IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 14TH DAY OF JULY, 2023

BEFORE

THE HON'BLE MR. JUSTICE C M JOSHI

REGULAR SECOND APPEAL NO. 7198 OF 2010 (PAR/POS)

BETWEEN:

1 BHEESMARAJA,
S/O PANDURANGAPPA ELLUR,
AGED ABOUT 59 YEARS,
OCC: BUSINESS,
R/O H.NO. 12A1,1581/2,
1ST FLOOR, MOULA MANSION,
NEAR NETAJI PUBLIC SCHOOL,
RAILWAY STATION ROAD,
BOUDHANAGAR,
SECUNDARABAD.

...PETITIONER

(BY SRI MANVENDRA REDDY, ADVOCATE [V/C])

AND:

1 SMT RADHABAI,
W/O LATE ELLUR PANDURANGAPPA,
AGED ABOUT 80 YEARS,
OCC: HOUSEHOLD,
R/O H.NO. 4-8-142,
MANGALWARPETH,
RAICHUR-584 101.

2 SHASHIREKHA,
W/O LATE DR. ASHOK RAJ ELLUR,
AGED ABOUT 55 YEARS,

OCC: HOUSEHOLD,
R/O H.NO. 93/1, RAJHOUSE,
HALKAR CROSS, HEGDE ROAD,
KUMTA.

3 SUNDERRAJ,
S/O LATE DR. ASHOKRAJ,
AGED ABOUT 32 YEARS,
OCC: STUDENT,
R/O H.NO. 693/1, RAJHOUSE,
HALKAR CROSS, HEGADE ROAD,
KUMTA.

4 HARSHARAJ,
S/O LATE DR. ASHOKRAJ,
AGED ABOUT 21 YEARS,
OCC: STUDENT,
R/O H.NO. 693/1,RAJHOUSE,
HALKAR CROSS,HEGDE ROAD,
KUMTA.

5 SMT. SAVITRAMMA,
W/O P.KRISHNAMURTHY,
AGED ABOUT 61 YEARS,
OCC:HOUSEHOLD,
R/O RADHA KRISHNA DEPARTMENTAL
STORES, OPP VIJAYALAXMI THEATRE
7-1-601, NEAR MADA TEMPLE
AMEERPETH, CHOURASTA,
HYDERABAD.

6 ELLUR VENKATESH,
S/O LATE PANDURANGAPPA,
AGED ABOUT 57 YEARS,
OCC: BUSINESS,
R/O H.NO. 4-8-140,
MANGALWAR PETH,
RAICHUR-584 101.

7 ELLUR GOPALKRISHNA,
S/O LATE PANDURANGAPPA,
AGED ABOUT 55 YEARS,
OCC: BUSINESS,
R/O H.NO. 4-8-142,
MANGALWARPETH,
RAICHUR-584 101.

…RESPONDENTS

(BY SRI SACHIN M MAHAJAN, ADVOCATE FOR R-1, R-6 & R-7 [V/C]
R2 & R5 SERVED AND UNREPRESENTED)

THIS RSA IS FILED U/S. 100 OF CPC AGAINST THE JUDGEMENT AND DECREE OF CIVIL JUDGE (SR.DN.) RAICHUR IN O.S.NO. 51/2005 DATED 10.12.2007, OF THE PRL. DIST. JUDGE, RAICHUR IN R.A.NO. 3/2008 DATED 22.01.2010.

THIS APPEAL HAVING BEEN HEARD THROUGH VIDEO CONFERENCE AND RESERVED FOR JUDGMENT ON 21.06.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY THROUGH VIDEO CONFERENCING AT BENGALURU, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is directed against the judgment in OS No.51/2005 by learned Additional Civil Judge (Sr.Dn) Raichur, on 10-12-2007 which came to be confirmed in RA No.3/2008 by the learned Principal District Judge, Raichur, on 22-01-2010, whereby the suit for partition by the appellant came to be dismissed.

2. The facts that are necessary for the purpose of this second appeal are as below:

The undisputed facts are that the plaintiff, defendant Nos.5,6 and 7 and another Ashokraj are the genitive children born to defendant No.1 from the propositus Kamvar Elluru Pandurangappa. The defendant Nos. 2 to 4 are wife and children of deceased Ashokraj, who was the first son of defendant No.1 and Kamvar Elluru Pandurangappa. It is also an admitted fact that the father of the plaintiff, Elluru Pandurangappa died intestate on 27-12-2004. He left behind him the suit schedule A to D properties. It is also an admitted fact that Elluru Pandurangappa and his wife, the defendant No. 1, had executed an Adoption Deed in favour of P.Vishnu and P.Shantabai on 22-12-1974. But the plaintiff contends that the adoption is bad in law.

