Privy Council Appeal No. 59 *of* 1940

Anant Bhikkappa Patil, minor, by his next friend Gangabai Kom Bhikkappa – – – – *Appellant*

v.

Shankar Ramchandra Patil – – – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1943

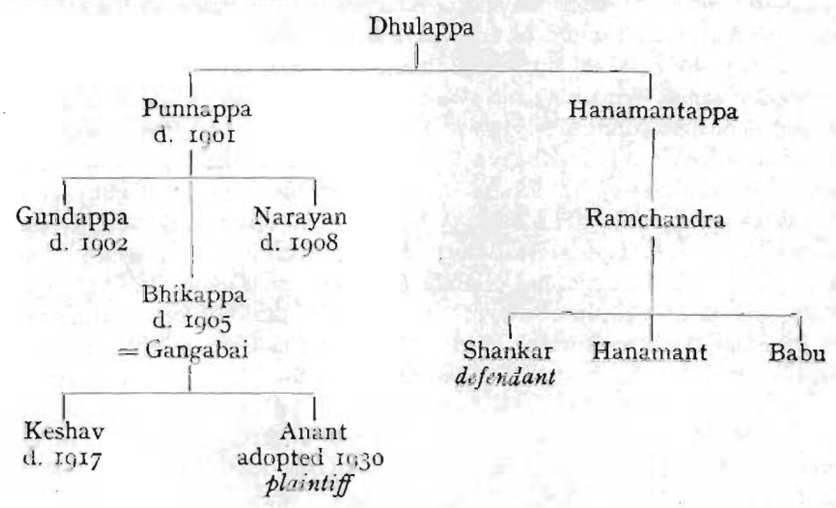
Present at the Hearing:

LORD ROMER
LORD PORTER
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

The appellant Anant brought the present suit in 1932 to recover certain watan properties from the respondent Shankar to whom possession had been given in 1928 by order of a Revenue Court. The properties in suit are the patilki right and the patilki watan lands of the village of Alnavar in the district of Dharwar in the Province of Bombay. These properties are governed by the Bombay Hereditary Office Act (Bombay Act III of 1874) as amended by Bombay Act V of 1886, which imposes upon them a special rule of succession whereby every female, other than the widow of the last male owner, is postponed to every male member of the watan family qualified to inherit. No other feature special to watan property was relied on or discussed in the Courts in India or mentioned in the printed cases lodged by the parties upon this appeal; and their Lordships are not called upon or prepared to consider whether upon other grounds the law applicable to watandars or watan property varies from the ordinary Hindu law.

The family are governed by the Mitakshara and the pedigree table hereunder given represents it sufficiently for the purposes of the case:



Dhulappa's sons Punnappa and Hanamantappa separated long ago—in 1857, and the Alnavar watan with its lands went to Punnappa. Narayan, one of his three sons, separated from him in his lifetime taking as his separate share two plots or parcels of land represented by Revenue Survey numbers $\frac{173}{2}$ and $\frac{174}{1}$ which are included in the lands now claimed by the plaintiff. Thereafter Punnappa died in 1901 and his son Gundappa in 1902, so that in 1905 Bhikappa and his minor son Keshav were the only co-parceners in the joint family. In 1905 Bhikappa died leaving his widow Gangabai and his son Keshav. In 1908 Narayan died leaving a widow but no issue; and the widow having in or about that year remarried, the two plots which were his separate property devolved by inheritance upon Keshav as being his nearest reversioner at the date of the remarriage. Keshav lived till 1917 when he died unmarried. At that date his nearest heir was the defendant Shankar, a somewhat remote collateral, who obtained possession of the suit properties from the Collector in 1928 despite Gangabai's opposition. Thereupon in 1930 Gangabai adopted the plaintiff Anant as a son to her deceased husband Bhikappa and in 1932 as next friend of her adopted son brought the suit which is now before the Board.

