PETITIONER:
DHARMA SHAMRAO AGALAWE

Vs.

RESPONDENT:
PANDURANG MIRAGU AGALAWE & ORS.

DATE OF JUDGMENT22/02/1988

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
SINGH, K.N. (J)

CITATION:
1988 AIR 845 1988 SCR (2)1077
1988 SCC (2) 126 JT 1988 (1) 376
1988 SCALE (1)365

ACT:
Hindu Adoptions and Maintenance Act, 1956-Section 12-Proviso (c)-Interpretation of-Whether a person adopted by a Hindu widow can claim share in the joint family property which had devolved on a sole surviving coparcener on the death of the husband of the widow who took him in adoption-Whether it bars filing of a suit for that purpose.

Hindu Law-Mitakshara School-Joint family property devolving on a sole coparcener-Whether remains joint family property-Distinction between powers of manager of joint family property and sole surviving coparcener-Whether a person adopted by a widow after the Hindu Adoption and Maintenance Act, 1956 came into force can claim share in the joint family property which had devolved on a sole coparcener prior to the Act.

HEADNOTE:
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A person had two sons, the appellant-Dharma and another Miragu. Miragu died issueless in 1928 leaving behind his widow, respondent No. 2. The Joint family property devolved on the appellant as sole surviving coparcener. The appellant disposed of certain properties. In 1956 the Hindu Adoptions and Maintenance Act, 1956 came into force. In 1968 the widow took respondent No. 1 in adoption. Respondent Nos. 1 and 2 filed a suit for partition and separate possession of one-half share in the property of the joint family. Trial Court dismissed the suit. Respondent Nos. 1 and 2 filed an appeal which was allowed by the District Judge and a preliminary decree for partition and separate possession was passed. The appellant filed an appeal before the High Court and the High Court affirmed the decree passed by the District Judge. Hence this appeal by special leave. The contention of the appellant was that respondent No. 1 could not divest him of any part of the estate which had been vested in him before the adoption of respondent No. 1 in view of clause (c) of the proviso to section 12 of the Act. Dismissing the appeal, this Court,
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HELD: The Joint family property does not cease to be joint family property when it passes to the hands of a sole

surviving coparcener.
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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 coparceners 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 coparcener 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. [1085G-H; 1086A-C]

In the instant case the joint family properties which belonged to the joint family consisting of Dharma-the appellant and his brother Miragu continued to retain the character of joint family properties in the hands of Dharma-the appellant as Champabai, the widow of Miragu was still alive and continued to enjoy the right of maintenance out of the said joint family properties. Pandurang-the 1st respondent on adoption became the adopted son of Miragu and became a coparcener with Dharma-the appellant in the joint family properties. When once he became a member of the coparcenary which owned the joint family properties he was entitled to institute a suit for partition and separate possession of his one-half share in the joint family properties, of course, except those which had been alienated in favour of third parties before the adoption by Dharma-the appellant. [1084E-G]

Clause (c) to proviso of section 12 of the Act would not be attracted in the instant case since there was no 'vesting' of joint family property in Dharma-the appellant which took place on the death of Miragu and no 'divesting' of property took place when Pandurang-the first respondent was adopted. [1086D-E]

The Joint family properties continued to remain in the hands of Dharma-the appellant as joint family properties and that on his adoption Pandurang-the 1st respondent became a member of the coparce-
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nary entitled to claim one-half share in them except those items which had been sold by Dharma-the appellant. [1086F]

Y.K. Nalavade and Ors. v. Anand G. Chavan and Ors., A.I.R. 1981 Bombay 109, approved.

Sawan Ram & Ors. v. Kala Wanti & Ors., [1967] 3 S.C.R. 687; Sitabai and Anr. v. Ram Chandra, [1970] 2 S.C.R. 1, referred to.

Narra Hanumantha Rao v. Narra Hanumayya and Ors., [1964] 1 Andhra Weekly Reporter 156-I.L.R. 1966 A.P. 140, overruled.

