

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.425 OF 1993
WITH CA/123/1994 WITH CA/4065/1993 WITH CA/15336/2015

Smt. Housabai W/o. Sadashiv Javak,
Deceased Through L.Rs.
Soluchana W/o. Raosaheb Kharade,
Deceased Through L.Rs. (Expired on 24.5.2003)
Pandharinath S/o. Raosaheb Kharade,
Deceased Through his L.Rs. (Expired on 11.7.1998)

1. Smt. Ranjana W/o. Pandharinath Kharade,
Age-51 Years, Occup - Household,
R/o. Ranjangaon, Tal- Parner,
District- Ahmednagar.
2. Sow. Smita W/o. Snil Shelar,
Age- 28 Years, Occup - Household,
R/o. Mahadevnagar, Near Dahireswar Temple,
Dahirgaon, Tal- Haveli, District- Pune-4.
3. Sow. Shewta W/o. Rajendra Jadhav,
Age-28 Years, Occup - Household,
R/o. Gunawadi, Tal- Baramati,
District- Pune.
4. Sow. Snehal W/o. Mahesh Kaalbhor,
Age- 25 Years, Occup - Service & Household,
R/o. Khopoli, Tal- Khopoli,
District- Raigad.
5. Kum. Trupti D/o. Pandharinath Kharade,
Age- 22 Years, Occup - Student,
R/o. Ranjangaon, Tal- Parner,
District- Ahmednagar.
6. Ranjit S/o. Pandharinath Kharade,
Age- 21 Years, Occup - Student,
R/o. As Above.

...Appellants

VERSUS

1. Smt. Bhagirthibai w/o Eknath Javak,
Age 46 years,

(2)

2. Chandrakant Eknath Javak, Age 28 yrs.
 3. Suresh Eknath Javak, Age 22 years,
 4. Rajesh Eknath Javak, Age 12 years,
minor guardian mother deft.No.1
Bhagirathibai Eknath Javak.
 5. Jayashri d/o Eknath Javak, Age 2 years,
minor guardian mother deft. No.1
Bhagirthibai Eknath Javak.
 6. Sakharam Vithu Javak, Age 60 years,
 7. Rajaram Vithu Javak, Age 61 years,
 8. Bajirao Vithu Javak, Age 50 years,
 9. Rangnath Vithu Javak, Age 51 years,
 10. Dinkar Bhagwanta Javak, Age 41 years,
 11. Sopan Rambhau Javak, Age 40 years, (Dismissed)
 12. Bapu Malhari Javak, Age 46 years,
All agriculturists, all resident of
Ranjangaon Taluka Parner, Dist. Ahmednagar. ...Respondents
- ...
- Mr. S.S. Jadhavar, Advocate for Appellants.
Mr. B.A. Dhengle, Advocate for the Respondent Nos.2 to 4.
Mr. V.S. Bedre, Advocate for Respondent No.5 (Absent).

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CORAM : S.G. MEHARE, J.**RESERVED ON : 20.12.2023****PRONOUNCED ON : 12.03.2024****JUDGMENT :-**

1. The legal heirs of the legal heir of the original plaintiff, Housabai, are pursuing this second appeal against the judgment and decree of the learned 3rd Additional District Judge, Ahmednagar, passed in Regular Civil Appeal No.446 of 1987 dated 19.06.1993.

2. The appellant will be referred to as the 'plaintiff', and the respondents will be referred to as the 'defendants'.

3. The plaintiff's case in brief was that her husband died in 1934, leaving behind her and a daughter. He had landed properties, described in para No. 1 of the plaint (those will be referred to as "the suit lands"). They had no male child. Therefore, on 19.06.1946, she adopted the son of her stepbrother and named him Eknath. She was residing with her adopted son and in joint possession of the suit lands. Her adopted son started harassing her. She turned old. Hence, she went to reside with her daughter for 8 to 10 years. She was treating her with love. Defendant No. 1, in collusion with the revenue officer, got recorded 3 aane and 2 pai shares in her name. She had $\frac{1}{2}$ share in the suit lands. Deceased Eknath sold Gut no. 147 to defendants Nos. 6 to 9 on 25.05.1968 and Gut No. 135 to defendant Nos. 10 to 12 on 30.10.1971. Those sale deeds are not binding on her. The defendants did not give her a share in the income from joint properties. They did not care about her. Gut Nos. 392, 150, and 81 were in possession of the defendants Nos. 1 to 5. She sought partition to the defendant Nos. 1 to 5 in April 1976. They denied. Hence, she filed a suit for partition, separate possession, the share in the income from suit fields for the last three years and a declaration that the sale deeds executed in favour of the defendant Nos. 6 to 12 are not binding on her.

