SHRIPAD GAJANAN SUTHANKAR

v.

DATTARAM KASHINATH SUTHANKAR AND ORS.

March 1, 1974

[D. G. PALEKAR, P. N. BHAGWATI AND V. R. KRISHNA IYER, JJ.]

Hindu Law—Prior to Hindu Succession Act, 1956—*Death of Coparcener leaving widow—Partition among other coparceners later—Adoption by widow— Share of adopted son in coparcenary property.*

M had two sons—the first defendant and K. K died in 1921 leaving a widow and a daughter. In 1944 there was a partition between M and the first defendant, and, in that partition, allotment for residence and maintenance of K's wid ow was made. Thereafter, M gifted away his share, which he got in partition, to the first defendant's son, the second defendant (appellant). In 1956, before the Hindu Succession Act came into force, the widow of K adopted her daughter's son (respondent) and he filed the suit for a fresh partition claiming a half share of the entire property ignoring the earlier partition and gift.

On the question of the rights and shares of the parties,

HELD : (1) The finding of the High Court that the adoption of the respondent was true and valid, both from the angles of custom and factum, is established by the evidence. [476F]

(2) (a) Under the Mitakshara School of Hindu Law a widow's adoption cannot be stultified by an anterior partition of the joint family and the adopted son can claim a share as if he were begotten and alive when the adoptive father breathed his last. [485E]

(b) Nevertheless the factum of partition is not wiped out by the later adoption. [485E-F]

(c) Any disposition, testamentary or *inter vivos*, lawfully made antecedent to the adoption is immune to challenge by the adopted son. [485F]

(d) Lawful alienation, in this context, means not necessarily for a family necessity but alienation made competently in accordance with law. [485F-G]

(e) A widow's power of alienation is limited, and if only if the conditions set by the Hindu Law are fulfilled will the alienation bind a subsequently adopted son. So also the alienation by the Karta of an undivided family or transfer by a coparcener governed by the Banaras School of Hindu Law; [485F-G]

(f) Once partitioned validly, the share of a member of a Mitakshara Hindu family in which his own issue have no right by birth, can be transferred by him at his will and such transfers, be they by will, gift or sale, bind the adopted son who comes later on the scene. [485G-H]

(3) In computing the net available property for giving a share to the respondent, the property gifted by M to the second defendant has to be excluded while the allotment for maintenance will have to be brought into the corpus. But, in calculating his share, the adopted son's right, arising long after other proprietary events, should be worked out, not rigidly but justly. If the respondent is given his 1/3 share as at the time when the partition took place, since M's share, which had been gifted away, should be ignored, the respondent will get his 1/3 share of the *entire* family property from out of the 1/2 share of the first defendant got by him at the 1944-partition. But it would be unfair to the first defendant to deprive him of such a large share merely because he had not parted with his properties before the respondent's adoption. Equally, it would be unjust to the respondent if he is given only 1/3 of the properties given to the Ist defendant and remaining with him at the date of adoption. Therefore, it would be eminently just to divide the properties got by the first defendant at the 1944-partition, which were with him at the date of adoption, into two equal shares and award one share to the plaintiff-respondent. Hence, a decree should be passed, (i) allowing the respondent an half share out of such properties allotted to the first defendant under the 1944-partition as were with the first defendant at the date of adoption, including, therein, the times set apart for the mainte-

A nance of the adoptive mother; (ii) directing profits to be paid to the plaintiff on that basis; and (iii) directing the cessation of payment of maintenance by the first defendant's branch to the adoptive mother. [479A-E; 485H-486G]

Govind v. *Nagappa*, [1972] 3 SCR 200, *P. Ammal* v. *Ramalingam*, [1970] 3 SCR, 894, *Srinivas* [1955], 1 S.C.R. 1;17; 24-45; *Krishna Murthi*, [1962] 2 S.C.R. 813, *Bhimji Krishna Rai*, [1950] 52 B.L.R., 290, in *Bijoor* v. *Padmanabh* (9) I.L.R.' [1950] Bom. 480, *Krishtappa* v. *Gopal*, A.I.R. 1957 Bom. 214, 215, *Balaji*, (1944) 47 B.L.R. B 121, *Sankaralingam*, I.L.R. (1943) Mad. 309 and *Somesekharappa* v. *Basappa Channabasappa*, (1960) Mys. L. J. 687, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1264 of 1967.