Gowli Buddanna v. Commissioner of Income Tax, Mysore Bangalore, [1966] 3 S.C.R. 224; Vasant and Anr. v. Dattu and

Ors., A.I.R. 1987 S.C. 399, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 906 of 1984.

From the Judgment and Order dated 8.7.1980 of the Bombay High Court in Second Appeal No. 663 of 1971.

V.N. Ganpule for the Appellant.

S.V. Deshpande for the Respondent.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. The short question which arises for consideration in this case is whether a person adopted by a Hindu widow after the coming into force of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as '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.

One Shamrao, who was governed by the Mitakshara Hindu Law died leaving behind him two sons Dharma (the appellant in this appeal) and Miragu. Miragu died issueless in the year 1928 leaving behind him his widow Champabai-respondent No. 2. The properties owned by the joint family of Dharma and Miragu passed on to the hands of Dharma who was the sole surviving coparcener on the death of Miragu. Under the law, as it stood then, Champabai had only a right of maintenance in the joint family properties. The Act came into force on 1080
21st December, 1956. On 9.8.1968 she took Pandurang, the 1st respondent, in adoption and immediately thereafter a suit was filed by Pandurang and Champabai in Regular Civil Suit No. 457 of 1968 on the file of the Civil Judge, Junior Division, Barsi for partition and separate possession of one-half share in the properties of the joint family of which Dharma, the appellant herein, and Miragu were coparceners. Before the said adoption took place, two items of the joint family properties had been sold in favour of Defendant Nos. 3 and 17 for consideration. Champabai had instituted a suit for maintenance against Dharma and obtained a decree for maintenance. Dharma resisted the suit on the ground that 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 and the properties which had been sold by him in favour of third parties could not in any event be the subject-matter of the partition suit.

The Trial Court dismissed the suit. Pandurang and Champabai filed an appeal against the decree of the Trial Court before the District Court, Sholapur in Civil Appeal No. 222 of 1970. The learned District Judge allowed the appeal and passed a preliminary decree for partition in favour of Pandurang and Champabai and separate possession of one-half share of the joint family properties except the two fields which had been sold earlier in favour of third parties. Aggrieved by the decree of the District Judge, the appellant filed an appeal before the High Court of Bombay in Second Appeal No. 663 of 1971. The High Court affirmed the decree passed by the learned District Judge following the decision of that Court in Y.K. Nalavade and Others v. Anand G. Chavan and Others, A.I.R. 1981 Bombay 109 in which it had been held that clause (c) of the proviso to section 12 of the Act was not a bar to such a suit for partition. This appeal by special leave is filed by the appellant against the judgment of the High Court of Bombay.

The only question urged on behalf of the appellant before us is that the suit for partition should have been dismissed by the High Court as the 1st respondent-Pandurang could not divest Dharma-the appellant of any part of the estate which had been vested in him before the adoption in view of clause (c) of the proviso to section 12 of the Act. Section 12 of the Act reads thus:

> 12. 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 and from such date all the ties of the child in the family of his or her birth shall be
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> deemed to be severed and replaced by those created by the adoption in the adoptive family:
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> Provided that-
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> (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;
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> (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;
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> (c) The adopted child shall not divest any person of any estate which vested in him or her before the adoption."

It is argued that Pandurang became the child of the adoptive mother for all purposes with effect from the date of the adoption and only from that date all the ties of Pandurang in the family of his birth should be deemed to have been severed and replaced by those created by the adoption in the adoptive family and, therefore, Pandurang, the adopted son could not claim a share in the joint family properties which had devolved on the appellant by survivorship on the death of Miragu. In support of this contention the appellant relied upon the decision of this Court in Sawan Ram & Others v. Kala Wanti & Others, [1967] 3 S.C.R. 687. The facts involved in that case were these. A widow, whose husband had died before the Hindu Succession Act came into force, adopted the second respondent in that case after the commencement of the Act. On the widow's death the appellant in that case, claiming to be the nearest reversioner of her husband, filed a suit challenging the adoption. The Trial Court dismissed the suit and the decree of the Trial Court was affirmed by the High Court. Against the decree of the High Court the appellant therein filed an appeal by special leave before this Court. In that appeal, the appellant contended that (i) the adoption was invalid under clause (ii) of section 6 read with section 9(2) of the Act as the son was given in adoption by his mother, even though the father was alive, and (ii) since under the Act an independent right of adoption had been given to Hindu female, if a widow adopted a son, he could become the adopted son of the widow only and could not be considered to be the son of her deceased husband also. This Court negatived both the contentions. We are not