3. The plaintiff who is before this Court in second appeal contended that soon after the death of his father Ellur Pandurangappa, he demanded his 1/5th share in the

suit properties and the defendants denied the same and as such, he was constrained to file the suit for partition. It was also stated that the defendants denied the share of the plaintiff contending that the plaintiff was given in an adoption to one P. Vishnu and his wife P. Shanthabai of Hyderabad. It was contended that the alleged adoption being in the year 1974, at which time, he was aged 24 years, the adoption was without his consent and was prohibited under the provisions of Sec.10 of Hindu Adoptions and Maintenance Act, 1956 ('the Act' for brevity).

4. The defendant Nos.1, 5 to 7 resisted the said suit contending that the plaintiff was given in adoption to one P. Vishnu and P.Shanthabai of Hyderabad and though no ceremony could not be performed during the life time of P. Vishnu, the ceremony was performed later by P. Shanthabai under the instructions of her late husband. In pursuance to the factum of adoption, a Deed of Adoption

came to be registered on 22-12-1974, which was executed between the said P. Shantabai and Elluru Pandurangappa, with the defendant No.1 as consenting party. It was specifically contended that the plaintiff was aged 23 years at the time of the adoption and he was brought up by the adoptive father much prior to the date of Adoption Deed. It was also contended that in Vysya community, to which the parties belong to, adoption of a child beyond 15 years was valid in Hyderabad Karnataka Area, as per the prevailing customs. They also contended that the eldest son Ashokraj had separated from the family long back by taking his share and had gone out of the family. It was contended that after the demise of Elluru Pandurangappa, the defendant Nos. 1,6 and 7 were alone entitled to succeed to the suit schedule properties and as such, the suit is liable to be dismissed.

5. The defendant Nos. 2 to 4 contended in their written statement that they are also entitled for partition

and separate possession in the suit properties and as such, they claimed 7/30th share.

6. On the basis of the above pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff is entitled to get share in the suit properties? If so, at what share?

2. Whether the defendants prove that the plaintiff has gone in adoption has no share in the suit properties?

3. Whether the plaintiff proves that the suit properties are joint family properties of the plaintiff and defendants?

4. Whether the court fee paid in the plaint is proper and correct?

5. What order or decree?

7. Plaintiff was examined as PW1 and Exs.P1 to P10 were marked in evidence. On behalf of the defendant No. 1 and 5 to 7, the defendant No.7 was examined as DW1 and another witness was examined as DW2 and Exs.D1 to D7 were marked in evidence. Defendant Nos. 2 to 4 did not lead any evidence.

8. The Trial Court having heard the arguments, answered the issue Nos. 2 and 4 in the affirmative and issue Nos. 1 and 3 in the negative and dismissed the suit.

9. Being aggrieved by the dismissal of the suit, the plaintiff approached the First Appellate Court in RA No.3/2008. After hearing both the sides, the First Appellate Court framed the following points for its consideration and answering them in the negative, dismissed the appeal as well as the suit of the plaintiff.

1. Whether the learned Trial Court committed any error in appreciating the pleadings and evidence on record as led in by both the parties so as to

result in mis-carriage of justice while passing the impugned judgement and hence the decree as contended by the plaintiff?

2. Whether the learned Trial Court committed error in interpreting section 12 of the Hindu Adoptions and Maintenance, Act, 1956?

3. What order?

10. Being aggrieved by the concurrent findings of both the Courts, the plaintiff has approached this Court in second appeal.

The appellant contended that the Adoption deed is not in dispute but the question is of its validity, as the said adoption was pertaining to the person who is aged 24 years. It is contended that Ex.D6 and Ex.D7 pertain to adoption of a person aged below 15 years though the deed was executed after the adoptee crossed the age of 15 years. He contended that there was no discernible evidence showing the custom in the community. It was

contended that Sec. 12 (b) of the Act was not at all considered by the Courts below and they failed to note that the property had vested in the plaintiff.

11. On issuance of notice, respondent Nos. 1, 6 and 7 have appeared through their counsel and despite service of notice, respondent Nos. 2 to 5 remained unrepresented.