Appeal from the Judgment and Decree dated the 8th April 1964 of the Mysore High Court at Bangalore in Regular Appeal No. 100 of 1958. C

S. V. Gupte and *R. B. Datar* for the appellant

S. S. Javali and *H. K. Puri*, for respondent No. 1

The Judgment of the Court was delivered by

D KRISHNA IYER, J. An intricate point of Hindu Law bearing on an adoption by a widow and its impact on an earlier partition in the coparcenary—all prior to the Hindu Succession Act, 1956—arise for decision in this appeal by certificate against the decree of the Mysore (now Karnataka) High Court. The plaintiff succeeded in both the Courts and the aggrieved second defendant, who is the appellant before us, has confined his challenge to two major contentions, E although a few minor matters also require our attention in working out the ultimate relief.

Now the facts. A small family of Gowd Saraswat Brahmins of Balgaum had, as its head, one Mahadev and as coparceners his two sons, Gajanand (Defendant No. 1) and Kashi Nath, who died in 1921 leaving behind a widow, Rakhama Bai (Defendant No. 3), and a daughter Lilawati. The plaintiff is Lilawati's son, i.e., the daughter's son F of late Kashi Nath. Gajanand, the first defendant had an only son, Shripad, the second defendant. Long years after the demise of her husband, the third defendant adopted the plaintiff on February, 16, 1956. In the considerable interval that elapsed, a partition took place in the family on April 24, 1944 between the then two living coparceners, namely, Mahadev and the first defendant. The former passed G away in 1946 but before his death he gifted his entire share in the joint family derived under the partition of 1944 to the second defendant. For completeness sake it must be mentioned that at the partition in 1944, an allotment for the residence and maintenance of the third defendant had been made. The second defendant, the donee from Mahadev, alienated some of those properties but the alienees are not parties to the present appeal although they were defendants to H the litigation. The adopted son, i.e., the plaintiff, filed the present suit on April 20, 1956 ignoring the partition of 1944 and praying for fresh partition by metes and bounds of his half share. His case was that the gift was invalid like the partition and that he was entitled to

an equal share with the first defendant together with profits attributable to his share. The contesting defendant was the second defendant who challenged the factum and validity of the adoption and also the right of the adopted son to re-open the partition or impugn the gift effected prior to the adoption. Other contentions had been raised which need not be noticed now.

The Trial Court granted a decree more or less as prayed for upholding the factum and validity of the adoption and the right of the plaintiff to re-open the partition and ignore the gift. The decree declared that the plaintiff was entitled to 1/3rd share, the first defendant to a 1/6th share, the second defendant to a half share, and so on. Profits that fell to the share of the plaintiff were also decreed. The liability of defendants 1 and 2 to pay maintenance to the third defendant under the partition deed of 1944 was to cease from the date of the suit. The High Court in appeal upheld the adoption and the right of the plaintiff to re-open the partition. Certain minor modifications were made which will be referred to, to the extent necessary, later.

Shri Gupte, appearing for the appellant (second defendant) has taken us through the evidence regarding the custom of adopting the daughter's son by the widow, and argued that as a source of law—undoubtedly, custom is a source of Hindu law—there was not sufficient material to hold on the triune aspects of antiquity, adequacy and continuity. He urged that the adoption was, therefore, invalid even though there was concurrence in the conclusions of the courts below. He did not seriously argue on the factum of the adoption, and even otherwise this is a finding of fact rendered by the courts below which we are not disposed to re-examine.

Counsel for the first respondent, Shri Javali, took us through the High Court's discussion of the evidence bearing on custom and we are satisfied that there is ample justification for the finding reached that the adoption of the plaintiff is true and valid, both from the angles of custom and factum.

It is established law that the adoption by a widow relates back to the date of the death of the adoptive father, which, in this case, took place in 1921. Indeed, the complexity of the present case arises from the application of this legal fiction of "relation-back" and the limitations on the amplitude of that fiction *vis a vis* the partition of 1944. in the light of the rulings of the various High Courts and of the Judicial Committee of the Privy Council, and of this Court, the last of which is *Govind* v. *Nagappa*.(1) According to the appellant, the rights of the adopted son, armed as he is with the theory of "relation-back", have to be effectuated retro-actively, the guidelines wherefor are available from the decided cases. It is no doubt true that "when a member of a joint family governed by Mitakshara law dies and the widow validly adopts a son to him, a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which

(1) [1972] 3 S.C.R. 200.

