SUPREME COURT OF INDIA

Shuganchand

Vs.

Prakash Chand

C.A.No.35 of 1957

(P. B. Gajendragadkar and K. N. Wanchoo, JJ.)

16.02.1961

JUDGEMENT

GAJENDRAGADKAR, J.:

1. This appeal by special leave arises from a suit filed by the appellant Shuganchand, who is a Jain, for possession of certain immovable property against the trespasser Umacharan Pradhan the respondent. Pending litigation Umacharan died and Prakash Chand and two others were brought on the record as his legal representatives. We will hereafter refer to Umacharan as the respondent. The property in question is a garden in Mouja and it bears Khasra No. 345 Rakba 71/4.

The appellant's case was that this property originally belonged to Kanakmal who died in 1910-11. During his life-time Kanakmal had adopted Mannilal who predeceased him leaving behind him his widow Sugan Bai. In the result at the date of Kanakmal's death the two members of his family were his widow Jadav Bai and his widowed daughter-in-law Sugan Bai. In 1922-23 Sugan Bai adopted the appellant. Jadav Bai died in 1932 and in 1936 the present suit for possession was filed by the appellant. According to the appellant, when he attained the age of majority he took steps to obtain possession of the property left by his grand-father and found that the respondent's father Munshi Gajpat Rai had adversely taken possession of the property in 1925. On a demand being made for the delivery of the said property the trespasser refused to accede to the demand and so the present suit had to be filed.

2. The claim thus made by the appellant was resisted by the respondent on several grounds. It was urged that the respondent and his father had constructed a building and planted trees on the garden and had improved the quality of the said property at considerable expense. The title of Kanakmal as well as that of the appellant was denied; so was the possession of Kanakmal disputed. It was urged that neither Kanakmal nor after his death his widow ever obtained possession of the property and so the suit was barred by limitation. In the alternative it was pleaded that the appellant would not be entitled to recover possession of the said property unless he reimbursed the respondent to the tune of Rs. 15,000 which had been spent by him and his father in improving the said property and in constructing a building on it. One should have thought that the suit in which these simple pleas were raised should have terminated without unnecessary delay; but, as we will presently point out, this simple action for possession against the trespasser has had a chequered and somewhat tortuous career.

3. At the trial the learned trial judge framed seven issues. He found that the suit was within time,

that the genealogical table given by the appellant was correct, and so the appellant, by adoption, became a member of the family of Kanakmal and was thus entitled to sue. The title of Kanakmal was held established. In regard to the plea made by the respondent that the land had been improved and construction had been made on it at considerable expense, the learned judge found in favour of the respondent and ordered that all the materials of the entire super-structure of the kothi and the garage built by the respondent belonged to him and he was at liberty to remove the said material. Similarly the learned judge found in favour of the respondent on the issue about the appellant's claim for Rs. 450/-. In the result a declaratory decree was passed in favour of the appellant and an order was made calling upon the respondent to deliver possession of the said property in suit to the appellant. This decree was prononuced on January 11, 1944, that is to say, the suit took eight years for disposal.

4. The respondent then took the matter in appeal and succeeds before the appellate court, the said court having held that on the basis of the evidence produced by the appellant it was not possible to arrive at the conclusion that the garden in dispute was the property of Kanakmal, and so Issue No. 3 was answered against the appellant. In the result the appeal was allowed and the appellant's suit was dismissed. This order was passed on September 2, 1944. Thereupon the appellant preferred an appeal to the High Court and the High Court set aside the finding of the District Judge on Issue No. 3, and without deciding the other issues which necessarily arose for consideration allowed the appeal and decreed the appellant's suit. When this decision was challenged by the respondent by a revisional application preferred in that behalf before the Judicial Committee, Huzur Durbar, Gwalior, he succeeded and the Durbar remanded the case to the first appellate court to consider Issues No. 1,2 and 7, give findings on them and decide the appeal in accordance with the said findings. This order was pronounced on December 26, 1949.

5. The matter then went back to the District Judge who decided the remanded issues in favour of the appellant and passed a decree in his favour on May 31, 1950. It was this appellate judgment that was challenged by the respondent by a second appeal, and the respondent succeeded before the High Court which allowed his appeal and dismissed the appellant's suit. The High Court has held that since Kanakmal's wife was alive at his death it was she alone who was competent to adopt with a view to obtain the estate of Kanakmal, and that the adoption made by the widowed daughter-in-law would not have the effect of divesting the estate which had vested in Kanakmal's widow. It is on this narrow ground that the respondent has succeeded in the High Court. The High Court's decision was pronounced on February 1, 1954. It is this decision which is challenged before us by the appellant who has brought the appeal to this Court with special leave.