12. At the time of admission, this Court has framed the substantial question of law on 23-4-2010 and it was recasted on 30-11-2011 as below:

> "Whether the Courts below were justified in negating the contentions of the appellant/plaintiff that Section 12(b) of the Hindu Adoption and Maintenance Act, 1956, can be pressed into service to claim share in the suit schedule properties?"

13. On perusal of the appeal memo and on hearing the arguments, it is felt necessary that another

substantial question of law needs to be considered. Hence the question of law as below is also considered by this Court:

> "Whether the courts below are justified in holding that adoption of the plaintiff, who was 23 years, is valid in view of the custom prevailing in Vysya Community?

14. The learned counsel appearing for the appellant/ plaintiff contends that the plaintiff is a coparcener in his genitive family and therefore, he had an existing right in the suit schedule properties. It is contended that the alleged Adoption was in the year 1974, when he was aged about 24 years. It is submitted that the alleged custom in Vysya Community prevailing in Hyderabad Karnataka Area is not proved by the defendants and there was no such specific pleading or the proof. He submitted that the genitive father died in the year 2004 and the suit was filed in the year 2004 itself. Therefore, it is contended that

when there are no religious ceremonies regarding the adoption, the alleged Adoption cannot be said to be proved only on the basis an Adoption Deed. He contended that Section 10 of the Act, prohibited the Adoption of a person above the age of 15 years. In support of his contention, he relies on the following decisions:

1. ***2010(4) AIR Kar R 87*** *in the case of B Y Narasimha Prasad V/s Smt H S Saraswathi;*

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2. ***AIR 2020 SC 1293*** *in the case of M Vanaja V/s M Sarla Devi by LR's;*

3. ***Judgement of apex court in Civil Appeal No. 7775/2021 dated 14.03.2023*** *in the case of Ashutosh Bala Dasi by LR's & Others V/s Smt Ranjan Bala Dasi & Others;*

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4. ***Air 1994 Bombay 235*** *in the case of Nemichand Shantilal Patni V/s Basantabai;*

5. ***AIR 2009 (NOC) 2727 (P & H)*** *in the case of Harnek Singh V/s Sarup Singh & Others;*

6. ***AIR 1961 SC 1378*** *in the case of Lakshman Singh Kothari V/s Smt. Rup Kanwar;*

7. ***AIR 1981 AP 19*** *in the case of Yarlagadda Nayadamma V/s Govt of AP;*

8. ***AIR 2016 SC 5253*** *in the case of Saheb Reddy V/s Sharanappa;*

9. ***2016(1) AKR 460*** *in the case of Ramning Ganesh V/s Ganesh Mukund Goamkar.*

15. Per contra, the learned counsel appearing for the contesting defendants contended that the defendants had contended in para 6 of the written statement that there is a custom in the Vysya community which allowed the adoption of a person aged more than 15 years. Such custom has been recognised by various judicial pronouncements. He also submitted that the custom is proved by the defendants by producing Exs.D6 and D7 and also examining a witness i.e. DW2. He submits that the properties of the genitive family had not vested with the

plaintiff at the time of Adoption and therefore, the plaintiff could not have filed the suit for partition. He also points out that the plaintiff had sold certain properties of the adoptive family after his Adoption and as such, the Adoption has been accepted by the plaintiff. Therefore, he contends that the plaintiff is estopped from contending that the Adoption was not valid. In support of his contention, he has placed reliance on the decision in the case of **Jupudi Venkata Vijayabhaskar Vs. Jupudi Keshava Rao (died) and others**[1] and in the case of **Atluri Brahmanandam (dead) through LRs Vs. Anne Sai Bapuji**[2]. Further he contended that the properties had not vested in the plaintiff at any time; and it being the contention of the plaintiff that he was one of the coparcener and seeking partition, he cannot contend that the properties had vested in him.

