

(1937) 08 BOM CK 0009
In the Bombay High Court
Case No : First Appeal No. 56 of 1934

Ayubsha Amirsha Jamadar	Vs	APPELLANT
Babalal Mahabut Danawade		RESPONDENT

Date of Decision : 09-08-1937

Acts Referred:

Citation : AIR 1938 Bom 111 : (1937) 39 BOMLR 1324 : 173 Ind. Cas. 801

Hon'ble Judges : Macklin, J; Barlee, J

Bench : Division Bench

Judgement

Barlee, J.—The dispute in this case is about the succession to the property of a lady called Bibisha, who was a resident in the Kolhapur State. She had landed property both in the Kolhapur State and British India, i.e., in the Chikodi taluka of the Belgaum district. The plaintiff, a collateral, claims the property as her nearest heir. Defendant No. 1 pleads that he has become her son by adoption.

2. It has been established in a suit in the Kolhapur State that Bibisha went through a ceremony of adoption and purported to take defendant No. 1, Babalal, as her adopted son. This action of hers led to litigation, for apparently she resiled from her choice; and Babalal, while a minor, had to file a suit against her for a declaration that he was her adopted son. The question was then agitated whether an adoption by a Mahomedan was in accordance with the custom of the Kolhapur State, and should be recognized as legal; and the litigation ended with a decree that the adoption was valid and that the adopted son Babalal, now defendant No. 1, was entitled to succeed to Bibisha's estate in the Kolhapur State. Bibisha then died and the question of succession to her estate in British India is for decision in the present case. The trial Court has decided that the adoption was valid and that the adopted son Babalal is entitled to succeed to the estate in suit. Against this decision there has been an appeal.

3. The learned trial Judge has decided in favour of Babalal on the ground that it had been proved conclusively by the production of the judgment of the Kolhapur State that adoptions by Mahomedans are recognised in the Kolhapur State, and

has rejected the argument put forward on behalf of the plaintiff, that a status recognised in Kolhapur is not available to Babalal as regards the lands in British India. The reasoning of the learned Judge has been developed by Mr. Murdeshwar in this Court, and is in effect, that the question whether Babalal is a validly adopted son has to be decided by the personal law of the parties, and for the personal law of the parties we must look to the country of their domicile, i.e., Kolhapur. If the learned advocate is correct, then his client was bound to succeed, for the status of the defendant, Babalal, in Kolhapur has been conclusively determined by the suit between him and the present plaintiff in the Kolhapur Court. But it appears to us that the learned Judge was wrong and that Mr. Murdeshwar's argument is incorrect. The rule of private international law adopted in English Courts, as stated by Dicey and Westlake, is that the succession to land in England is governed by the law of England; and the English Courts have gone so far as to say that they will only recognise as an heir to land in England a man who is legitimate by the law of England and will not recognise a man who is illegitimate in the eyes of that law even though he be legitimate according to his personal law. This rule of adopting the *lex loci* for the discovery of the right heir to land is not confined to England (see Dicey). It appears to be the law of India also or rather of the Bombay Presidency with which we are concerned; for it is enacted in Bombay Regulation IV of 1827, that the law to be observed in the trial of suits shall be Acts of Parliament, etc.; and in the absence of such Acts and Regulations, the usage of the country in which the suit has arisen. It follows that the personal law of the defendant can only be taken into consideration in the absence of an usage of the country in which this suit has arisen, i.e., of British India.

4. We have to decide this matter, then by the law of British India, and the law of British India for the succession to Mahomedans is the Mahomedan law as varied by custom. But it is the Mahomedan law, pure and simple, unless a variation has been introduced by custom. Therefore the main question in this appeal is whether the defendant had succeeded in proving that adoptions by Mahomedans in the Chikodi taluka of the Belgaum district are customary, and if so, whether the custom satisfies the legal requirements of a valid custom. This in our opinion he has failed to do. It is proved that the custom exists in the Kolhapur State near the border and the evidence of the custom proved in the Kolhapur State would be of very great use to him if he had been able to produce similar evidence in the Belgaum district. But he has not produced any evidence of that sort. He has given a list of adoptions of Mahomedans at p. 25 of the paper book, and two of the persons named were persons living in the Chikodi taluka. But he has not made it clear whether those took sons in adoption or gave sons in adoption to Kolhapur Mahomedans and that is the defect in their evidence which renders it useless. We notice that he promised to call witnesses to prove these adoptions, but eventually he called none. We are left, therefore, with the evidence that there is a custom of adoption amongst the Mahomedans of the Kolhapur State, but no evidence that there is any such custom in the Belgaum district; and,

though the former evidence may be suggestive, it is not sufficient to prove the defendant's case; particularly as with the exception of a brief period at the beginning of the 19th century the Belgaum district and the Kolhapur State have been under different jurisdictions for centuries. It is quite possible that under the Maharajahs of Kolhapur a custom has arisen, which did not arise under the Peshwas who were the sovereigns of what is now the Belgaum district up to 1818.

5. We, therefore, must disagree with the decision of the learned Judge, and the result of our finding is that the case must be remanded to the lower Court. The land in dispute was mortgaged to defendant No. 4 and was redeemed by defendant No. 1. He is entitled to stand in the shoes of the mortgagee, and must be redeemed by the plaintiff before he can be required to give it up, and therefore the lower Court must frame a preliminary mortgage decree. The plaintiff has an interest which entitles him to redeem.

6. Our order is that the decree of the lower Court is set aside and the suit be remanded under Order XLI, Rule 23, for disposal according to law.

7. The appellant must get his costs up to date including the costs of this Court.