

Sunderabai & Ors.

Vs

Devaji Shankar Deshpande

Civil Appeal No. 128 of 1951

(Mahajan, Chandrasekhara Aiyar and Bhagwati, JJ.)

03.10.1952

Bhagwati, J.

This is an appeal from the judgment and decree of the High Court of Bombay confirming the decree passed in favour of the plaintiff by the Civil Judge, Senior Division of Belgaum.

2. One Devarao had a son by name Shankar born to him by his wife Rangubai who died in about 1898. Shankar died in about 1902 leaving him surviving his widow Gangabai. Devarao died in the year 1904 leaving him surviving his widow Sunderabai, the Defendant 1. Devarao was the sole surviving co-partner of the family and after his death the Defendant 1 and Gangabai the widow of his pre-deceased son Shankar were the only two members of the family surviving. Gangabai adopted Devaji the plaintiff as a son to her deceased husband Shankar on or about the 18th February, 1934, and disputes arose between Gangabai and the plaintiff on the one hand and the Defendant 1 on the other in regard to the validity of the adoption of the plaintiff.

These disputes were referred to the sole arbitration of V.d. Belvi, a pleader at Belgaum. He entered upon the reference and during the course of the reference the communicated to the parties his opinion in regard to the position of the plaintiff as the adopted son of Shankar, in fact suggesting to the parties that they should if possible bring about an amicable settlement and an award was made by the Arbitrator in terms of the compromise. Under the terms of the award the Arbitrator ordered:

1. It is declared that the adoption of the plaintiff is not valid.
2. It is declared that the right of adoption is lost to Gangabai from the very beginning.
3. It is declared that the plaintiff is not and can never become entitled to the property belong to the family of Devarao Bapuji Deshpande.
4. Nevertheless, with the object of maintaining peace and good-will and affection in the family and the property belonging to the family may not be wasted away owing to the rise of any dispute of whatsoever sort and if

Gangabai and the plaintiff were to agree to what is written in the above paragraphs some consideration will have to be given to them respectively for all these purposes-the Defendant 1 shall pay to the plaintiff rupees 8,000/- (eight thousand) in one lump sum. If the Defendant 1 does not pay the amount as aforesaid the Plaintiff shall recover the same from the property belonging to the family, lying in the defendant 1's possession.

5. The decree for maintenance obtained by Gangabai against the Defendant 1 in the regular suit no. 224 of 1911 of the Gokak Subordinate Judge's Court, shall continue permanently.

3. An application was made in the Court of the First Class Subordinate Judge at Belgaum which was registered as Suit NO. 291 of 1937, to obtain a decree in terms of the award and the plaintiff having admitted the terms of the compromise and the award and the receipt of Rs. 8,000 the Court made a decree accordingly on the 6th August, 1937. The defendant 1 continued to pay to Gangabai maintenance in accordance with the decree passed in her favour by the Subordinate Judge's Court at Gokak and this position of affairs continued right up to December, 1943.

4. The decision of their Lordships of the Privy Council in-'Anant v. Shankar', AIR 1943 PC 196 (A), was pronounced on the 26th July, 1943, and some lawyer seems to have advised Gangabai that she could adopt the plaintiff again. Following the advice Gangabai adopted the plaintiff as a son to her deceased husband. Shankar again on 12th December, 1943. Coming to know of this adoption, the defendant 1 adopted her daughter's son, Jivaji, the defendant 2 as a son to her deceased husband Devarao but it is alleged that she ante-dated the deed of adoption executed by her in his favour to the 28th November, 1943. The plaintiff thereupon filed on the 31st January, 1944, a suit being Regular Original Suit No. 330 of 1944 in the First Class Subordinate Judge's Court at Belgaum against the Defendant 1 and 2 claiming possession of the properties belonging to the family, basing his claim to the same on his adoption by Gangabai on the 12th December, 1943.

5. In the plaint the contended that the adoption of the Defendant 2 by the Defendant 1 had not taken place on the 28th November, 1943, as alleged but on a date subsequent to the 12th December, 1943. The defendant 2 was impleaded as a party defendant to the suit as some property out of the said property was in his possession. The defendant 1 filed her written statement in the suit contending 'inter alia' that the suit was barred by 'res judicata' by virtue of the decree passed in suit no.291 of 1937 and that the plaintiff's claim was barred by estoppel. The defendant 2 filed his written statement adopting the contentions raised by the defendant no.1 in her written statement set out above.