The learned trial Judge gave the plaintiff a decree dated 22nd November, 1933, for possession with mesne profits from the date of suit: also a declaration that he is the lawfully adopted son of Bhikappa and that as such he is the heir of the last male owner Keshav. The High Court on 16th December, 1937, set aside the order for possession and mesne profits and qualified the declaration by adding the words: " except as regards the watan property which has already vested in the defendant." They made no specific reference to the two plots which had belonged to Narayan and the order for possession and mesne profits was set aside without any exception being made as to these plots. The ground of the High Court's decision was that as the co-parcenary which existed at the time of Bhikappa's death (1905) had come to an end on the death of Keshav (1917) and the family property had then vested in his heir; the subsequent adoption (1930) by Bhikappa's widow, though valid, would not revive the co-parcenary or divest Keshav's heir, the adopting widow not being herself Keshav's heir.

In *Chandra* v. *Gojarabai* (1890) I.L.R. 14 Bom. 463, it had been held that on the death of the sole surviving co-parcener an adoption to a pre-deceased co-parcener was ineffective to take property which had belonged to the joint family out of the hands of the former's heir and vest it in the adopted son. The decision was understood by the Board in *Bhimabai* v. *Gurunathgouda* (1932) L.R. 60 I.A. 25, 40 to mean that the adoption was invalid. In *Chandra's* case Bhau and Nana were undivided brothers. Nana survived all the other male members of the family and on his death without issue his widow Gojarabai took the family property by inheritance from him. After that Bhau's widow adopted the plaintiff who sued Gojarabai to recover the property. The judgment of the Court (Sargent C.J. and Telang J.) was delivered by Telang J., a distinguished learned judge of special competence on questions of Hindu law. The ultimate ground of decision was that " strictly speaking according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption." (p. 471.) This reasoning had been questioned by Seshagiri Ayyar J. in *Madana Mohana* v. *Purushothama Ananga* (1914) I.L.R. 38 Mad. 1105, 1118; also by Venkatasubba Rao J. in *Panyam* v. *Ramalakshmamma* (1931) I.L.R. 55 M. 581, 590. After *Amarendra's* case, 1933 L.R. 60 I.A. 242, had cast further doubt upon it, a Full Bench of the High Court of Bombay had in *Balu Sakharam* v. *Lahoo*, I.L.R. (1937) Bom. 508, dealt with the matter, the judgment of the Full Bench being that of Beaumont C.J. with which Wadia J. agreed and from which Rangnekar J. dissented. In that case as in *Chandra's* case the property at the date of the adoption to a pre-deceased co-parcener had already vested in an heir of the last male holder nearer to him than a natural born son of the predeceased co-parcener would have been. The present case is different in that the plaintiff, if he is an heir of Keshav, is a nearer heir than the

defendant. The learned Chief Justice dealt with both types of case and held that in neither case did the adoption have effect to vest the property in the adopted son. His view was that an adoption made after the termination of the co-parcenary does not vest in the adopted son the interest in joint family property which would have vested in a natural born son of the adoptive father; also that *Amarendra's* case had not disturbed the rule of law that an adoption by the widow of a divided Hindu does not divest any estate of inheritance unless the estate was then vested in the adopting widow as heir either to her husband or to a deceased son. Upon that view it is irrelevant that as an heir to Keshav a brother would be nearer than the defendant Shankar.

The learned Judges who decided the present case in the High Court followed this Full Bench ruling as their duty was. But their Lordships must examine its correctness and for this purpose find it necessary to distinguish and separately consider two lines of reasoning.

As the defendant Shankar claims by inheritance from Keshav it might or might not be sufficient to determine whether by his adoption the plaintiff became Keshav's preferential heir. This is the ground on which the trial Judge proceeded, and to the two plots which had once been Narayan's this is the only ground of claim which the plaintiff can formulate. But in view of the case law and the principles which govern the validity of an adoption and the rights of an adopted son in cases of succession by inheritance and by survivorship, it will be safer to avoid making assumptions or taking partial views and to examine the plaintiff's case at its highest. That case may be put as follows: That the plaintiff by adoption was invested with the rights of a male member of the family in the family property as though he were a natural son of Bhikappa, and that his adoption, though made after the death of a sole surviving co-parcener, 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 been made in Keshav's lifetime by the widow of a pre-deceased co-parcener other than his father. This contention may be right or wrong, but it is not an argument that the plaintiff is Keshav's heir. It is an argument which cuts into Keshav's right, challenging its character as an absolute right and founding on qualifications which impair its completeness. This argument will be considered first.

