KASABAI TUKARAM KARVAR & ORS. A

v.

NIVRUTI (DEAD) THROUGH LEGAL HEIRS & ORS.

(Civil Appeal No. 6076 of 2010)

JULY 20, 2022 B

**[K. M. JOSEPH AND HRISHIKESH ROY, JJ.]**

*Hindu Succession Act, 1956 – Succession prior to the Act – Share of daughter* vis-à-vis *adopted son, if any – Doctrine of relation back – Applicability of – Father of the first appellant-plaintiff (since deceased) died in 1948 – She was born soon thereafter – Her mother adopted a son (first defendant) in 1949 – Suit filed by the plaintiff seeking partition of the plaint schedule properties was eventually dismissed by High Court reversing the concurrent findings of the Trial Court and First Appellate Court – On appeal, held: In the present case, admittedly the succession opened up prior to the 1956 Act coming into force – Further, there is no dispute about the adoption or the validity of the adoption – Thus, on applying the doctrine of relation back, it would be deemed that as on the date of the death of their father, the first defendant was very much notionally alive and he would become the sole coparcener – The adopted son (first defendant), being a son on applying the doctrine of relation back, would exclude the daughter-plaintiff – She would not be an heir, in view of the notional existence of the adopted son by virtue of the said doctrine – No case made out for any interference – Hindu Women's Rights to Property Act, 1937 (XVIII of 1937).* C D E F

**Dismissing the appeal, the Court**

**HELD: 1.1 There is no dispute about the adoption or about the validity of the adoption. It is, in fact, the case of the plaintiff that the first defendant was the adopted son. On the said basis, the further conclusion is inevitable that on applying the doctrine of relation back, it would be deemed that as on the date of the death of their father, the first defendant was very much notionally alive and he would become the sole coparcener. There can be no vacuum or break in vesting of title on the death of a person. This is a case where succession opened up admittedly prior to the Hindu Succession Act, 1956 coming into force. The plaintiff relied** G H

A **upon Section-72 of *Part-I, Chapter VI-Order of Succession to Males in the Bombay State in Mulla on Hindu Law, 23rd Edition.* There are other heirs but they are not being referred to. The Court must, in the facts of this case, proceed on the basis that the adopted son (first defendant), being a son on applying the doctrine of relation back, would exclude the daughter. This result flows from the statement that the persons in serial Nos.1 to 6, namely, son, son's son (whose father is dead) and son's son's son (whose father and grandfather are both dead) inherit simultaneously. If there is a son, the daughter would not be entitled to share along with the son. The daughter, in other words, would not be a legal heir who would take simultaneously with the son. [Paras 11-14][906-C-F; 907-C-E]**

**1.2 It is, undoubtedly, true that in view of *the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937),* the widow, *inter-alia,* is also recognized as an heir. There was, as on the date when the succession opened, in this case in the year 1948, the daughter (the appellant) who would not have any right. The daughter would not be a coparcener which she, undoubtedly, is under the present dispensation in view of the sweeping developments which took place in the matter of succession which have been ushered in as a result of the Hindu Succession Act and the changes that have been engrafted therein. The plaintiff daughter would not be an heir, in view of the notional existence of the adopted son by virtue of the doctrine of relation back. As far as the effect of remarriage of the mother of the plaintiff and the first defendant is concerned, again, in view of the fact that in the presence of the son, the daughter may stand excluded, it would again result in no right accruing to the plaintiff-daughter as a result of the remarriage. The first defendant, as son, would become the sole owner of the property. The appellants have not made out a case for any interference. [Paras 15, 16 and 18][907-E-H; 908-A, B-C]**

*Govind Hanumantha Rao Desai v. Nagappa alias Narahari Laxman Rao Deshpande and Sever Others* **(1972) 1 SCC 515 : [1972] 3 SCR 200;** *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar*

*and Others* **(1974) 2 SCC 156 : [1974] 3 SCR 474 – relied on.** A

*Mulla on Hindu Law* 23rd Edition **– referred to.**

**Case Law Reference**

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| **[1972] 3 SCR 200** | **referred to** | **Para 10** |
| **[1974] 3 SCR 474** | **referred to** | **Para 10** |

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6076 of 2010.

