CASE NO.:
Appeal (civil) 11632 of 1995

PETITIONER:
Namdev Vyankat Ghade & Anr.

RESPONDENT:
Chandrakant Ganpat Chadge & Ors.

DATE OF JUDGMENT: 25/02/2003

BENCH:
Doraiswamy Raju & Shivaraj V. Patil

JUDGMENT:

J U D G M E N T

SHIVARAJ V. PATIL J.

This appeal is by the plaintiffs challenging the validity and the correctness of the judgment and decree dated 27th June, 1994 passed in Second Appeal No. 405 of 1994 by the High Court of Bombay affirming the concurrent findings of the trial court and that of the first appellate court. In order to appreciate the contentions urged before us, it has become necessary to state the facts to the extent necessary for deciding the questions that arise for consideration. The family pedigree of the parties is as set out below:-

BALI

VYANKAT (DIED ON 8.2.1978	ANAND RAO DIED IN 1930
WIDOW KRISHNABAI (Defendant No. 2)	DIED IN APRIL 1980) #ALLEGEDLY ADOPTED *DATTATRAYA ON 10.6.78

(Peti No.1 (Plaintiff No. 1)	(Peti No.2 (plaintiff No. 2)	(Resp. No.1 No. 1)	Sarda (Defendant No. 3)	Leelavai (Defendant (No. 4)	Bhagirithi (Defendant No.5)	
Namdev	Laxman	Ganpat				
		#daughter's son *Dattatraya adopted by Krishnabai (Defendant No. 6)				

Bali had two sons, namely Vyankat and Anand Rao. Anand Rao died on 6.7.1930 in joint family. The defendant no. 2 was the wife of Anand Rao. After death

of Anand Rao, Vyankat became absolute owner of the suit property. The share of Anand Rao in suit property merged and the defendant no. 2 had only right of maintenance being a widow in the joint family of plaintiffs and defendant no. 1. Plaintiffs and defendant no. 1 are sons of said Vyankat and defendants 3 to 5 are the daughters of said Vyankat. Defendant No. 6 is the adopted son of defendant No. 2. After death of Anand Rao, maintenance was used to be given to defendant no. 2. On 8.2.1978, Vyankat also died and thereafter defendant no. 1 in collusion with the defendant no. 2 got the name of defendant no. 2 mutated in records showing half share in the suit property and got half share mutated in his name in the suit properties being the Karta of the family. It is the further case of the plaintiffs that as per Hindu law, defendant no. 2 had no right over the suit property, the plaintiffs filed complaint about the said mutation entry; however, the defendant no. 1 with the help of defendant no. 2 obstructed their possession over the suit property. Hence, the plaintiffs filed a suit for partition of their shares in the suit property collectively claiming that they had 7/12th share, defendant no. 1 having 7/24th and defendant nos. 3 to 5 each having 1/8th share in the suit property and that defendant no. 2 had only right to maintenance. During the pendency of the suit, defendant no. 2 also died and plaintiffs and defendants 1, 3 to 5 are her legal heirs. It was also the case of the plaintiffs that defendant no. 2 had not taken defendant no. 6 in adoption. The defendant no. 1 in collusion with defendant no. 2 set up the adoption of defendant no. 6 who is the grandson of the defendant no. 1 through his daughter Sindutai. Defendant nos. 3 and 5 remained absent in the suit and were proceeded ex-parte. Defendant nos. 1 and 2 filed joint written statement and contested the suit, contending that on 10.6.1968, defendant no. 2 had taken defendant No. 6, grandson of defendant no. 1, namely, Dattatraya in adoption after performing some due ceremony; hence the defendant no. 6 is having share in the suit property; defendant no. 2 denied that she had only right of maintenance; the defendant nos. 1 and 2 denied that after the death of Anand Rao, his share merged and said Vyankat became absolute owner of the suit property; according to them, plaintiffs would not get more than 7/48th share in the suit property. Defendant no. 4 filed written statement and denied that after the death of Anand Rao, said Vyankat became absolute owner of the suit property being sole surviving coparcener. It was further the case of the defendant no. 4 that in item nos. 2 to 4 of the suit schedule property, the said Vyankat being the tenant, after the re-grant, he became owner of those grants as self-acquired property. Consequently, defendant no. 2 and alleged adopted son has no share in the said lands. Defendant no. 6 suo moto appeared and he was allowed to take part in the proceedings after the death of defendant no. 2. The trial court held that the adoption of defendant no. 6 was valid and decreed the suit of the plaintiffs declaring that the plaintiffs 1 and 2 and defendant no. 1 each having 7/48th share, defendant nos. 3 to 5 having 1/48th share in the suit property.

