
(1940) 07 BOM CK 0013
In the Bombay High Court
Case No : First Appeal No. 360 of 1938

Damodar Vishnu Juvekar

APPELLANT

Vs

Shriram Lakshman Juvekar

RESPONDENT

Date of Decision : 30-07-1940

Acts Referred:

Trusts Act, 1882 — Section 32

Citation : AIR 1941 Bom 56 : (1940) 42 BOMLR 1086

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Broomfield, J.—The appellants in this case are the trustees under a deed of trust executed by Sagunabai widow of Laxman Damodar Juvekar. The plaintiff was adopted by Sagunabai in 1937 as son to her deceased husband and he has sued to recover the property from the possession of the trustees. Laxman before he died in 1900 made a will the principal provisions of which were as follows. He gave all his moveable property to his wife and also the income of his Immovable properties. But she was restrained from alienating these properties by sale, mortgage or gift. Authority was given to her to adopt a son subject to certain restrictions. A sum of Rs. 100 a year was set apart for beating drums before the family God morning and evening and it was provided that if she did not adopt Sagunabai was to make some permanent arrangement for this and other charitable purposes mentioned by the testator. In case a son was either born to the testator or adopted, then the will provided that the son was to be full owner of the property.

2. Fifteen years after her husband's death Sagunabai executed a deed of trust. This deed, exhibit No. 45, begins by reciting that Sagunabai had been given malki or ownership of the estate under the will, which was not a fact. The object of the trust deed was stated to be that "the estate may continue to be managed and used as I am doing up till now." As regards the powers of the trustees the

deed says " in order to carry out the management mentioned hereafter I have from to-day entrusted to the trustees title to the estate and I have given them all sorts of rights except the right of making a mortgage, sale or gift." Then there are various directions to the trustees to spend the income on specified charitable objects allowing Rs. 100 a year for Sagunabai's maintenance.

3. In 1919 Sagunabai decided to adopt a son and did adopt one Shrirang alias Siddheshwar, but the adoption was challenged by the trustees and was set aside by the Courts. The trustees continued as before in management of the property until 1937 when the plaintiff was adopted. The plaintiff's suit was resisted by the trustees who contended that the adoption was invalid on various grounds. The trial Court, however, found that it was valid and awarded possession to the plaintiff with mesne profits from the date of suit.

4. In this appeal the learned advocate for the appellants contends, firstly, that the plaintiff's adoption was invalid in view of the directions contained in Laxman's will, and, secondly, that if the adoption is valid, the adopted son is bound by the provisions of the trust deed in 1915.

5. In order to consider the first argument it is necessary to refer in more detail to the provisions of the will. The important paragraph in this connection is paragraph 4 which contains these words:

I authorise her (i.e. Sagunabai) to take a boy in adoption after my death. As to the boy to be adopted she may adopt any one of the sons of my nephews other than my two nephews Vishnu Vasudeo and Krishnaji Sitaram according to her choice. If they refuse to give their son in adoption, she may adopt a boy of any other person as she likes, but she shall not adopt a boy of either Vishnu or Krishnaji.

Reference may also be made to paragraph 6 which says:

In case I happen to survive this illness and a son be born to me, then my wife should, after me, manage the properties and household affairs in the way I have been doing, until that son attains majority. If that does not happen, then, after me, a boy should be adopted by her as written in paragraph 4 at any time she likes.

6. Laxman had three brothers all of whom had sons. He had altogether five nephews, two of whom he mentioned in the will as persons whose sons he did not wish to be adopted by his widow. That left three eligible nephews and they all had sons. In 1919 at the time of the first adoption some of these nephews and sons were still living so that there was nothing to prevent Sagunabai complying with the provisions of paragraph 4 of the will. Instead of doing that she adopted somebody else and therefore the adoption was held to be invalid. But by the year 1937, when the plaintiff was adopted, the three eligible nephews and their wives were all dead, so that, although some of their sons were living, they had no parents to give them in adoption, and it was impossible to comply

with the provisions of the will. Plaintiff is a grandson of one of the eligible nephews. Mr. Virkar's argument is that on the true construction of paragraph 4 of the will the widow's power to adopt was restricted so that she could only adopt one of the sons of the nephews other than Vishnu and Krishnaji. The only exception to that was that if these nephews refused to give their sons in adoption the widow was authorised to adopt another boy. It is urged that the refusal of the nephews to give their sons in adoption was a condition precedent to the adoption of any other person and that as, so far as the evidence goes, Sagunabai never tried to adopt a son of one of the eligible nephews and waited until the parents of these sons were all dead, her power to adopt had become extinguished.

7. The provisions of this will were construed by this Court in the case which arose from the first adoption and the following observations were made in the judgment in *Shriram Laxman Juvekar v. Shri Dev Bhargavram* (1923) F. A. No. 234 of 1921, decided by Macleod C.J. and Crump J., on February 5, 1923 (Unrep.)

As there was a clause in the will with regard to the widow's power of adoption - the widow was bound to follow the directions" given therein. She was not obliged to adopt anybody and if she were minded to adopt, then in the first instance she could only adopt one of the sons of the testator's nephews other than the two nephews Vishnu and Krishna. There is therefore an express direction that she should adopt, if she made up her mind to adopt, from a particular class of grand-nephews. It was only in case nephews, other; than Vishnu and Krishna, refused to give a boy in adoption that the widow could adopt any other person she liked, always excepting the boy belonging to Vishnu or Krishna. In order to show that the widow was entitled to adopt the plaintiff according to the directions of her husband's will, it would have to be proved that there were no grand-nephews who could be adopted. and that therefore the choice of the widow had become unobstructed.