From the Judgment and Order dated 07.01.2009 of the High Court of Judicature at Bombay Bench at Aurangabad in Second Appeal No. 299 of 2000. C

Anish R. Shah, Brij Kishor Sah, Ms. Shivani Rautela, Aditya S. Jadhav, Shivaji M. Jadhav, Advs. for the Appellant.

Nachiketa Joshi, Ms. Sucheta Joshi, Ms. Himadri Haksar, Ms. Medhavi Mishra, Advs. for the Respondent. D

The Judgment of the Court was delivered by

**K. M. JOSEPH, J.**

By the impugned judgment, the High Court has allowed the Second Appeal No.299 of 2000 filed by defendant No.1. The Second Appeal arose out of R.C.S No.91 of 1986 filed by the first appellant (*Kasabai* since deceased). The said Suit was filed seeking partition of the plaint schedule properties. The genealogy of the parties is admitted and is as follows:- E

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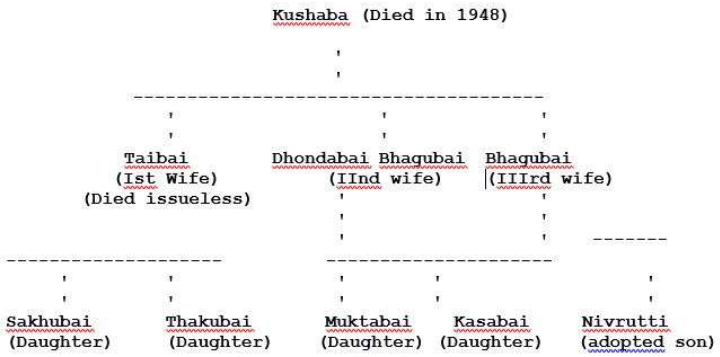


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A 2. The first appellant (*Kasabai* since deceased) was the plaintiff. *Nivrutti*, in other words is the adopted son and referred to as the first defendant. The father of the plaintiff and the first defendant and other family members passed away on 16th March, 1948. We have already noticed that the father had married on three occasions. The first marriage did not produce any issues. The second marriage produced defendant B Nos. 4 to 6 in the present suit. The third marriage entered by the father with *Bhagubai* (third wife) produced one issue, namely, *Kasabai.* The plaintiff was born, in fact, after 10 days of passing away of her father. It is again not in dispute that the first defendant was adopted by the widow on 17.11.1949 by a registered deed. There is also no dispute that the C adopted son instituted a suit claiming right over the plaint schedule properties impleading defendant Nos.4 to 6. Defendant Nos. 4 to 6 are step sisters born to the second wife *(Dhondabai) and* their father *Kushaba*. The said suit was decreed. In the appeal, there was a compromise. On the strength of the said compromise, the step sisters instituted a suit - R.C.S. No. 53 of 1984. The said suit has been decreed D finally *as we can* notice by the dismissal of the Second Appeal No.233 of 2000, as can be discerned from the common judgment which is the impugned judgment in this case also.

3. The present civil appeal arises, however, from the common judgment by which the High Court has allowed the Second Appeal No.299 E of 2000. The Second Appeal No.299 of 2000 arises from the suit for partition which we have noticed was filed by the plaintiff. As far as the *lis* between the step-sisters (defendant Nos. 4 to 6) and the plaintiff is concerned, it has been given a quietus by the common judgment.

4. As far as the cause of action relevant to the present civil appeal F is concerned, the plaintiff proceeded on the basis that the plaint schedule properties are joint family properties. It is the further case of the plaintiff that the plaintiff being the daughter was entitled to share along with the adopted son. Their mother also got a share and remarried. The result of the remarriage has been found by the Trial Court in favour of the plaintiff G that her share would vest in the legal heirs. Resultantly, both the plaintiff and the first defendant (adopted son) would get 1/2 share. This view also found acceptance in the hands of the First Appellate Court. It is this concurrent finding which has been reversed by the High Court in the Second Appeal by the impugned judgment.

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5. The High Court has found that in view of the adoption made of a son by the widow, namely, the mother of the plaintiff and the first defendant, the adoption would relate back to the time of the death of the father-*Kushaba* on 16.03.1948. The further consequence of the doctrine of relation back being applied was that the adopted son would emerge as the sole and exclusive heir and he would divest the plaintiff of her rights.