Upon the initial question of the validity of the plaintiff's adoption their Lordships must reject the view that Gangabai's power to adopt came to an end on her son Keshav's death by reason that he was the sole surviving co-parcener in the joint family. This circumstance would seem, upon the principles declared in *Amarendra's* case, to have no bearing upon the continuance of Gangabai's authority. As stated by the Board in *Vijaysingji Chhattrasingji* v. *Shivsangji* (1935) L.R. I.A. 161, 165, " the power of a widow to adopt does not depend upon the question of vesting or divesting of the estate." Their Lordships on this point agree with the majority of the Full Bench in *Balu Sakharam's* case and find themselves unable to accept the conclusion of Rangnekar J. who supported *Chandra's* case. The learned Judge seems also to have considered it to be settled law (p. 572) that the widow's power to adopt can be defeated by a partition between co-parceners, a view which has since been negatived by two High Courts on very cogent reasoning, *Bajiro* v. *Ramkrishna* I.L.R. (1941) Nagpur 707, *K. R. Sankaralingam Pillai* v. *Veluchami Pillai*, A.I.R. (30) (1943) Madras 43. Of *Chandra's* case it should be remembered that Telang J. had in 1890 to reconcile two lines of decisions—those which following *Raghunadha* v. *Brozo Kishoro* (1876) L.R. 3 I.A. 154, allowed an adoption to divest co-parceners and those which, as in *Bhoobun Moyee* v. *Ram Kishore* (1865) 10 Moo. I.A. 307, refused to regard as valid an adoption which would divest persons (other than the adopting widow) who had taken by inheritance. He had to find a dividing line and he drew the line at the death of the last surviving co-parcener when the property passed by inheritance and not by survivorship. But *Amarendra's* case

has profoundly modified the effect of previous decisions in cases of inheritance and the line of distinction need no longer be drawn in the same way.

If then the plaintiff's adoption was valid, can it be held that it does not take effect upon the property which had belonged to the joint family because there was no co-parcenary in existence at the date of the adoption? On this point their Lordships, differing from the majority decision in *Balu Sakharam's* case (*supra*), hold that the adoption being valid cannot be refused effect. That the property had vested in the meantime in the heir of Keshav is not of itself a reason, on the principles laid down in *Amarendra's* case, why it should not devest and pass to the plaintiff. Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption (cf. *Veeranna* v. *Sayamma* (1928) I.L.R. 52 Mad. 398). But in his lifetime adoption by the widow of a collateral co-parcener would have divested him of part of his interest and the same right to adopt subsisting after his death must, in their Lordships' view, have qualified the interest which would pass by inheritance from him. As *Appovier's* case (1866) 11 Moo. I.A. 75 made clear, the fraction which is at any time employed to describe the quantum of the interest of a male member of the family does not represent his rights while the family is joint, but the share which he would take if a paritition were then to be made. His interest is never static but increases by survivorship as others die and lessens as others enter the family by birth or adoption. What principle requires that the death of the last surviving co-parcener should prevent any further fluctuation of the interest to which he was entitled notwithstanding that a new male member has since then entered the family by adoption? There is, of course, some convenience in bringing fluctuations to an end, but other principle it is difficult to find. There is force in the comment of Seshagiri Ayyar J. on the Bombay decisions: " The learned Judges seem to regard the joint family as a quasi corporation which loses this character by the death of the last male member." *Madana Mohana* v. *Purushotama* (1914) I.L.R. 38 Mad. 1105, 1118. A broader, and as their Lordships think, a more adequate view, is that taken by the High Court at Nagpur:

> " We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member."