[1] AIR 2003 SC 3314
[2] (2010)14 SCC 466

16. The first aspect to be considered by this Court in furtherance of the substantial question of law is regarding the validity of the Adoption. The plaintiff contend that he was aged about more than 15 years as on the date of the alleged Adoption and therefore, the said Adoption is invalid. On the other hand, the defendants contend that there was a custom in the Vysya community and therefore, the Adoption is valid. It is not the case of the plaintiff that there was no such Deed of Adoption, for, he himself has produced the Adoption Deed at Ex.P8. Therefore, the question is only whether there was a custom in existence among the Vysya community to which the plaintiff and the defendants belong to. It is also to be noted at this juncture that the provisions of Sections 10 and 16 of the Act come into play. Sections 10 and 16 of the Act, read as below:

> "10 provides that no person shall be capable of being taken in adoption unless four conditions are fulfilled viz. (i) he or she is a Hindu; (ii) he or she has not already been adopted; (iii) he or

she has not been married and; (iv) he or she has not completed the age of fifteen years.

xxxxxx

16 Presumption as to registered documents relating to adoption. — Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

17. The learned counsel appearing for the appellant/ plaintiff contends that there was no such custom in their community. In support of his contention he placed reliance on the decision in the case of **B.Y.Narasimha Prasad Vs. Smt. H.S. Saraswathi[3],** wherein, it was held that the custom cannot over ride the express law. It was held that the parties who plead about the custom have to establish the same by clear and unambiguous evidence and such evidence must be founded on pleadings.

[3] 2010(4) AIR Karnataka R 87

18. It is worth to note that the burden of proving that there was a custom is on the defendants. The defendants have pleaded the existence of such custom among them and therefore, the burden is on them. The decision in the case of **M.Vanaja Vs. M.Sarala Devi (dead)**[4] also speaks about the need of custom if in violation of the provisions of Hindu Adoption and Maintenance Act.

19. The learned counsel for the appellant also relied upon the decision in the case of **Nemichand Shantilal Patni Vs. Basantabai**[5]**.** There again, the contention regarding the adoption was rejected on the ground that the custom was not established. He also relied on the short notes in the case of **Harnek Singh Vs. Sarup Singh and others,**[6] wherein, it was held that if the adoption is in respect of a person more than 15 years, the

[4] AIR 2020 SC 1293
[5] AIR 1994 Bombay 235
[6] AIR 2009(NOC)

existence of the custom has to be established. He also relied on the decision in the case of Lakshman **Singh Kothari Vs. Smt. Rup Kanwar**[7] where, it was held that the performance of the rituals of the adoption that is giving the child by the genitive parents and receiving the child by the adoptive parents is essential and in the absence of the proof of such rituals, the adoption cannot be said to be valid. It is relevant to note that it was a case wherein, there was no Adoption Deed. As noted supra, when there is a registered Adoption Deed, the provisions of Section 16 of the Act, comes into play and therefore, the proof of such rituals is not essential. In the case on hand, it is an admitted fact by the plaintiff that there is a document as per Ex.P8. It is his contention that there was no such custom and therefore, the Adoption is hit by the Section 10 of the Act. Therefore, this decision is not relevant for the purpose of this case.

[7] AIR 1961 SC 1378

20. The learned counsel appearing for the respondent has placed reliance on the decision in the case of **Jupudi Venkata Vijayabhaskar Vs. Jupudi Keshava rao (died) and others[8].** In this decision, the Andhra Pradesh High Court para 10 has held that on the question of adoption, the Trial court has held that in Vysya Community there has been a custom adoption of boys above the age of 15 years and such view was upheld. The adoption was upheld in the said decision. Later, the matter had been considered by the Apex Court in the case **Jupudi Venkata Vijayabhaskar Vs. Jupudi Keshava rao (died) and others[9]** where the view taken by the trial Court regarding the existence of custom in Vysya community was recognised.

21. Further, learned counsel appearing for the defendants has placed reliance on the decision in the case of **Atluri Brahamanandam (dead) through LRs Vs.**

[8] AIR 1994 SC 8134.
[9] AIR 2003 SC 3314

Anne Sai Bapuji,[10] where again, it was considered that in Kamma community of Andhra Pradesh there exists such custom and the custom has been established.

22. Secondly, it is also relevant to note that Exs.D6 and D7, the copies of the adoption deeds produced by the defendants to establish the custom show that adoption therein was earlier to the Adoption Deed. Exs.D6 and D7 show that though the adoption was during the minority i.e., below the age of 15 years, the deed of adoption was made after the adopted child was aged more than 15 years. In other words, the Adoption Deed was later to the date of the Adoption. However, in view of Ex.P8, the adoption deed, the factum of adoption or non performance of the rituals cannot be raised by the plaintiff. Coupled with this, the evidence of DW2 also show that there is such custom in Vysya community.