4. Defendant No.1 resisted the suit for herself and her children. She admitted that the plaintiff's husband owned the suit lands. He died in 1934. However, she denied the succession and her possession. She did not deny the adoption of her husband. She admitted that her husband Eknath died on 09.11.1975. She denied her $\frac{1}{2}$ share in the suit lands. The plaintiff had only the right of maintenance over the suit lands. The plaintiff had sold Survey Nos.147, 149 and 150 in 1950 and enjoyed its consideration for her own. Deceased Eknath had filed the suit, stating that the plaintiff had no exclusive right to sell those lands. The said suit was decreed. The High Court maintained the said judgment and decree. The decree was executed, and deceased Eknath got exclusive rights and titles over those suit lands. In those fields, the plaintiff had no right. They prayed to dismiss the suit. In the alternative, they have pleaded that if the Court holds her share, the loss suffered by them in securing the property sold by her be adjusted.

5. The learned Court of the First Instance and the First Appellate Court dismissed her suit.

6. This Court, by order dated 31.08.1994, admitted the second appeal, considering Ground Nos.4 and 5 are substantial questions of law. Those grounds are reproduced below :

"(4) Whether the Courts below acted illegally and contrary to law by not holding that deceased Housabai who died on 11/1/1982 after the death of her adopted son Eknath on

9/11/1975 has got a share in the suit property as per Schedule-I of the Hindu Succession Act, 1956.

(5) The Courts below should have held that since the adoptive son Eknath died prior to his mother Housabai, as per the Hindu Succession Act, Housabai shall get a share in the suit property, and the present appellant, Sulochana, shall get the share of deceased Housabai."

7. Learned counsel for the appellants has vehemently argued that the theory of relate back does not apply. He would submit that as per Section 14 of the Hindu Succession Act 1956 (for short 'Act 1956'), she was not a limited owner. She, being the widow, was entitled to equal share. He relied on the case of Krishnamurti Vasudeorao Deshpande and Another Vs. Dhruwaraj, A.I.R. 1962 SC 59, and argued that the adoption does not affect the rights acquired prior to the adoption. He also relied on the case of Kesharbai Jagannath Gujar by her heirs Vs. State of Maharashtra and Another, 1981 Bom.C.R. 362 and argued that Section 4 of the Act 1956 lays down the overriding effect of the succession Act, so far as Shastric Hindu Law is concerned. Relying on the case of Punithavalli Ammal Vs. Minor Ramalingam and Another, 1970 (1) SCC 570, he argued that the property vested in the widow before the Act 1956, she became the absolute owner under Section 14. The rights conferred on Hindu women under Section 14(1) of the Act are not restricted or limited by any rule of Hindu law. Therefore, the property she holds is

under her full ownership. He also relied on the case of Danamma Alias Suman Surpur Vs. Amar, A.I.R. 2018 S.C. (Civil) 1957 and argued that daughters have rights as of a son by birth. He prayed that the deceased was entitled to have a share in the property. Therefore, her daughter is also entitled to inherit her share.

8. Per contra, learned counsel for respondents Nos.2 to 4 submits that Housabai sold three fields in 1950. Eknath contested the suit and got those sale transactions cancelled. She had limited interest as she inherited the property before 1937. Referring to Section 12(c) of the Hindu Marriage Act, he argued that it was a relevant provision of law to determine the issue. To bolster his arguments, he relied on the case of Bhagirathibai Chandrabhan Nimbarte and Another Vs. Tanabai Ramchandra Zanzad (Dead) and Ors, 2013 (2) Mh.L.J. 502 and argued that when her husband died in 1937, his widow/the plaintiff had no coparcenary right in the ancestral property. Therefore, neither the widow nor her daughter get any share in the property. Only the son becomes the full owner of the property. He also relied on the case of Krishnamurti Vasudeorao Deshpande (supra) and argued that it favours Eknath. He argued that the theory of relating back would apply. There is no substance in the appeal; hence, the appeal be dismissed.

9. The arguments of both learned counsels revolve around the theory of relate back. Neither party disputes the adoption of the

deceased Ekanth. The learned counsel for the respondent submits that when Eknath was adopted, Shastric Hindu Law was in force, which had introduced the theory of relate back. Applying this rule of relate back, the legal heirs of Eknath claim that soon after, the adopted son divested his adopted mother of the estate.