A the deceased coparcener had, and it vests at once in the adopted son". (see Mulla on Hindu Law, 13th edn. page 516). The same author, however, points out that "the rights of an adopted son arise for the first time on his adoption. He may, by virtue of his rights as adopted son, divest other persons in whom the property vested after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him. His right to impeach previous B alienations would depend upon the capacity of the holder who made the alienation as well as on the nature of the action of alienation. When the holder was a male, who had unfettered right of transfer, e.g., the last surviving member of a joint family, the adopted son could not impeach the transfer. In case of females who had restricted right of transfer even apart from any adoption, the transfers would be valid only when they are supported by legal necessity." (*ibid*; pp; 516-517; C para 507). "An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural-born son would be." (*ibid;* p.517; para 508).

It is settled law that rights of an adopted son spring into existence only from the moment of the adoption and all alienations made by D the widow before the adoption, if they are made for legal necessity or otherwise lawfully, such as with the consent of the next reversioners, are binding on the adopted son. The narrow but important question that arises here is as to whether the adoption made in 1956 can upset the partition of 1944, validly made under the then conditions, and whether the gift by Mahadev of properties exclusively set apart to him, and, therefore, alienable by him, could be retro-actively in- E validated by the plaintiff on the application of the legal fiction of "relation-back". It is unlikely that a similar question will arise hereafter since s. 4 of the Hindu Succession Act, 1956 has practically swept off texts, rules and the like in Hindu Law, which were part of that law in force immediately before the commencement of the Act, if provisions have been made for such matters in the Act. Since on the husband's death the widow takes an absolute estate, questions F of the type which engage us in this appeal will be stilled for ever. Of course, we need not investigate this aspect of the matter as the present case relates to a pre-statutory adoption. Even s. 12 of the Hindu Adoptions and Maintenance Act, 1956, makes it plain that 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.

G

We may now proceed to consider the contention of Mr. Gupte that the adopted son cannot challenge the partition and the gift.

The plaintiff, as the adopted son, for secular and spiritual purposes continues the line of the adoptive father and when the widow adopts, H the doctrine of 'relation-back' makes sonship retro-active from the moment of death of the late husband. The new entrant is deemed to have been born on the date of death of the adoptive father. Supposing there was an undivided family in existence when the adoptive

father died, how far can the legal fiction of anterior sonship disrupt the doings between notional birth and actual adoption? Mulla sums up the result of the rulings thus : (p. 496).

> "If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second and enabling the adopted son to claim a share in the family properties as if they were still joint."

This means that at the partition of 1944 although as a physical fact only Mahadev and defendant No. 1 were alive, the plaintiff must be deemed to have been alive. The division had denied a share to him while he was eligible, in the eye of law, to a share. There were thus three co-parceners and the plaintiff was entitled to a third out of the estate of the joint family as it then existed. Illustration (a) at page 497 of Mulla, based on *Surendra Nandan*(1) is apt and reads :

> "A and B are undivided brothers governed by the Mitakshara law. A dies leaving authority to his widow to adopt a son to him. On A's death his undivided half share in the coparcenary property passes to B, the surviving coparcener. While B is still alive, A's widow adopts a son to A. The effect of the adoption is that a coparcenary interest is created in the joint property co-extensive with that which A has in the property (that is, one-half), and it vests in the adopted son."

The plaintiff's claim for a share is thus well-founded—not half, which is tall but one-third which fits the fiction as in 1944.

Two crucial questions then arise. One-third share out of what? Should the gift by Mahadev of what was under the then circumstances his exclusive property be ignored in working out the one-third share? Two principles compete in this jurisdiction and judges have struck a fair balance between the two, animated by a sense of realism, impelled by desire to do equity and to avoid unsettling vested rights and concluded transactions, lest a legal fiction should by invading actual facts of life become an instrumentality of instability. Law and order are jurisprudential twins and this perspective has inarticulately informed judicial pronouncements in this branch of Hindu law. In short, the principle of relating the birth of the adopted son to the last day of the adoptive father's life is put in peaceful co-existence with recognition of rights lawfully vested on the basis of the realities then existing. The law frowns on divesting vested rights and keeping in cold storage or suspended animation normal legal events like competent transfers and collateral succession, except when compelled by jural mandate. So viewed, the partition of 1944 was valid; so also the gift

(1) (1891) 18 Cal. 385.

