

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.1056 OF 2004

AND

CROSS OJECTION (St.) NO. 7509 OF 2007

1. Shri. Vishnu Maruti Jadhav, alias
Shri. Keshav Parvati Jadhav,
Since deceased
Survived by his Legal heirs

(A) Smt. Laxmibai Keshav Jadhav,
Adult, Occ: Household,
Residing at : Salawade,
Tal : Bhore, Dist. Pune.

(B) Bhujaba Keshav Jadhav,
Adult, Occ: Agriculture,
Residing at : Salawade,
Tal : Bhore, Dist. Pune.

(C) Mrs. Ujawala Sampat Bhilare,
Adult, Occ: Household,
Ra Bhillarwadi,
Tal : Bhore, Dist. Pune.

(D) Mrs. Mangal Vijay Avhale,
Adult, Occ: Household,
Residing at : Bholawade,
Tal : Bhore, Dist. Pune.

**APPELLANTS
(Ori. Defendant No. 1)**

Versus

1. Mrs. Kamalabai Sadashiv Rajawade,
Age About 61 years
Occ: Household,
Residing at : Pune Municipal Corporation

2. Mrs. Sindhu Nana Dhamaware,
Adult, Occ: Agriculturist and Household,
Residing at : Pare (BK),
Dist. Pune.

RESPONDENTS & CROSS-OBJECTIONIST
(Org. Plaintiff No.1 and Plaintiff No.2)

3. Shri Narayan Maruti Jadhav,
Age about 55 years,
Occ : Agriculture,
4. Shri Bajirao Maruti Jadhav,
Age about 52 years,
Occ : agriculture,
5. Shri Digambar Maruti Jadhav,
Age about 50 years,
Occ : agriculture,
6. Shri Dattatray Maruti Jadhav,
Age about 45 years,
Occ – agriculture
7. Smt. Savitribai Maruti Jadhav,
Age about 84 years,
Occ : agriculture,
All : Residing at :- Talawade,
Tal : Bhore,
District Pune.
8. Indubai Annaba Gade,
Adult, Occ : Agriculture,
Residing at :- Harishchandra,
Tal : Bhore,
District Pune.

9. Chandrabhaga Dnyanuba Chavan
Adult, Occ : Household,
Residing at :- Wenawade,
Bhor, District Pune.
10. Dnyanubai Murlidhar Kalaskar,
Adult, Occ : Household,
Residing at :- Sawarde,
Tal : Bhor,
District Pune.
11. Shri Chagubai Madhukar More,
Adult, Occ : Household,
Residing at :- Malegaon,
Tal. Bhor,
District Pune.

...RESPONDENTS

(ORIGINAL RESPONDENTS)

(Org. Defendant No. 2, 3, 4, 5,6,7,8,9 and 10)

Mr. A.V. Anturkar Sr. Advocate with Mr. S.B. Deshmukh for
Appellants and for Respondents in Cross-objections
Mr. S.S. Kulkarni for Respondent nos.1 and 2 and for Cross-
objectionist

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CORAM: A.M.DHAVAL, J

JUDGMENT RESERVED ON: 4th OCTOBER 2018

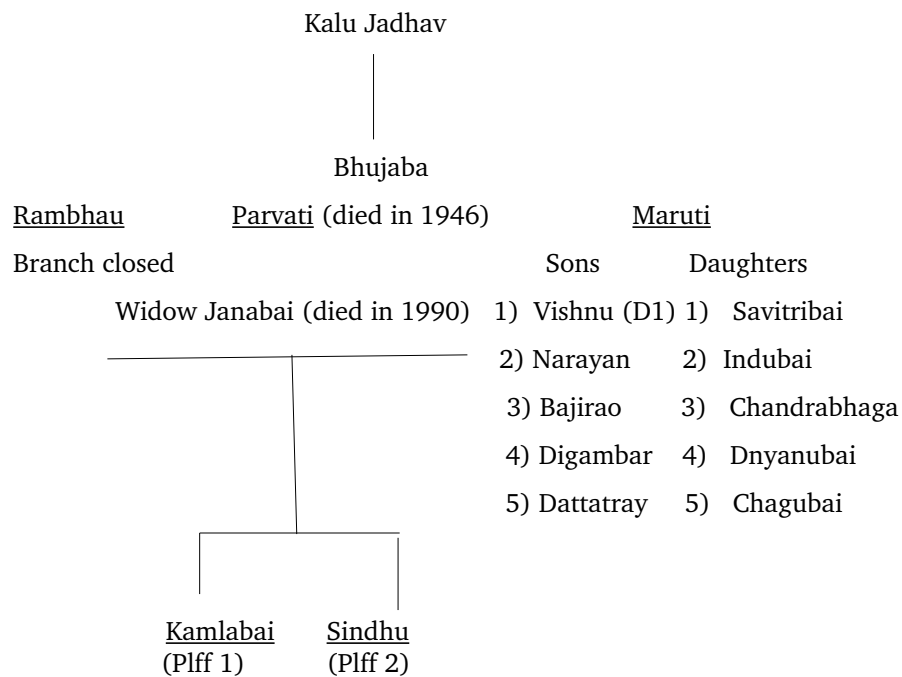
JUDGMENT PRONOUNCED ON: 19th OCTOBER 2018

