attempt was made by the other heirs in February, 1934, to be brought on the record when the claim was not barred by time. the plaintiffs we think should be given an opportunity to remove the defect resulting from the omission to produce a certificate. It is manifest that the lower Court in passing a decree upon this action for debt due to the estate of a deceased Mahomedan without a certificate acted without jurisdiction. We therefore set aside that decree and remand this case to the lower Court for passing a fresh decree for the plaintiffs if they produce a certificate of representation to the estate of the deceased Sayad Harun. within six months from the date of the receipt of the papers by the lower Court. On failure to furnish such a certificate within the time allowed, the suit shall be dismissed. As this result has been brought about by the negligence of the plaintiffs, we think that they should bear the costs of the defendants throughout.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Wassoodew and Mr. Justice Sen.

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September 13

BASAWANTAPPA MALLAPPA BHOPALPUR, A MINOR BY HIS GUARDIAN GENETIVE FATHER ADIVEPPA BASAWANTAPPA DODWAD (ORIGINAL PLAINTIFF), APPELLANT *v.* MALLAPPA BIN MALLAPPA BHOPALPUR, A MINOR BY HIS GRAND-FATHER GURUPADAPPA FATHER DUNDAPPA DODWAD AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Alienation of co-parcener's property—Alienation not valid when it was made—Whether subsequently adopted son can impeach the validity of alienation.

Under Hindu law, the interest of an adopted son in the family property arises from the date of his adoption and accordingly he cannot challenge any alienation, even if invalid, effected prior to his adoption.

* First Appeal No. 172 of 1936.

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Sivagnanam Servaigar v. *Ramasawmy Chettiar*,[1] *Rambhat* v. *Lakshman Chintaman Mayalay*,[2] *Veeranna* v. *Sayamma*,[3] *Ponnambala Pillai* v. *Sundarappayyar*,[4] and *Sabapathi* v. *Somasundaram*,[5] referred to.

FIRST APPEAL against the decision of V. V. Phadake, First Class Subordinate Judge, at Dharwar.

Suit for partition and to recover possession of property.

The facts material for the purposes of this report are sufficiently stated in the judgment of Wassoodew J.

G. A. Desai, for *A. G. Desai*, for the appellant.

S. R. Joshi, for respondent No. 2.

S. B. Jathar, for respondents Nos. 3 and 4.

WASSOODEW J. This is an appeal by the plaintiff against the decree of the First Class Subordinate Judge of Dharwar granting possession to him of half share only in those properties of the family which were not alienated to defendants Nos. 2 and 3 by the plaintiff's cousin prior to his adoption on January 29, 1934. The plaintiff's claim in the suit related to a half share in the entire properties which were in the possession of his adoptive father and the latter's brother prior to the alienations between 1926 and 1932. The material facts on which the claim was based are these :—The properties in dispute belonged at one time to one Ayyappa and his brother Basappa and the four sons of the latter by name Mallappa, Shivlingappa, Gadigeppa and Karbasappa. Mallappa and Shivlingappa were born of one wife, and Gadigeppa and Karbasappa of another. It is not known whether the brothers Ayyappa and Basappa were divided. But it appears that after the death of Ayyappa prior to 1896, Basappa gave his two sons Shivlingappa and Gadigeppa in adoption simultaneously to Ayyappa's widow, Shivakka. Notwithstanding that adoption Basappa and

(1) (1912) 22 Mad. L. J. 85.
(2) (1881) 5 Bom. 630.
(3) (1928) 52 Mad. 398.
(4) (1897) 20 Mad. 354.
(5) (1882) 16 Mad. 76.