10. The facts of the case are that after the death of her husband in 1934, the plaintiff and her daughter were the only heirs. Thereafter, the Hindu Womens' Right to Property Act, 1937 (for short 'the Act 1937') was enacted. The plaintiff adopted a son in 1946. They continued to be joint until the Act 1956 was enacted and thereafter also. Before discussing the rights of women under the Act 1937, it would be appropriate to discuss its repeal by Section 31 of the Act 1956.

11. The Act 1937 was repealed by Section 31 of the Act 1956. However, Section 31 of the Act 1956 was repealed by repealing and amending Act 1960 (58 of 1960).

12. The first question is, did repealing the Act 1937 by Section 31 of the Amending Act 1960 take away the rights of a person acquired under the repealed Act?

13. Section 7 of the General Clauses Act provides for the revival of repealed enactments. This Section lays down that if any enactment is repealed wholly or partially and if it is desired that any

part of the repealed enactment be revived, then it shall be necessary to state those facts specifically.

14. In the case of Vidyaben Vs. Jagdishchandra Nandshankar Bhat, AIR 1974 GUJ 23, it has been held that under Section 7 of the General Clauses Act, in the absence of any specific word stating that such an Act would be revived, the result would be that the Act which was repealed by Section 31 of the Act cannot revive even Section 31 itself was repealed.

15. The Madras High Court in the case of Kuppathammal Vs. Sakthi @ Thayammal and another, AIR 1957 MAD 695, held that the repeal effected by Section 31 of Act XXX of 1956 does not in any way impair the rights conferred on the widows of the deceased by Act of 1937. The repeal effected by Section 31 of Act XXX of 1956 would not affect the rights of widows to enjoy those rights which they acquired or accrued to them. The Madras High Court referred to Section 6 of the General Clauses Act, which provides for the effect of repeal. It has been provided therein that any subsequent Act repeals any enactment made or to be made after the commencement of the said Act, unless a different intention appears, the repeal shall not affect the previous operation of enactment so repealed or anything duly done or suffered thereunder; or affect any right, privilege, obligation or liability acquired or accrued under any enactment so repealed.

16. The Andhra Pradesh High Court, following the view of Kuppathammal, has reiterated that the repeal of the Act 1937 by Section 31 of the Act 1956 does not extinguish the right of a woman she acquired in the property of her husband under Act 1937. Her right is saved by Section 6 of the General Clauses Act. It has been further observed that in Act 1956, saving the rights conferred by Act 1937, rights derived by a widow of a last man holder of property under Section 3 of the said Act are protected by Section 6 of General Clauses Act, which preserves rights which have already been acquired or accrued under repeal enactment. The repeal effected by Section 31 of the Amending Act, 1960 did not destroy or take away the right already acquired by a widow under Act 1937 before the Act of 1956 came into force.

17. Let's now turn to the position of women before the Act of 1937. Under old Hindu Law, the widow had no right except for the maintenance in the property of the joint family of which her husband died as a member. Even in the case of separate property, if her husband left a male issue, then her only right was one of maintenance.

18. The Act of 1937 made a substantial change in her rights. Section 3 of the said Act was most important. By Section 3(1), the widow or widows of the Hindu died intestate, leaving separate property were entitled to the share as a son. The widow of a

predeceased son also had a right to inherit in like manner as a son if there is no son surviving of such predeceased son. Sub-section 2 was applied to a Hindu governed by any school of law other than Dayabhaga or by customary laws. In such case, a Hindu dies having at the time of his death an interest in a Hindu joint family property, his widow, subject to Sub-section (3) had the same interest as he himself had. In other words, sub-section (1) of section 3 dealt with a separate property of Hindu dies intestate, and sub-section (2) dealt with the Hindu joint family property subject to the provisions of sub-section (3). Sub-section (3) was provided for the devolution of interest on Hindu womens' limited interest, known as Hindu Women's Estate. She had the same right to claim partition as a male owner. The Legislature gave her full rights in the property that her husband had without any limitation except that she got the estate as a widow. Such rights were not given in lieu of maintenance or only for the purpose of maintenance. As discussed above, sub-section (1) deals with property over which a Hindu had power of disposition by testament. Such property means the separate property where the Hindu is governed by the Mitakshara school.

19. The Hon'ble Supreme Court in the case of Potti Laxmi Perumallu Vs. Potti Krishnavenemma A.I.R. 1965 Supreme Court 825 held that the interest the widow acquired is neither by survivorship nor by inheritance but a special type of interest, which is the creation

of the statute. By Act 1937, the widow got a right to seek partition after the death of her husband as she is the male coparcener. In the case of separate property, the widow, along with the sons, was entitled to the same share as a son.

20. The substantial change in the inheritance of women in the property by the Act 1937 gave solace and stability to the widows. They were entitled to inherit the family and separate properties of her husband.