Aggrieved by the decree passed by the trial court,

the plaintiffs filed appeal before the District Judge. The learned District Judge, concurring with the findings recorded by the trial court, dismissed the appeal. Thereafter, the plaintiffs filed second appeal before the High Court. The High Court also dismissed the second appeal declining to interfere with the concurrent findings of both the lower courts. Hence, this appeal.

In view of the concurrent findings of fact the learned counsel for the appellants did not question the validity of the adoption of defendant no. 6. However, he urged that clause (c) of Section 12 of the Hindu Adoption and Maintenance Act, 1956 precluded defendant No. 6 to claim share in the property, already vested in the heirs of Vyankat before his adoption, and that the restriction imposed on the rights of adopted child under clause (c) of Section 12 is applicable to the interest vested in sole surviving coparcener when the adoption was made subsequent to the death of sole surviving coparcener.

He urged that the decision in Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe and Ors. [AIR 1988 SC 845], is clearly distinguishable and the courts were wrong in holding that the ratio of that case applied to the facts of the present case on all fours. The courts have failed to notice that it was a case where adoption had taken place during the life time of sole surviving coparcener but in the present case, defendant no. 6 was adopted after the death of sole surviving coparcener, namely Vyankat which makes all the difference.

The learned counsel for the respondents made submissions in support of the impugned judgment. He also contended that the question of law now sought to be urged, having not been raised in the courts below, cannot be permitted to be urged for the first time in this Court. Since the facts are not disputed and nothing more is to be done except interpretation and application of law to the facts of the present case that no further evidence is required to decide this question of law, we consider it appropriate in the interest of justice to consider them by permitting the appellants to raise the said pure question of law.

Learned counsel for the appellants was not in a position to dispute the validity and factum of adoption of defendant No. 6 Dattatraya by defendant No. 2 Krishnabai. It is useful to notice few important dates having bearing on the decision in this appeal. Anand Rao, the husband of defendant No. 2, died in 1930. Vyankat, his only brother, died on 8.2.1978. Defendant No. 2, the widow, adopted Dattatraya (Defendant No. 6) on 10.6.1978. Relationship between parties is also not disputed. In these circumstances the only question that arises for consideration is whether the adopted son Dattatraya could divest the property, which devolved on the heirs of Vyankat and vested in them prior to his adoption so as to claim share in the suit property. Vyankat died on 8.2.1978. Adoption of the defendant No. 6 by the defendant No. 2 took place on 10.6.1978, i.e., about four months after the death of Vyankat. The first appellate court placed reliance on the judgment of this Court in Dharma Shamrao Agalawe

vs. Pandurang Miragu Agalawe and others [AIR 1988 SC 845] in dismissing the appeal of the appellants while confirming the judgment of the trial court. The High Court dismissed the second appeal summarily at the stage of admission stating that there was no need to interfere with the concurrent findings of both the lower courts. The trial court and the first appellate court, after detailed consideration and appreciation of evidence, held that adoption of defendant No. 6 was valid and settled the shares of parties on that basis. In doing so reliance was placed on the aforementioned decision of this Court in the case of Dharma Shamrao (supra).

It is not necessary for us to look into the evidence in view of the concurrent findings and admitted facts in order to decide the question of law that arises for consideration. Whether adoption of defendant No. 6, after the death of sole surviving coparcener, makes any difference in determining the rights of adopting son in relation to the family properties? If the adoption had taken place during the life time of Vyankat, there would have been no difficulty whatsoever in confirming the judgment under challenge in the light of the decision of this Court in Dharma Shamrao Agalawe vs. Pandurang Miragu Agalawe and others aforementioned.