[10] (2010) 14 SCC 466

23. Thirdly, the custom of adoption of a person elder to 15 years, prevailing in Bombay Karnataka Area is recognised by various judicial pronouncements. It is also to be noted that Raichur District is adjoining the Bombay Karnataka area and there are several decisions which recognise the said custom of adoption of a person aged more than 15 years. The decision of the Apex Court in the case of **Kondiba Rama Papal @ Shirke (dead) and another Vs. Narayan Kondiba Papal**[11]**,** recognises that there exists such custom in Bombay Karnataka Area. In the said decision, it was observed as below:

> "At the time when the plaintiff was adopted he was about 22 years old, but even though there is a difference of opinion between various schools as to the age when a boy may be adopted, so far as he Bombay State is concerned the position is well settled in view of more than one judicial decision. As pointed out in Mulla's Hindu Law, 14th Edition at page 550 in the Bombay State a person may be adopted at any age though he may be older than the adopter and though he may be married and have children. The adoption is not invalid although it took place after the thread ceremony of the boy was performed. Thus the custom is judicially

[11] AIR 1991 SC 1180

> recognised in the Bombay State as regards adoption of a child at any age. Once the custom is judicially recognised, it is not required to be independently proved in subsequent cases.
>
> 2. This observation of the High Court is well supported by a long line of decisions of that Court including the subsequent decision of the Full Bench of that Court in Anirudh Jagdeorao v. Babarao Irbaji, (AIR 1983 Bom 391). In the circumstances we see no reason to interfere with the impugned judgment.."

Such view is also taken by Bombay High Court in the case of **Haribai Vs. Baba Anna and another.**[12]

24. The decision in the case of **Anirudh Jagdeorao Vs. Babarao Irbaji and others**[13] also recognised that in this part of area, there is a custom which permits the adoption of the person aged more than 15 years. It was held that, when a custom is repeatedly brought to the notice of the Court, the Court may hold that the customs introduced into law without necessity of establishing it

[12] AIR 1977 BOMBAY 289
[13] 1983 SCC online Bombay 11 = 1983 MLJ 379

each individual case. In the above decision, it is laid down as below:

> "The word "rule" in clause (a) of section 3 of the Hindu Adoptions and Maintenance Act refers to what is set out in clause (a) of section 4 namely to any text, rule or interpretation of Hindu Law or any custom or usage as part of that law. What is saved by section 4 is "any custom or usage as a part of" Hindu Law in force immediately before the commencement of Hindu Adoptions and Maintenance Act. The expressions "custom" and "usage" as defined in clause (a) of section 3 of the Hindu Adoptions and Maintenance Act include not only customs and usages in the ordinary sense which have obtained the force of law among Hindus in any local area, tribe, community, group or family but also texts, rules and interpretation of Hindu Law which have been continuously and uniformly observed and have obtained the force of law among Hindus in any local area, tribe, community, group or family. Hindus in Marathwada area in the erstwhile Nizam state of Hyderabad were governed by the Vyavahara Mayukha or what is known as the Bombay School of Hindu Law and not by the Mitakshara School. The Mayukha School of Hindu Law permitted a widow to take a boy of over 15 years of age in adoption as also a married person. Consequently adoption on the coming into force of the Hindu Adoptions and Maintenance Act in areas which were previously governed by the Mayukha School of Hindu Law

> permits adoption of a married man over 15 years of age and such custom is covered by the expression as used in Section 3(a) read with section 4(a) of the said Act. Adoption of a such person is perfectly valid. 1978 Mh.LJ 127: AIR 1977 Bom 289 held correctly Decided. Second Appeal No. 1444 of 1965 Bhimrao v. Chandru Chawla by Malvankar J., 1977 Mh.LJ 68: AIR 1976 Bom 264 and AIR 1977 Bom 412, OVERRULED."
>
> (emphasis by me)

25. It is also pertinent to note that Raichur also comes within the area of the erstwhile Nizams State of Hyderabad and therefore, the Hindu in the area governed by Vyavahara Mayukha and what is known as Bombay School of Hindu law.

26. Under these circumstances, the existence of the custom that a person aged more than 15 years may be adopted in this part of the area, particularly among the Vysya community has been recognised by the Courts and therefore, the conclusions reached by the Trial Court as

well as the First Appellate Court has to be upheld in this regard. Both the Courts below were right in holding that there exists a custom wherein, a person aged more than 15 years may be adopted among the Vysya Community. Therefore, the validity of the adoption has to be upheld.

