PRIVY COUNCIL

Dhanraj Joharmal

Vs.

Soni Bai

P.C.A No. 133 of 1923, decided on 2nd February 1925
(Lord Sumner, Sir John Edge, Mr. Ameer Ali And Sir Lawrence Jenkins JJ.)

02.02.1925

JUDGMENT

MR. AMEER ALI J.

1. This appeal arises out of a suit brought by the plaintiff, *Soni Bai* in the Court of the Additional District Judge of Amraoti, in East Berar for a declaration that she was entitled by inheritance to the estate of her father, *Ramdhan* Marwari, who died at Amraoti on the 24th June 1914. She was a minor at the time and brought the suit by her guardian, her father-in-law Narain Das, as next friend.

2. The facts of the litigation may be stated shortly for the purposes of this judgment. *Ramdhan*, the plaintiff's father, resided at a place called Khanapur, Taluk Morsi, in the district of Amraoti and carried on business there; while his brother, one *Joharmal* , lived in the township of Chandur, Bazaar, in Taluk Ellichur, where he had a shop. Both were Agarwallas by caste. *Joharmal* died in September 1912, and the defendant Dhanraj claims to have teen adopted by him some years before his death. On the death of *Ramdhan* in 1914, Dhanraj took possession of his es tate, claiming to be entitled to *Ramdhan*'s property as the adopted son of his brother *Joharmal* . There appears to have been a proceeding under Section 145 of the Code of Criminal Procedure with regard to the possession of certain lands belonging to *Ramdhan*, and by an order of the District Magistrate made on the 17th September 1914, the defendant was put in possession of that property also.

3. In order to establish his right to the succession to *Ramdhan*'s estate, in opposition to the claim of *Ramdhan*'s rightful heir, the defendant alleged that he had been adopted in accordance with the rules prescribed by the Hindu Law and that the essential rites were duly performed. He further alleged that *Joharmal* and *Ramdhan* were joint and

undivided.

4. The plaintiff's case, on the other hand, is that in the year 1908, when the formal adoption of Dhanraj took place, he was an orphan and as such could not be validly adopted under the Hindu law. She further controverted the defendant's allegation that *Joharmal* and *Ramdhan* were joint. She alleged that they were separate in estate and carried on separate businesses and that consequently Dhanraj even if he had been validly adopted, which he was not, could not claim the estate of *Ramdhan*. As a contradiction to the allegation of the plaintiff that in 1908 both his parents being dead, he could not be validly adopted, the defendant averred that some years be fore, viz., in 1903, his mother, who was alive at the time, gave him in adoption to *Joharmal* , although the usual ceremonies and documents connected with the adoption were completed in 1908. He further contended that *Ramdhan* was estopped by his conduct from impugning the validity of the adoption and that, consequently the plaintiff was effected by the same estoppel.

5. On these respective allegations of the parties a number of issues were framed by the Additional District Judge, three of which only need consideration viz., (1) whether the defendant was validly adopted ; (2) whether *Joharmal* and *Ramdhan* were joint in estate; and (3) whether the plaintiff is estopped from challenging the validity of the defendant's adoption.

6. It is contended on the plaintiff's behalf that unless the defendant can establish that the "giving and taking" required by the Hindu law took place in the lifetime of his mother in 1903, nothing which occurred in 1908 would constitute him a validly adopted son of *Joharmal* , or entitled him to the estate of *Ramdhan*, even if *Ramdhan* and *Joharmal* were joint. A mass of evidence was adduced on both sides; the Additional District Judge was of opinion that the defendant had esta blished the adoption, and accordingly dis missed the suit. On appeal the Court of the Judicial Commissioner, after a careful analysis of the evidence, came to a totally different conclusion. They have held that the defendant had failed to prove that there was a "giving and taking" as re quired under the Hindu law in 1903 ; nor were *Ramdhan* and the plaintiff "estop ped" from impugning the validity of the defendant's adoption. In view of the minute examination of the facts by the learned Judicial Commissioner, their Lordships are relieved of the necessity of discussing them in detail : they, there fore, propose to confine their attention to the salient features of the case.

7. On the 25th May, 1908, two deeds were executed, one by *Joharmal* in favour of the

defendant, whose parental name was Ghanasham, declaring that he was being adopted by *Joharmal* as a son and that thenceforth he would be called Dhanraj; the other was executed by the brothers of Dhanraj, the defendant, in favour of *Joharmal* , declaring that they had from that day forth given their younger brother Ghanasham to *Joharmal* in adoption. The deed of adoption executed by *Joharmal* in Exhibit "D.63," and the agreement by the two brothers of Dhanraj is Exhibit "D.62."