In the case of Dharma Shamrao the question that came up for consideration was whether a person adopted by Hindu widow after coming into force of the Hindu Adoptions and Maintenance Act, 1956 (for short 'the Act'), can claim a share in the property which had devolved on a sole surviving coparcener on the death of the husband of the widow, who took him in adoption. The facts in that case were that one Shamrao, who was governed by the Mitakshara Hindu Law, died leaving behind him two sons Dharma and Miragu. Miragu died issueless in the year 1928 leaving behind him his widow Champabai. The joint family properties of Dharma and Miragu passed on to the hands of Dharma, the sole surviving coparcener on the death of Miragu. Champabai had only right of maintenance in the joint family properties under the law, as it stood then. She took Pandurang in adoption on 9.8.1968, long after the Act came into force. Immediately thereafter the adopted son Pandurang and Champabai filed a regular civil suit for partition and separate possession of one-half share in the properties of joint family. Before the adoption took place two items of the joint family properties had been sold in favour of others for consideration. Dharma resisted the suit on the ground that adopted son Pandurang was not entitled to claim any share in the properties, which originally belonged to the joint family in view of clause (c) of the proviso to Section 12 of the Act.

In Vasant and another vs. Dattu and others [AIR 1987 SC 398], interpreting clause (c) of the proviso to Section 12 of the Act, Chinappa Reddy, J., speaking for the Bench, observed that where the joint family properties had passed on to the hands of the remaining members of the coparcenary on the death of one of the coparceners no vesting of the property actually took place in the remaining coparceners while their share in the joint family properties might have increased on the death of one of the coparceners, which could decrease on the introduction of one more member into the family

either by birth or by adoption. It did not involve any question of divesting any person of any estate vested in him and that the joint family continued to hold the estate, but, with more members than before with introduction of a member into the joint family by adoption; there was no fresh vesting or divesting of the estate in any way.

This Court in the case of Dharma aforementioned respectfully agreed with the above observations made in Vasant vs. Dattu (supra), as stated in para 9 of the said judgment thus: -

"We respectfully agree with the above observations of this Court in Vasant's case (supra). The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcenor or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted."

Finally this Court concluded that the joint family property continued to remain in the hands of Dharma, the appellant, as joint family properties and that on his adoption Pandurang, the first respondent, became the member of the coparcenary entitled to claim one half share in them except the items, which had been sold by Dharma, the appellant.

From the facts in Dharma's case it is clear that adoption of Pandurang took place during the lifetime of Dharma and as such Pandurang became member of coparcenary to claim the share.

In the present case with which we are concerned

now, it is not disputed that adoption of Dattatraya took place after the death of Vyankat, the sole surviving coparcener. In our view this makes all the difference for the reasons to be stated hereinafter.

On the date of death of Vyankat the properties of the joint family in his hands devolved on his heirs, i.e., his sons and daughters as per Section 6 of The Hindu Succession Act, 1956, subject to rights of maintenance of defendant No. 2 Krishnabai. Opening of succession and devolving of properties operated immediately on the death of Vyankat and the joint family properties stood vested in the heirs of Vyankat. Defendant No. 6 was adopted by defendant No. 2 about four months after the death of Vyankat by which time the properties had already been vested in his heirs as stated above.

It is appropriate to extract Section 12 of the Act, which reads: -

"12. Effect of Adoption. - 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 adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family;

Provided that

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."
(emphasis supplied)

It is plain and clear that an adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of Section 12. Proviso (c) to Section 12 in clear terms states that the adopted child shall not divest any person of any estate, which vested in him or her before the adoption.

In the case of Dharma aforementioned, adopted son became member of coparcenary with Dharma and there was no question of divesting of any property already vested in the view expressed by this Court in Vasant (supra).

But on the death of Vyankat, in the present case, property in his hands devolved and vested in his heirs. In view of proviso (c) of Section 12 of the Act defendant No. 6 Dattatraya by virtue of his adoption four months after the death of Vyankat could not divest the properties vested in the heirs of Vyankat so as to claim his share.

