PRIVY COUNCIL

Arjuno Naiko

Vs.

Modonomohono Naiko

P.C.A.No.7 of 1938
(Lord Russell of Killowen, Sir Lancelot Sanderson and Mr.M. R.Jayakar JJ.)

18.06.1940

JUDGMENT

LORD RUSSELL OF KILLOWEN J.

1. This appeal is brought by some of the defendants to a suit in which one Modonomohono Naiko was the plaintiff. The suit, in form a suit for partition, was in reality brought for the purpose of establishing that the plaintiff, as the adopted son of one Horikrushno deceased, was entitled to succeed to the Sirdarship of Gondadharo which had been held and enjoyed by Horikrushno in his lifetime. After Horikrushno's death (which occurred on 5th April 1924), questions arose as to the succession, and as to whether the plaintiff was in fact the adopted son of the late Sirdar. The Revenue Divisional Officer reported adversely to the plaintiff's claim; but the Board of Revenue having considered the evidence then adduced, most properly thought that the question was too complicated for a Revenue Court to decide, and directed that the petitioner (i.e., the plaintiff) should establish his claim in a competent Civil Court. The present suit was accordingly instituted on 3rd August 1927, in the Court of the Subordinate Judge of Berhampur. The following pedigree shows the natural relationship of the parties :

> The respondents to the present appeal are the plaintiff and defendants 3, 5 and 6. A claim had been set up by defendants 1, 2 and 4, that Dondopani (defendant 2) was the adopted son of the late Sirdar, but both Courts in India have rejected this claim, and it may be ignored. The relief sought by the plaint was the allotment to the plaintiff of one-sixth of the joint property possessed by the undivided Hindu family of which the common ancestor was Brundabono. Obviously, the share which the plaintiff claimed could only be his if he were in

fact the adopted son of Horikrushno. of the issues framed in the suit only two are now material, viz. (1) whether the plaintiff is the adopted son of Horikrushno and (6) what are the respective shares of the plaintiff and defendants 1, 2, 3, 5 and 6 in the suit properties ? The Subordinate Judge found the first issue against the plaintiff. After a lengthy catalogue of the documentary and oral evidence, he states his decision in the following words :

On a consideration of the whole evidence, I am of opinion that plaintiff has failed to discharge the burden that is on him to prove his alleged adoption in 1909, and even in the view that in fact the adoption did take place in 1909, it is invalid inasmuch as evidence on record conclusively shows that plaintiff was married before the date of the alleged adoption.

2. That in substance constitutes the judgment on the first issue. As regards the 6th issue, he decided that defendants 5 and 6 belonged to a divided branch, but that they together with defendants 1, 2 and 4 (the widow being entitled by will to Horikrushno's share), were entitled to the shares agreed upon between the parties as evidenced by a certain document, Ex. 31. A decree, dated 30th March 1929, was made accordingly. From that decree, three appeals were presented to the High Court of Judicature at Madras; (1) by the plaintiff asserting his adoption; (2) by defendants 5 and 6, asserting their title to a quarter share each in the entire family property ; and (3) by defendants 1 and 2 asserting the alleged adoption of Dondopani. Later, on the death of defendant 1, his other five sons (being with defendant 2, his legal representatives) were added as co-appellants in this third appeal.

3. The High Court (Cornish and Varadachariar JJ.) delivered a careful and closely reasoned judgment. They dismissed the third appeal. As regards the two other appeals, they held that the plaintiff was the adopted son of Horikrushno, and that the shares in which the parties were entitled were as follows: One-sixth to the plaintiff as such adopted son, one sixth to defendant 1's branch, one-sixth to the third defendant's branch, and one-quarter each to the 5th and 6th defendants. A decree, dated 13th November 1935, was made accordingly. From that decree defendant 2 and the other legal representatives of Krupasindhu have appealed to His Majesty in Council and seek to have restored the decree of the Subordinate Judge. There are only two questions for decision in this case, viz. the question of the plaintiff's adoption, and the question of the shares in which the parties are entitled to the property. As regards the adoption, the Subordinate Judge, who had the advantage of seeing the witnesses who gave oral testimony before him, made the following observation in the course of his judgment :

> "There is a mass of oral evidence on record in this suit. The fight is between two brothers, and each is trying to secure the Sirdar's office for his own branch. Plaintiff has his own father-in-law, a rich and influential man, to back him up. Defendant 1 being the Sirdar at present, wields much influence, and there will be no lack of oral evidence in support of the respective versions on either side. The decision has to be reached in this case mainly on the documentary evidence based on probabilities."

