APPELLATE CIVIL.

1922.

November 24.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

MAHABLESHWAR NARAYAN BHAT DEVTE (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* SUBRAMANYA SHIVRAM JOSHI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS Nos. 2 to 5), RESPONDENTS *.

Hindu law—Mitakshara—Share on partition—Subsequent adoption does not divest that share.

A person does not, on his adoption, lose the share which he has already obtained on partition from his natural father and brothers in his family of birth.

Sri Rajah Venkata Narasimha Appa Row v. *Sri Rajah Rungayya Appa Row* (1), followed.

Dattatraya Sakharam v. *Govind Sambhaji* (2), distinguished.

SECOND appeal from the decision of V. M. Ferrers, District Judge of Kanara, confirming the decree passed by B. G. Kadkol, Subordinate Judge at Kumta.

Suit to recover possession of property.

One Shivram had three sons by his first wife, and one son (plaintiff) by his second wife. The names of the elder three sons were: Mahableshwar (defendant No. 1), Ganpati (defendant No. 2) and Venkatram (defendant No. 5). They came to a partition in 1904, each one taking a 1/5th share in the joint property. Three years later Mahableshwar was adopted into another family.

Shivram died shortly afterwards. He left a will by which he devised Mahableshwar's share in the family property equally to the plaintiff and defendant No. 2 in case it came to him as a whole; but if he got only a portion of that share, the portion was devised to the plaintiff alone.

In 1919 the plaintiff sued to recover a moiety of Mahableshwar's share.

* Second Appeal No. 22 of 1922.

(1) (1905) 29 Mad. 437.

(2) (1916) 40 Bom. 429.

The trial Court applied the ruling in *Dattatraya Sakharam* v. *Govind Sambhaji* (1) and came to the conclusion that Mahableshwar on his adoption lost the share which he had obtained in the family of his birth on partition between his father and brothers ; that the share went to Shivram as the nearest heir ; that Shivram was competent to dispose of that share by his will ; and that the plaintiff was entitled to a decree.

On appeal the plaintiff's claim was upheld by the District Judge.

Defendant No. 1 appealed to the High Court.

Nilkant Atmaram, for the appellant.

G. P. Murdeshwar, for respondent No. 1.

MACLEOD, C. J. :—A joint Hindu family consisted of one Shivram Joshi, his three sons, Mahabaleshwar, Ganpati and Venkatraman by his first wife, and one son Subramanya by his second wife. In 1904 there was separation of the family and partition of the family property, the father and his four sons each taking one-fifth of the family property. Mahabaleshwar, the present first defendant, after partition, was in 1907 given in adoption by his father to one Narayan Bhatta Devte. He thereby became a member of his new family. Shivram Joshi died leaving a will, dated 28th September 1907, wherein he stated that he was not quite confident as to whether he could own the entire property which had been acquired by partition by the first defendant or only one-fourth share. If he owned the whole he left it in equal shares to Subramanya and Ganpati. If he only had a share he left it all to Subramanya. Subramanya then brought this suit seeking to recover from the first defendant the share which was given to him by his father's will in the property originally acquired by the first defendant on

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the partition. The suit has been decreed in both Courts on the ground that the decision in *Dattatraya Sakharam* v. *Govind Sambhaji* (1) was conclusive on the point.

In order to see whether the decision in that case applies, it is necessary to ascertain the facts. One Mahadev and his brother Sambhaji were divided in interest. Mahadev died more than twenty years before the suit, leaving a widow Parvatibai, a son Ramchandra, and daughters. After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior, and the properties in suit, which were originally assigned to the share of Mahadev and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption. The mortgagee filed a suit to enforce the mortgage. The opponents were the sons of the divided brother of Mahadev and the heirs of Parvatibai. The plaintiff's claim was contested on the ground that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Parvatibai had no right to mortgage the property as Ramchandra was alive. Mr. Justice Shah in giving judgment at p. 433 said :—

"The text of Manu (Adhyaya IX, verse 142) bearing on this point is clear. It is translated in Vol. XXV of the 'Sacred Books of the East' at page 355 as follows :—'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)' ".