A of his exclusive share by Mahadev, to Shripad, Defendant No. 2. The plaintiff could reopen the partition only to the limited extent rights flowing from these two facts viz. disruption of jointness and alienation by one share permitted. Nor is law inhuman or inequitable or abstract, its essence being social engineering. Therefore, the humane endeavour to work out equities in a given case has engaged the con-
B science of judges in the reported rulings. Here, the circumstance that the whole share of Mahadev has gone out of the corpus of the coparcenary on account of the gift inflicts an injustice on the plaintiff if he is to get only one-third of the properties which were allotted to Gajanan whose branch still remained in tact; equally unjust it would be on Gajanan if out of his allotment the plaintiff were to slice off what is equal to one half of the total assets as at the time of partition
C in 1944 merely because of the misfortune that he had still kept it as the asset of his branch at the time of the adoption. Equitable considerations would suggest a modification. When the adoption was made there were only two coparceners and the corpus available only Gajanan's properties. So a half share out of those items may be fair, in the totality of circumstances. Maintenance to the mother and profits due to the plaintiff are minor matters and will be gone into
D last.

The broad approach made and the general conclusions reached above do fit into the conspectus of judge-made law, as we will presently discuss. May be, a flash-back method of reference to the case law will be more effective, and that way the recent decision in *Govind* v. *Nagappa*(1) clears the ground a great deal. Hegde, J., speaking for the Court, drew the lines clearly in the situation of confrontation
E between the fiction of relation-back and the fact of partition, in a way analogous to our case. In asking for a share the adopted son could overlook the prior division but in pushing the fiction to its plenary extreme of nullifying the partition so as to re-unite a divided family, the Court cried halt. The learned Judge observed :

> "It is true that by a fiction of law—well settled by decided
> F cases—that an adopted son is deemed to have been adopted on the date of the death of his adoptive father. He is the continuator of his adoptive father's line exactly as an aurasa son and an adoption, so far as the continuity of the line is concerned, has a retrospective effect.
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> Consequently he is deemed to have been a coparcener in
> G his adoptive father's family when Krishna Rao and Lakshmana Rao partitioned the properties. The partition having been effected without his consent, it is not binding on him. But from this it does not follow that Krishna Rao and Lakshmana Rao did not separate from the family at the time of the partition. It was open to Krishna Rao and Lakshmana Rao to separate themselves from the family. Once they did separate, the appel-
> H lant and his adoptive mother alone must be deemed to have continued as the members of the family.
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> * * *

(1) [1972] 3 S.C.R. 200.

When the partition took place in 1933, the appellant even if he was a coparcener on that day could have only got 1/3rd share. We fail to see how his position can be said to have improved merely because he was adopted subsequent to the date of partition. It is true that because he was not a party to the partition, he is entitled to ask for reopening of the partition and have his share worked out without reference to that partition.

* * *

The doctrine of relation back is only a legal fiction. There is no justification to logically extend that fiction. In fact the plaintiff had nothing to do with his adoptive father's family when Krishna Rao died.

* * *

The devolution of Krishna Rao's property must be held to have taken place at the very moment Krishna Rao died. We know of no legal fiction under which it can be said to have been in a suspended animation till the plaintiff was adopted.

* * *

We see no basis for the contention of the appellant that he can ignore the events that took place in 1933. He can no doubt ignore the actual partition by metes and bounds effected by Krishna Rao and Lakshmana Rao and ask for a repartition of the properties but his adoption by itself does not and cannot re-unite the divided family. It is one thing to say that an adopted son can ignore a partition effected prior to his adoption, which effects his rights and it is a different thing to say that his adoption wipes out the division of status that had taken place in his family.

* * *

Further the interest of the society is not advanced by engrafting one more fiction to the already existing fiction that an adopted son is deemed to have been born on the date of death of his adoptive father. Acceptance of the new fiction canvassed on behalf of the plaintiff is bound to create various complications. Hindu widows in the past were proverbially long lived because of the child marriage system. Adoptions might take place and have taken place more than half a century after the death of the adoptive father. Meanwhile the other coparceners might have dealt with the family property on the basis of the then existing rights. They might have alienated the property. We see no justification to create chaos by inventing a new fiction unknown to Hindu law texts nor authorised by *stare decisis*.

* * *

But where the succession to the property of a person other than the adoptive father is involved, the principle applicable is not the rule of relation back but the rule that inheritance once vested cannot be divested."