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concerned with the first ground for purposes of this case. On the second contention this Court held that the provision in section 12 of the Act made it clear that the adopted son of a Hindu female, who had been married, was in fact the adopted son of her husband also. That decision was sufficient to dismiss the suit filed by the appellant as the

adopted son in that case being the nearest heir was entitled to claim the properties involved in the suit to the exclusion of the appellant therein who was a more distant heir was not, therefore, entitled to lay claim to any part of the suit properties. In the course of the said decision a decision of the Andhra Pradesh High Court in Narra Hanumantha Rao v. Narra Hanumayya and Others, [1964] 1 Andhra Weekly Reporter 156-I.L.R. 1956 A.P. 140 had been cited before this Court. In that case the High Court of Andhra Pradesh had taken the view that clause (c) of the proviso to section 12 of the Act laid down explicity that the adoption of a son or daughter by a male or female Hindu was not to result in the divesting of any estate vested in any person prior to the adoption and that clause (c) also applied to the interest which passed on by survivorship on the death of a coparcener to the remaining coparceners. As pointed out earlier the said question did not actually arise in the appeal before this Court. This Court, however, observed as follows:

> "It may, however, be mentioned that the conclusion which we have arrived at does not indicate that the ultimate decision given by the Andhra Pradesh High Court was in any way incorrect. As we have mentioned earlier, the question in that case 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. It is significant that 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. By that time, the Hindu Women's Rights to Property Act had not been enacted and consequently, C, as the sole male survivor of the family became full owner of that property. 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 provisions contained in clause (c) of the proviso to section 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 Shastriclaw, if a child was adopted by a widow, he was treated as a natural-born child
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> 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 section 12, and section 13 of the Act were incorporated. In that respect, the rights of the adopted child were restricted. It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot, therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband. The second ground taken on behalf of the appellant also, therefore, fails."

It is no doubt true that the above observations appear

to support a case of the appellant but since we are of the view that these observations were not necessary for deciding the case which was before the Court they have to be held obiter dicta.

In Sitabai & Anr. v. Ram Chandra, [1970] 2 S.C.R. 1 which was again decided by a bench of three Judges, this Court was called upon to decide a case which was more or less similar to the one before us. In that case the facts were these. Two brothers were in possession of ancestral properties consisting of a house and tenancy rights of an ordinary tenant in agricultural lands. The elder brother died in 1930 leaving a widow, the first appellant therein. The first appellant continued to live with the younger brother and had an illegitimate son by him, the respondent therein. In March, 1958, she adopted the second appellant, and some time later, the surviving brother died. After his putative father died, the respondent who was the illegitimate son took possession of all the joint family properties. The two appellants thereupon filed a suit for ejectment. The Trial Court decreed the suit. The first appellate court held that a will executed by the respondent's father (the younger brother) was valid in so far as his half share in the house was concerned and, therefore, modified the decree by granting a half-share of the house to the respondent. In second appeal, the High Court held that the appellants were not entitled to any relief and that their suit should be dismissed on two grounds, namely, (i) the joint family properties ceased to have that character in the hands of the surviving brother when he became the sole surviving coparcener, and (2) the second appellant did not become, on his adoption, a copar-
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cener with his uncle in the joint family properties. In this Court the appellants in that appeal questioned both the conclusions reached by the High Court. On the first contention, this Court held that the joint family properties continued to retain their character in the hands of the surviving brother, as the widow (the first appellant) of the elder brother was still alive and continued to enjoy the right of maintenance out of the joint family properties following the decision of this Court in Gowli Buddanna v. Commissioner of Income Tax, Mysore, Bangalore, [1966] 3 S.C.R. 224. On the second contention this Court held that the scheme of sections 11 and 12 of the Act was that in the case of adoption by a widow the adopted child became absorbed in the adoptive family to which the widow belonged. It further observed that though section 14 of the Act did not expressly state that the child adopted by a widow became the adopted son of her deceased husband, it was a necessary implication of sections 12 and 14 of the Act and that was why section 14 of the Act provided that when a widow adopted a child and subsequently married, that husband became the step-father of the adopted child. Therefore, when the second appellant was adopted by the first appellant he became the adopted son of the first appellant and her deceased husband, namely, the elder brother, and hence became a coparcener with the surviving brother in the joint family properties, and after the death of the surviving brother the second appellant became the sole surviving coparcener entitled to the possession of all the joint family properties except those bequeathed under the will, that is, except the half-share of the house. Applying the above decision it has to be held in the case before us that the joint family properties which belonged to the joint family consisting of Dharma-the appellant and his brother Miragu continued to retain the