4. The High Court agreed with his view and so do their Lordships. As to the oral evidence, it may be justly said that it the evidence favourable to the plaintiff could be accepted as truthful, the fact of adoption would be thereby proved beyond doubt; on the other hand, if the negative evidence given by various relations and connexions of the plaintiff were reliable, it would be difficult to understand how the plaintiff could have become the adopted son of the late Sirdar, without those relations and connexions having been aware of the adoption. Although, the testimony of witnesses who gave detailed evidence of the act and fact of the plaintiff's adoption was discredited by the Subordinate Judge, in some cases without reason assigned, and in others for what might appear to be insufficient reason, it will in their Lordships' opinion be safer, if possible, to arrive at a conclusion from a consideration of the documents and the inferences deducible there from.

5. A few preliminary matters may be noted. The three brothers and their families, and defendants 5 and 6 (who had lost their father when very young) all lived together in one house, though occupying separate rooms. Krupasindhu seams to have taken a prominent part in the management of their affairs. The eldest brother, Horikrushno, the Sirdar, was a personage of wealth and importance : the Revenue Divisional Officer in his report to the Collector (in May 1926), described him as "a big landed magnate," and said that he was looked upon "more or less as a petty potentate." There seems to be a suggestion by some witnesses that one or more sons had been born to the Sirdar and his wife Asili; on the other hand, both his will and an adoption deed executed by Asili contain statements that no male issue were ever born to them. However that may be, it is not disputed that no natural son was alive when the adoption is alleged to have taken place (viz. on 15th November 1909), or subsequently. Their Lordships now proceed to consider the relevant documents in the case.

6. The first group relates to the plaintiff's school days. He was on 24th June 1909, admitted as a pupil in the training school at Russellkonda. The application form for admission (Ex. 2 (a)) is signed by his father Brojobondhu, and in the form

Brojobondhu is given as the name of the pupil's "father or guardian." The same details appear in the school's register (Ex. 2) together with the additional information that the boy left the school on 7th February 1910. He then went to the secondary school at Russellkonda; and on 24th February 1910 i.e. after the date of the alleged adoption), Krupasindhu signed a form of application (Ex. 13 (a)) for his admission to that school. On the same day he signed similar forms for the admission of his own son Bhimo, and of Notoboro. In the two latter forms (Exs. 13 and 13 (b)) he gave his own name as the "name of parent or guardian"; but in the plaintiff's form he gave the name of Horikrushno. The plaintiff's natural father was then (and is still) alive; and, as the High Court observed, there is no conceivable reason other than the alleged adoption for the insertion by Krupasindhu of the name of Horikrushno as the parent or guardian of the plaintiff. In fact upon the original form the words "or guardian" have been struck out in ink which has not faded as has the ink in the other entries on the form; and this has led to a suggestion that the document has been tampered with. The document, however, was put in evidence by the defendants, and was produced from the custody of the school authorities. But the suggestion is of little moment, as even if the erasure of the words "or guardian" took place at some subsequent date the erasure in no way lessens the weight of the document, which came into existence many years before any question of succession to the Sirdarship had arisen.

7. A second group of documents came into being in November 1917, and February 1918, in connexion with the Sirdarship. Horikrushno was dismissed from his office on 16th October 1917, but was reinstated on 2nd July 1918. Immediately after the dismissal there arose a crop of applications to the authorities for appointment to the office. The Tahsildar of Gumsur was asked by the Divisional Officer to enquire and report about the appointment of a successor. He held an enquiry in the locality on 7th November 1917, on which day the plaintiff made a statement (Ex. B) before him which was taken down by the Tahsildar and signed by the plaintiff in the following words: "I am the adopted son of *Horikrushno Naiko*. My age is 17 years. I am living with my adopted father." According to a certified statement by the Tahsildar, the plaintiff's statement was made in the presence of various members of the family and was not disputed. In his report to the Deputy Collector (Ex. 53 (a)) the Tahsildar states that the dismissed Sirdar had an adopted son Modonomohono, but recommended the appointment of an outsider Jadobo. Four formal applications to the Deputy Collector were produced in evidence from the custody of the Revenue Divisional Officer, Gumsur : one (Ex. C-3) by Notoboro, dated 11th November 1917, in which he sets out a pedigree showing the plaintiff to be Horikrushno's son, and Brojobondhu to have one

son only: another (Ex. C) by the plaintiff, dated 15th November 1917, stating his adoption by the dismissed Sirdar, another (Ex. C-2) by the Sirdar's wife Asili, dated 15th November 1917, asking for the appointment of "my adopted son Modonomohono"; and another (Ex. C-1) by the late Sirdar of the same date. This last is in the following terms :

> About 8 years ago, when I was suffering from colic, I accepted as my adopted son, Modonomohono Naiko, eldest son of my undivided younger brother, Brojobondhu Naiko, and have been treating him with affection and kept him after having performed his marriage and all other duties.
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> 8. As I have now been dismissed from the office of Sirdar, my adopted son, the said *Modouomohono Naiko,* is the proper and rightful heir to the said office. I therefore pray very much that you will be pleased to permanently appoint the said Modonomohono Naiko to the said Sirdar's office, and to appoint Netrotsobo Podharno, who is my son-in-law, to act for him till he attains majority. Be pleased to consider.

