HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	**Case No.**	Second Appeal No.57/1999
2	**Parties Name**	Ranchhod Vs. Ramchandra
3	**Date of Judgment**	21/06/2017
4	**Bench constituted of**	Hon'ble Shri Justice Prakash Shrivastava
5	**Judgment delivered by**	Hon'ble Shri Justice Prakash Shrivastava
6	**Whether approved for reporting**	**Yes**
7	**Name of counsels for parties.**	Shri S.S. Garg, learned counsel for the appellants. Shri B.L. Pavecha, learned senior counsel and amicus curiae.
8	**Law laid down**	An undivided interest in the coparcenery property cannot be treated as the property vested under Section 12(b) of the Hindu Adoption and Maintenance Act.
9	**Significant paragraph numbers**	7 to 14.

(PRAKASH SHRIVASTAVA)

J u d g e

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SB: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Second Appeal No.57/1999

Ranchhod S/o Narayan Khati & Ors. …. Appellants

Vs.

Ramchandra S/o Sitaram Khati & Anr. …. Respondents

Shri S.S. Garg, learned counsel for the appellants.

Shri B.L. Pavecha, learned senior counsel and amicus curiae.

Whether approved for reporting :

JUDGMENT

(Delivered on 21/6/2017)

1/ This appeal under Section 100 of the CPC is at the instance of the defendants in the suit challenging the judgment of the two courts below. Trial Court by the judgment dated 4.4.1996 had decreed the C.S. No.70A/94 filed by the respondent-plaintiff and the first appellate court by the judgment dated 28.11.1998 by dismissing the Civil Appeal No.53-A/1996 has affirmed the judgment of the trial Court.

2/ The respondent No.1 had filed the suit for declaration, partition, possession and mesne profit pleading that the suit properties originally belong to Sevaram and on his death they were received by his sons Sitaram and Narayan. Respondent No.1 is the biological son of Sitaram, whereas the

appellants are sons, daughters and widow of Narayan. It was further pleaded that respondent No.1 is the sole heir of Sitaram who had died 40 years prior to filing of the suit, when the respondent No.1 was a minor child. Narayan had taken care of the respondent No.1 and he was cultivating the suit land with Narayan and his name was also mutated in place of his father. Thereafter the respondent No.1 was taken in adoption by Chunnibai in village Banediya but he had continued to jointly cultivate the suit land and when he came to know about the deletion of his name from the revenue record, he had filed the present suit.

3/ The suit was opposed by the appellants by filing the written statement and taking the plea that the respondent No.1 was taken in adoption 35 years back by Chunnibai W/o Bheraji and that Sitaram was never a member of the joint family and on account of his bad conduct, he was separated from the family and after the death of Sitaram, his wife had gone in Natra leaving the respondent No.1 orphan, therefore, Narayan had taken care of the respondent No.1 but the respondent No.1 had no right or title in the suit property and with his consent on 1.3.1971 his name was deleted from the revenue record.

4/ Trial Court had decreed the suit on reaching to the conclusion that the suit properties were ancestral properties of the appellant and the respondent No.1, which were jointly cultivated by them. It was also found that the respondent No.1 was taken in adoption at the age of 10-11 years by Chunnibai but his right on the ancestral property had not come to an end. Accordingly the suit was decreed. The first appellate court has affirmed the judgment of the trial Court.

5/ This Court vide order dated 16.11.1999 had

admitted the appeal on the following substantial question of law:-

> "1. Whether the words *property which vested* used under Section 12 of the Hindu Adoption and Maintenance Act, 1956 can be construed as right which vested?
>
> 2. Whether under the facts and in the circumstances of the case, when a child gone in adoption who was a member of co-parcenery and had only a right in the co-parcenery property by birth will continue to have a right with other co-parceners even after going in adoption?"

6/ The aforesaid questions of law are interrelated, therefore, they are being answered as under:-

7/ Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the two courts below have concurrently found that the suit properties were ancestral properties and they were inherited by Sitaram and Narayan, the two sons of Sevaram. The appellants are LRs of Narayan, whereas the respondent No.1 is the son of Sitaram. It has also been concurrently found that the respondent had gone in adoption on 4.11.1962 to Chunnibai of village Banediya and Sitaram, father of the respondent, had died somewhere around 1955-56. The first appellate court has taken the view that on the death of Sitaram, the title had accrued to the respondent No.1 in respect of the suit house and the agricultural land and therefore, in terms of proviso to Section 12(b) of the Hindu Adoption and Maintenance Act, 1956 (for short "the Act") his right on the suit property will remain intact even after his adoption.

8/ Section 12 of the Hindu Adoption and Maintenance

Act provides as under:-

> "**12. Effect of adoption**.- 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 property, 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."

9/ In terms of proviso (b) to section 12 the property vested in adopted child before the adoption, continues to be vested in him subject to the obligations attached to it. In the present case admittedly no partition has taken place because the suit of the respondent itself is for partition, therefore, the pivotal question is that if undivided share in the ancestral property received by the respondent No.1 on the death of Sitaram, amounts to vesting of property in him? The position in this regard is that the share of a co-parcener in the undivided property is fluctuating share which keeps on varying with addition and extinct of members of coparcenery. The share is crystallized only when the property is partitioned, therefore, till the partition takes place the ancestral property can not be said

to have vested in the coparcener. [See: **AIR 1988 SC 845 (Dharma Shamrao Agalawe Vs. Pandurang Miragu Agalawe and others)**, **AIR 1981 Bombay 109 (Y.K. Nalavade and others Vs. Ananda G. Chavan and others)**, **AIR 1987 SC 398 (Vasant and another Vs. Dattu and others)**.

