Bombay High Court
Irappa Lokappa Vastrad vs Rachayya Madiwalayya on 17 August, 1939
Equivalent citations: (1939) 41 BOMLR 1300
Author: N Wadia
Bench: N Wadia, Wassoodew
JUDGMENT N.J. Wadia, J.

1. This appeal raises a short and interesting question with regard to the law of adoption. The plaintiff, who is the first respondent before us, claimed to be the adopted son of one Shivalingayya, and filed the suit to recover possession of his half share in the suit property from the first defendant Irappa, who was his paternal uncle, and the second defendant Gurbasappa, who was the son of Irappa. Shivalingayya, the plaintiff's adoptive father, and his younger brother Irappa were the sons of one Lokappa who died in the year 1915. Shivalingayya himself died in 1925. At the time of his death he was joint with his brother Irappa. He left a widow Parawwa who was defendant No. 3 in the case and who is respondent No. 2 before us. On September 18, 1933, Irappa and his son Gurbasappa, who were at the time the only members of the coparcenary, divided. The partition deed (exhibit 70) mentions that the partition had been effected because Gurbasappa, who had come of age, had taken to bad habits and bad company and was constantly quarrelling with his father and demanding separation. The property of the family was partitioned. The deed mentioned that Parawwa kom Shivalingayya, the widow of Irappa's brother, had obtained a decree in the Bijapur Court awarding her maintenance at Rs. 165 per annumand provided that this maintenance should be paid to her by Gurbasappa alone. About two months after this partition, on November 10, 1933, Parawwa adopted the plaintiff, and on January 24, 1935, the plaintiff filed the suit out of which this appeal arises to recover a half share in the family property from Irappa and Gurbasappa.

2. The defendants had contended inter alia that in fact no adoption had taken place although an adoption deed had been executed, and that the adoption was also invalid because of the unchastity of Parawwa. The learned Judge has found that unchastity on the part of Parawwa during the lifetime of her husband had not been proved, and this point was not seriously pressed before him. At the trial the defendants admitted the factum of the plaintiff's adoption, and the plaintiff admitted that there had been a partition between defendants Nos. 1 and 2 on September 18, 1933. But he added that that admission was subject to his right to show that the partition was not bona fide and was intended to defeat the rights of others. No issue was sought or raised with regard to the dishonest nature of the partition. The learned Judge found on the admission of the plaintiff himself that the partition had taken place, and on the admission of the defendants, that the plaintiff's adoption had taken place on November 10, 1933. He held that the adoption was valid.

3. On the view which has now been taken by the Privy Council Parawwa was clearly entitled to make an adoption. The only question is whether as a result of that adoption the plaintiff acquires any right to a share in the property which had originally belonged to the joint family and which had been partitioned by defendants Nos. 1 and 2 prior to the plaintiff's adoption. The learned Judge held that it was not permissible for the defendants to put an end to the coparcenary by separation, and that the plaintiff by reason of his adoption was entitled to a share in the joint family property. He therefore made a decree giving the plaintiff a half share in the suit property. Against that decree the

first two defendants Irappa and Gurbasappa have appealed, and the only question before us is whether the adoption of the plaintiff by Parawwa after the coparcenary had come to an end by the partition between Irappa and Gurbasappa, who were the only members of the coparcenary, could revive the coparcenary and entitle the plaintiff to claim a share in the coparcenary property which had been divided between defendants Nos. 1 and 2.

4. In the recent full bench decision of this Court, Balu Sakharam v. Lahoo (1936) 39 Bom. L.R. 382, F.B to which I was a party, it was held by the majority of the full bench that (p. 414):

where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly... [But] where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her.

In principle I am unable to see any distinction between the extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition, so far as the rights of an adopted son adopted after the extinction of the coparcenary are concerned. The effect of a partition is to dissolve a coparcenary, with the result that the separating members hold their respective shares as their separate property after the partition. In Hirachand v. Rowji Sojpal (1938) 41 Bom. L.R. 760 it was held by Mr. Justice Rangnekar sitting singly that "under Hindu law, on the extinction of a coparcenary by a partition, the widow of a coparcener, who had died long before the partition, cannot make a valid adoption." In dealing with the effect of partition Mr. Justice Rangnekar said (p. 766):

The effect of partition under the Mitakshara is the conversion of an indefinite joint right in the whole into a specific right in part. The effect of partition is to dissolve the coparcenary, with the result that the separating members thenceforth hold their respective shares as their separate property, and the share of each member dying without issue will pass on his death to his heirs. But if a member, while separating from his other coparceners, continues joint with his own male issue, the share allotted to him or) partition will in his hands retain the character of coparcenary property as regards his male issue.

In the face of these principles, which are as old as the hills, it is difficult to appreciate the argument that the nature of the property remains the same after a partition as before it, or that the [nature of the] property remains dormant. True, that qua a divided member and his issue a coparcenary comes into existence, but it is not the coparcenary which subsisted before the partition. It is a new coparcenary ; and in that way a partition may at once give rise to several coparcenaries, but these coparcenaries are quite distinct from the larger original coparcenary in existence before the partition but destroyed by the partition.

After referring to the decisions in Balu Sakharam v. Lahoo and Chandra v. Gojarabai (1890) I.L.R. 14 Bom. 463 Mr. Justice Rangnekar says (p. 768):

If, therefore, on the extinction of a coparcenary by reason of the property devolving by inheritance on the heir of the last surviving coparcener, an adoption made by the widow of a predeceased coparcener is invalid and cannot affect that property, it is difficult to hold that, on the extinction of a coparcenary by a partition, the widow of a coparcener, who had died long before the partition, can make a valid adoption.