21. After the adoption in 1946, the adopted son and mother were residing jointly after the Act 1956, and Hindu Adoption and Maintenance Act 1956 ('The Adoption Act' for short) came into force. The adopted son predeceased the plaintiff/mother. Then, she filed a suit for partition. The plaintiff claimed that before the adoption, she acquired $\frac{1}{2}$ share under the right she acquired under Act 1937. Therefore, the plaintiff was entitled to the same share as a son as provided under Section 3(1) of the Act of 1937. The defendants have a defence that on adoption, her son divested his mother in the estate. Hence, she had no right to claim partition.

22. The whole story changed after the adoption. Before the Adoption Act, no female could adopt a son for herself. It was for her deceased husband. In Shastric law, on the adoption of a son by a widow, the adopted son was divesting his adopted mother of the

estate. However, in the case at hand, the adoption was after the Act 1937. Hence, the following question fall for consideration :

(i) Whether the doctrine of 'Relation back' applies to this case and what is the effect of adoption after enactment of the adoption Act.

23. The doctrine of Relation back under old Hindu Law states that if a Hindu widow adopts a son after the death of her husband, then the adopted son will be deemed to have been adopted on the death of her husband. The theory was against the rule that a property cannot be divested once vested. In old Hindu Law the adopted son was divesting his adopted mother of the estate of his adoptive father. She had a right to maintenance only.

24. Both counsels referred to the judgment of Krishnamurti (supra), wherein the case of Shrinivas Krishnarao Kango Vs. Narayan Devji Kango, AIR 1954 SC 379 was referred to, and on the basis of the said judgment, the principle from the observations made in the said case were deduced, that an adopted son is entitled to take in defeasance of the rights acquired prior to adoption on the ground that in the eye of law, his adoption relates back, by a legal fiction, to the date of the death of his adoptive father. He, being put in the position of posthumous son, as a preferential heir, an adopted son (a) divests his mother of his estate of his adoptive father (b) divests his adoptive mother of the estate she gets as an heir of her son who died after the death of her husband, a coparcenary continues to subsist so long as

there is existence a widow of coparcener capable of bringing a son into existence by adoption; and if the widow made an adoption, the rights of the adopted son are the same as if he had been in existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last copercener.

25. The facts of Krishnamurthi's case were that Krishnamurthi was the grandson of Krishnabai, who had succeeded to his father's property as full owner. Her brother predeceased her father, leaving behind his widow. The widow then adopted a son. He had filed a suit against the grandsons of the daughter of the first person. Under this premise, the Hon'ble Supreme Court dealt with the rights of the adopted son by applying the doctrine of relating back. The Hon'ble Supreme Court held that the principle of relation back cannot be applied when the claim made by the adopted son relates not to the estate of his adoptive father but to that of collateral. With reference to the claim with respect to the estate of collateral, the governing principle is that inheritance can never be in abeyance and that once it devolves on a person who is the nearest heir under the law, it is thereafter not liable to be divested. When succession to the properties of a person other than the adoptive father is involved, the principle applicable is not a rule of relation back, but the rule that inheritance once vested, could not be divested. This principle was extracted from

the case of *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango*, AIR 1954 SC 379.

26. In the case of Shrinivas (supra), the Hon'ble Apex Court, in para 17, observed that :

“thus far, the scope of principle of relation back is clear. It applied only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of the joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. The point for determination now is whether this doctrine of relation back can be applied when the claim made by the adopted son relates not to the estate of the adoptive father but of collateral. The theory on which this doctrine is based is that there should be no hiatus in, the continuity of line of adoptive father. That, by its very nature, can apply only to him and not to his collateral.

In Oxford dictionary, the word “collateral” is defined as meaning ‘descended from the same stock but not in the same line’. The reason behind the rule that there should be a continuity in line does not warrant its extension to its collateral. Nor is there any authority until we came to the decision in AIR 1943 PC 196 (a), which applied the theory of relate back to the properties inherited from the collateral. With reference to them, the governing principle was that inheritance can never be in abeyance, and that once it devolves on a person who is the nearest heir, it is thereafter not liable to be divested. “

27. The facts of the case of Shrinivas (*supra*) were that Siddopant and Krishnarao were the brothers and the members of a joint undivided family. Krishnarao predeceased to Siddopant leaving behind a widow Rukminibai. Siddopant died leaving him surviving his son. His son died leaving behind widow. His widow adopted a son. He had three sons who were the defendants in the suit. The widow of Krishnarao adopted Shrinivas. He had filed a suit for partition claiming half share in the family property. The trial Court held that the plaintiff was entitled to half share in the agricultural fields on the ground that they belong to the family as ancestral properties. However, the High Court held, that had not been established. Under this premise, the Hon'ble Supreme Court held that the doctrine of relates back could not be applied and finally modified the decree of the trial Court adding the remaining parties for partition. It was a judgment before enactment of the Act 1956 and Hindu Adoption and Maintenance Act.

