

BOMBAY HIGH COURT

Ramchandra Narayan Badale

Vs

Murlidhar Yeshwant Khambekar

(Broomfield, J.)

22.12.1936

JUDGMENT

Broomfield, J.

1. This appeal arises from a suit for possession of property under a deed of gift dated 7th July 1930. The material facts are these. One Raghunath Sakharam had two sons, Bandhu and Krishnaji, and three daughters. Bandhu and one of the daughters predeceased him so that when he died on 8th March 1891, he left a son Krishnaji and two daughters Sundrabai and Bajibai. Krishnaji died in 1896. In 1906 Raghunath's widow Gangabai adopted a son Narayan who in course of time married and had a son Ramchandra. Narayan died in 1922, Gangabai died in 1930 and her daughter Sundrabai made a gift of some of the property comprised in the estate to the plaintiff who is the son of her sister Bajibai. She also sold other property to one Khanderao Sakharam. That alienation is the subject of other suits with which we are not concerned.

2. The plaintiff has brought this suit to get possession of the land conveyed to him by the deed of gift from Ramchandra, the son of Narayan, adopted by Gangabai to Raghunath. He is a minor represented by his mother Laxmi, Narayan's widow. The plaintiff's case is that Raghunath's son Krishnaji was married to one Radhabai and that when he died he left Radhabai to succeed to the estate as his widow and heir. Radhabai re-married a few years after Krishnaji's death and upon her re-marriage Krishnaji's mother succeeded to the estate as heir to her son. That being so, Gangabai had no power to adopt a son to her husband Raghunath. In spite of the adoption, the estate continued to belong to her until her death. She was succeeded by Sundrabai as sister of Krishnaji, the last male holder. Sundrabai was therefore legally competent' to make a gift of the property to the plaintiff. The defence is first a denial of the fact that Krishnaji was married and of the fact that his widow re-married. It is also contended that even if Krishnaji did leave a widow, the adoption was valid under the Hindu law and that in any case the plaintiff is estopped from disputing the adoption and from recovering the property in suit. The trial Court has decreed the plaintiff's suit, and this appeal is brought by the defendant.

3. The same points have been taken in the appeal as in the trial Court. The evidence of the marriage of Krishnaji and Radhabai consists of the oral testimony of Parasharam (Sundrabai's husband), of Sundrabai herself and of one Dinanath who is a member of the same caste and also a relation, and says that he was present at the marriage. These persons are obviously likely to be acquainted with the facts. Parasharam and Sundrabai at any rate must be aware of them. If their evidence stood alone, it might possibly be regarded as not substantial enough to prove the marriage alleged, but it is most powerfully reinforced by documentary evidence in the shape of a large number of entries in the village records, Village Form No. 1, Exs. 60, 61 and 62. These show that after the death of Krishnaji, Radhabai's name was entered as his widow and heir, Gangabai described as her mother-in-law being entered as her guardian. There is no explanation of these entries in the village records if Krishnaji and Radhabai had not been married, and the learned trial Judge was quite justified in holding the marriage proved. Parasharam and Dinanath have also deposed to the re-marriage of Radhabai two or three years after the death of her husband. It has been contended here that their evidence is not sufficient and stress is laid on the fact that Radhabai herself was alive and has not been called as a witness. It appears however that she was cited as a witness for the plaintiff. She refused the summons on the ground that she was ill. The plaintiff therefore applied that she should be examined on commission and this application was opposed by the defendants. Under the circumstances they cannot make a grievance of the fact that she has not been examined. The learned trial Judge says in the course of his judgment that the defendants gave up their contention that Radhabai had not re-married. The finding that the re-marriage is sufficiently proved must, in my opinion, be accepted.