6. The learned Trial Judge came to the conclusion that the suit was not barred by 'res judicata', that the adoption of the Plaintiff by Gangabai on 12th December, 1943 was proved and that the same was valid, and that the adoption of the defendant 2 by the defendant 1 was also proved though he did not record a finding on the issue as to what was the date of that adoption. He, however, held that the plaintiff was estopped from claiming possession of the properties from the defendant 1 and was only entitled to possession of the properties belonging to the family after her death.

He came to the conclusion that the adoption of the defendant 2 by the defendant 1 was invalid by reason of the adoption of the plaintiff by Gangabai which was anterior in date.

He, therefore, granted to the plaintiff the declarations that he was the validly adopted son of Shankar, that the adoption of the defendant 2 by the defendant 1 as son to her deceased husband Devarao was invalid and that the plaintiff was entitled to the possession of the suit properties on the death of the defendant 1. The plaintiff suit in other respects was dismissed. The learned Trial Judge in effect dismissed the plaintiff's suit for possession merely granting to him the declarations above mentioned. The defendants 1 and 2 appealed against this decree to the High Court of Judicature of Bombay the same being first appeal no. 344 of 1946. The High Court confirmed the decree and dismissed the appeal with costs. The defendants 1 and 2 obtained from the High Court leave to appeal to the Federal Court and the present appeal has thus come for hearing and final disposal before this Court.

7. The findings of facts reached by both the courts below were not contested before us. The adoption of the plaintiff by Gangabai on the 12th December, 1943 was held proved by both the courts below and was held to be a valid adoption. The adoption of the defendant 2 by the defendant 1 was equally held by both the courts as subsequent in date to the adoption of the plaintiff by Gangabai and therefore invalid. No appeal was filed by the defendant 2 against this finding.

8. The only points which were canvassed before us were points of law and they were:

1. Whether the present suit was barred by 'res judicata' by reason of the consent decree passed in suit no. 291 of 1937, and

2. Whether the plaintiff's claim was barred by estoppel.

9. Before we deal with these points of law we might deal with an argument which impressed the High Court, viz., that the plaintiff in the suit before us was claiming under a different title from the one which he put forward in the former suit no. 291 of 1937 and that therefore there was no bar of res judicata nor estoppel. Reliance was placed in support of this position on a decision of the High Court of Bombay reported in- 'Mahadevappa v. Dharmappa', AIR 1942 Bom. 322 (B). IN that suit one R., a distant agnate of S. brought a suit in 1928 for a declaration that the adoption of M by D. the widow of S. was invalid, a compromise decree was obtained by R. declaring that adoption of M was null and void, as under the law of adoption then understood D. had no power to adopt without authority of her husband S.

In 1932, there was a change in the law of adoption, and in 1935 M was again adopted by D and a suit was then brought by M for a declaration that he was the adopted son of S. On a plea of 'res judicata' being taken by the defendant in that suit, it was held that M was not litigating under the same title. The title that he sought to make out in the two suits had according to him been derived from different transactions and 'prima facie' therefore his title in each suit though of the same

nature in both was different. The two adoptions of M by D, the widow of S. were treated as different transactions conferring on the plaintiff in that suit different titles though the claim in each suit was really of the same nature, i.e., the claim as an adopted son of S. Even though the facts of that case appear to be on all fours with the facts of the present case, the real ratio of the decision is to be found in the judgment of Broomfield, J. as under:

"It is true that 'litigating under the same title' has generally been interpreted to mean 'in the same capacity'. The plaintiff here is litigating in the same capacity in this suit as in the suit of 1928, namely, in the capacity of an adopted son. All the same, I doubt very much whether he can be said to be litigating under the same title. One of the matters to be considered must, I think, be whether the claim put forward in the second suit could have been put forward in the first, and obviously plaintiff could not have set up his adoption in 1935 in the suit of 1928."

10. Thus Mr. Justice Broomfield refused to entertain the bar of 'res judicata' not on the ground, that the plaintiff was not litigating under the same title but on the ground that matter directly and substantially in issue in the former suit in a court competent to try such subsequent suit had not been heard and finally decided by such courts.