9. C. 1 bears on its back a stamp of the Revenue Divisional Officer, dated 18th November 1917. These four documents all support the adoption. It was suggested however that C. 1 was a forgery and was somehow wrongfully introduced into the official records. Their Lordships however can find no foundation for this suggestion. It was received by the officials not later than 18th November 1917, i. e. three days after the date which it bears and as will be seen later from Ex. E, was obviously taken into consideration by the Deputy Collector when he prepared and signed the list of applicants for the post. It is true that when the Revenue Inspector prepared a nomination roll (Ex. 53) on 29th November 1917, he made no reference to the late Sirdar's request, though he does include Asili's request; why he should omit the one and include the other it is difficult to say; but that C. 1 had already reached the authorities is clear from the official date stamp which it bears. This nomination roll twice refers to the plaintiff as the dismissed Sirdar's adopted son. The next step seems to have been that the Deputy Collector held some sort of inquiry on 17th February 1918, at Russellkonda, to which he summoned all the applicants. Ex. D shows that Horikrushno himself was summoned to attend, as well as the plaintiff and Notoboro. The Deputy Collector then prepared and signed particulars of all the applicants for the post (Ex. E) which he sent to the Collector on 22nd February 1918. In this the plaintiff is numbered six, and is described as the adopted son of the dismissed Sirdar; and at the end of the list, the Deputy Collector adds the following observations, which reproduce faithfully the contents of C. 1 :

> No. 6 is the adopted son of the dismissed Sirdar. The dismissed Sirdar requests that No. 6 may be appointed. If he is considered too young, he may be registered for the post and he requests that No. 11 may be appointed as his deputy.

10. In their Lordships' opinion these documents, coming as they do, from official sources, and recording, as they do, statements as to the adoption made to officials in the locality, not merely by the plaintiff himself in the presence of others, but also by Notoboro, and the dismissed Sirdar himself, carry the greatest possible weight. They are made at a time when no disputes have arisen, and in connexion with a matter of undoubted local interest, viz. the appointment of a new Sirdar; and it appears to their Lordships impossible to imagine that a claim, made in that connexion, to be the adopted son of the great man of the locality, could be made without the claim, if false, being at once denounced as such It is this aspect of the matter which prevents the plaintiff's statements from being, dismissed as mere self-assertions, and therefore of no importance. They count for much by reason of the circumstances in which they were made, and by reason of the publicity which necessarily attached to them. Unless he had been known in the family, and by repute in the locality to be the adopted son of the dismissed Sirdar, his assertion of the adoption would have been a vain and idle proceeding. The reinstatement of the Sirdar in July 1918 put an end to the question of a successor; but near the end of the year 1919 the plaintiff had occasion to apply to the authorities to be appointed temporarily to the post of Karji, in place of a Karji who was applying for one year's leave. On 22nd November 1919, he presented a petition (Ex. G) to the Tahsildar asking to be appointed, and describing himself as the adopted son of the Sirdar. On that petition is endorsed a recommendation by the Revenue Inspector that the Karji be removed or granted leave, and that the plaintiff be appointed in his stead. He added :

> If the applicant be appointed, I am certain that the Sirdar of Gondadharo and the applicant (his son) will jointly work and clear off all the Government dues before the end of November 1919.

11. On 9th January the plaintiff made a formal statement taken down and signed by the Tahsildar (Ex. F), in which he again described himself as the adopted son of the Sirdar, and on 13th January 1920, the Tahdldar made his report (Ex. G.2) to the Deputy Collector as to the various applicants, recommending the appointment of the plaintiff whom he describes as the Sirdar's adopted son. The plaintiff was appointed to act during one year's leave granted to the existing Karji. The same remarks apply to these documents as to those in the second group. It remains to consider the documents

relied upon by the appellants as showing that the plaintiff's claim to adoption is false. There is a copy of a deposition (Ex. III) made by the plaintiff on 29th July 1920, in some proceedings in the Court of the Stationary Second Class Magistrate of Gumsur. At the head of the deposition is a column of eight particulars relating to the witness, such as name, father's name, caste, etc., and opposite the words "father's name" appears the name of his natural father, Brojobondhu. This document is of no real assistance, since the wording of the question to which it is an answer is unknown. The plaintiff in his evidence said, as to this document, that his statement was that his natural father was Brojobondhu; and it may well be that he was only answering affirmatively a question put in that form. Exactly the same comments apply to the deposition of Notoboro (Ex. 67) in the same proceedings, in which is recorded a statement by him as to the plaintiff : "His father is Brojobondhu." Two other documents were relied upon by the present appellants before the Courts in India. They purport to be two communications, dated 27th March 1924, from the Sirdar, the one (Ex. 55) to the Tahsildar, Gumsur, the other (Ex. 55 (a)) to the General Deputy Collector. They are in identical terms and run thus :