And in *Pratapsing Shivsing* v. *Agarsingji Raisingji* (1918) L.R. 46 I.A. 97, 107, it was said by Mr. Ameer Ali delivering the judgment of the Board:

> " Again it is to be remembered that the adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned has a retrospective effect: whenever the adoption may be made there is no hiatus in the continuity of the line. In fact, as West and Bühler point out in their learned treatise on Hindu law (3rd ed., p. 996, note (*a*)) the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible."

Taking first the simpler case where the adoption has been made by the widow of a pre-deceased collateral of the last surviving co-parcener, their Lordships find it difficult upon the foregoing principles to discover in the death of the latter before the adoption any ground for denying that the interest of the adoptive father or any part of it passes to the adopted son. Telang J. in *Chandra's* case (*vide* I.L.R. 14 Bom. at pp. 471-2) considered that this result would lead to much inconvenience and embarrassment because more than one widow in the family might retain a right to adopt; and because an adoption not made until after the death of the last male holder would defeat his chance to obtain by partition a separate allotment of property descendible to his own heirs. The learned judge very fairly said that " although the possibility of such difficulties arising is not to prevent the rule of law from being enforced, it is entitled

to weight in the consideration of the question whether the rule does really extend as far as has now been indicated." Their Lordships are not greatly impressed by the supposed grievance as regards partition, but they are bound to contemplate the possibility of more than one adoption being made in a family after the death of a sole surviving co-parcener. They see no reason, however, to anticipate that such a case would ordinarily present any new or formidable difficulty. The second or third person to be adopted would, like the first, take his place in the family as son to his adoptive father, and the interest of the person or persons already entitled by adoption must fluctuate to make room for the new-comer.

In the present case the adopting widow was the mother of the last surviving co-parcener. Her power to adopt could not have been exercised in his lifetime and if exercised after his death cannot, as their Lordships think, be given any less effect than would have attached to an adoption made after his death by the widow of a pre-deceased collateral. 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 co-parcener. On the latter's death it might well be, as already noticed, that his mother was not the only lady who as widow of a pre-deceased co-parcener still retained the right to adopt a son. If the rights of both were exercised and the other adopted son claimed to exclude the plaintiff from any share in the family property, the plaintiff would have no logical defence on the footing that he was merely Keshav's heir.

In *Balu Sakharam's* case the question whether the adoption does not divest property in favour of the adopted son was referred to the Full Bench in a double form (question II (*a*) and (*b*) I.L.R. 1937 Bombay at pages 543-4) according as the person in whom the property at the date of the adoption had already vested was an heir of the last male holder *nearer* or *remoter* than a natural son of the adoptive father would have been. In both forms the question was answered by the Full Bench in the negative because it was not considered that the adoption could be allowed to have any divesting effect after the co-parcenary had come to an end. But if, as their Lordships hold, it can have such effect it becomes necessary to observe that remoteness from the last male holder has no relevance or effect as an answer to a claim by the adopted son to derive an interest in the family property from his adoptive father. 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. In their Lordships' opinion the plaintiff's claim to the lands other than the two parcels which had belonged to Narayan is made out independently of his being shown to be the person who is nearest in the line of Keshav's heirs according to the special rule which governs watan property. But it is necessary to consider this last mentioned ground of claim in order to decide whether the plaintiff's adoption has divested the defendant of these two parcels of land—lands which were not in Keshav's hands joint family property but his separate property and in which Bhikappa at no material time had any interest whatever.

As *Bhoobun Moyee's* case (*supra*) was understood in Bengal (cf. *Faizudain Ali Khan* v. *Tincowri Saka* (1895) I.L.R. 22, Cal. 565, 571) it involved that no adopted son could claim as preferential heir the estate of any person other than his adoptive father if such estate had vested before the adoption in some heir other than the adopting widow. So too in *Chandra's case* (vide I.L.R. 14 Bom. at page 469) Telang J. understood it to involve that adoption by a widow does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband. Similar views could be cited from other High Courts. The question is whether after *Amarendra's* case these propositions still hold good. Their Lordships think that they do not. Neither the present case nor *Amarendra's* case brings into question the rule of law considered in *Bhubaneswari* v. *Nikomul* (1885) L.R. 12 I.A. 137, 141 (cf. *Kalidas Das* v. *Krishnachandra Das* (1869) 2 Ben. L.R.F.B. 103) and stated by the Board to be that " according to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral." Their Lordships say nothing as to these decisions