A By parity of reasoning we have to give the plaintiff a one-third share, which alone even an aurasa son of late Kashinath would have got stirpitally. To undo the divided status and continue the coparcenary till the date of the suit so as to award a half share to the plaintiff as representing one of the two surviving branches would be legal fiction run riot. Neither principle nor precedent compels that course.
B

We now sail into still more troubled waters. Where is this share to come from ? From the coparcenary property, less what has legitimately gone out of it. If the widow of a deceased coparcener had alienated for binding necessity, such property has to be excluded—although a strict projection of the fiction would mean that the adopted
C son was alive at the time succession opened and the widow could not have the right to even a limited estate and *a fortiori* could not competently alienate for necessity or otherwise. Liberties with the legal fiction have been taken in this and other aspects of the "relation back" theory. If a property has validly gone out of the hotch-potch the adopted son cannot recall it. The fact of partition cannot be drowned by the subsequent adoption because when it was entered into there
D was no legal impediment in doing it. Likewise, if a manager or widow alienates for binding necessity the constructive ante-dated nativity of the adopted son cannot nullify what has taken place before he in actuality entered the coparcenary. By the same token, a sole surviving coparcener (except perhaps in the Banaras School where unlike in other schools he has no independent power of transferring his share) may dispose of the estate before adoption by a deceased coparcener's
E widow and that act defeats the claim of a later adoptee. Such is the inexorable operation of time and circumstance on long later adoptions and their proprietary fall-out. You cannot put the clock back beyond a certain stage. We may express the view that some observations, clearly *obiter*, in *P. Ammal* v. *Ramalingam*,(1) relied on by Shri Javali for the 1st respondent are wider than justified. Legal fictions have legal frontiers. In *Srinivas*(2), Venkatarama Iyer, J., after referF ring to the relevant books and cases, cautioned against the application of the defeasance right of the adopted son to cases of collateral succession opening before adoption. "The law was thus well settled that when succession to the properties of a person other than an adoptive father was involved, the principle applicable was not the rule of relation back but the rule that inheritance once vested could not be divested." The learned Judge, expressing some dissent from *Anant Bhikappa*(3),
G stated the proposition thus :

> "When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is
H subject to the limitation that alienations made prior to the

(1) [1970] 3 S.C.R. 894. (2) [1955] 1 S.C.R. 1;17;24-25
(3) 70 I.A. 232.

date of adoption are binding on him, if they were for purposes binding on the estate. Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened—in this case it was 41 years thereafter—and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. We must hesitate to subscribe to a view of the law which leads to consequences so inconvenient. The claim of the appellant to divest a vested estate rests on a legal fiction, and legal fictions should not be extended so as to lead to unjust results."

This Court, in *Krishnamurthi's* (1) case, also considered the amplitude of end embankments on the "relation back" stream of adoption by a widow. But there one basic fact deserves attention. The adopted sons's claim was as heir to his grandfather whose property devolved, on death, on his daughters, the adoptive father having died long before the grandfather and the adoption having taken place long after the grandfather's death. The Court took the view that the daughters who took as heirs did so on a defeasible title. For one thing, there was no coparcener alive and no joint family—either as a whole or even a branch thereof — at the time of the adoption and the adopted son displaced those who got title only in the absence of a son. Secondly, inheritance stands on a different footing from alienation—or, at any rate, the erosion of the relation back doctrine has not affected claiming back from direct heirs. (The adopted son's claim to divest collateral heirs has been negatived in *Srinivasa.*(2) *Krishnamurthi's*(1) crucial ratio, giving it full scope, is that property inherited absolutely but subject to defeasance, fails when the divesting even occurs, and the character of the property does not change from coparcenary property to self-acquired property so long as the possibility of defeasance by a widow of the last coparcener, by adding a member by adoption, exists. In the present case, by parity of reasoning, the properties which came to Gajanan's share (Defendant No. 1) must remain vulnerable to the claims of the potential coparcener projected into the family by the widow's adoption. But this case does not deal with and cannot govern valid alienations which have effectually changed its character as family property. In *Bhimji Krishna Rao*(3) Chagla, C. J., speaking for himself, and Gajendragadkar, J., (as he than was) affirmed this position. We may usefully extract the headnote here :

(1) [1962] 2 S.C.R. 813. (2) [1955] 1 S.C.R. 1,17, 24-25.
(3) [1950] 52 B.L.R. 290.