JUDGMENT :

1. This appeal raises the issue of effect of adoption by a widow in 1953 on her rights under Hindu Women's Rights to Property Act, 1937.

2. Reference to the facts and pleadings shorn of unnecessarily details is necessary. The subject matter of the suit are 9 agricultural lands and one house property described in para 1 of the plaint. (One Bhujaba was the common ancestor. He was survived by three sons Rambhau, Parvati and Maruti. Rambhau died issueless. Parvati died in 1946. He was survived by widow Janabai and two daughters Kamalabai and Sindhu. (The daughters are the original plaintiffs who are the respondents herein.) Parvati's brother Maruti had five sons and five daughters. Defendant no.1 Vishnu son of Maruti who is the appellant herein claims to be adopted son of Janabai.) Other defendants are also descendants of Maruti. Janabai died in 1990 and her two daughters filed Regular Civil Suit No.108 of 1992 in the court at Bhore, District Pune, by denying the adoption of Vishnu by Janabai, and claimed that Parvati was having $\frac{1}{2}$ share in the suit properties and on his death, Janabai inherited the said share by way of limited interest which ripened into absolute interest in the year 1956 under Section 14 of Hindu Succession Act, and they were entitled to inherit the

same on death of Janabai. They had issued notices to the defendants but, there was no response. Hence, the suit for partition and separate possession. By a subsequent amendment, it was claimed that the defendants cut and sold 500 teak trees from the suit field worth Rs.1,40,000/-and they should pay 50 % amount (Rs.70,000/-) to them. Accordingly, additional court fee was paid.



3. The plaintiffs claimed that their mother had a right to claim partition. The claim of the plaintiffs is for separation of their shares and not for partition. They did not become coparceners. Hence though, ladies they can claim partition.

4. Defendant no.1 claimed that as per wishes of Parvati he was adopted by Janabai in an adoption ceremony on 28.07.1953 held as per the provisions of law and the same was registered on 29.8.1953 and his name was changed as “Keshav S/o Parvati.” His name is wrongly shown as “Vishnu S/o Maruti.” His adoption relates back to the date of death of Parvati. He thereby became a co-parcener. Therefore, the Plaintiffs could not succeed to the share of Parvati. It is also claimed that the plaintiff being the daughters cannot file a suit for partition when property was still joint among all the parties.

5. The parties led evidence in the trial Court and the learned trial Judge by judgment dated 10.12.2002 held that the adoption of defendant no.1 Vishnu @ Keshav was proved. He was entitled for $\frac{1}{2}$ share of Parvati and the plaintiffs had no share. Their suit is also barred by limitation. Hence, the suit came to be dismissed with costs. The plaintiffs preferred regular Civil Appeal no.282 of 2003 and the learned 15th Ad-hoc Additional District Judge Pune by a judgment dated 20.4.2004 confirmed that the adoption was proved but held that the

plaintiffs had 1/6th share each while defendant no.1 had 2/3rd share in the property of Parvati. The Suit was accordingly partly decreed with consequential reliefs and costs.

6. Being aggrieved by the judgment. the original defendant no.2 Vishnu @ Keshav has preferred this Second appeal. It was claimed that the learned Judge of the first appellate Court erred in applying the provisions of the Hindu Adoption and Maintenance Act, 1956 through the adoption was of 1953. Janabai was not entitled to get share in the joint family property as it was not separate property of Parvati. Therefore the plaintiffs had no shares and the suit was rightly dismissed by the trial court.