27. The second question that falls for consideration is, Whether Section 12(b) of the Hindu Adoptions and Maintenance Act can be invoked by the plaintiff to contend that much prior to the alleged adoption, the suit schedule properties had vested in him. Section 12 of the Hindu Adoptions and Maintenance Act, reads as below:

> "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 deemed to be severed and replaced by those created by the adoption in the adoptive family:
>
> Provided that —
>
> (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

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

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

28. The learned counsel appearing for the appellant/ plaintiff has placed reliance on the decision in the case of **Yarlagadda Nayudamma and others Vs. the Government of Andhra Pradesh and others** [14], wherein, it was held that a coparcener who is given in adoption still has vested rights in undivided property of his natural family. In the said decision, it was held as below:

> **"3.** From the provisions of the aforesaid Statute it is quite manifest that the Legislature has enacted a special provision, ie. proviso (b) to Section 12 of the Act which is explicit and unequivocal in its language and intention. The property as per the said proviso (b) which vested in the adopted child before the adoption

[14] AIR 1981 ANDHRA PRADESH 19

shall continue to vest in such person. It is further added that property will be subject to the obligations, if any, attached to the ownership of such property. Therefore, it is the undoubted view of the Legislature that a person even after being given In adoption, takes along with him the property from his natural family which vested in him and continues to vest in him, adoption not withstanding whether that property vested in him either due to partition or otherwise. The texts of the Mitakshara Law, which we will presently see, are emphatic with regard to the vesting of the property in the co-parcener. The property vests in a coparcener by birth and hence he gets a vested right in that property by virtue of inheritance. The position would have been probably different, if the proviso (b) was not enacted in Section 12. Be that as it may, in so far as these, proviso (b) is concerned, it makes perfectly clear that the person even after his adoption, takes the property along with him which was earlier vested in that person. This view of ours is supported by Sri S.V. Gupte, who has written commentary on Hindu Law of Adoption, Maintenance, Minority and Guardianship. While dealing with the proviso (b) to Section 12, the learned Author holds the view of ours, which is to the following effect :—

> "As regards property held by a son as the sole surviving coparcener in the natural family, there was as stated earlier, a difference of opinion. But that difference does not exist under this Act; it is submitted that all property vested in the son in his natural family whether self- acquired,

obtained by Will or inherited from his father or other ancestor or collateral (which is not coparcenary property held along with other coparcener or coparceners) including property held by him as the sole surviving coparcener would not be divested on adoption but would continue to be vested and to belong to the son even after adoption. Under the old law a corparcener given in adoption would be divested of his interest in the coparcenary property of the natural family. That was the undoubted law. Does that law still continue or is it modified by clause (b) of the proviso to S. 12 of the Act? Under Clause (b) any property vested in the adopted child before adoption continues to vest in such person. Can it be denied that the interest of a coparcener in the joint family property, though fluctuating, is a vested interest, whatever may be the extent of that interest? If the interest of a deceased coparcener can devolve upon his heirs mentioned in the proviso to Sec. 6 of the Hindu Succession Act and not by survivorship, why can it not be said that by virtue of the provisions of clause (b) the undivided interest of a person in a Mitakshara coparcenary property will not, on his adoption, be divested but will continue to vest in him even after adoption. If the main provisions of Section 12 had stood alone it would have been possible to contend that by virtue of these provisions a son given in adoption would cease to be a coparcener and lose his interest in the coparcenary property. But clause (b) is an exception to the general rule contained in Section 12 and the main provisions of the

section must be read subject to that exception."

"In short on adoption not only the property belonging to an adopted child in the natural family such as his or her self-acquired property, property inherited by him or her from other persons including his or her father or other ancestor, and property held as a sole surviving coparcener in a Mitakshara property, *but even the undivided interest of a male child in a Mitakshara coparcenary would pass with him as if he had separated from their coparcenary.*"

29. He further contended that the above point of view can also be inferred from the decision in the case of **Saheb Reddy Vs. Sharanappa[15],** wherein, it was observed that " *a property which is vested in widow and three daughters of the deceased would not be disturbed by virtue of subsequent adoption of son by a widow."* It was a case wherein, a female Hindu had succeeded to the property under the Rules of Succession along with her three daughters. Thereafter, she had adopted a son. It

[15] AIR 2016 SC 5253

was held that her property would be divided among her adopted son and heirs of three daughters who had predeceased her. This decision is not of much help to the counsel for the appellant for the reason that it was in respect of Section 12(c) of the Act.