character of joint family properties in the hands of Dharma-the appellant as Champabai, the widow of Miragu was still alive and continued to enjoy the right of maintenance out of the said joint family properties. It should also be held that Pandurang-the 1st respondent on adoption became the adopted son of Miragu and became a coparcener with Dharma-the appellant in the joint family properties. When once he became a member of the coparcenary which owned the joint family properties he was entitled to institute a suit for partition and separate possession of his one-half share in the joint family properties, of course, except those which had been alienated in favour of third parties before the adoption by Dharma-the appellant.

The effect of section 12 of the Act again came up for consideration before this Court in Vasant and Another v. Dattu and Others, A.I.R. 1987 S.C. 399. In that case interpreting clause (c) to the proviso
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of section 12 of the Act Chinnappa Reddy, J. who spoke for the Court observed that in a case of this nature 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 was bound to decrease on the introduction of one more member into the family either by birth or by adoption. In the above connection, the Court observed thus:

> "4. We are concerned with proviso (c) to section 12. The introduction of a member into a joint family, by birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. The joint family continues to hold the estate, but, with more members than before. There is no fresh vesting or divesting of the estate in anyone.
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> 5. The learned Counsel for the appellants urged that on the death of a member of a joint family the property must be considered to have vested in the remaining members by survivorship. It is not possible to agree with this argument. The property, no doubt passes by survivorship, but there is no question of any vesting or divesting in the sense contemplated by s. 12 of the Act. To interpret s. 12 to include cases of devolution by survivorship on the death of a member of the joint family would be to deny any practical effect to the adoption made by the widow of a member of the joint family. We do not think that such a result was in the contemplation of Parliament at all."

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 pro-
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perty 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 coparcener 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 alientation cannot object to alientations made before he was begotten or adopted.

The decision of the High Court of Bombay in Y.K. Nalavade's case (supra) which was followed by the High Court in dismissing the appeal, out of which the present appeal arises, has been rightly given. We agree with the reasons given by the High Court of Bombay in that decision for taking the view that clause (c) to proviso of section 12 of the Act would not be attracted to a case of this nature since as observed by this Court in Vasant's case (supra) there was no 'vesting' of joint family property in Dharma-the appellant took place on the death of Miragu and no 'divesting' or property took place when Pandurang-the first respondent was adopted. The decision of the Andhra Pradesh High Court in Narra Hanumantha Rao's case (supra) which takes a contrary view is not approved by us. It, therefore, stands overruled.

The joint family properties continued to remain in the hands of Dharma-the appellant as joint family properties and that on his adoption Pandurang-the 1st respondent became a member of the coparcenary entitled to claim one-half share in them except those items which had been sold by Dharma-the appellant.

In the result this appeal fails and it is dismissed. There is no order as to costs.

H.S.K. Appeal dismissed.
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