8. This document "D. 62" contains the passage, " Our mother gave him in adoption just in his childhood," on which the defendant's allegation of the "giving and taking" in 1903 mainly, if not entirely, rests. The plaintiff charges that this passage is an interpolation made after its execution for the purpose of corroborating the statements of witnesses as to the "giving and taking" in the lifetime of the mother. The reasoning of the Additional District Judge on this point appears to be open to criticism; he seems to think that as the evidence of the witnesses for the defendant was consistent and was corroborated by the passage in question in "D. 62," their statements being thus corroborated, he was of opinion that it could not be an interpolation. Relying practically on the statement in question contained in "D. 62," in conjunction with the oral testimony, he came to the conclusion, as already stated, that the defendant had been validly adopted, by Johar mal, and that, as *Joharmal* and *Ramdhan* were joint in estate Dhanraj was entitled to the latter's estate.

9. The Judicial Commissioners consider the passage on which the additional District Judge rested his decision, as corroborating the story of the defendant's witnesses, was an interpolation.

10. They also held against the defendant on the plea of estoppel. In view of their decision on the question of fact relating to the adoption, they did not consider it necessary to determine whether Johar mal and *Ramdhan* were separate or joint. In the appeal to His Majesty in Council exception is taken to the conclusions, of the Judicial Commissioners on both points. Firstly, it is urged that the factum of a valid adoption in accordance with the rules of Hindu law is conclusively established on the evidence; and, secondly, that *Ramdhan* was estopped by his conduct and representations from questioning the validity of the adoption, which equally affects the plaintiff.

11. Admittedly, under the Hindu law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else (Mayne's Hindu law, para 132). Consequently, a boy who has lost both his parents

cannot be adopted.

12. Their Lordships then discussed the evidence as to the alleged giving of the boy in adoption in 1903 and proceeded :- Their Lordships agree with the judicial Commissioners in holding that the defendant has failed to establish his allegation of the adoption in 1903.

13. But it has been strongly contended that *Ramdhan* and his heir are estopped by the provisions of Section 115 of the Indian Evidence Act (1 of 1872) from questioning the adoption.

14. That section runs as follows :- "Where one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

15. What are the "declarations, acts or omissions" of *Ramdhan* which are said to constitute the estoppel ? It is not necessary to decide in this case whether a status that rests on religious rule and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Assuming however, that such a status can be established by applying the doctrine of equitable estoppel in section 115, so as to affect the rights of persons other than the adopter, it is necessary to consider in the first place what actually happened in 1908, and what were the acts and representations of *Ramdhan* which created the estoppel. He is said to have brought the boy to Chandur Bazaar from his native village, to have become a witness to the deed of adoption; allowed him to perform the cremation ceremony of *Joharmal* ; and at the time of his marriage represented him to be the adopted son of *Joharmal* .

16. The parties to this litigation belong to the caste or sect of Agarwallas. These Agarwallas, as has been pointed out in the case of *Bhawant Das Tejmal v. Rajmal 10 B.H.C.C. 241* generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of Shraddh, the offering of oblations for the salvation of the sale of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

17. The Agarwallas are said to be divided into a number of sub-castes or sects. In the cases of *Sheosingh Rai v. Mussamat Dakho* in the High Court of Allaha bad, which afterwards came before the Judicial Committee, and the judgment of the learned

Judges was affirmed by this Board, the parties belonged to the Saraoji sub caste. In the present case it is not clear to what sub-sect. *Joharmal* adhered, but the evidence shows that the defen dant belongs to the Sekhavati sect. The majority of the defendant's witnesses appear to be Moheshris. Whatever difference there might be between these sub-sects in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole. The learned Judges, who decided in the High Court of Allahabad the case of *Sheosingh Rai v. Mussammat Dakho, 6* ***N.W.P. 382*** state the difference between the Brahmi nical Hindus and the Jains in the following words :-

> "They differ particularly from the Brahminical Hindoos in their conduct towards the dead omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of the pro genitor, and consequently adoption is a mere temporal arrangement and has no particular object."

18. Among the Agarwallas the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the pre sence of the principal men of the community (the panchas) and giving them a feast. According to the document D. 63, as well as the agreement D. 62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in *Sheosingh v. Mt. Dakho's case, 6 N.W.P. 382*.

19. Their Lordships have no doubt on the evidence that the story about a regular Hindu or, rather, Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwalla adoption, the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, *Joharmal* and *Ramdhan*, which is held to be illegal under the Hindu law.

20. If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in 1908, and so far as the representation and acts if *Ramdhan* are concerned, they only relate to that adoption.