10/ The Supreme Court in the matter of **Dharma Shamrao (supra)** while approving the earlier judgment in the Vasant's case, it has been held that:-

> "10. The decision of the High Court of Bombay in Y.K. Nalavade's case (supra) which was followed by the High Court in dismissing the appeal, out of which the present appeal arises, has been rightly given. We agree with the reasons given by the High Court of Bombay in that decision for taking the view that clause (c) to proviso of section 12 of the Act would not be attracted to a case of this nature since as observed by this Court in Vasant's case (supra) there was no 'vesting' of joint family property in Dharma- the appellant took place on the death of Miragu and no 'divesting' or property took place when Pandurang-the first respondent was adopted. The decision of the Andhra Pradesh High Court in Narra Hanumantha Rao's case (supra) which takes a contrary view is not approved by us. It, therefore, stands overruled."

11/ Initially Aandhra Pradesh High Court in the matte of **Yarlagadda Nayudamma Vs. The Government of Andhra Pradesh and others reported in AIR 1981 Andhra Pradesh 19** had taken the view that under proviso (b) of Section 12 of the Act, a coparcener given in adoption has vested right in the undivided property of his natural father but subsequently Bombay High Court in the matter of **Devgonda Raygonda Patil Vs. Shamgonda Raygonda Patil and another reported in AIR 1992 Bombay 189** after taking note of the judgment of the

Supreme Court in the case of **Vasant (supra)** and **Dharma Shamrao Agalawe** (supra) has held that the adoptee cannot have vested right in the undivided joint family property of his natural birth. The view of the Bombay High Court in the case of **Devgonda Raygonda Patil** (supra) is that:-

> "16. The same view came to be reiterated by the Supreme Court in AIR 1988 SC 845 Dharmu Shamrao Agalawe v. Pandurang Miragu Agalawe. The Supreme Court also approved the decision of this Court in AIR 1981 page 109. Therefore, in my view, if there is coparcenary or joint family in existence in the family of birth on date of adoption, then the adoptee cannot be said to have any vested properly. The property does not vest and therefore provision of S.12 proviso (b) is not attracted. In the context of S.12 proviso (b) 'vested property' means where indefeasible right is created i.e. on no contingency it can be defeated in respect of particular property. In other words where full ownership is conferred in respect of a particular property. But this is not the position in case of coparcenary properly. The coparcenary property is not owned by a coparcener and never any particular property. All the properties vest in the joint family and are held by it. I therefore reject the contention of Mr. Ingale."

12/ The same issue came up before the Patna High Court, wherein the Division Bench of the Patna High Court in the matter of **Santosh Kumar Jalan @ Kanhaya Lal Jalan Vs. Chandra Kishore Jalan and Anr. reported in AIR 2001 PATNA 125** while dissenting with the view of the Andhra Pradesh High Court in the matter of **Yarlagadda Nayudamma** (supra), has held that:-

> "12. I regret my inability to accept this as the correct legal position. I have already stated above that though a coparcener has vested right of joint possession and enjoyment of the estate of his natural family, Proviso (b) refers to "any property which vested". As there is no vesting of "any property" and there is vesting of only

> community of interest with other coparceners, the proviso cannot be extended to cover such interest."

13/ The Punjab & Haryana High Court also in the matter of **Khidmat Singh Vs. Joginder Singh and others by the judgment dated 12.3.2010 in RSA No.1234/1985 reported in 2010(4) RCR(Civil) 252** has considered the similar question of law in the appeal which has been formulated in the present case and has taken note of the judgment of Bombay High Court in the case of **Devgonda Raygonda Patil** (supra) and Supreme Court in the case of **Dharma Shamrao Agalawe** (supra) and has held that the property inherited by a person before adoption only is protected under Section 12 of the Hindu Adoption and Maintenance Act and not mere interest in coparcenary property.

14/ Having considered the aforesaid factual and legal position, I am of the opinion that only the property which stands vested in the adopted child before the adoption continues to be vested in him under proviso (b) to Section 12 of the Act and the respondent No.1 being a member of coparcenery having undivided share in the coparcenery before the adoption, the properties of the coparcenery of the natural father did not vest in him and are not protected under proviso (b) to Section 12 of the Act. Hence the respondent No.1 is not entitled to the partition of the said ancestral property after his adoption. The courts below have committed an error in appreciating the effect of proviso (b) of Section 12 of the Act while decreeing the suit of the respondent by holding that the undivided ancestral properties of the family of natural father of the respondent had vested in him. Such a conclusion of the courts below cannot be sustained in view of the legal position noted above.

15/ Hence, the appeal is allowed and the judgment and decree passed by the courts below is set aside and the suit filed by the respondent is dismissed.

(PRAKASH SHRIVASTAVA)
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