6. The main contention which is urged before us by Mr. Andley for the appellant is that the High Court was in error in allowing the respondent to make out a new point before it at a very late stage, and he has also contended that in deciding the said point against the appellant the High Court has lost sight of a very important fact that at the time when the present suit was brought Jadav Bai was dead and there was no question of divesting the estate vested in her. Though, as we have already seen, this litigation has passed through a protracted career, it is significant that throughout these procedings the validity of the adoption and the inability of the adopted son to divest the estate of Jadav Bai were never specifically and clearly raised; several other points of dispute arose between the parties but this aspect of the matter was never raised for a decision until the matter reached before the High Court in second appeal at the last stage of the present proceedings. It is nobody's case that on the death of Jadav Bai any other heir could claim a preferential title as against the appellant. The adoption of the appellant is held proved. It appears to be established that at the time of his adoption Jadav Bai was present and she gave consent to it. The appellant had stayed with

the family all the time after his adoption and has been treated as a member of the family by Jadav Bai and his adoptive mother. It appears from the allegations in the plaint which have not been successfully traversed that the rest of the estate left by Kanakmal is in the possession of the appellant. That being so, it seems to us plain that whether or not the appellant could have divested Jadav Bai's estate while she was alive, on her death he gets the property by succession, and if Kanakmal's title is held proved and the other pleas raised by the respondent are rejected, there can be no effective answer to the appellants claim for possession of the suit land. That is why we think the High Court unnecessarily entered into the discussion of an academic point raised before it in that form for the first time, and in dealing with the said academic point it lost sight of the basic fact that by the death of Jadav Bai which had taken place before the suit was filed the question raised for its decision did not fall to be considered.

7. Faced with this difficulty Mr. Achhru Ram, for the respondent, attempted to raise a point which has never been raised before. He sought to contend that it was a misnomer to call the appellant the adopted son of Mannilal. It was a case of a mere appointment of an heir, and according to him such an appointed heir would not take all the rights of an adopted son and would not necessarily be able to claim the estate of Kanakmal. In support of this argument Mr. Achhru Ram relied on the decision of the Privy Council in Dhanraj Joharmal v. Soni Bai, ILR 52 Cal 482: (AIR 1925 PC 118). In that case their Lordships have observed that they had 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 since it was found that the adoption in that form had not taken place the claim for collateral succession could not be entertained. Mr. Achhru Ram did not appear to contest the position that so far as Jains are concerned the ordinary Hindu law is to be applied to them in the absence of proof of special customs and usages varying that law. It is true that Jains do not believe that a son either natural or adopted confers any spiritual benefit on the father, and so adoption amongst Jains is a purely secular matter, but, with regard to the rights of an adopted son, unless a contrary custom or usage is established the ordinary Hindu law would apply. That is why Mr. Achhru Ram seeks to make a distinction between adoption properly so called and an appointment of an heir. In that connection he wanted us to consider decisions of the Punjab High Court in respect of appointed heirs. We have not allowed Mr. Achhru Ram to develop this point, because we think it is too late now to raise any such contention. In this plaint the appellant had set out the pedigree and claimed to be the grandson of' Kanakmal and evidence was led by him to prove his adoption. It appears that Mannilal himself was the adopted son of Kanakmal. Several pleas were raised but it was never suggested that the appellant was merely appointed as an heir and that as such his case was different from that of an adopted son. We have no doubt that it would be extremely unreasonable to allow ingenuity free scope at this late stage of this litigation. As we have already observed, a very simple suit for possession has had an unduly prolonged career, and there is no justification for giving it any further lease of life.

8. In the result the appeal must be allowed, the order passed by the High Court in second appeal must be set aside and that of the District Court restored with casts throughout. We direct the appellant to pay court fees which he would have had to pay if he had not been permitted to file his appeal in forma pauperis. The amount of this cost would be included in the appellant's cost which we have ordered the respondents to pay him. Counsel's costs to be taxed under 0. 14, R. 7 (a).

Appeal allowed.