A "A Joint Hindu family consisted of the sole surviving coparcener and the widow of a deceased coparcener. The surviving coparcener made alienations of portions of the family property. Subsequently, the widow adopted a son. The son having sued to set aside the alienations:—

B Held, that at the dates of the alienations the coparcener had full right to treat the family property as if it was his own property, and that the adoption which was subsequent to the alienations could not affect the property which was already disposed of by the coparcener as a person who acted as the full owner of the property.

C In considering whether a particular alienation made of joint family property prior to the date of adoption is or is not a lawful alienation, the alienation must be lawful, not in relation to the rights of the adopted son, but it must be lawful at the date when the alienation was made. If it is lawful, it cannot be questioned or challenged by the adopted son whose adoption is subsequent to the alienation."

D The Court relied on the observations of the Privy Council in *Krishnamurthi Ayyar* v. *Krishnamurthy Ayyar* (1) and quoted the following passage which illumines the principle :

"When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subse-
E quently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place."

Thus, alienations by a sole coparcener or testamentary dispositions
F by him are beyond assail by a subsequently adopted son. This proposition was affirmed in a slightly later decision by the same strong bench in *Bijoor* vs. *Padmanabh*(2). The headnote sufficiently sums up the law thus :

"The doctrine of relation back under which a son adopted by a Hindu widow is deemed to have been in existence in the
G adoptive family at the death of the adoptive father cannot be accepted in its entirety. It is a doctrine with certain definite limitations and exceptions, and one of the important limitations and exceptions is that the adopted son is bound by all the lawful alienations made by his adoptive father if he was the sole surviving coparcener of a joint family. In this behalf there is no difference in principle between an alienation *inter vivos*
H and a disposition made by a will."

(1) 54 I.A. 248.
(2) I.L.R. [1950] Bom. 480.

A full bench of the Bombay High Court had occasion to touch on a similar issue arising before us although the case was eventually decided on the equities of the situation. We may extract the observations in this case (*Krishtappa* v. *Gopal*) (1) as, in a way, they reinforce our view :

> "It is possible to take the view that the position of the members of the divided family is in law the same as that of a sole surviving coparcener. Just as the sole surviving coparcener has every right and authority to dispose of the property as if it was of his absolute ownership, so also after partition the members of the erstwhile coparcenary have equally the right of disposing of the share which came to them on partition as if it was their property."

Dealing with a fair working out of rights the Court made observations relevant for us at a later stage of this case. Chagla, C. J., observed in that context :

> "Whenever a partition is re-opened, shares must be allocated on a fair and equitable principle, and what was uppermost in the minds of these two learned Judges was that, in giving to the adopted son his proper share, no injustice should be done to any coparcener and the adopted son should get his own fair share.
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> As Mr. Justice Bavdekar himself observes in the judgment at page 257 ; "It is really a question of equity ; and if the judgment proceeds on a question of equity, we entirely agree with the two learned judges that equity could only be done provided the basis adopted is the basis suggested by these two learned Judges in their judgment. We, therefore, do not look upon this judgment as in any way impairing the principle which was laid down by this Court in 52 Bom LR 290 : (AIR 1950 Bom 271). This is not a case of interfering with the right of a divided coparcener to deal with his share as his own ; nor is this a case of impairing the principle accepted by this Court over a long period that an adopted son is bound by all lawful allenations made prior to the adoption. But we look upon this case as a simple case of doing equities on the re-opening of a partition in order that the property should be re-divided on a fair and equitable basis."

Shri Javali pressed before us that *Balaji's*(2) case was a closer parallel to our case, forgetting that as Chagla, C. J., explained in *Bhimji* (Supra) that Lokur, J. decided that case on the footing that a partition was not an alienation and the conclusion would have been different had he treated a partition as a transfer. But now, this Court has laid down that a post-partition adoption cannot re-unite the family even though it may not deprive him of a share so long as some coparcenary

(1) A.I.R. 1957 Bom. 214, 215. (2) (1944) 47 B.L.R. 121.

A property existed. The Full Bench case in *Sankaralingam*(1) also does not militate against the Bombay view. Leach, C. J., in the course of the judgment, observed :

> "If the law recognizes in an adopted son of a deceased coparcener the right to share in the estate as it existed before the partition, property *which has not been lawfully alienated in the meantime* is still within his reach." (emphasis supplied).