28. The question in Krishnamurthi's case differs from the questions in the case at hand. Here, the adopted mother and adopted son remained joint in property and the suit was filed after the Act 1956. This suit is directly between the adopted son and the adopted mother.

29. Section 12 of the Adoption Act speaks of the effect of adoption. The adopted child is deemed to be a child of his adoptive

father and mother for all purposes with effect from the date of the adoption, and from such date, all ties of the child in the family of his birth shall be deemed to be severed and replaced by those created by adoption in the adoptive family. In other words, adoption is the transplantation of a new family. An adopted child gets all the rights in the adopted family as if a child born into their family. The rights are conferred upon him subject to certain conditions. Clause (c) of its proviso clause is relevant to the facts of the case, which reads thus :

"Provided that,

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

30. Its a significant proviso that does not go away with the fiction of relation back under the Old Hindu Law. The Adoption Act abrogated the rule of Mitakshara law that on an adoption made by a widow, the adopted son becomes entitled to share of his deceased adoptive father, which has passed by survivorship to the other members of the coparcener. The rights of the adopted son, which rested on the theory of relate back, can no longer be claimed by him. The said proviso lays down that adopting a child does not result in divesting any estate vested in any person before the adoption. Section 14 of the Act 1956 conferred absolute ownership to a widow, and the child taken in adoption by her could not divest what had already been vested in her.

31. Section 4 of the Adoption Act is about the overriding effect of the Act by which the text rule or interpretation of Hindu Law or any custom or uses as part of that law in force immediately before the commencement of this Act ceased the effect with respect to any matter for which provision has been made in the said Act. On reading this Section with proviso (c) of Section 12, it could safely be said that Old Hindu Law on adoption before the codification divesting the mother has no effect. The said proviso has protected the rights of all persons vested in them before the Adoption Act. However, Section 30 of the Adoption Act saved the adoptions before the Adoption Act. In other words, the Adoption Act did not affect the adoptions before enactment of the said Act. The law has taken care of his inheritance in the property of the adopted family. His rights to inherit the properties have been protected under the 1956 Act.

32. The Hon'ble Supreme Court in the case of Danirajji Vrajilaji Vs. Vahuji Maharaj Shri Chandraprabha, AIR 1975 SC 784 held that the intendment and effect of Section 4 of the Adoption Act are to abrogate the existing law or custom in so far as it is replaced by the law enacted in the statute. If a provision is made in the statute that operates on the same area as in the existing law or custom, the statutory provision must prevail over it, and custom must be given away.

33. This Court in the case of *Yamunabai and others Vs. Ram Maharaj Shreedhar Maharaj Pandit and others, AIR 1960 Bom, 463* dealt with a similar issue of adoption by widows before the enactment of the Act 1956. In that case, the plaintiff was the widow of the last male holder of the Inam property. It was recognized as Navawali of property of the former Kolhapur State. However, the Kolhapur State had rules that a widow could not adopt without obtaining sanction from the then Government of the State of Kolhapur. It was an adoption without a sanction. However, the adopted son obtained the ex post facto sanction after the suit was filed. In that premise, the provisions of Sections 4, 14 and 5 of the Act 1956 were dealt with. It has been held that the estate possessed by the plaintiff, which has become absolute by virtue of Section 14 of the Act 1956, was not liable to be divested on the grant of the ex facto sanction to adoption of the defendant No.1 i.e. the adopted son. The question referred to the Larger Bench was " Whether by reason of Section 14 of the Hindu Succession Act, which converts the limited estate into full ownership, in case of joint family property, does the adopted son take interest by birth i.e. by civil birth, the date of his adoption?