7. The original plaintiffs (respondent nos. 1 and 2) preferred cross-objections challenging the concurrent findings regarding adoption of defendant no.1 by Janabai.

8. Cross-objections was admitted without framing substantial question of law. Though not substantially pleaded

learned advocate Mr.Kulkarni argued that he be permitted to add the grounds of grants of mesne profit. He argued that it is a pure question of law. Learned senior advocate Mr.Anturkar opposed the request contending that such point cannot be permitted for the first in Second Appeal.

In Chittoori Subbanna vs Kudappa Subbanna AIR 1965 SC 1325, it was held that it (grant of mesne profits) is pure question of law not depending on facts. If can be allowed for first time in ground of appeal or even as an additional ground at later stage. It is discretion of appellate Court. “

Considering the arguments and facts, I allow the plaintiff to add ground in Cross-objections to claim statutory mesne profit.

9. While admitting the Second Appeal, following substantial questions of law was framed :

(1) *Whether the doctrine of relating back of the adoption to the date of death of adoptive father is applicable to the facts and circumstances of the present case ?*

10. Cross-objections was admitted without framing substantial question of law. By consent of parties, they were

informed that following substantial question of law are framed and they were heard:

- 2) *Whether the learned lower Courts erred in ignoring the material evidence or by considering in-admissible evidence to record a finding that adoption of defendant no.1 was duly proved ?*
- 3) *Whether the relief of inquiry into mesne profits under Order 20 Rule 12 of Civil Procedure Code can be directed ?”*

11. Mr.A.V.Anturkar learned senior advocate appearing for the appellant argued that as per the provisions of Hindu Women's Right to Property Estate Act, 1937 the widow Janabai inherited the share of her husband Parvati from the joint family property. He argued that there are concurrent findings that defendant no.1 Vishnu @ Keshav was adopted by Janabai in 1953. He was then aged 9 years and he himself has led evidence. This adoption was acted upon and was registered with the Sub-Registrar. Thereafter, Vishnu the appellant has acted as adopted son of Parvati and was treated as such. He submitted that since adoption took place before 1953, it relates back to the death of Parvati by a deeming fiction. The appellant became son of Parvati on the date of Parvati's death. There will be co-parcenary of Parvati and Vishnu. Therefore, Janabai would not

inherit any share in the share of Parvati as the share of Parvati would go to the appellant by survivorship. In that event, the plaintiff would get nothing and the plaintiff's suit will have to be dismissed.

12. Mr.Anturkar submitted that in case this argument is not accepted, in the alternative. On death of Parvati, his $\frac{1}{2}$ share would be divided equally among Janabai and the appellant and each of them would get $\frac{1}{4}$ th share and Janabai's $\frac{1}{4}$ th would be further divided into two plaintiffs and the appellant. Thus, the two plaintiffs would be entitled for only $\frac{1}{12}$ th share each and granting them $\frac{1}{6}$ th share each was not correct.

13. Per contra, learned advocate Mr.Shriram Kulkarni appearing for the respondents argued that the adoption itself, is not signed by natural mother of the appellant, whose consent was essential. No witness to the adoption has been examined. In Invitation cards printed by the appellant at the time of marriage of relatives he disclosed his name as “ Vishnu Maruti

Jadhav” and not “Keshav” son of Parvati. Apart from the fact that adoption is not proved he argued that even if adoption is held to be proved Janabai would inherit entire share of her husband Parvati. The same would not be divested from her, in view of the subsequent adoption. He argued that the theory of adoption relates back applies to the cases in which the deceased father had died before 1937. (He argued that the plaintiffs are entitled for a money decree of $\frac{1}{2}$ price of teak woods.) He argued for the confirmation of the findings recorded by the learned first appellate Court. Both the learned advocates cited judgments which will be considered at appropriate place.

14. The substantial questions of laws with my findings are as under :

(A) Whether the doctrine of relating back of the adoption to the death of the adoptive father is applicable to the facts and circumstances of the present case ?

It relates back to the death of Parvati resulting into divesting of $\frac{1}{2}$ share of the deceased Parvati's half share ($\frac{1}{4}$) out of the share inherited by deceased Janabai.

2. (i) Whether both the lower courts erred in holding that the adoption of defendant no.1 was duly proved ?