Full Bench of Bombay High Court in Jivaji Annaji vs. Hanmant Ramchandra [AIR (37) 1950 Bom. 360], dealing with a case of adoption after collateral's death and the principle of relation back, after referring to number of Privy Council decisions, held that any adoption after the death of collateral will not allow the adopted son to come in as a heir of the collateral. Adoption relates back to the death of the adopting father and an adopted son must be looked upon as if he was in existence at the date of the death of the adopting father. But it is not a correct proposition to say that the rights of adopted son are in all respects identical with that of a natural born son. The principle of relation back is not an absolute principle but it has certain limitations. Chagla, C.J., speaking for himself and on behalf of Gajendragadkar and Shah, JJ., in para 2 of the said judgment, has stated thus: -

"2. Now, it has been observed by the Privy Council in several cases that an adoption relates back to the death of the adoptive father and an adopted son must be looked upon as if he was in existence, at the date of the death of the adoptive father. But it is not a correct proposition to say that the rights of an adopted son are in all respects identical with that of a natural born son. The principle of relation back is not an absolute principle but it has certain limitations. For instance, one limitation is that any lawful alienations made by the last absolute owner would be binding on the adopted son, and the question that we have to consider in this Full Bench is whether there is a further limitation on the rights of the adopted son and the limitation that is contended for is that if the property by inheritance goes to a collateral and the adopted son is adopted after the death of the collateral, the adoption cannot divest the property which has vested in the heir of the collateral. Reliance is placed on the Privy Council decision in Bhubaneswari Debi v. Nilkomul Lahiri (12 Cal. 18 P.C.). There it was expressly held that according to Hindu law an adoption after the death of a collateral does not entitle an adopted son to come in as heir to the collateral. Mr. Madbhavi has attempted to distinguish this case by pointing out that Sir Barnes Peacock, both while arguments were going on at the bar and in the judgment of the Privy Council which he

delivered, emphasized the fact that the adopted son was not in existence at the time of the death of the widow in whom the property was vested. But in our opinion that particular fact cannot be looked upon as the deciding factor in the decision. That is certainly not the ratio which led the Privy Council to come to the conclusion. It is immaterial whether an adopted son is or is not in existence at the time of the death of the person whose property is attempted to be divested. The question is, what is the effect of the adoption which for certain purposes relates back to the death of the adoptive father. But whatever might have been said of the decision of the Privy Council in Bhubaneshwari's case (12 Cal. 18 P.C.), all doubt has been set at rest by the manner in which the Privy Council has re-affirmed and re-emphasised that principle in the recent decision of Anant Bhikappa v. Shankar Ramchandra, 70.I.A. 232 : AIR (30) 1943 P.C. 196). At p. 9 their Lordships say:

"Neither the present case nor Amarendra Mansingh v. Sanatan Singh, 35 Bom. L.R. 859 : (AIR (20) 1933 P.C. 155), brings into question the rule of law considered in Bhubaneshwari Debi vs. Nilkomul Lahiri 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 colalteral."

This is not a stray observation. It is the considered view of the Privy Council that the rule of law as laid down in Bhubaneshwari's case, is still good law notwithstanding the decision of Anant Bhikappa vs. Shankar Ramchandra."

(emphasis supplied)

We are in respectful agreement with the statement of law made in the aforesaid judgment on the point touching the controversy in the present case.

A Bench of three learned Judges of this Court in Sawan Ram and others vs. Kala Wanti and others [1967 (3) SCR 687], after referring to Nara Hanumantha Rao vs. Nara Hanumayya and Anr. [(1964) 1 Andhra Weekly Reporter 156], was unable to accept the interpretation placed by the Andhra Pradesh High Court on Sections 12 and 13 of the Hindu Adoptions and Maintenance Act but however, found that the conclusion arrived at in that case by the Andhra Pradesh High Court was correct. In that case, the question that arose for consideration was whether E after the adoption by D, the widow of B

could divest C of the rights which had already vested in C before the adoption. By the year 1936 C was the sole male member of the Hindu Joint Family which owned the disputed property. B died in the year 1924 and A died in 1936 before Hindu Women's Rights to Property Act had come into force and, consequently, C as the sole male survivor of the family became full owner of the property. This Court further observed "In these circumstances, it was clear that after the adoption of E by D, E could not divest C of the rights already vested in him in view of the special provision contained in clause (c) of the proviso to S.12 of the Act. It appears that, by making such a provision, the Act has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (c) of the proviso to S.12, and section 13 of the Act were incorporated."

This being the legal position defendant No. 6, having been adopted after the death of Vyankat and after the properties vested in his heirs, is not entitled for share in the suit properties. In this view the impugned judgment and decree of the High Court affirming the decrees of both the courts below cannot be upheld. Consequently and necessarily they are set aside and the suit of the plaintiffs-appellants stands decreed.

The appeal is allowed accordingly. Parties shall bear their own costs.