which appear to apply only to cases of inheritance and which do not seem to have proceeded on the footing that the adoptions in question were invalid. But in *Amarendra's* case, *Faizuddin's* case was among those cited to the Board (L.R. 60 I.A. at p. 243). Yet Bibhudindra, the last male owner of an impartible estate, having died unmarried, his mother adopted Amarendra, and it was held by the Board that this adoption divested Banamalai, in whom at Bibhudindra's death the estate had vested by virtue of the family custom. And in the later case of *Vijaysingji Chhatrasinghji* v. *Shivsangji* (1935) L.R. 62 I.A. 161, 165 the Board stated the effect of their previous decision by saying that " the adoption in that case which was made by a widow after the death of her natural son without leaving a son or a widow, was found to be valid though the estate had vested in a collateral of the son." In *Vijaysingji's* case itself the suit of the paternal uncle and nearest heir of the last male holder was held to be defeated by an adoption made by the latter's mother after his death; though in the High Court it had been held that the widow could not make an adoption which would have the effect of divesting the estate which had vested in the uncle. A certain difficulty in interpreting these decisions of the Board arises from the absence in either judgment of a statement that the impartible estate descended as joint family property or as separate property: and in *Balu Sakharam's* case the learned Chief Justice seems to have thought that they were to be explained on the footing that a sort of co-parcenary was subsisting. This, however, is not the explanation of either decision. In neither case had the unsuccessful plaintiff claimed on the ground of jointness or survivorship and in neither had the question whether the impartible estate descended as joint or as separate property been so raised at the trial as to be satisfactorily cleared up in the Courts in India. But on the appeal to His Majesty in Council *Amarendra's* case was clearly argued and decided on the footing that the estate was separate property. This is expressly stated both at page 243 of the sixtieth volume of Indian Appeals and at page 643 of the twelfth volume of the Patna series of the Indian Law Reports. The language of the Board's judgment in *Vijaysingji's* case may be thought applicable to either of the two positions, but they clearly followed *Amarendra's* case, and they say that in the presence of the adopted son " the plaintiff cannot inherit the estate " (p. 165).

Now an impartible estate is not held in co-parcenary (*Sartaj Kuari* v. *Deoraj Kuari* (1888) L.R. 15 I.A. 51) though it may be joint family property. It may devolve as joint family property or as separate property of the last male owner. In the former case it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g., lineal male primogeniture. In the latter case jointness and survivorship are not as such in point: the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom. The zemindari property claimed in *Amarendra's* case was adjudged to belong to the adopted son on this last mentioned principle—that is, as heir of the last male owner.

If the effect of an adoption by the mother of the last male owner is to take his estate out of the hands of a collateral of his who is more remote than a natural brother would have been and to constitute the adopted person the next heir of the last male owner, no distinction can in this respect be drawn between property which had come to the last male owner from his father and any other property which he may have acquired. Keshav's separate watan property devolves not on his mother who would be his heir at the general law but on the nearest male in the line of heirs; and if the plaintiff's adoption as son to Bhikappa puts him in that position, his right to succeed cannot be limited to such watan property as Keshav derived from Bhikappa. On this ground the appellant's suit succeeds as regards the two parcels of land which Keshav inherited from Narayan.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court dated 16th December, 1937, set aside, and the decree of the Subordinate Judge of Dharwar dated 22nd November, 1933, restored. The respondent will pay the appellant's costs of this appeal and of both the Courts in India.

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In the Privy Council

ANANT BHIKKAPPA PATIL, MINOR, BY HIS NEXT FRIEND GANGABAI KOM BHIKKAPPA

v.

SHANKAR RAMCHANDRA PATIL

DELIVERED BY SIR GEORGE RANKIN

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