.. In the negative

- (ii) Whether the relief of inquiry into mesne profits under Order 20 Rule 12 can be directed ?

**In the affirmative for the
statutory period**

**Reasons:
Proof of adoption**

The alleged adoption has taken place on 28.8.1953 whereas the evidence was recorded in 2002 i.e. after a period of 49 years. It is obvious that it is difficult to find direct evidence in such cases as most of the grown-up persons at the time of adoption must have died. Defendant no.1 has stated that he was aged 9 years and he not only deposed about the adoption programme in detail but also about the registration thereof. It may be stated that the adoption Deed is a registered document signed by father of defendant no.1 and bears thumb mark of the adopting mother-Janabai. There is endorsement of Sub-Registrar that the executant was identified to him by person known to him and she has admitted the execution of the document and again put her thumb mark below the endorsement. This is

presumption about the correctness of the endorsement made by Registrar.

15. Learned Advocate Mr.S.S.Kulkarni for the respondents rightly argued that the provisions of Hindu Adoption and Maintenance Act, 1956 would not be applicable to the adoption as it has taken place in the year 1953. However, he conceded that there is no difference in the mode of proof of adoption and there was no breach of any conditions essentials for adoption. The dispute is regarding the happening of adoption ceremony. At the time of adoption, defendant no.1 was aged 9 years whereas the plaintiff no.1 who has led evidence was aged around 10 to 12 years. They had the age of understanding and their evidence is certainly admissible. The evidence of defendant no.1 is supported by the registered Adoption Deed which is marked as Exhibit without any objections from the other side. There are certain circumstances both in favour of the adoption and against the adoption. Defendant no.1 could have examined any other person to prove the adoption and the Adoption Deed but he has not done so. He

has filed one photograph showing the adoption. Though it is not marked as an Exhibit in the evidence, it has not been specifically denied by the plaintiff as well. Defendant No.1's earlier name was 'Vishnu Maruti Jadhav' and after adoption, his name was 'Keshav Parvati'.

16. Plaintiff No. 1 in the marriage invitation card of her son dated 20.03.1990 (Exh.194) has shown defendant No.1 as 'Vishnu Parvati Jadhav Mama'. Similarly, in the marriage of daughter of the plaintiff No.2 on 13.03.1991 (Exh. 193), defendant No.1 was shown as son of 'Parvati Jadhav and Mama' of the girl. The documentary record subsequent to the filing of the suit has no value. Defendant No. 1 has received envelope sent by Registered Post A.D. and has signed the acknowledgement as Vishnu Maruti Jadhav. His name also appears in 7/12 extract as 'Vishnu Maruti Jadhav'. His name is shown as Vishnu Maruti Jadhav in invitation cards of marriage of his relatives. Thus, there is evidence supporting both the views one in favour of the adopted son and another against it. Defendant No.1 has sometimes acted as son of his biological

father whereas the plaintiffs have treated him as the son their father.

17. Whether defendant no.12 is adopted son or not is a question of fact. There is mixed evidence and the trial Court and the learned first Appellate Court on appreciation came to a concurrent finding that the adoption was duly proved. No perversity has been shown. It has not been shown that any material evidence which could have tilted the result was ignored or any in-admissible evidence was taken into consideration.

18. In the light of these facts, there is no scope in second appeal to enter into appreciation of fact of adoption. In this regard, I rely on following decisions :

(a) Ramdas alias Ram Suraj vs Gandiabai & ors 1997

(1) SCC 74 wherein it has been observed in para 4 as follows :

“However, before the High Court could exercise its jurisdiction under Section 100 read with Section 103 CPC applicable at the relevant time in 1969 it had to be shown that the lower appellate court had wrongly determined any question of fact by reason of any illegal omission, error or defect as were referred to in Section 100 CPC. Therefore, it had to be demonstrated that

the finding of fact reached by the first appellate court was affected by any of the errors as contemplated by provisions of Section 100, sub-section (1)(a),(b) and © CPC.