11. The real ratio governing such class of cases is to be found in a decision of the Full Bench of the Lahore High Court in-'Mt. Sardara v. Shiv Lal', AIR 1944 Lah 282 (FB) (C), where it was held that where the right claimed in both suits is the same the subsequent suit would be barred as 're judicata' though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as 'res judicata' even though the property was identical. It is therefore, clear that the plaintiff in the case before us was litigating under the same title, i.e., in the same right as the adopted son of Shankar though that claim of his was sought to be based on a later adoption. Than the one in the former suit.

12. The bar of 'res judicata' however, may not in terms be applicable in the present case, as the decree passed in Suit No. 2991 of 1937 was a decree in terms of the compromise. The terms of section 11 of the Civil Procedure Code would not be strictly applicable to the same but the underlying principle of estoppel would still apply. Vide: the commentary of Sir Dinshaw Mulla on section 11 of the Civil Procedure Code at page 84 of the 11th Edition under the caption 'Consent decree and estoppel:

"The present section does not apply in terms to consent decrees: for it cannot be said in the cases of such decrees that the matters in issue between the parties 'have been heard and finally decided; within the meaning of this section. A consent decree, however, has to all intents

and purposes the same effect as 'res judicata' as a decree passed 'in invitium'. It raised and estoppel as much as decree passed 'in invitium."

13. The contention which was very strenuously urged before us by the learned Attorney-General on behalf of the defendant 1 therefore was the plaintiff was estopped from contending that Gangabai had a right to adopt him as a son to her deceased husband Shankar, on the 12th December, 1943.

14. Estoppel is a rule of evidence and the general rule is enacted in section 115 of the Evidence Act, which lays down that when one person has by his declaration, act or omission 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 proceedings between himself and such person or his representative to delay the truth of that thing. This is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of 'res judicata'. The estoppel in this case was pleaded by the defendant 1 in the manner following in paragraph 6 of her written statement :

"The plaintiff's claim is also barred by estoppel as he received Rs. 8,000/- as a consideration for accepting the terms of compromise from the defendant. As the compromise was lawful and as he induced the defendant to pay Rs. 8,000/- on the understanding that Gangabai lost her right to adopt and he would never raise any dispute, he is estopped from contending that Gangabai had not lost her right to adopt."

15. We have set out above the terms of the consent decree obtained by the parties in that suit and this plea of estoppel is based on term no.2 of the consent decree whereby it was declared that the right of adoption was lost to Gangabai from the very beginning. It was contended that the representation of fact which was made by this term was that whatever right Gangabai had to adopt a son to her deceased husband Shankar was lost to her from its very root or from its very commencement and that she had not and would not have any right of adoption as such.

The learned Solicitor General who appeared for the plaintiff drew our attention to the terms of the award where it was stated that there was no dispute between the parties regarding the facts of the case but there was difference of opinion between them regarding legal issues only. The legal issues which arose were whether or not the adoption of the plaintiff was valid, and if the adoption was valid, whether the plaintiff became or might become entitled to the property belonging to the family. There was before the arbitrator the decision of the Bombay High Court in -'Balu v. Lahoo', AIR 1937 Bom 279 (FB) (D), in which a minority judgment had been delivered by Rangnekar, J, holding that under such circumstances the power to adopt was at an end and the widow could not make a valid adoption to her deceased husband.

If this point of view was correct the adoption of the plaintiff by Gangabai would be illegal and no right whatever at any time to the family property would be acrued to the plaintiff. This was the dispute between the parties and a compromise of the dispute

between the parties and a compromise of the dispute was arrived at which was incorporated in the terms of the order set out in the award. As a part of the compromise it was declared that the right of adoption was lost to Gangabai from the very beginning, that the adoption of the plaintiff was not valid, and that the plaintiff was not and could never become entitled to the property belonging to the family of Devarao. The decree for maintenance obtained by Gangabai against the defendant no.1 was to continue permanently and the plaintiff was to be paid a sum of Rs. 8,000 in a lump sum.

16. On a true construction of term no. 2 of this consent decree, Gangabai, as also the plaintiff declared that the right of adoption was lost to Gangabai from the very beginning. That was in our opinion a representation of fact that Gangabai had from the very beginning no right to adopt a son to her deceased husband Shankar. The sum of Rs. 8,000/- was to be paid by the defendant 1 to the plaintiff as a consideration for this declaration and it was because of this declaration that she in fact paid the sum of Rs. 8,000/- to the plaintiff a day before the Court passed the decree in terms of the award.