30. It is to be noted that the protection available under Section 12(b) of the Act can be invoked only if the property had vested in the adoptee. If he was a coparcener of the family having interest in the coparcenery properties, it cannot be said that the properties had vested in him. The meaning of the word 'vested' has been considered by the Apex Court in the case of **MGB Grameena Bank Vs. Chakrawarti Singh**[16] at para 11, 12 and 13, which read as below:

> "11. The word "vested" is defined in Black's Law Dictionary (6th Edn.) at P.1563, as:
>
> "Vested - fixed; accrued; settled; absolute; complete. Having the character or given in the

[16] (2014)13 SCC 583

rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute 'vested rights'."

12. In Webster's Comprehensive Dictionary (International Edition) at p. 1397, "vested" is defined as law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (vide Bibi Sayeeda v. State of Bihar [(1996) 9 SCC 516: AIR 1996 SC 1936] and J.S. Yadav v. State of U.P. [(2011) 6 SCC 570 : (2011) 2 SCC (L&S) 140]).

13. Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/scheme could be

changed. [Vide Kuldeep Singh v. Govt. (NCT of Delhi). [(006) 5 SCC 702: AIR 2006 SC 2652].”

31. It is relevant to note that the share of a coparcener in a family cannot be said to be vested interest, for the simple reason that such share varies on the birth and death of the other sharers in the family. If there was a partition prior to the adoption, it could be said that the plaintiff had a right vested in him and he had the rights to alienate such property. A vested right is a right independent of any contingency that could happen in the family. A vested right could not vary without the consent of such person. Admittedly, when the plaintiff was the coparcener of the family, he did not have an independent vested right in the suit schedule properties. His father Ellur Pandurangappa was the Manager of the family and therefore, it cannot be said that the suit schedule properties had vested with the plaintiff.

32. The Commentary on Section 12(b) of the Hindu Adoptions and Maintenance Act, 1956 by Mulla, 22nd Edition, observes that, in cases governed by Mitakshara Law, there was some divergence of judicial opinion on certain aspects of the matter. Section 12(b) lays down the clear Rule that any property that might have vested in the adoptee before the adoption continues to vest in the adoptee, subject, of course to any obligations attaching to the ownership of such property, including the rights of maintenance. In other words, the adopted person is not, by fact of adoption, divested of any property which had already vested in him. As a corollary it follows that the Rule is that the fact of adoption should not operate to the prejudice of the persons related to the adoptee in the natural family, who had the right to claim maintenance. The proviso only says that the property vesting in adoptee before the adoption continues to vest in him post his adoption.

33. This takes us to the concept of vesting of the rights. Such vesting of rights must be understood in the context of the nature of the property. In the case of separate property, it does not pose any difficulty, but in the context of the rights under the Hindu Law, it must be understood in the context of the joint rights contemplated under the joint family. The concept is peculiar when it is applied under Hindu Law. Under Hindu Law, no person can claim a particular fixed share in the property, his rights, which fluctuate with the births and deaths in the family. In this regard, the observations of the Supreme Court in the case of **State Bank of India Vs. Ghamandi Ram**[17], is worth to be noted. It was observed as below:

> " The incidents of coparcenership under the Mitakashara Law are: First the lineal male descendants of a person up to the third generation, acquire on birth, ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till

[17] AIR 1969 SC 1330

partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners; and sixthly, that the interest of the deceased member lapses on his death to the survivors".

34. In the words of Privy Council, in the case of **Appovier Vs. Rama Subba Aiyan**[18], it was observed that *"a member of the joint Mitakshara family cannot predicate at any given moment what his share in the joint family is. His share becomes defined only when a partition takes place."* Therefore, when we see the vesting of the rights in the light of the above context of Hindu Law, it become clear that the vesting of the rights has to be given a meaning of crystallising a person's share in the property.

[18] (1866) 11 MIA 75

A fluctuating interest in the property cannot be construed to be vesting of the property in a person.