B

Mysore also has fallen in line with this strand of thought. In *Somesekharappa* v. *Basappa Channabasappa*(2) a Bench of that Court laid down the law condensed in the headnote thus :

> "A son adopted by a widow of a deceased coparcener cannot claim the joint family property in the hands of a transferee from the heir of the last surviving coparcener, even though the transfer took place before the adoption. The doctrine of relation back will not extend to a case where a transfer has already been made either by the sole surviving coparcener or by his heir. The principle is that when a disposition is made *inter vivos* by one who has full power over property under which a portion of that property is carried away, no rights of a son who is subsequently adopted can affect that portion which is disposed."

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True, the decision under appeal before us also is from Mysore and takes the opposite view.

We reach the end of the journey of precedents, ignoring as inessential other citations. The balance sheet is clear. The propositions that emerge are that : (i) A widow's adoption cannot be stultified by an anterior partition of the joint family and the adopted son can claim a share as if he were begotten and alive when the adoptive father breathed his last ; (ii) Never-the-less, the factum of partition is not wiped out by the later adoption ; (iii) Any disposition testamentary or *inter vivos*, lawfully made antecedent to the adoption is immune to challenge by the adopted son; (iv) Lawful alienation, in this context, means not necessarily for a family necessity but alienation made competently in accordance with law ; (v) A widow's power of alienation is limited and if—and only if—the conditions set by the Hindu Law are fulfilled will the alienation bind a subsequently adopted son. So also alienation by the Karta of an undivided Hindu family or transfer by a coparcener governed by the Banaras school ; (vi) Once partitioned validly, the share of a member of a Mitakshara Hindu family in which his own issue have no right by birth can be transferred by him at his will and such transfers, be they by will, gift or sale, bind the adopted son who comes later on the scene. Of course, the position of a void or voidable transfer by such a sharer may stand on a separate footing but we need not investigate it here.

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Applying the above formulations to the present facts, the conclusion is clear. The plaintiff will be eligible to get one-third of the available joint family property. In computing net property the gift by Mahadev

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(1) I.L.R. [1943] Mad. 309. (2) [1960] Mys. L.J. 687.

to the 2nd defendant has to be excluded. But the allotment for maintenance of the 3rd defendant will have to be ignored, brought into the corpus and, in the division by metes and bounds allotted to the share of the plaintiff.

One more problem, rather ticklish, remains—the equitable effectuation of the partition. The Full Bench decision of the Bombay High Court in *Krishtappa* (Supra) emphasized that the adopted son's right, arising long after other proprietary events, should be worked out, not rigidly but justly. Chagla, C. J., laid down the guidelines already extracted while dealing with the case earlier. We agree with this sensitive approach and proceed to adopt it here. The plaintiff has to be given his one-third share as in 1944, when the partition took place. Assuming that the entire estate was then worth 3 lakhs, the adopted son would have got a lakh of rupees, say. But Mahadev's share has been entirely gifted away and must be ignored. Which means that the plaintiff's one-third share valued at one lakh will have to come out of Gajanan's properties which, on our arithmetical assumption, would be one-half of three lakhs, i.e. 1½ lakhs. It would be unfair to deprive Gajanan of a lion's share out of his allotment merely because, before adoption, he had not parted with his properties. It would be eminently just to make the first defendant bear only one-half the burden cast by the notional re-entry of the plaintiff into the coparcenary and we direct a division into two equal shares of such of the properties which fell to the first defendant's share in the 1944 partition as were with the first defendant at the date of adoption, and award one share to the plaintiff. The justice and equity of the situation, not any inflexible legal principle, prompts this course. We confess that the prestatutory law of adoption, in its conflict between fiction and fact, has had a zigzag course in courts and we have read the diverse dicta imbued by the Holmseian thought that the life of the law is not logic but experience.

We are informed that the first defendant is now no more and rival claims to his inheritance are being agitated in some other litigation. We do not take note of it in this decree. Nor do we think it necessary to direct *inter se* partition between the first and the second defendants as was done in the courts below. In substantial allowance of the appeal, we direct that a decree be passed (a) allowing the palintiff a half share out of such of the properties allotted to the original first defendant under the 1944 partition as were with the first defendant at the date of adoption, including among the items to be divided the item set apart for the maintenance of defendant No. 3 ; (b) directing profits to be paid to the plaintiff on the basis of the one-half share of the divisible assets ; and (c) directing the cessation of maintenance to be payable by the first defendant's branch to the 3rd defendant. Parties to bear their costs throughout.

V.P.S.