34. The learned counsel for respondents relied on the case of Punithavalli (supra). However, the ratio of the said case was based on its facts. Hence, it does not assist the respondent. He also relied on the case of Bhagirathibai (supra). The facts of the said case were

that Tanabai was the daughter of Vithobha Nimbarte and Radhabhai. Tanabai filed a suit for declaration that she was entitled to share through her mother/Radhabai. Chandrabhan was the son of Vithobha, and Bhagirathibai was the widow of Chandrabhan. Chandrabhan died in 1952, leaving behind his widow and daughter. The Court of the first instance decreed the suit partly, holding that Tanabai was entitled to 1/3rd share in the suit property. In a first appeal preferred by Bhagirathibai, the first appellate Court held that after the death of Chandrabhan, the mother/Radhabai would get half share and the widow Bhagirathibai would get half share. Thus, they became the joint owners. Upon the death of Radhabai, her daughter Tanabai and Wanmala, the daughter of Chandrabhan, will be entitled to 1/4th share in the suit property. It has been further held that after the death of Vithoba on 23rd January 1934, his widow Radhabai was not entitled to any share in the property of Vithoba as per the position prevailing prior to coming into force of the Hindu Women's Right to Property Act, 1937. It has also been held that the mere fact that Radhabhai was not in possession of the suit property along with Bhagirathibai, the widow of Chandrabhan after 1952 was not sufficient to attract provisions of Section 14 of the Hindu Succession Act. The Section is not intended to validate the illegal possession of a female Hindu, and it does not confer any title on mere trespasser as has been held by the Apex Court in the case of Eramma Vs. Veerupana and

others, AIR 1966 SC 1879. The Court answered the substantial question of law that upon the death of Chandrabhan, Bhagirathibai, his widow, became the absolute owner of the suit property, and Tanabai, the sister of Chandrabhan did not acquire any right in the estate of Chandrabhan. Both the Courts below have committed an error of law in holding that Tanabai had any share in the estate either by herself or through her mother/Radhabai. The facts of this case are different from the facts of the case at hand.

35. He also relied on the case of M. Sivadasan (Dead) through Lrs. and others appellate Vs. A. Soudamini (Dead) through Lrs and others, 2023 SCC Online SC 1078. The trial Court had dismissed the suit, holding that the land and house sought to be partitioned were agricultural lands. The appellate Court, as well as the High Court, upheld the judgment of the Trial Court. The facts of that case were that the property was originally belonging to Sami Vaidyar. On his death in 1942, it devolved on his male successor son Sukumaran. Sami Vaidyar's daughters claimed property rights through their mother, Choyichi, who was the widow of Sami Vaidyar. They claimed that their mother, who died in 1962, had a right, though limited under the Hindu Mitakshara Law as well as by virtue of the Act 1937, which blossomed into a full-fledged right under Section 14 (1) of the Act of 1956. In this premise, it has been held that the land in question undoubtedly has coconut trees on it, and was a garden

land. It has been held that since the mother of the plaintiff was never in possession of the property, she would not get the right under Section 14(1) of the Act of 1956. It must be noted that the suit property was in Kerala State.

36. After the said Act 1937 came into force, controversy arose about whether the said Act covered and applied to agricultural lands. The Act 1937 nowhere defined the term 'property'. It was also opposed on the grounds that no limited right in agricultural property can be said to be given to a widow woman. The said conflict about the exclusion of agricultural land from the purview of Act 1937 was settled by a decision of the Federal Court in A.I.R. 1941 Federal Court 72. The Federal Court answered the questions framed in the said case about regulating the succession to agricultural land and devolution by survivorship of property other than the agricultural land that the Act of 1937 and amended Act of 1938 do not operate to regulate succession to agricultural land in the Governor's provinces; and do not operate to regulate devolution by survivorship of property other than the agricultural land. The subject of devolution by survivorship of property other than the agricultural land is included in entry no.7 of list 3, concurrent list.

37. After the said decision, many States, including Maharashtra but not Kerala, amended the Act 1937 and passed an

extension bill to make Act 1937 applicable to agricultural land in its ambit.

38. The Hon'ble Supreme Court in the case of Vaijanath and ors Vs. Guramma and ors, AIR 1999 (SC) 555, while examining the scope of the Act 1937 viz a viz Hyderabad (Application of Central Acts) 1952, held that there is nothing in the 1937 Act that would exclude the agricultural land. Thus, it was held that the judgment of the Federal Court shall not apply and the said Act shall also be deemed to include the agricultural land.

39. In view of the verdict of the Hon'ble Supreme Court in the case of Vaijanath (supra) and the amendment to the 1937 Act by the State of Maharashtra, the Court is of the view that the case of Sivadasan (supra) is distinguishable on facts as the Act 1937 was not amended at the relevant time.