21. This Board in the case of *Gopee Lall v. Mt. Sree Chundraolee Buhoojee* on the question of estoppel, urged in similar circumstances, said as follows :-

> "It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even, asserting the law in their favour, inasmuch as they have represented in former suit and in various

ways, by letters and by their actions, that Luchminjee was the adopted son of Damodurjee adopted by Damodur jee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepre sentation on the part of Luchminjee or the defendant on any matter of fact. They are alleged to have represented that Luchminjee was adopted. The plaintiff's case is that Luchminjee was in fact adopted. So far as the fact is concerned there is no misrepresentation, it comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lord ships' judgment is erroneous; but that creates no estoppel whatever between the parties."

22. A number of rulings of this Board and a decision of the Madras High Court have been referred to in support of the contention that the plaintiff is estopped. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, give rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Rani Dharam Kunwar v. Balwant Singh* the estoppel was considered purely personal.

23. Their Lordships are in entire agreement with the ruling of the Board in Gopee Lall's case (supra), and think that there is no substance whatever in the plea of estoppel raised by the defendant. On the whole they are of opinion that the judgment of the Court of the Judicial Commissioner is sound and that this appeal should be dismissed with costs.

24. The appellant has, however, taken some exception to the decree made by the Appellate Court. No such objections were either embodied in the grounds of appeal or brought to the notice of the learned Judges. It was only shortly before the hearing of the appeal here that notice was given to the respondent to the effect that objections would be urged against the decree on the bearing. Their Lordships think that to allow a litigant to bring for ward at this stage exceptions to a decree which have never been urged before, is open to very grave objection. The course adopted in the present case was reprehended by the Board in the case of Mt. Dakho already referred to and their Lord ships propose to adhere to the principle laid down there. It seems, however, necessary that the decree as framed should be put into a more practical shape in order to avoid difficulties in the execution Court. The plaintiff attached six schedules to her plaint. Schedule "A" sets out the amount standing to the credit of the plain tiff's

mother in the books of *Ramdhan* including her ornaments. Schedule "B" refers to immovable property consisting of fields, etc. Schedule "C" includes money lent on mortgages, etc.

25. Schedule "D" relates to out standings on current accounts, decrees, etc. Schedule "E" gives the amounts due by the plain tiff to certain specified people, and Schedule "F" relates to moveable property alleged by the plaintiff to have been taken by the defendant.

26. The appellant in his reply denied that he took forcible or unlawful possession of the property in dispute. He did not deny the fact that he did take possession of the property. In paragraph 6 of his reply he denied that the property mentioned in Schedule "A" was the property of the plaintiff's mother. In paragraph 7 he stated that he had not removed any ornaments and cash from the safe of *Ramdhan*. In paragraph 8 he stated that the ornaments pledged by *Ramdhan* to Kaluram belonged to the joint estate of the defend ant and *Ramdhan* and that he was entitled to them; in paragraph 11 he says that the property mentioned in Schedules "B," "C," "D," "E," and "F" does not belong to the plaintiff but to the defendant. Practically he admits having taken possession of all the property which the plaintiff claimed to belong to the estate of *Ramdhan*. In these circumstances their Lordships think that the decree should run in the following terms :-

> (1) that it should be declared that the plaintiff is entitled by right of succession to the estate of her father Ramdhan; (2) that there should be a decree for possession of the immovable properties claimed by the plaintiff; (3) that there should be a decree for the delivery of the ornaments and other moveable property taken possession of by the defendant; (4) that the defendant should deliver to the plaintiff all documents of title, securities for loans such as mortgages, decrees, etc., which came into his bands as appertaining to Ramdhan's estate; (5) that if necessary there should be an enquiry as to what was the stridhan property of the plaintiff's mother; an account of what is due to Kaluram on the ornaments pledged to him, and (6) an account of the debts of, and out standings belonging to, Ramdhan's estate realised by the defendant with liberty to the parties to apply to the Court for directions.

27. In case any of the debts have been bar red by the wilful neglect or default of the defendant, he would necessarily be liable for those debts. For the purpose of taking these accounts and giving effect to the decree generally a Receiver should be appointed.

28. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that the amendments they have indicated should be embodied in the decree.

Appeal dismissed.

Cases Referred.

19 WR 12 : 11 LR 891 : IA Sup Vol 131 : 3 Sar 217

(1912) 34 All 389 : 39 IA 142 : 16 CWN 675 : 9 ALJ 730 : Bom LR 485 : (1912) MWN 64 : 12 MLT 95 : 16 CLJ 60 : 15 IC 673 : 23 MLJ 200 (PC)