his children continued to live as before in union. Some time after the adoption Basappa divided the estate into three parts. After reserving one part consisting of a few items of the family property to himself, he conveyed the other two of equal extent one to Mallappa and Shivlingappa jointly, and the other to Gadigeppa and Karbasappa. The effect of that division and allotment was disputed at the trial. But it is conceded on either side for the purpose of this appeal that Shivlingappa and Mallappa took the property as joint tenants. And the learned trial Judge's conclusion in that respect upon the evidence that both Shivlingappa and Mallappa treated the estate as their joint property seems to be correct. The deed of allotment (exhibit 81) has not been translated, and therefore it was not found possible to explain its contents to the Court. Shivlingappa died in 1903, and his brother Mallappa in 1911. The latter left no children but two widows Sankava and Balavva, of whom the former remarried in or about the year 1919. Shivlingappa's son, who is responsible for a large part of these alienations in dispute, died in 1929 leaving a son, the present defendant No. 1, a minor, born in 1922. After the alienations Balavva, the junior widow of Mallappa, adopted the plaintiff on January 29, 1934. The factum of that adoption is not sericusly disputed in this appeal, and we accept the conclusion of the lower Court that there is sufficient and satisfactory evidence to prove it.

The plaintiff has alleged that his adoptive father Mallappa had separated from his brother Shivlingappa after the allotment of 1896, that after his father's death the entire property was in the possession of Shivlingappa's son and grandson with the consent of his widowed mother, and that he is entitled to the specific items of property of his father mentioned in the Schedule B to the plaint, or in the alternative, his half share in the entire family property after division. It is further said that Shivlingappa's son, the principal alienor in this case, was addicted to vice and that

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his alienations are not binding on the plaintiff and do not affect his share. It is on the footing that the property since its allotment in 1896 by Basappa was undivided that this appeal has been argued, there being no reliable evidence of the alleged division between Mallappa and Shivlingappa.

The learned trial Judge has held that although the alienor had contracted vicious habits and squandered away the income of his property which was considerable, the alienations effected by him and those by his son during his minority through his guardian, to pay off several debts of his father, have not been proved to have been made to satisfy the vicious propensity of the alienor and that at least it could not be said that any part of the alienations was for an immoral purpose. On the other hand, he has found that there was an honest enquiry by the alienees, and that much the larger part of the alienations was for payment of antecedent debts and for legal necessity, such as buying of bullocks, paying rent and assessment and repairing agricultural lands. He therefore held that these alienations could not be questioned, more so because the plaintiff, having been adopted subsequently to the alienations, could not in law impeach them. Accordingly the plaintiff was given half share in the property that had remained in the family at the date of the adoption. One award decree which confirmed the alienations was also held to be binding on the plaintiff as well as the parties thereto, namely, defendant No. 1. In regard to the debt of defendant No. 4, who had threatened execution but who has not appeared in this suit, the learned trial Judge without any discussion of the plaintiff's liability ordered that the plaintiff was bound to pay that debt.

The principal controversy centres round the question whether the alienation of the coparcenery property even without any justifying necessity or in excess of the interest of the alienating coparcener, is binding upon a coparcener adopted after the date of the alienation. That question need

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not be complicated by the fact of the simultaneous adoptions of 1896 prior to the allotment and division of the property in dispute by Basappa. Those adoptions, we think, were altogether void. It is settled law since the ruling in *Rungama* v. *Atchama*[1] that a successive adoption during the lifetime of another adopted son is invalid. We were referred to certain texts cited in the learned treatise on Hindu Law by Golapchandra Sarkar, Sastri, 7th Edition, at page 189, in support of the view that the Hindu law encourages plurality of adoptions. Those quotations from Usanas and Vrihaspati are as follows :—

"Many sons should be secured, possessed of good character and endowed with virtue ; if amongst them all, even one goes to Gaya, and if having arrived at Gaya performs the *sradha*, the paternal ancestors being saved by the same, attain the highest state."—Usanas.

"All the paternal ancestors apprehending fear of the infernal regions are desirous that that son who will go to Gaya will become our saviour. Many sons should be secured if even one may go to Gaya, or perform the horse sacrifice or dedicate the Nila bull."—Vrihaspati.

It seems from the comments of the learned author, who was trying to extol the importance of an *aurssa* son from the spiritual point of view, that the reference is not to be regarded as an encomiastic and uncritical estimate of the authority regarding the merit of affiliation of subsidiary sons. This is what he has stated (p. 194) :—

"If one carefully reads the passages of the Smritis, extolling the importance of sons in a spiritual point of view, he will find that they all relate primarily to the real legitimate sons, and not to the secondary sons.