Thus relevant evidence was reappreciated by the first appellate court and a clear finding of fact was reached that plaintiff was not adopted by Ram Charan, his stepfather, prior to latter's remarriage with his mother and plaintiff was merely staying with him as his stepson. This pure finding of fact is interfered with by the learned Single Judge in second appeal while exercising jurisdiction under Section 100 CPC. In our view such a finding of fact based on relevant evidence as arrived at by the first appellate court was final. It was neither contrary to law nor to some usage having force of law. Nor had the first appellate court failed to determine any material issue of law or usage having the force of law. Nor was there any substantial error defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force which might possibly have produced error or defect in the decision on this question. In short none of the grounds contemplated by Section 100(a), (b) and © existed on the record of the case to entitle learned Single Judge of the High Court to interfere with the finding on adoption of the plaintiff while resolving the matter under Section 100 CPC, even on the basis that simpliciter error of law could also be interfered with in those days prior to 1976.

(b) In similar facts in *Municipal Committee Vs. Punjab Electricity Board* 2013 (10) SCC 216 (para 26 and *Dagadabai Vs. Abbas* 2017 (13) SCC 705 in respect of the matters of adoption in light of concurrent findings of the Court below and absence of perversity, it was held that no interference was called for.

19. In **Punithavallai Ammal vs Minor Ramalingam**

AIR 1970 SC 1730 in para 3,5,6 and markings it is held as under :

“One Somasundara Udayar of Poongavur village in Tanjavoor District died prior to 1937 leaving behind him his widow Sellathachi and two daughters Kuppaimal and Punithavalli Ammal. The properties left behind by the deceased were inherited by his widow and they were in her possession when the Act came into force on June 17, 1956. By virtue of Section 14(1) of the Act. Sellathachi became the full owner of the properties inherited by her husband. On July 13, 1956, she adopted the plaintiff-Ist respondent in this appeal. Thereafter on June 19, 1957 she settled 9 acres 16 cents of land and half share in a house inherited by her from her husband on her daughter Punithavalli Ammal, the appellant in this appeal. (para 2)

.....

The fiction of relation back has been given full effect by Courts and consequences spelled out as if the fiction is a fact. The adopted son is deemed for all practical purposes, subject to some minor exceptions to have born as an aurasa son on the date his adoptive father died. Admittedly but for the relevant provisions in the Act the settlement in favour of the appellant could have afforded no basis for resisting the claim of the adopted son. (para 3)

“Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her a full owner thereof and not as a limited owner”. (para 4)

It was conceded at the Bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the full owner of the property on that date. From a plain reading of section 14(1), it

is clear that the estate taken by a Hindu female under the provision is an absolute one and is not defeasible under any circumstances. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent it conflicts with the rights conferred on a Hindu female under section 14 (1) of the Act. In Sukhram v. Gauri Shankar, (1968) 1 SCR 476 = (1968 SC 365) this Court held that though a male member of a Hindu family governed by the Benaras School of Hindu law is subject to restrictions on alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. (para 6)

20. In case of Kesharbai Gujar Vs. The State of Maharashtra AIR 1981 Bombay 115 Full Bench, wherein, the issue was what will be the effect of subsequent adoption which took place after 1956. It was held :

27. Our discussion till now will show that the Legislature has brought about a categorical change by introducing the provisions of Section 14(1) of the Hindu Succession Act. The female holder is now made full owner and has the effect of changing the nature of the property. This will always be the effect irrespective of the nature of the property which the woman possessed as a limited owner till June 1956. The earlier nature of that property thus becomes irrelevant. Once that position is appreciated, it does not become necessary to investigate the nature of the property which came in the hands of the widow. If a Hindu male possessed only self-acquired property and died leaving a widow, the position would not be different. Till 1956 June his widow would succeed to that property under the Mitakshara law and would take a limited estate known as Hindu widow's estate. If she adopts and thus gets a son in the nature of law, so far as the son is concerned the property of his adoptive father would be ancestral property

in his hands. The father having died intestate like the natural son, the adopted son would inherit that property. The widow would be effaced and by the (principle of relation back, he would get the father's property. All these consequences of Shastric Hindu Law have now been totally effaced by the inconsistent contrary provision of Section 14(1) of the Hindu Succession Act. That precisely is the effect of this statutory provision as is laid down by Section 4 of that Act. We do not think, therefore, that the nature of the property had any particular relevance while construing the provisions of Section 14(1) of the Hindu Succession Act.

However, in the present case, the adoption has taken place before 1956.