35. In the Commentary on the Hindu Law by Mulla, concerning Section 12(b), it is observed as below:

> "Reference to Manusmrithi would also be apposite here. Even if verse 142 of Chapter 9 of Manusmrithi (which is mentioned in § 491 in Part I of this book) is examined, the translated version reads as follows:
>
> *'9.142. An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)'*
>
> The words 'family name' and 'the estate' refer to the family name and the (family) estate as they have to be read in conjunction with each other and in the context that they are used. Therefore even the Shastric law restricted the rights of an adoptee, as can be seen from the translated text of *Manusmruti*. Useful reference can also be had to the decision of the Supreme Court in V.T.S. Chandrasekhar Mudaliar v. Kulandaivelu Mudaliar, *(V.T.S. Chandrasekhar Mudaliar v. Kulandaivelu*

Mudaliar, AIR 1963 SC 185) which decision held that the purpose of adoption under Hindu law was that "It may, therefore, safely be held that the validity of an adoption has to be judged by spiritual rather than temporal considerations and that *devolution of property is only of secondary importance*."

Analysed in this background, s 12(b) can only be held to be applicable in cases where the adopted person had already been conferred rights in the coparcenary property due to 'vesting' of property either by inheritance or partition in the natural family prior to adoption. In such circumstances, the share of coparcenary property coming to the share of such adoptee would 'vest' upon the adoptee, but not otherwise, where there was no inheritance or partition prior to such adoption. In so far as separate property of such person is concerned, there is no such difficulty as it had already vested upon him or her. It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction."

36. In the case of **Vasant and another Vs. Dattu and others**[19] the Supreme Court observed as below:

[19] AIR 1987 SC 398

"4. We are concerned with proviso (c) to S.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.

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."

(emphasis by me)

37. Later, a Division Bench of this Court in the case of **T. Rathan and others vs. Chikkamuth**[20], has relied on a decision of the Bombay High Court in the case of **Devgonda Raygonda Patil Since deceased by his heir Hirabai Devgonda Patil vs. Shamgonda Raygonda Patil since deceased by his heirs Trishala Shambonda Patil and others**[21] and held that if there is coparcenary or joint family in existence in the family of birth on the date of adoption then the adoptee cannot be said to have any vested property. Subsequently, this Court in the case of **M. Krishna Vs. M. Ramachandra and another**[22] has also reiterated the view that if the adoptee was the member of the joint family at the time of adoption, his rights in the joint family property extinguish unless, he possessed those properties by way of partition. It was observed that on adoption the adoptee gets transplanted in a family in which he is adopted with the same rights as that of a natural born son and as such,

[20] AIR 2013 KARNATAKA 49
[21] AIR 1992 BOMBAY 189
[22] AIR 2019 KARNATAKA 188

transfer of the adopted child severs all his right with the family from which he was taken in adoption. It was categorically held that, he loses right of succession in the genitive family properties.

38. There are umpteen number of decisions, namely, **Jupudi Venkata Vijayabhaskar vs. Jupudi Keshava Rao**[23], **Dharma Shamrao Agalawe Vs. Pandurang Miragu Agalawe**[24] etc., which laid down that after adoption the adoptee become a coparcener in the adoptor's family. If we accept the contention of the learned counsel for the appellant herein, it would lead to a situation whereby an adopted son would continue to be exercising rights as a coparcener in the genitive family as well as the adoptive family. Therefore, this contention at any rate cannot hold good. Therefore, when the decision of the Apex Court in **Vasant and another Vs. Dattu's** case has clarified the matter, and when the Shastric Law

[23] AIR 2003 SCC 3314
[24] AIR 1988 SC 845

also do not approve the rights of a adopted person in the genitive family, the views of the Andhra Pradesh High Court in **Yarlagadda Nayadamma's** case cannot bind this Court to hold that the plaintiff is entitled for rights in the suit schedule properties of the coparcenary, regarding which he had ceased to be member. According to the Mitákshará law, a son acquires by birth a right to the ancestral property in the possession of the father, and an undivided coparcenery interest is vested in him as a member of the 'family corporation'. The vesting, however, is imperfect as the interest is liable to variation and also to extinction by reason of any subsequent disqualification. The interest is acquired in the character of a member of the family, and when that character is lost by adoption, the interest also ceases.

39. For aforesaid reasons, this Court comes to the conclusion that the adoption of the plaintiff to the family of P. Vishnu and P. Shanthabai is valid and that the plaintiff

cannot take shelter under Section 12(b) of the Act, to claim share in the suit schedule properties. The substantial questions of law raised are answered accordingly.

40. In the result, the appeal fails and hence, it is dismissed.

Sd/-
JUDGE

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