It was this representation of fact made by Gangabai as well as the plaintiff which induced the defendant 1 to believe it to be true and to act upon such belief to her detriment. But for her being induced in this manner she would not have paid to the plaintiff the sum of Rs. 8,000/- The plaintiff in his turn having received the sum of Rs. 8,000/- the representation was in fact acted upon and he could not be heard to deny the truth of that representation and subsequently assert that Gangabai had in fact the right to adopt a son to her deceased husband Shankar, she having lost that right from the very commencement.

17. It was contended by the learned Solicitor General on behalf of the plaintiff that this was to representation of fact but was only an expression of a mere intention on the part of Gangabai not to adopt the plaintiff as a son to her deceased husband Shankar. It was argued that a mere representation of an intention could not amount to an estoppel. This contention however ignores the wording of term no.2 which does not limit the declaration to any particular period but is quite general in its terms. It is not a declaration that Gangabai had no right to adopt in the past, it is not a declaration that she did not intend to adopt a son in the future, it is a clear representation that the right of adoption which was vested in her by virtue of her being the widow of her deceased husband Shankar was lost to her from the very commencement.

This right could be lost in various ways and one of the ways in which it could be lost was the legal position as it obtained in the minority judgement of Rangnekar, J., in - 'AIR 1937 Bom. 2779 (FB) (D)', abovementioned. The right could be lost also by reason of other circumstances and if the representation of the nature contained in term no. 2 was made it would be not merely a representation of intention or a representation of the legal position but a representation of fact in regard to the right of adoption which had vested in Gangabai as the widow of her deceased husband.

18. It was further contended by the learned Solicitor-General that on a true construction of term no.2 Gangabai agreed not to adopt a son to her deceased

husband Shanakar, that the matter had passed from the stage of mere representation into an agreement and that therefore it would be a case of breach of contract, if any. We are afraid that this position cannot avail him. Even though the matter may have passed from the stage of a representation into an agreement, there are cases where the courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action. Authority for this position is to be found in the following passage from Biglow on Estoppel', 6th Edition, pp. 639-640;

"Situations may arise, in which a contract should be held an estoppel, as in certain cases where only in inadequate right of action would, if the estoppel were not allowed, exist in favour of the injured party. In such a case the estoppel may sometimes be available to prevent fraud and a circuity of action".

In the case before us Gangabai as well as the plaintiff could be deemed to have agreed that Gangabai would not take a son in adoption to her deceased husband Shankar in the future, for the consideration of Rs. 8,000 paid by the defendant 1 to the plaintiff. The defendant 1 acted upon this position to her detriment and paid in fact a sum of Rs. 8,000 to the plaintiff. The plaintiff accepted this sum of Rs. 8,000 and relinquished all rights which he then had or which he could ever have had in the future to the property belonging to the family of Devarao. Gangabai continued to accept maintenance in accordance with the decree for maintenance which was passed in her favour and the parties all along acted upon this agreement upto the time that the lawyer advised Gangabai to adopt the plaintiff again after the decision of their Lordships of the Privy Council in -'Anant v. Shankar', AIR 1943 PC 196 (A). To allow the plaintiff to take up this position now would be to encourage a fraud or circuity of action which according to the passage from Bigelow above quoted would be the last thing a court would ever countenance. Treating it therefore as an agreement or an undertaking given by Gangabai as well as the plaintiff, even so the plaintiff would be estopped from contending that Gangabai had not lost her right of adoption as set out in term no.2 of the award and asserting that she could adopt the plaintiff as a son to her deceased husband on the 12th December, 1943.

19. Having regard to the observations which we have made above, we have come to the conclusion that the plaintiff was estopped from contending that Gangabai had the right to adopt him as a son to her deceased husband on the 12th December, 1943. This estoppel prevails in spite of the fact that both the courts below have found that he was validly adopted by Gangabai as a son to her deceased husband on the 12th December, 1943.

20. The result therefore is that the plaintiff's suit is barred by estoppel, that he is not entitled to any relief which he has prayed for in his plaint, that the decree which has been passed by the Trial Court in his favour and which the High Court has confirmed is liable to be set aside and that his suit is liable to be dismissed. We accordingly allow this appeal, reverse the decree which has been passed by the High Court in favour of the plaintiff and dismiss the plaintiff's suit with costs throughout.

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