21. The above findings disclose that Vishnu was adopted by Janabai after the death of her husband Parvati in 1946. The adoption took place in the year 1953 i.e. before the enactment of The Hindu Adoptions and Maintenance Act, 1956

22. Sections 2 and 3 of The Hindu Women's Rights to Property Act, XVIII of 1937) (amended by XI of 1938) read as follows :

(2) "Application: Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. Devolution of property.- (1) When a Hindu governed by Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or any customary law dies intestate leaving

separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son shall inherit in the like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is a surviving son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu Joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu women's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

23. It is not in dispute that on death of Parvati, by virtue of section 3 of Hindu Womens' Right to Property Act, his wife Janabai inherited interest of her husband-Parvati in joint family which was recognized as limited interest.

24. The law regarding this interest may be stated as follows :

a) In **Dagadu Balu vs Namdeo Rakhmaji AIR 1955 Bombay 152**, it is held :

On a plain reading of the sub-sections (2) and (3) of S. 3, it is clear that a Hindu widow on her husband's death in a joint Hindu family gets the same interest that her husband had with the limitation that the interest is not absolute but is limited and limited in the manner known to Hindu law, viz., a Hindu widow's estate. The Legislature did not wish to confer upon the Hindu widow the same right that her husband as a coparcener had quae the joint family property. In the case of a Hindu widow who steps into the shoes of her husband in a joint family, her right is not to be able to alienate absolutely her husband's share in he joint family which has devolved upon her, but only to be able to alienate absolutely for legal necessity, and if the legal necessity, and if the legal necessity is absent then only to alienate her own life interest.

b) In **Potti Lakshmi vs Potti Krishnavenamma AIR 1965 SC 825**, it is held as under :

A widow can under the Act claim a share not only in the property owned and possessed by the family at the time of her husband's death but also in the accretions arising therefrom,irrespective of the character of the accretions. The interest which the law has conferred upon he widow is a new kind of interest though in character it is what is commonly known as the Hindu widow's estate. Her interest is a fluctuating one and is liable to increase or decrease according as them are death in or additions to the members of the family or according as

there are accretions to or deminutions of the property. When the Act says that she will have the same right as her husband had it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition. The interest devolving upon the widow need not necessarily be either by survivorship or by inheritance but could also be in a third way i.e. by statute and where the interest is taken by her under a statute no further difficulty arises.

Previously, the agricultural properties were not liable to be governed by the above provisions but, by Bombay Act (17 1942) made applicable retrospectively, the agricultural lands are also governed by Section 3 of the Act.”

c) Nagappa Narayan Shetti vs Mukambe

Venkatraman AIR 1951 Bombay 309 it is held as under :

“A, B and C formed a joint Hindu family. A died long before 1937 leaving his widow D. B died in 1938 leaving him surviving his widow E and his son F. F died in 1939. C was then the sole surviving co-parcener. In 1945 E filed a suit for partition of the joint family property and possession of her half share in it against C.

Held that E had an interest in the joint family properties by virtue of the provisions of the Act and the same could not be affected by the death of F. The interest which E got in the joint family property was neither an interest by survivorship nor one by inheritance but was one specially created under the terms of the Act. The interest which E acquired in the family property was liable to fluctuation and until a partition was demanded it was not possible to ascertain the share to which E would be entitled under S.3(2) and (3) of the Act. Although E got an interest in the joint family property as a result of the death of her husband B, she got a share in the property of the family as at the date of the suit for partition. E was, therefore, entitled to a half share.

d) Mr.Anturkar learned senior Advocate for the appellant has relied on C. Krishna Parasad vs CIT Bangalore (1975) 1 SCC 160 wherein it is observed as under :

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. The Judicial Committee further held that an adopted son can claim as preferential heir the estate of any person other than his adoptive father if such estate has vested before the adoption in some heir other than the adopting mother.

The above case, in our opinion, can hardly be of any assistance to the assessee-appellant. As would appear from the facts of that case, the question involved there related to the adoption by a widow after the death of the sole surviving coparcener.

Anant was adopted by Gangabai as a son of Bhikappa. It is now firmly established that the rights of the adopted son relate back to the date of the adoptive father's death and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of latter's death (see p.543 of Mulla's Principles of Hindu law, 14th Ed.). This principle of relation back is subject to certain exceptions but we are not concerned with them. As Bhikappa died in 1905, Anant should be deemed to have been in existence as the son of Bhikappa at the time of latter's death in 1905. A necessary corollary of the above legal fiction would be that Anant as the adopted son of Bhikappa would be taken to be in existence during the years 1917 to 1930. Gangabai consequently cannot be considered to be the sole member of the Hindu undivided family during the above period."