It was urged there by Mr. Shingne that there was no provision in the text for the divesting an estate once vested in a person, and that the person leaving the family of his birth could not be divested of property exclusively vested in him before adoption. But the

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learned Judge thought that that argument ignored the essential idea of an adoption. He said (p. 435) :

"There is a change in the position of the boy, and this divesting of the estate of the natural father is an incident, and, in my opinion, a necessary incident, of that change. The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father, if the adoption takes place in his father's lifetime. To that extent the rights vested in him are divested after adoption. If the divesting of a vested interest so far is to be allowed, I do not see any difficulty in holding that, even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption."

That is the *ratio decidendi* in that case. If the father and son are joint, and the son is given in adoption, then any vested interest which the son had in the joint family property is divested by virtue of the adoption. If the father dies and the whole estate becomes vested in the son, then on the son being adopted the learned Judge thought the same result would follow.

There was a further argument that if the adopted boy could take his self-acquired property with him and was under no obligation to leave it in the family of his birth, there was no reason why he should not take with him the property, which had vested in him exclusively on the death of his father before the adoption. The learned Judge thought that that argument ignored the difference between the self-acquired property and the estate which had become vested in him exclusively on his father's death. In one case the property was his own, and in the other it was the estate of his natural father.

The same question came before a Bench of the Madras High Court in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* [1]. One Venkatamayya had become entitled after partition

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with his brother to what was called the Madur estate. Venkatamayya had a son Narayya who on his birth became a co-sharer with his father in that estate. Then Venkata died and his son became the last surviving member of the family and was solely entitled to the estate subject to the right to maintenance of his mother. Narayya was adopted by the widow of another Narayya belonging to an elder branch of the same family and the question was whether he was divested of the Madur estate by reason of his adoption. The learned Judges, after citing the texts bearing on the question including the text of Manu, Adhyaya IX, verse 142, came to the conclusion that there was nothing in those texts which necessarily carried with it the idea that the adopted son was divested of property which was his own absolutely at the time of adoption. In their opinion the correct view seemed to be that by the adoption the filial relationship, as the author of the Chandrika said, was extinguished in one family and was created in the other family, and that thereafter the person adopted could not claim or take any property in his natural family by virtue of the extinguished filial relationship therein.

With the very greatest respect it seems to me that there was a good foundation for the conclusion arrived at by their Lordships.

In the present case the first defendant had an absolute right to the share in the family property which had come to him on partition. He could have disposed of it so long as his right of disposition was not fettered by a son being born to him. It might be said that the rights of disposition possessed by the sole surviving member of the joint family would be the same until a son was born to him, but the origin of his title to the

property would be of a different character, since nothing would have been done to put an end to the existence of the joint family. In my opinion it cannot be said that in the case of a partition in a Hindu joint family consisting of a father and his sons, the sons take their shares as the estate of their natural father and therefore the decision in *Dattatraya Sakharam* v. *Govind Sambhaji*[1] cannot be taken as governing this case. Otherwise the heir of the defendant at the time of his adoption would have had to be ascertained as if he was dead and if there were no heirs then such property would have escheated to the Crown. As their Lordship said in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Rau* [2] there is a great danger in speaking of adoption as civil death and a re-birth and in attempting to enforce the consequences that might be supposed logically to flow for those conceptions. It could only be on the assumption that the first defendant was civilly dead that his father as his heir would be considered as entitled to deal either *inter vivos* or by will with the property in the first defendant's possession. There are certain circumstances which by operation of law may bring about the devolution of an interest in property from the holder to another person, but I do not think that the texts which have been relied upon in this case show that under Hindu law the interest of the first defendant in the suit property devolved upon his father on his adoption. I think the appeal must be allowed and the suit dismissed with costs throughout.

CRUMP, J. :—I agree:

Appeal allowed.

R. R.

[1] (1916) 40 Bom. 429.

[2] (1905) 29 Mad. 437 at p. 451.