It may be that in this case simultaneous adoptions were resorted to as a device to evade the rule in *Rungama's* case.[1] But if that were so, the matter has been set at rest by clear pronouncement against the validity of a second adoption during the lifetime of a previously adopted son in *Mohesh Narain Moonshi* v. *Taruck Nath Moitra*[2] [see also *Bhujangouda Adgonda* v. *Babu Bala Bokare*[3]]. As

[1] (1846) 4 Moo. I. A. 1. [2] (1892) L. R. 20 I. A. 30, s. c. 20 Cal. 487.
[3] (1920) 44 Bom. 627.

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the object of affiliation is to confer spiritual benefits on the father in the absence of a natural born son it is reasonable to suppose that the law would not permit him to do more than what it was legitimately essential for the purpose. And it has been held that an adoption of one son is sufficient to satisfy those requirements [see *Akhoy Chunder Bagchi* v. *Kalapahar Haji*[1]].

But the decision on the question of the legality of the adoptions is of no consequence; for it is now expressly admitted that the estate in dispute was possessed even after that adoption by Mallappa and Shivlingappa under the deed of 1896 as joint tenants. That would indeed be so if the interest was conveyed by the father to his two sons under the circumstances explained by the lower Court without express words of severance. The learned trial Judge has found that Shivlingappa and Mallappa lived together as joint tenants, even after the adoption, by mutual agreement, as the whole course of their conduct suggests. It is important to note that after the deaths of Ayyappa and his son Mallappa their widows did not claim the property of their husbands as heirs. One of these Balavva was content to claim mere maintenance from the son of Shivlingappa. It may also be noted that upon the division by the father of this family property the status of the two brothers would be a matter of proof and not presumption [see *Rudragouda* v. *Basangouda*[2]]. Apart from the admission in argument it is not possible in our opinion to draw a legitimate inference from the circumstances and the absence of evidence of separate demise or enjoyment, that Shivlingappa and his brother intended to hold the property in severalty. The circumstances are in favour of the contrary view. The conclusion must therefore emerge that upon the death of Mallappa in 1911 the entire property devolved upon Shivlingappa and his son as survivors.

[1] (1885) L.R. 12 I.A. 198, s.c. 12 Cal. 406. [2] (1937) 40 Bom. L. R. 202.

Now Shivlingappa's son, who is also named Mallappa, alienated a part of that property for the first time about the year 1926. In that year he mortgaged certain lands of the family to defendant No. 3 for Rs. 3,500 and followed it by another mortgage of another property in 1927 (*vide* exhibit 96). This comprised of three lands of Hadagali. It is admitted before us that the former mortgage was for family necessity and would be binding upon the coparceners if Mallappa were regarded as their manager and the property coparcenery property. In regard to the later mortgage the only item of the advance disputed is Rs. 1,000 which it is said, is not properly accounted for. From 1928 onwards defendant No. 1's father effected two other mortgages of other properties in favour of defendant No. 2, the first for Rs. 2,000 in July 1928, and the second for Rs. 2,500 in November of that year (exhibit 108). The plaintiff has urged that the alienor being addicted to vice it must be inferred that the debts now questioned were contracted for an immoral purpose, and that therefore he as adopted son of the alienor's undivided uncle, assuming that his property was not divided, is entitled to impeach them on that ground.

The learned advocate has argued that an alienation of coparcenery property, if it was not valid when it was made, is not binding upon a coparcener adopted after the date of the alienation. The respondents have contended to the contrary. There is no direct authority of this Court on the point. In *Sivagnanam Servaigar* v. *Ramaswamy Chettiar*[1] there are observations of the learned Chief Justice to the effect that an adopted son cannot challenge, even if invalid, any alienations of the joint family property effected before the date of his adoption in that family. But there the Court also found that the alienations were for necessity and in fact made by the father of his own interest and the interest of his sons to pay off antecedent debts.

[1] (1912) 22 Mad. L. J. 85.