25. Per contra, Mr.Kulkarni learned Advocate appearing for the respondents, relied on Narayan Govind Hegde vs Kamalakara Shivarama Hegde (2001) 8 SCC 487 wherein it

is observed in para 12 and 13 as under :

Thus, the settled position of law is that the widow succeeds as a heir to her husband. The ownership of properties vests in her. She fully represents the estate, the interest of the reversioners therein being only spes successionis. In the case in hand after the death of her husband, the widow – Smt.Yenki, Opposite Party 3 succeeded to the property of her husband and she was entitled to full enjoyment of the estate subject to limited interest known as Hindu women's estates. The right includes right to alienate the property for legal necessity of the family. Therefore, the allegation of the applicant that he was the sole owner of the disputed land is not sustainable in law.

The Court further held that (AIR pp 86-87 para 4)

“Where however there is necessity for a transfer, the restriction imposed by Hindu law on her power to alienate ceases to operate and the widow as owner has got the fullest discretion to decide what form the alienation should assume. Her powers in this regard are as held in a series of decisions beginning with Hunoomanperau Panday vs Mussamat Babooee Munraj Koonweree those of the Manager of an infant's estate or the Manager of a joint Hindu family.”

26. From the plain language of the section and rulings cited, it is certain that this right of a widow is not dependent on or affected by existence or non-existence of any children to her. It is also given to the widow of pre-deceased son or widow of pre-deceased son's predeceased son.

27. Bhujaba was full owner. Parvati and Maruti inherited $\frac{1}{2}$ share only. The fiction of relating back will lead to an assumption that the adopted son of defendant no.1 on adoption becomes son of deceased Parvati as if he was born just before Parvati died. Its effect will be $\frac{1}{2}$ share of deceased Parvati would be divided equally between him and his adopted son .e. $\frac{1}{4}$ th share each.

28. There is no substance in the contention that in view of Doctrine of adoption relating back the provisions of Women's Estate Act, 1937 would not be applicable at all and the adopted son would take the entire share of the deceased Parvati. Thus, on the death of Parvati, the adopted son would have $\frac{1}{4}$ th share and remaining $\frac{1}{4}$ th share of Parvati would be of the Janabai. It would be inherited by his widow by special statute of Women's Estate Act as a limited interest. On coming into force of the Hindu Succession Act, 1956 the limited interest of Janabai the widow of Parvati would be converted into an absolute right and from that day, Janabai had $\frac{1}{4}$ th share while defendant no.1 the adopted son was having $\frac{1}{4}$ th share.

29. Janabai died in 1990 leaving behind one adopted son i.e. defendant no.1 and two daughters-the plaintiffs. Her $\frac{1}{4}$ th share would be equally divided between the two plaintiffs and defendant no.1. Thus, each of them would get $\frac{1}{12}$ th share in the joint family properties whereas defendant no.1 Vishnu @ Keshav Jadhav would get $\frac{1}{4}$ th share as a member of the co-parcener plus $\frac{1}{3}$ rd of $\frac{1}{4}$ th share of Janabai i.e. $\frac{1}{12}$ th share by way of inheritance from his mother. Thus, the plaintiffs would have $\frac{1}{12}$ th share each while defendant no.1 shall have $\frac{1}{4}$ th plus $\frac{1}{12}$ th share i.e. $= \frac{4}{12} = \frac{1}{3}$ rd share. Remaining $\frac{1}{2}$ share will go to legal heirs of Maruti.

30. In view of my above findings, I answer the substantial question of law framed as partly in the affirmative to the extent of $\frac{1}{2}$ share of Janabai ($\frac{1}{4}$ th share of Parvati).

31. The learned Ist appellate Court followed the proper line of reasoning but, while determining the shares it held that the plaintiffs were entitled for $\frac{1}{6}$ th share each. Since Parvati

was himself holding only $\frac{1}{2}$ share, Janabai and adopted son were entitled for only $\frac{1}{4}$ share and on Janabai's death the two plaintiffs along with the adopted son inherited $\frac{1}{3}$ rd share each in the $\frac{1}{4}$ th share of Janabai. The learned Ist appellate Court committed mistake in calculating the shares of the plaintiffs which needs to be corrected.