> I have been seriously ill since the last one month and I am in a very shattered condition. I have no hope of recovery. I therefore request that you will be pleased to appoint my adopted son, Dondopani Naiko, as permanent Sirdar after my death, and to appoint one of my brothers or nephews to act for him during his minority. Be pleased to consider.

12. Both these documents have been pronounced to be forgeries by both the Courts in India, and they need to be no further considered. Their Lordships, however, note that the official date-stamps on the originals show that Ex. 55 only reached the Tahsildar on some illegible date in the month of April 1924, and that Ex. 55 (a) did not reach the Revenue Divisional Office until 6th April 1924, i. e., the day after the Sirdar's death. They further note, in connexion with the document next to be mentioned, that the forger of Exs. 55 and 55 (a) describes the Sirdar as being on 27th March in a very shattered condition, with no hope of recovery. The only other document which was alleged to disprove the plaintiff's claim, and which was in substance the only one relied upon before their Lordships for that purpose, remains to be considered. It is the will of the Sirdar (Ex. 5), which is dated 1st April 1924, and which contains this sentence addressed to his wife : "After my death, you shall at your discretion, adopt a son from among the sons of my own younger brothers." There is no dispute that the document is genuine in the sense that it is signed by the "Sirdar"; indeed it was admitted to registration after contest. Nor can it be doubted that the sentence quoted, is

irreconcilable with the Sirdar having already an adopted son. The will is therefore prima facie tantamount to an allegation by the Sirdar, made in solemn circumstances, that he had not adopted the plaintiff; and is a most important element to be taken into consideration in ascertaining where the truth lies.

13. The question, however is still open whether the will, and in particular the quoted sentence, in fact expressed the mind of the testator. The official who admitted the will to registration had not before him all the evidence which was forthcoming at the trial of this suit, and which creates an atmosphere of the gravest suspicion concerning the circumstances in which the document came into existence. The Judges in the High Court expressed their criticisms and suspicions as to the will. Their Lordships are in agreement with them as to these, and are of opinion that the will does not weaken, much less destroy, the inference to be drawn from the other documents in favour of the view that the plaintiff is the adopted son of the late Sirdar. From a consideration of the relevant documents their Lordships feel no doubt that the plaintiff has discharged the onus which lay upon him. Their Lordships also agree with the High Court that the evidence does not establish that the plaintiff was married before the adoption. Indeed the marriage was never alleged in the written statement. No issue was framed in regard to it, nor was any evidence led in respect to it. The question of the shares into which the property is divisible may be dealt with more briefly. The Subordinate Judge decreed shares in purported accordance (though not in fact in accordance) with an alleged agreement. He said, "I find the parties are entitled to the shares agreed to between them as evidenced by Ex. 31." The High Court took the view (with which their Lordships agree) that upon the pleadings it was not open to defendants 1, 2 and 4 to contend that Notoboro and Nokulo were not members of the undivided family. As such members, they would prima facie be entitled to a half share. The High Court declined to give any effect to the division purported to be agreed upon by the agreement alleged to be established by Ex. 31. on the ground that in so far as the document purported to diminish the share to which Notoboro and Nckulo were legally entitled and increase the shares of others, it was ineffective and inadmissible in evidence for want of registration.

14. Their Lordships find it unnecessary to consider the question of registration, because they are of opinion that Ex. 31 is a document which proves nothing and of which, upon the evidence, no notice should have been taken. It only purports to be a draft or copy. The original was not produoed nor was its absence explained. The alleged agreement is not referred to in any written statement. No issue was framed in

regard to it. It was repudiated by all the alleged parties to it who gave evidence at the time of the trial. Krupasindhu said it was "a got-up document." Brojobondhu said that Nokulo refused to accept it as he and Notoboro were entitled to one half, and therefore the document was not given effect to. Notoboro said the game. Even the copy as printed in the record cannot be relied upon, for it would appear from the judgment of the Subordinate Judge that the original of Ex. 31 contains references to Noknlo which had been struck out. There is no trace of these in the record. In these circumstances their Lordships can only come to one conclusion, viz. that the alleged agreement for a division of the property otherwise than in accordance with the legal rights of the parties must be disregarded, and that the property is divisible as stated in the High Court's decree. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the respondents.

Appeal dismissed.