6. It is also found by the High Court that the case of the plaintiff that she was in joint possession of the plaint schedule properties, did not inspire the confidence of the Court. The said version was also disbelieved. This necessarily resulted in the dismissal of the suit filed by the plaintiff after reversing the concurrent findings.

7. We have heard learned counsel for the plaintiff and learned counsel for the first defendant.

8. Learned counsel for the plaintiff would raise a controversy as to the applicability of the doctrine of relation back. He would further contend that the impugned judgment results in the exclusion of the daughter who was in the womb even when the father was alive and born immediately after the death of the father. She is entitled to her rightful share. It is further pointed out with reference to what is stated in *Mulla on Hindu Law, 23rd Edition Section 72 of Part I, that the daughter in the region from which the parties hailed (the Bombay region)* would get the right as a heir. It is further contended that upon remarriage of her mother, the plaintiff, as a legal heir, would get, at any rate, a part of *her* right and would be entitled to a share *out of the* estate of the mother along with the adopted son.

9. Per-*contra,* the learned counsel for the adopted son (first defendant) supports the impugned judgment. He would submit that the High Court is right in applying the doctrine of relation back. With reference to the discussion to be found in *Mulla on Hindu Law 23rd Edition* relied upon by the appellant, he would contend that the son would exclude the daughter once it is found that there is valid adoption and doctrine of relation back applies. Even the subsequent divesting of the right of the mother would not *enure* to the benefit of the plaintiff who is a daughter in view of the subsequent adoption which relates back to the date of death of the father.

A 10. As far as the doctrine of relation back goes, we need only notice decisions of this Court in *Govind Hanumantha Rao Desai versus Nagappa alias Narahari Laxman Rao Deshpande and Sever Others, (1972) 1 SCC 515 and Shripad Gajanan Suthankar versus Dattaram Kashinath Suthankar and Others, (1974) 2 SCC 156.* We may only further expatiate by referring to paragraphs 6, 7 and 9 of *Shripad Gajanan Suthankar and Others (Supra)*.

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> "6. It is established law that the adoption by a widow relates back to the date of the death of the adoptive father, which, in this case, took place in 1921. Indeed, the complexity of the present case arises from the application of this legal fiction of "relation-back" and the limitations on the amplitude of that fiction vis-a-vis the partition of 1944, in the light of the rulings of the various High Courts and of the Judicial Committee of the Privy Council, and of this Court, the last of which is *Govind* v. *Nagappa*. According to the appellant, the rights of the adopted son, armed as he is with the theory of "relation-back", have to be effectuated retro-actively, the guidelines wherefor are available from the decided cases. It is no doubt true that
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> "when a member of a joint family governed by Mitakshara law dies and the widow validly adopts a son to him, a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son". (See *Mulla on Hindu Law*, 13th Edn.p. 516.)

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F The same author, however, points out that:

> "the rights of an adopted son arise for the first time on his adoption. He may, by virtue of his rights as adopted son, divest other persons in whom the property vested after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him. His right to impeach previous alienations would depend upon the capacity of the holder who made the alienation as well as on the nature of the action of alienation. When the holder was a male, who had unfettered right of transfer, e.g., the last surviving member of a joint family, the adopted son could not impeach the transfer. In case of

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females who had restricted rights of transfer even apart from any adoption, the transfers would be valid only when they are supported by legal necessity". (*ibid*, pp. 516-517; para 507.)

"An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural-born son would be. (*ibid*; p. 517: para 508.)

7. It is settled law that the rights of an adopted son spring into existence only from the moment of the adoption and all alienations made by the widow before the adoption, if they are made for legal necessity or otherwise lawfully, such as with the consent of the next reversioners, are binding on the adopted son. The narrow but important question that arises here is as to whether the adoption made in 1956 can upset the partition of 1944, validly made under the then conditions, and the gift by Mahadev of properties exclusively set apart to him and, therefore, alienable by him, could be retro-actively invalidated by the plaintiff on the application of the legal fiction of "relation-back". It is unlikely that a similar question will arise hereinafter since Section 4 of the Hindu Succession Act, 1956 has practically swept off texts, rules and the like in Hindu Law, which were part of that law in force immediately before the commencement of the Act, if provisions have been made for such matters in the Act. Since on the husband's death the widow takes an absolute estate, questions of the type which engage us in this appeal will be stilled for ever. Of course, we need not investigate this aspect of the matter as the present case relates to a pre-statutory adoption. Even Section 12 of the Hindu Adoptions and Maintenance Act, 1956, makes it plain that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption.