4. That brings me to the principal point in the case, viz. whether the adoption of Narayan by Gangabai was a valid adoption in view of the fact that Gangabai's husband, Raghunath, was survived by a son who was married and left a widow surviving him. The principal authority on this question is *Amarendra Mansingh v. Sanatan Singh*¹ The head-note of this case, as reported in 35 Bom L.R 859, has I believe generally been recognized as giving a correct summary of the law as laid down by their Lordships of the Privy Council in this case. That is to say, it is now settled law that the power of a Hindu widow to adopt is not dependent in any way on the vesting or divesting of property and that her authority to adopt in a case where her husband leaves a son comes to an end only when the son dies after attaining full legal capacity to continue the line either by the birth of a natural born son or by adoption to him of a son by his own widow. The test is, whether these conditions exist at the time of the son's death. The mother's power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. In other words, it is the interposition of a grandson, or the son's widow, that brings the mother's power of adoption to an end.

5. Now, in the present case, as I have said, Gangabai's husband left a son who in his turn died

leaving a widow and according to the commonly accepted interpretation in *Amarendra Mansingh v. Sanatan Singh A.I.R 1933 P.C 155(Supra)* the power of Gangabai to adopt a son to Raghunath was extinguished on the death of Krishnaji. The learned advocate who appears for the appellants has suggested certain qualifications of that rule. He says that it is necessary in such cases that the son must have attained full legal capacity, that in addition to that he must have left either a son or a widow, and lastly that if he leaves a widow only, the widow must have capacity to continue the line; that is to say, she must be "clothed with the power of adoption". In support of these propositions, he has referred us to various passages in *Amarendra Mansingh v. Sanatan Singh A.I.R 1933 P.C 155(Supra)* and the earlier cases referred to in that judgment in which their Lordships of the Privy Council have used the expression "legal capacity" in connexion with the son of a widow whose power to adopt to her husband is in question. I do not think it necessary to cite all these passages. It is sufficient, I think, to say that in all these cases wherever the expression "legal capacity" is used, what is meant clearly is legal capacity for continuing the line. As we had occasion to point out in a recent case (Reported in A.I.R 1937 Bom 837) the gist of the judgment seems to be contained in the passage at page 256 of 60 I.A:It being clear upon the decisions above referred to that the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end but that the mere birth of a son does not do so, and that this is not based upon a question of vesting or divesting of property, their Lordships think that the true reason must be that where the duty of providing for the continuance of the line for spiritual purposes, which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son die himself sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive.

6. Their Lordships seek to explain, but do not in any way question or qualify the rule, treated as 'well established' (page 251), that the power of adoption in a mother is extinguished when her son has died, leaving a widow to whom the estate has passed by inheritance. It may be difficult to say precisely what is meant by legal capacity of the son in this connexion, but I cannot feel the slightest doubt that the requirements are satisfied when the son has married and dies leaving a widow to succeed him. It is admitted and cannot be disputed that if he dies leaving a son to succeed him, then there can be no question of an adoption by his mother to her own husband. I cannot see why on principle any distinction should be made between the case where the son dies leaving a son and the case where he dies leaving a widow. In either case according to the ruling of the Privy Council the mother's power of adoption is extinguished. Mr. Dharap has admitted that he cannot cite any direct authority for his last proposition, viz. that the Son's widow herself must have capacity to continue the line by which he means apparently that she must have

reached the age of discretion. He has referred us to a passage in *Amarendra Mansingh v. Sanatan Singh*² where their Lordships say: Whether in order to bring this principle into play it is essential that the son's widow should herself be clothed with the power of adoption is left open.