Cross-Objections:

32. The cross-objections regarding challenge to the adoption are dismissed. However, under Order 41 Rule 33 of the Code of Civil Procedure, 1908 Cross-objections can be allowed to the extent of inquiry into mesne profits under Order XX Rule 12 of the Code.

33 The appellants have claimed Rs.70,000/- towards the trees cut from the land by the defendant no.1 during the pendency of the suit. The records shows that they had claimed inquiry into the mesne profits. The trial Court had dismissed the suit. The Ist appellate Court should have considered the prayer for grant of mesne profits. As far as mesne profits from the date of the suit till the date of the decree and further period up to

three years is concerned, it is a statutory relief under Order XX Rule 12 of the Code of Civil Procedure and even if the Ist appellate Court has not granted it, this Court can grant it.

34. In Ganpati Madhav Sawant vs Dattur Madhav Sawant 2008 (3) SCC 183 it was held that inquiry into mesne profit is a must.

(ii) In Patel Naranbhai Marghabhai & ors vs Deceased Dhulabai Dhulabhai Galbarbhai & ors 1992 (4) SCC 264 with regards to mesne profits, it is observed as under :

10. "It is next contended that the executing court has no power to award mesne profits. Admittedly, the appellants as successors in interest of the mortgagee continued in possession after the discharge of the debt by the mortgagor. They enjoyed the property and the civil court found as a fact that the income derived would be Rs.5000/- per year. There is no material contra placed on record. The charge created by the award stands terminated from the date of payment of the award amount. Thereafter the respondents became entitled to claim mesne profits from the appellants from the next day of the discharge of the debt. The civil Court awarded from a period of three years preceding the date of the application till date of possession. No appeal or proceedings under Article 226 or 227 was taken by the respondent. Payment of mesne profit is consequential to the

execution of the award for unlawful retention of the possession. Thus, the court has power and jurisdiction to award mesne profits as a concomitant of order for delivery of the possession. Viewed from this perspective we hold that the civil court is right to award mesne profits as integral power to order delivery of possession as this would arise only due to non-delivery of possession. Accordingly, the appellants are liable to pay mesne profits.”

In this case, the inquiry into mesne profit was directed beyond the period of three years which was contrary to the provisions of Order 20 Rule 12 of the Code of Civil Procedure. It was modified.

Considering the facts, I allow the plea to grant statutory mesne profit to be added to the cross-objections.

It is axiomatic that the agricultural land shall be partitioned as per section 54 of the Code of Civil Procedure or through the Collector or the Collector delegate and the house properties should be partitioned through the Court Commissioner and the appellant/plaintiffs shall be put in possession of their 1/12th share each in the suit properties. If it is not possible to separate the 1/12th share each of the

plaintiffs, in the agricultural lands, or the house properties, the provisions of Partition Act shall be applicable and the properties shall be sold in public auction and the plaintiffs shall be paid proportionate share and in such an event, the defendants shall be permitted to purchase the properties in public auction.

35. The claim of the appellants for the trees cut by the plaintiffs shall be considered in such inquiry and proportionate share of the trees shall be paid to the appellant on determination of the mesne profits and payment of remaining court fees if any.

36. In the circumstances, the appeal is partly allowed as follows :

The appeal is partly allowed.

(a) The judgment and decree dated 20.4.2004 passed by the Ist Appellate court in Appeal No.282 of 2003 is set aside and modified as follows :

(b) It is declared that the appellant shall have 1/12 share each in the suit properties.

(b) It is declared that the appellant shall have 1/12 share each in the suit properties while defendant no.1/appellant shall have 1/3rd share.

The rest of the judgment and decree of the first appellate Court is maintained as it is.

The cross-objections regarding challenge to the adoption are dismissed. However, under Order 41 Rule 33 of the Code of Civil Procedure, 1908 Cross-Objections are allowed to the extent of inquiry into mesne profits under Order XX Rule 12 of the Code.

It is directed that there shall be inquiry under Order 20 Rule 12 of the Code of Civil Procedure, 1908 from the date of the suit till delivery of possession or till three years from the date of this judgment.

(c) In the light of above facts, parties shall bear their own costs of this appeal. The decree shall be drawn up accordingly.

Sd/-
{A.M.DHAVAL, J}