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It therefore held that they were not invalid when they were made. Consequently the observations referred to might be treated as *obiter*. It is however conceded before us owing to the current of authority that an alienation, valid when it was made, cannot be impeached by a subsequently adopted son—[see *Rambhat* v. *Lakshman Chintaman Mayalay*,[1] and *Veeranna* v. *Sayamma*[2]]. The question is whether the converse proposition is true. Now an adopted son becomes a member of the coparcenery only from the moment of his adoption. He is till then a stranger to the family and has no kind of interest in the family property. If there was prior to the adoption a sole surviving male member in the family, the question is simplified, for as full and sole owner he is competent to deal with the entire property as he likes and the subsequently adopted coparcener could not question the alienations whether valid or otherwise. That is because the rights of an adopted son do not relate back to a period earlier than the date of his adoption. As Mayne has pointed out in paragraph 197 of his Treatise on Hindu Law and Usage, 9th edn. :—" till he was adopted, it might happen that he never would be adopted ; and when he was adopted, his fictitious birth into his new family could not be ante-dated." It is true that it cannot be said that by his adoption he does necessarily acquiesce in all the dealings with the estate since the death of his adoptive father till his own adoption, particularly if the estate is held by a female with limited ownership and encumbrances are created beyond her powers. But that does not support the plaintiff's claim. In Bombay the right of the male coparceners to alienate their own share in the coparcenery property without the consent of the other coparceners is well recognised—[see *Lakshman Dada Naik* v. *Ramchandra Dada Naik*,[3] *Pandurang Narayan* v. *Bhagwandas Atmaramshet*,[4] and *Pandu Vithoji*

(1) (1881) 5 Bom. 630.
(2) (1928) 52 Mad. 398.
(3) (1880) 7 I. A. 181, s. c. 5 Bom. 48.
(4) (1919) 44 Bom. 341.

v. *Goma Ramji*[1]]. As pointed out by Mayne in para. 198 (p. 272), "it would be intolerable that he (such coparcener) should be prevented from dealing with his own, (interests) on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them." Those remarks have particular bearing on the Mitakshara law as interpreted in the provinces where a coparcener as in Bombay has unlimited powers to deal with his own share. If however he does alienate more than his interest in the joint family property, the alienation not being one for legal necessity or for payment by a father of an antecedent debt, according to the series of decisions of this Court the other members are entitled to have the alienation set aside to the extent of their own interest therein [see *Ramappa* v. *Yellappa*,[2] and *Naro Gopal* v. *Paragauda*[3]]. The position of the adopted person at the utmost could not be regarded as any higher than that of such coparcener and he could certainly not claim the right to set aside the entire alienation.

For a contrary authority we have been referred to the following passage in Mayne's Hindu Law, 9th Edition, paras. 342, 343 at pp. 469-470 :—

> "If the alienation (by a father) was invalid, he (the son) acquires a share in the whole property including the portion purported to be alienated—not because the alienation was an invasion of his rights, for he had none : but because it was bad in itself and did not diminish the corpus of the joint family property . . . An adopted son stands in exactly the same position as a natural-born son, and has the same right to object to his father's alienations."

It is therefore urged that an alienation if found to be invalid, the adopted son would acquire a share in the whole property including the entire subject-matter of the alienation. Now those observations were made with reference to the decisions in *Tulshi Ram* v. *Babu*[4] and *Lachmi Narain Prasad* v.

(1) (1918) 43 Bom. 472.
(2) (1927) 52 Bom. 307.
(3) (1916) 41 Bom. 347.
(4) (1911) 33 All. 654.

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Kishan Kishore Chand.[1] In Allahabad a coparcener for alienating his own share requires the consent of his co-sharers. Those remarks therefore do not affect the settled law in this presidency. The observations in the Allahabad cases and those of the Privy Council in *Chet Ram* v. *Ram Singh*[2] are applicable to the facts of those particular cases and the law obtaining in Allahabad and the United Provinces. Therefore in Bombay the alienation by a coparcener cannot be set aside in its entirety. Accordingly the alienations in this case so far as they affect the alienor's interest are binding on the subsequently adopted coparcener as they are on his own son.