40. In this case, after these two laws were passed, the adoptive mother and son were living under one roof. The adopted son predeceased the adopted mother. The suit for partition was filed after the death of the adopted son i.e. after 28th August, 1978. It is evident that till 1972, during the lifetime of the adoptive son, she was in actual joint possession of the suit land. It is also evident that she sold block No. 392 to Gulam Hussainbhai Bhaijanbhai Manner on 16.05.1947. It was after the adoption of a son. The record reveals that the adopted son had filed a suit for cancellation of that sale deed and

a declaration that it was not binding upon him. The said suit was registered as Special Civil Suit No. 14 of 1957. The Civil Judge, Senior Division, Ahmednagar, had decreed the said suit in 1959. The said decree was executed and the adopted son had recovered its possession. The said suit was not directly against the adoptive mother. It was again a third person. Therefore, the said judgment does not support the adopted son that he divested his adoptive mother from the estate of his adopted father.

41. As discussed above, after the death of the husband of the adoptive mother in 1934, she and her daughters were the exclusive heirs. Mother had acquired the rights in the suit properties. However, introducing the adopted son in preference to their right does not affect the right acquired by the adopted mother. In view of the overriding effect of section 4 of the Act 1956 and the Adoption Act, the Rules of succession and the effect of the adoption governed under the Shastric Hindu Law ceased to have an effect on the matter of succession and the effect of the adoption.

42. The law is well settled on not divesting the vested right of any person after the adoption. Clause (C) of the proviso to Section 12 of the Adoption Act was a shield protecting the rights vested in the adopted mother. After the Act 1956, the estate in possession of the widow before that Act was her absolute property.

43. Therefore, Section 12 (c) of the Adoption Act would apply to determine the rights of the adopted son, adopted mother and sister.

44. It has been argued for the defendants that the plaintiff did not possess the land when the suit was filed. Therefore, she can not claim the suit lands as absolute properties. For getting the absolute entitlement of the properties, possession of women over the properties acquired before or after the commencement of Act 1956 was *sine qua non*. It is admitted that after the Act 1956 she was possessing the suit lands. However, 8 to 10 years before the suit, she went to reside with her daughter. She was never legally dispossessed from the suit lands.

45. The Hon'ble Supreme Court in Gummalapura Taggina Matadakotturuswami Vs. Setra Veeravva and others, AIR 1959 SC 577 held that the possession might have been either actual or constructive or any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into an absolute estate under this particular Section, was at least in such possession, taking the word 'possession' in its widest connotation when the Act came into force, the Section would not apply. The law has been laid down that to claim the absolute title under Section 14(1) of the Act 1956, two conditions, possessing the property and transforming it into absolute estate, are to be satisfied.

The mother had acquired the rights under Section 3 (1) of the Act 1937. However, the facts of the case as discussed above, after the death of her husband before coming into force the Act 1937, she acquired the absolute right, and before the Adoption Act, she adopted a son.

46. They carried the property of her husband and adoptive father after the commencement of the Act 1956. By adoption, she created shares. She died after her adopted son. When she adopted a son, her share was reduced to half.

47. In a changed scenario of the death of the adopted mother, her sole daughter, who had no right to share before the Act 1956 was pursuing the suit as her legal representative/ heir. She claimed through her deceased mother. She also died before the Hindu Succession (Amendment Act), 2005. Therefore, it is objected that her legal representatives are not entitled to inherit her right. The suit is also liable to be dismissed on this ground.

48. The learned counsel for the appellant relied on the case of Gummalapura (supra). He submitted that under Order VII Rule 7 and under Order XLI Rule 27 of the C.P.C., the appellate Court is entitled to consider any change in the law.

49. He further argued that the original plaintiff was in possession of the suit lands. He submits that if it is assumed that though on the date of filing of the suit she was residing separately

with her daughter at her place, she had constructive possession, which covers the word 'possess' in Section 14 of the Act 1956. The Hon'ble Supreme Court took an identical view in the above case.

50. In view of the facts, the Court concludes that the mother had acquired a right as a son in her husband's properties as per the Act 1937. However, their shares have been divided after the adoption, which is the birth of a new descendant. The plaintiff/the adopted mother of the deceased adopted son has half share in the suit lands.

51. It was the defence of the defendant that the adopted mother had transferred some land to a third person after the adoption. The adopted son had filed a suit against those persons and restored those lands. Therefore, the plaintiff was not entitled to claim a share in those properties. However, there was no material before the Court to believe that those were the self-acquired properties of the deceased adopted son. On the contrary, those properties were again blended into a joint family property. Therefore, there is no substance in their defence that those fields are liable to be excluded from partition.

52. The learned counsel for the plaintiff relied on the case of Gummalapura (supra), and argued that the appellate Court is entitled to take into consideration any change in the law. He emphasized that in view of Section 14 of the Act 1956, the plaintiff became the

exclusive owner of her share. Therefore, her half-share was her absolute property.