7. This passage may possibly be the foundation of the learned advocate's argument, but it cannot be said to support it. Obviously it was necessary for the Privy Council to leave open the case of a widow not being clothed with the power of adoption, because there are parts of India where without express authority a widow cannot adopt, That, however, is not the case in Bombay where every widow may be said to be clothed with the power of adoption, at any rate potentially. She is not in need of any authority from her husband, or anyone else. We have been referred to a number of decisions of this High Court in which it has been held that although a minor may make a Valid adoption, nevertheless an adoption by a girl who has not reached the age of discretion will not be recognized as legal by the Courts: *see Basappa v Sidramappa*³ *Murgeppa v. Kalva Golappa*⁴ and *Parvatava v. Fakirnaik*⁵ In the first case it was held on the evidence as to the intellectual capacity of the girl concerned that an adoption by a girl of fifteen was valid. In the other two cases it was held on similar considerations that adoptions by girls of twelve and twelve and a half years respectively were invalid. There is no very definite evidence as to what Radhabai's age was at the time of her husband's death. Parasharam does not mention her age. He says that Krishnaji was ten or twelve years at the date of his marriage. Sundrabai says that Krishnaji was ten or twelve years old and Radhabai was seven or eight years at the time of the marriage. Dinanath says that Krishnaji was twelve or thirteen years and Radhabai ten years at the time of the marriage. Apparently Krishnaji died about two years after his marriage and Radhabai re-married about two years after that. These periods are merely approximate. It is possible, in view of the authorities I have cited, that if Radhabai had adopted a son immediately after her husband's death, it might have been held invalid by this Court.

8. But, in my opinion, this is not a point which we need consider. She was potentially capable of adopting and I am not satisfied that the authorities require anything more than this. Mr. Dharap's argument is that it is not, sufficient that Krishnaji should have left a widow, that the requirements of the law are that he should actually make provision for the continuance of the line and that he could only do so by leaving a widow who at the time of his death had reached the age of discretion. But it is obvious that he could not actually make provision for the continuance of the line except perhaps by adopting a son himself. The fact that his wife was of full age would not guarantee her making an adoption. All that it was necessary for Krishnaji to do was to provide for the continuance of the line by marrying and leaving a widow to succeed him. It is not contended that in such a case the mother could at once adopt a son to her own husband, and obviously that would be most inequitable. Mr. Dharap says that her power to adopt would be in suspense until the son's widow did reach the age of discretion or died or re-married before doing

so. But, apart from the uncertainty and confusion likely to result from any such doctrine, it is directly contrary to the dictum of their Lordships at page 260, that the question whether the mother's power to adopt is extinguished or not depends on the conditions existing at the son's death. I am not prepared to accept the contention of the learned advocate for the appellants that the rule laid down by their Lordships of the Privy Council in Amarendra Mansingh v. Sanatan Singh A.I.R 1933 P.C 155(Supra) needs be or ought to be qualified in the manner suggested by him. I think we must hold on the authority of that case that Gangabai's power to adopt a son was extinguished on the death of Krishnaji leaving a widow. The learned trial Judge is therefore right in his finding that the adoption of Narayan was invalid.

9. On the point of estoppel it is not necessary to say very much. We were told that when Narayan was adopted, Sundrabai was invited to the ceremony and she could not go but her husband was present. After the adoption she frequently went and stayed with Gangabai and the adopted son. Neither Gangabai nor her husband made any protest. It is suggested, therefore, that there was a representation by conduct, extending over a long period of years, that the adoption, was valid and that therefore the plaintiff who claims through Sundrabai is estopped from challenging it. It is quite clear in my opinion that there is no force in this argument. A mere acquiescence in an adoption or a mere presence at an adoption does not create an estoppel. There is no evidence of any representation by the plaintiff or anyone through whom he claims as to any matter of fact on the strength of which the defendants can be said to have acted. As the learned trial Judge says, there can be no doubt at all that all the parties were labouring under a common mistake of law. The adoption was not challenged because, as the law was understood at the time, it was considered to be valid. In such circumstances there can be no question of estoppel: see Kuverji v. Babaji (1890) 19 Bom 374. This contention, there, fore, also fails. The decree of the trial Court must therefore be confirmed and the appeal dismissed with costs.

Wassoodew, J.

10. I agree.

Cases Referred.

1A.I.R 1933 P.C 155

2A.I.R 1933 P.C 155 at page 257

3A.I.R 1919 Bom 107

4A.I.R 1920 Bom 354

5A.I.R 1922 Bom 105