The question is whether the alienations in excess of that share are not binding on the subsequently adopted coparcener. The principle underlying the decisions of this Court is that the persons entitled to impeach the alienations made by a coparcener in excess of his interest are those who have a vested interest in the property at the time of the alienations. In *Ponnambala Pillai* v. *Sundarapayyar*[3] it was held that a coparcener who was in existence at the time of the completion of the alienation could alone impeach the alienation. It is also recognized that such an alienation can be set aside at the instance of a coparcener who was conceived at the date of the alienation if it is invalid [*Sabapathi* v. *Somasundaram*[4]]. A subsequently adopted coparcener like the plaintiff cannot *prima facie* be said to have an interest in the property at the time when the alienations were made. I have referred to the cases which suggest that the theory of relating back is not applicable to adoptions. If the interest of the adopted son arises for the first time on adoption (see *Rambhat* v. *Lakshman Chintaman Mayalay*[5]), he cannot in my opinion be allowed to challenge the transaction which has reduced the extent of the coparcenery property at the date of the

(1) (1915) 38 All. 126.
(2) (1922) L. R. 49 I. A. 228, s. c. 44 All. 368.
(3) (1897) 20 Mad. 354.
(4) (1882) 16 Mad. 76.
(5) (1881) 5 Bom. 630.

adoption. In that view it is not within the competence of the plaintiff to challenge the alienations even if invalid, they having been effected prior to his adoption. The sale effected by defendant No. 1 in 1932 while he was the sole surviving coparcener at that time stands on a different footing, for then he was the sole or full owner of the property and could deal with it as he liked. We are not called upon to decide in this case whether the plaintiff could benefit from a decree obtained after the adoption by defendant No. 1, the son of the alienor, setting aside the alienations in excess of the interest of the alienor. The first defendant, the son Mallappa, has not impeached those alienations and has made no common cause with the plaintiff in the suit.

In view of the above it is not necessary to examine the necessity or otherwise of the alienations. But even so we are satisfied upon the important evidence that has been read over to us that the conclusion of the learned trial Judge that the plaintiff has not proved that any part of the alienation was for immoral purpose, is correct. There is *prima facie* proof that the a ienee made proper and honest enquiry, and that he paid a fair price and was satisfied upon proof submitted that there was justifying necessity for the alienation. It may be that the alienor at one time led an extravagant and immoral life, and perhaps had utilized every farthing of the income available in vice. But if as a result of the absence of thrift and prudence there were arrears of rent and assessment to be paid and also previous debts, it could not be said that the alienation was contrary to law. I do not think therefore that we should interfere with the decree of the trial Court by giving the plaintiff the relief claimed against the property whch was alienated before the adoption.

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With regard to one clause in the Court's order stating that the plaintiff is bound by the decree obtained by the fourth defendant, who did not appear to contest the suit, we think it was not proper to hold in the circumstances that the debts were binding on the plaintiff or on his share in the property. We therefore set aside that part of the lower Court's order. We maintain the remaining part of the decree of the lower Court and dismiss this appeal with costs in one set.

SEN J. I agree.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Macklin and Mr. Justice Wassoodew.

1938
September 9

RAMSING ALIAS RAMA BHAGIRATHA NAVLE AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* FAKIRA WALAD RAMSING ALIAS RAMA NAVLE, MINOR BY HIS GUARDIAN KASHIBAI MARD ANANDA BELDAR AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

Hindu law—Joint family—Suit for partition by minor co-parcener—Severance of joint status—If a decree passed in the suit, severance takes effect from the date of suit—Minor's share not liable to decrease by birth of a member subsequent to the date of suit.

Under Hindu law, although the institution of a suit for partition by a minor co-parcener through his next friend doesnot *ipso facto* effect a severance of joint status, if a decree were passed in that suit, the severance in estate must take effect from the date of the suit. Consequently the minor's share is not liable to decrease by the birth of a member subsequent to the date of the suit.

Krishnaswami Thevan v. *Pulukaruppa Thevan*,[1] *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*[2] and *Rangasayi* v. *Nagarathnamma*,[3] approved.

SECOND APPEAL against the decision of P. N. Moos, District Judge at Nasik, confirming the decree passed by D. R. Ugrankar, Joint Subordinate Judge of Nasik.

* Second Appeal No. 225 of 1937.

[1] (1924) 48 Mad. 465.

[2] (1927) 50 Mad. 866.

[3] (1933) 57 Mad. 95 F. B.