53. The legal heir of the plaintiff had no case that she bequeathed or transferred her right to her daughter. In the absence of any testamentary disposition, it is presumed that she died intestate. The daughter of the original plaintiff died on 24.05.2003. She was claiming through her mother. Her husband also died on 11.7.1998. Hence, her daughters and only son were brought on record as her legal representatives. The law is settled that the daughter has a share in the property of the mother, and her legal representatives are also entitled to her share.

54. In view of the three deaths i.e. of the mother, son and daughter, the suit properties would be divided amongst the legal heirs of the son and daughter. The mother and a son had equal shares. After the death of the mother her half share would be divided equally between the daughter and a son. The son predeceased mother. Hence, mother would get $1/6^{\text{th}}$ share in the share of her son. In view of this, the legal heirs of the son and daughter would get the shares in common as follows :

- (a) Mother and son would get half share each.
- (b) Since son died, mother would get $1/6^{\text{th}}$ share in his half share. The said $1/6^{\text{th}}$ share would be divided equally between the son and

the daughter that comes to $1/12^{\text{th}}$ share each. That share would be added to half share of the mother. Its fraction is as follows :

$$\frac{1}{2} + \frac{1}{12} = \frac{12 + 2}{24} = \frac{14}{24} = \frac{7}{12}$$

(c) The mother's $7/12^{\text{th}}$ share would be divided equally between the daughter and son that comes to ;

$$\frac{7}{12} \times \frac{1}{2} = \frac{7}{24}$$

The legal heirs of deceased daughter would get $7/24^{\text{th}}$ share in common.

(d) The five legal heirs of son would get $5/12^{\text{th}}$ share + $7/24^{\text{th}}$ share. Its calculation is as follows :

$$\begin{aligned} & \frac{5}{12} + \frac{7}{24} \\ &= \frac{(5 \times 24) + (12 \times 7)}{24 \times 12} \\ &= \frac{(120) + 84}{288} = \frac{204}{288} = \frac{102}{144} = \frac{51}{72} = \frac{17}{24} \\ &= \frac{17}{24} + \frac{7}{24} = \frac{24}{24} = 1 \end{aligned}$$

On calculating the shares as above, the legal heirs of the son would get $17/24^{\text{th}}$ share and the legal heirs of the daughter would get $7/24^{\text{th}}$ share.

55. It is not disputed that the deceased son sold field Gat No.147 and 135 to defendants nos.6 to 12. Those were the joint

family properties. Therefore, those sale deeds do not bind the plaintiff to the extent of her share. In such a situation, normally, all the lands are to be blended for partition. Where, the properties for partition are more than the land sold subject to its quality and potential, such sold properties should be excluded. It is not a universal rule, but a possible rule.

56. The plaintiff had also claimed the share in the income from the lands for the last three years. However, she did not prove the actual loss of income. Therefore, her prayer for the share in the income derived from the suit lands cannot be granted.

57. In view of the above, the first substantial question of law is answered that the plaintiff/Housabai had half share in the suit lands and question No.2 is answered that the legal heirs of the daughter of the plaintiff, Housabai, would get the share as determined above.

58. In view of the discussion on the law and facts, the Court concludes that both courts erred in law in denying share to the deceased mother in the suit land. Therefore, the impugned judgment and decrees are liable to be quashed and set aside.

59. Before parting this Court appreciate the sincere assistance rendered by Shri R.N. Mehare, District Judge-1, Buldhana in determining the shares in fractions.

60. Now the Court passes the following order :

ORDER

- (I) The appeal is partly allowed.
- (II) The judgment and decree of the learned Civil Judge Senior Division passed in Special Civil Suit No. 232 of 1978 dated 30.11.1983, and the judgment and decree of 3rd Additional District Judge passed in Regular Civil Appeal No. 446 of 1987 dated 19.06.1993, are quashed and set aside.
- (III) The suit is partly decreed.
- (IV) It is declared that the legal heirs of the daughter, Sulochanabai are entitled to 7/24th share in common and the legal heirs of the son Eknath, are entitled to 17/24th share in common and separate possession of the suit lands.
- (V) It is further declared that the sale deeds dated 27.05.1968 of Gat No.147 and 30.10.1971 of Gat No.135 executed by the deceased son in favour of defendant nos.6 to 9 and 10 to 12 are not binding upon the plaintiffs, to the extent of their share.
- (VI) The decree be drawn up accordingly.
- (VII) A precept under Section 54 of the C.P.C. be sent to the Collector for partition and separation of the land by metes and bounds.
- (VIII) No order as to costs.
- (IX) R and P be returned to the learned Court of first instance.
- (X) Pending civil applications stand disposed of.

(S.G. MEHARE, J.)