9. The plaintiff, as the adopted son, for secular and spiritual purposes continues the line of the adoptive father and when the widow adopts, the doctrine of "relation-back" makes sonship retroactive from the moment of death of the late husband. The new entrant is deemed to have been born on the date of death of the adoptive father. Supposing there was an undivided family in existence when the adoptive father died, how far can the legal fiction of anterior sonship disrupt the doings between notional birth

A and actual adoption? *Mulla* sums up the result of the rulings thus: (p. 496)

> "If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second and enabling the adopted son to claim a share in the family properties as if they were still joint."

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11. In this case, there is no dispute about the adoption or about the validity of the adoption. It is, in fact, the case of the plaintiff that the first defendant was the adopted son. On the said basis, the further conclusion is inevitable that on applying the doctrine of relation back, it would be deemed that as on the date of the death of their father, the first defendant was very much notionally alive and he would become the sole coparcener. It is indisputable that there can be no vacuum or break in vesting of title on the death of a person. We must further bear in mind that this is a case where succession opened up admittedly prior to the *Hindu Succession Act, 1956* coming into force.

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12. The learned counsel for the plaintiff, no doubt, relied upon Section-*72 of Part-I, Chapter VI-Order of Succession to Males in the Bombay State in Mulla on Hindu Law, 23rd Edition* which is reproduced below:-

> 72. Order of succession in cases governed by Mitakshara-The following is the order of succession to males among sapindas in the Bombay State in cases governed by *Mitakshara*:
>
> (1-6) Son, son's son (whose father is dead) and son's son's son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1937, the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognised as heirs.
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> (7) Daughter
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> In the Bombay State, daughter do not take as joint tenants with benefit of survivorship, but they take as tenants-in-common. Further, a daughter in that State does not take a limited estate in her father's property, but takes the property absolutely. Thus, if Hindu governed by the Bombay School dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death her share will pass to her own heirs as her stridhana.

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13. There are other heirs but they are not being referred to. We must, in the facts of this case, proceed on the basis that the adopted son (first defendant), being a son on applying the doctrine of relation back, would exclude the daughter. This result flows from the statement that the persons in serial Nos.1 to 6, namely, son, son's son (whose father is dead) and son's son's son (whose father and grandfather are both dead) inherit simultaneously.

14. We would hold that if there is a son, the daughter would not be entitled to share along with the son. The daughter, in other words, would not be a legal heir who would take simultaneously with the son. The example which, in fact, has been set out and which we have extracted would only be applicable in a situation where there were only daughters and no son.

15. It is, undoubtedly, true that in view of the *Hindu Women's Rights to Property Act, 1937 (XVIII of 1937)*, the widow, *inter-alia*, is also recognized as an heir. There was, as on the date when the succession opened, in this case in the year 1948, the daughter (the appellant) who would not have any right. The daughter would not be a coparcener which she, undoubtedly, is under the present dispensation in view of the sweeping developments which took place in the matter of succession which have been ushered in as a result of the Hindu Succession Act and the changes that have been engrafted therein. The plaintiff daughter would not be an heir, in view of the notional existence of the adopted son by virtue of the doctrine of relation back.

16. As far as the effect of remarriage of the mother of the plaintiff and the first defendant is concerned, again, in view of the fact that in the presence of the son, the daughter may stand excluded, it would again result in no right accruing to the plaintiff-daughter as a result of the

A remarriage. In other words, the first defendant, as son, would become the sole owner of the property.

17. Aid is sought to be drawn from the terms of the compromise entered into between the adopted son (first defendant) and the step-sisters in a proceeding to which the plaintiff was admittedly not a party. B We are not even called upon to decide a case that estoppel, as such, would arise in favour of the plaintiff.

18. In view of the aforesaid discussion, the appellants have not made out a case for any interference. The appeal stands dismissed.

No order as to costs.

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Pending application(s), if any, stand disposed of.

Divya Pandey Appeal dismissed.
(Assisted by : Deepak Panwar, LCRA)