnu had given permission and whether Keshavrao had consented there is no reason to doubt the correctness of the concurrent decisions in the negative.

Trimbak died in 1910 leaving two sons, the second appellant born in 1908 and the first appellant (plaintiff) born in 1910. Anandrao continued in the management of the family property till his death in 1928, when the first defendant Waman took over the management. From the findings of both the Courts in India in the present case it appears that the appellants had in Anandrao's time been receiving from him a share of the income, corresponding in fact to 4 annas 8 pies and not to a one-third (5 annas 4 pies) share. The learned Subordinate Judge was of opinion that what they got was paid to them in virtue of their right to a one-third share—that is, in recognition, that Rangrao's adoption having proved invalid he had reverted to his original rights as a member of his natural family and not upon the view that he was relegated to the rights given to him by the deed of 1868.

However that may be, from 1928 when the first defendant Waman succeeded Anandrao in the management of the family properties he refused to pay anything to the appellants. In the present suit, brought on the 26th August, 1930, the appellants claim to be entitled between them to a one-third share. The decree which they ask for, and which was given to them by the trial judge on 21st December, 1931, is a decree for possession with mesne profits and for partition. The decree was made against the first three defendants who are the respondents upon this appeal, but the second defendant is the widow of Anandrao's son and does not now appear to have any interest in the matter. The relief claimed by the appellants is as against Waman, the first defendant (son of Rangrao's brother Govind) and Govind, the third defendant, who was the son of Waman but has been

given in adoption to the son of Anandrao. These two defendants represent respectively the branches of Rangrao's brothers Govind and Anandrao and claim to be entitled each to a half share in the suit properties, excluding Rangrao's descendants altogether

The learned Subordinate Judge had no occasion to doubt the invalidity of Rangrao's adoption and had little difficulty in holding that his rights in his natural family remained to him and that the deed of 1868 became void when the adoption was declared in 1899 to be invalid. From this decree the defendants appealed to the High Court and their memorandum of appeal dated 29th March, 1932, set out that Rangrao and his heirs were paid an amount corresponding to 4 annas 8 pies under the deed, that the deed became void in 1899 and that the subsequent payments were made purely out of love and sympathy.

The appeal did not come on for hearing till 1935. Meanwhile, on 4th November, 1932, the rule of law as to the power of a widow to adopt which had in 1899 been applied to Rangrao's adoption had been declared by this Board to be erroneous and the true rule under the Mayukha had been declared to be that unless the widow has been expressly forbidden by her husband to adopt she can do so notwithstanding that he died undivided and that she has not obtained the consent of his surviving coparceners (*Bhimabai's* case (1932) L.R. 60 I. A. 25). This reversed a long-standing decision of a Full Bench of the Bombay High Court (*Ramji* v. *Ghaman* 1879 1 L.R. 6 Bombay 498) as to which another Full Bench in 1926 (*Ishwar Dadu* v. *Gajabai* 1 L.R. 50 Bombay 468) had decided that it had not been over-ruled by the Board in *Yadao* v. *Namdeo* (1921) L.R. 48 I.A. 513. In *Bhimabai's* case the Board held that *Ramji's* case had been over-ruled by *Yadao's* case and they restored as law the interpretation which had been put upon the Mayukha in 1868 in the case of *Rakhmabai* v. *Radhabai* (5 Bom. H.C. (A.C.J.) 181) a Full Bench decision in the time of Sir Richard Couch.

This alteration in the case law had changed the entire complexion of the present case pending the appeal to the High Court. Section 41 of the Indian Evidence Act does not give to such decisions as those arrived at in Trimbak's suit of 1894 the character of judgments *in rem*: indeed it is based upon a judgment of Sir Barnes Peacock (*Kankya Lal* v. *Radha Charan* (1867) 7 W.R. 338, 344) in the course of which it was said:—

> " If a judgment in a suit between A and B that certain property for which the suit was brought belonged to A as the adopted son of C were a judgment *in rem* and conclusive against strangers as to the fact and the validity of the adoption the greatest injustice might be caused."

In the High Court learned counsel for the present appellants had to admit the validity of Rangrao's adoption subject to a contention as to *res judicata* which the High Court rightly rejected. On this footing two questions or sets of questions arose. *First*, whether the appellants though mere strangers to the family of Madhavrao had been in fact for twelve years before 1928 in possession of a one-third or other share in the suit property adversely to the branches of Anandrao and Govind? If so, does not section 28 of the Indian Limitation Act entitle them to bring a suit to recover possession of such share against the defendants as trespassers and to obtain a partition thereof as also a decree for mesne profits? *Secondly*, whether the deed of 1868 was still operative and if so were not the present appellants entitled to enforce the rights given thereunder to Rangrao and his descendants: if so, upon a true construction of the deed did it give them a 4 annas 8 pies share in the properties or only in the income, and to what relief are they entitled?

Though these were the material questions arising upon the footing that the adoption of 1865 was valid neither question had been raised by the pleading or by the issues framed in the trial court. The only question of limitation had been whether the defendants had been in possession adversely to the plaintiff. The deed of 1868 had not been mentioned in the plaint and the plaintiff in a counter written statement had refused to admit it and

had contended that in any case it became inoperative when the adoption was held to be invalid. The learned judges of the High Court while saying that the agreement of 1868 was undoubtedly acted upon did not decide whether the appellants could recover on the strength of it since the suit was not based on the agreement and indeed the plaintiff had repudiated it.

On the assumption that Rangrao's adoption was invalid, the defendants had contended that he had not reverted to his natural family; hence the plaintiff might have set up any case he desired to make under section 28 of the Limitation Act. On the other hand there were more direct answers to this contention of the defendants. The validity of the adoption made an end of the reason given in the plaintiff's pleading for regarding the deed of 1868 as inoperative. It is true that no application to amend the pleadings or to frame new issues was made on behalf of the present appellants in the High Court whose action in disposing of the issues as they stood is hardly open to criticism. But their Lordships finding that a change in the case law had put the present appellants in a most embarrassing position are concerned to scrutinise somewhat narrowly a decision which deprives the appellants of an income which for many years had been enjoyed by them, their father and their grandfather. Though not impossible, it is difficult in almost any circumstances to suppose that such an income was received by them without any claim of right. Hence their Lordships think that the dismissal of the suit would entail risk of injustice unless the appellants be allowed the fullest opportunity to make good such case as they may have upon either of the two lines of argument which have been indicated —that is, under section 28 of the Limitation Act and upon the deed of 1868. As the respondents have not appeared at the hearing of this appeal their Lordships do not think it right to determine any matter which is not strictly within the pleadings and issues as they now stand, even though materials for the decision may be on the record.

They consider that the appeal should be allowed and the decree of the High Court dated 20th August 1935 set aside save as regards the directions as to costs therein contained, that the case should go back to the High Court with directions to frame issues in respect of the two questions hereinbefore set forth and to dispose of the appeal to the High Court after determining the same. The High Court is to be at liberty if it should see fit to exercise its power under Order 41 r. 25 to refer such issues to the trial court and to give all such directions as it may think necessary in respect of the amendment of pleadings and the taking of further evidence provided always that should either party desire to adduce further evidence upon the said issues an opportunity to do so shall be afforded. Their Lordships will humbly advise His Majesty accordingly. There will be no order as regards the costs of this appeal.

(12777) Wt. 8194—7 160 7/41 D.L. G. 338

In the Privy Council

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DELIVERED BY
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