Mr. Justice Rangnekar's remarks with regard to the validity of such an adoption are in accordance with the view which he took in his dissenting judgment in Balu Sakharam v. Lahoo. On the view taken by the majority of the full bench in that case such an adoption would be valid, but would give the adopted son no right to divest the property which had already vested in others by reason of the extinction of the coparcenary whether by the death of the last surviving coparcener or by partition. The view taken by Mr. Justice Rangnekar in the above case was subsequently followed by a division bench of this Court, of which I was a member, in Shivappa Jayappa Kumatagi v. Yagappa Shiddappa Kumatagi (1938) First Appeal No. 247 of 1935. The facts in that case were very similar to the facts in the case before us. In that case the plaintiff, who claimed to have been adopted by the widow of one Jayappa in March, 1933, brought a suit against four defendants who represented two other branches of the family to recover his one-third share in the property. Prior to the plaintiff's adoption there had been a partition in the family in the year 1901-02. The question was whether the plaintiff having been adopted in the third branch of the family long after the partition between the other two branches could claim a share in the joint family property which had gone to those branches at the partition. The judgment of Mr. Justice Rangnekar in Hirachand v. Rowji Sojpal (1938) 41 Bom. L.R. 760 was cited before us in that case, and the view taken by Mr. Justice Sen and myself was that where a coparcenary had come to an end whether by the death of the last surviving coparcener or by partition, a son adopted subsequent to such termination of the coparcenary should not be allowed to reopen the partition or to divest the property already vested in others. Mr. Justice Sen, who delivered the judgment in that case, pointed out that this view was in accordance with the view which had been taken by the full bench in the case of Balu Sakharam v. Lahoo and also with the view which had been taken in Chanbasappa V. Huchappa . In the latter case two branches of a joint family arrived at a partition of the joint family property, each branch taking a half share., One of the branches consisted of the defendant, who was the last surviving coparcener, and the widow of his paternal uncle, who continued to live jointly. The widow thereafter adopted the plaintiff. In a suit brought by the plaintiff to obtain his half share in the property which fell to the defendant on partition, it was held that the plaintiff as the adopted son was entitled to a share in the property in the hands of the defendant, as the joint family was still subsisting and had not come to an end. The plaintiff in that case was entitled only to a share in the property which had fallen to his branch which at the time of the partition had been represented by defendant No, 3. But he was not held entitled to a share in the property of the other branch. The learned Chief Justice held in that case that the half share which defendant No, 3 took on partition was taken by him as the joint family property of his branch and not as his absolute property, and that therefore the plaintiff, who was the adopted son of his father's brother, was entitled to a share in what defendant No, 3 had taken. Dealing with defendant No. 3's contention that the share which he took on partition was his absolute property the learned Chief Justice said (pp. 1187-88):

He [defendant No. 3] and the widow of Parappa were the only members of the joint family, and no doubt he was the sole coparcener. But in my opinion it is not accurate to say that the coparcenary had come to an end, I think the coparcenary still exists in respect of the share which he took on the partition, and that on the birth of a son to him, that son would have a share in the coparcenary, and on the adoption of a son by his father's brother's widow, that adopted son is also entitled to share.

5. Mr. Madbhavi for the respondent-plaintiff contends that his case is similar to Chanbasappa v. Huchappa, and that on the principle there laid down he is entitled to a share in the property which Irappa and Gurbasappa took at the partition. We are unable to accept this contention. The present case is clearly distinguishable. In that case there was a member of the plaintiffs branch who took a share at the time of the partition, and the view which the learned Chief Justice took was that by reason of the partition the original coparcenary came to an end, but new coparcenaries were created between the two dividing branches, one branch being represented by defendants Nos. 1, 2 and 4 in that case, and the other branch being represented by defendant No. 3, and that a joint family continued within defendant No 3's own branch represented by himself and Virawwa, the widow of his predeceased uncle. In the case before us there was no representative of Shivalingayya's (i.e. plaintiff's) branch at the time of the partition. The only coparceners were defendants Nos. 1 and 2 representing the other branch and after the partition there could be no state of jointness between either of them and Parawwa, the widow of Shivalingayya. The mere fact that by the partition deed Gurbasappa undertook the liability to pay the maintenance which had been awarded to Parawwa, the widow of Shivalingayya, by the Civil Court, did not create any state of jointness between Gurbasappa and Parawwa, and the subsequent adoption of the plaintiff by Parawwa could not possibly have the effect of reviving the coparcenary between Gurbasappa and Irappa which had terminated by the partition ; nor could it give the plaintiff, the adopted son, any right to divest either of them of the property which they had taken at the partition. That property ceased to be joint family property from the date of the partition. The facts in this case are, in our opinion, exactly similar to the facts in Shivappa Jayappa v. Yagappa Shiddappa and the decision in that case is binding on us. On this view of the case, although Parawwa was legally entitled to adopt, and the plaintiff's adoption is therefore valid, the plaintiff would by the adoption acquire no right to a share in the joint family property which had already been partitioned two months before his adoption. His suit must fail. The appeal will therefore be allowed and the plaintiff's suit dismissed. Appellants Nos. 1 and 2 will get their costs throughout from the first respondent, plaintiff.

6. Under Order XXXIII, Rule 11, of the Civil Procedure Code, we direct that the plaintiff should pay the Court fees in the suit.