8. Mr. Virkar says that these observations support his argument in the present case, but we do not think so. The position then was, as I have already mentioned, that there were grand-nephews alive who could have been given by their parents. Therefore it was open to Sagunabai to comply with the directions in the will and that being so, she was| no doubt bound to comply with them. But in 1937, when the parents of the grand-nephews were all dead, it was no longer possible to comply with the directions in the will. The last sentence of the passage quoted suggests that in such circumstances there would be no longer any obstruction to the widow's power to adopt.

9. We were referred to a decision of the Privy Council in *Rajendra Prasad Boso Vs. Gopal Prasad Sen*, where their Lordships said that the ordinary rule as to the construction of powers which prevails in England (as, for instance, that when a power is given to be executed with the consent of a person, and that person dies before the power is executed, the power comes to an end), is generally applicable to the construction of an *anumatipatra* executed in India. But this was

a case from Patna governed by the Dayabhaga law, under which a widow cannot adopt except with the authority of her husband. That is to say, her power to adopt is derived from the husband. In Bombay, on the other hand she has an inherent power to adopt under the Hindu law which she can exercise except in so far as it has been expressly limited or restricted by the husband. Cases under the Dayabhaga therefore in our opinion have no application to the present case.

10. Sitabai Vs. Bapu Anna Patil, was also cited for the proposition that a Hindu widow under the Bombay school of law is bound to obey any mandatory direction contained in her husband's will as to the way in which her power of adoption should be exercised. That proposition is of course correct. But in our opinion it does not support the argument advanced on behalf of the appellants here. The only provision in paragraph 4 of this will which can be described as mandatory is the prohibition against the adoption of a son of either Vishnu or Krishnaji.

11. The leading authority on this point is Yadao v. Namdeo (1921) L.R. 48 IndAp 513: 24 Bom. L.R. 609 s.c. where their Lordships laid down the rule that a direction to operate as a prohibition against a widow adopting a boy as a son to her husband except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption to him. This rule was reaffirmed in Jagannath Rao Vs. Rambharosa, . The learned trial Judge was of opinion that, applying this rule to the present case, the direction that the son of a nephew should be adopted was merely recommendatory; so long as a nephew was available to give him in adoption and it was not intended that the direction was to be followed for all time and on every occasion when the widow might choose to adopt. We are in agreement with this view. We think it is reasonable to infer from the provisions of the will that Laxman was desirous that an adoption should be made by his widow. He prohibited the adoption of a son of Vishnu or Krishnaji and he expressed the desire that the son of one of his other nephews should be adopted if available. But he has not made it clear that in the event of such a son not being available no adoption was to be made.

12. I, may refer in this connection to Lakshmibai v. Rajaji (1897) ILR 22 Bom. 996 where this Court approved a proposition contained in West and Buhler (p. 997):

It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least in Bombay, to warrant the adoption of another child, unless indeed he had said "such a child and no other." The presumption is that he desired an adoption, and by specifying the object merely indicated a preference.

It can make no difference in principle we think whether the specified child dies or the parents of that child die, so that his adoption becomes impossible. We think,

therefore, that this authority applies directly to the present. case.

13. Mr. Virkar suggested that it made a difference that the widow had not apparently made any attempt to comply with the provisions of the will by adopting a son of one of the nephews other than Vishnu or Krishnaji which she could have done had she been so minded. But the husband could have limited the time within which the adoption was to be made. It seems that if was not his desire to impose any such limit and in paragraph 6 of the will he has expressly stated that the widow might adopt at any time she liked. The law is clear that apart from any express restriction in that respect imposed by the husband there is no limit to the time during which a widow may exercise her power of adoption. Although in the trial Court the validity of the adoption was assailed on various other grounds, no other argument has been put forward in the appeal except that which I have discussed. In our opinion the trial Court was perfectly right in the view it took of the construction of the will and in finding that the adoption was a valid one.

14. If the adoption was valid, it is obvious we think that the plaintiff cannot be affected by the provisions of the trust deed. It is clear from paragraphs 6, 7 and 9 of the will that if a son were born to the testator or adopted to him, that son was to be the owner of the property. The learned trial Judge has" expressed the opinion that the trust deed was void *ad initio* as being beyond the powers of the widow. Apparently he regarded it as an alienation. What was prohibited by the will was alienating the property by gift, sale or mortgage. I think it is doubtful whether the trust deed can be regarded as an alienation. But the point is not really material. If it was an alienation, then clearly it was void. If it was not, it was merely an arrangement made by the widow for the management of the property until such time as an adoption was made and the arrangement must necessarily come to an end when the adoption took place. It was urged that the trust deed had been executed by defendant No. 3 in accordance with her husband's instructions as given in the will of which she was made executrix. But the will itself shows that any such arrangement was only to be made in case there were no adoption. It would be quite impossible to hold therefore that the trust deed is in any way binding on the plaintiff.

15. On the merits therefore the appeal entirely fails, but we think there is force in Mr. Virkar's arguments in respect of two minor points, mesne profits and costs. Mesne profits have been awarded from the defendants from the date of the suit. But the defendants being trustees were bound to carry out the provisions of the trust deed and were justified in continuing to do so even after the suit was; brought, at least until the passing of the decree by which the adoption of the plaintiff was affirmed to be valid. We think therefore that the order as to mesne profits should be varied and it should be made subject to this, that the trustees shall be held discharged from liability in respect of sums proved by them to have been paid in accordance with the trust deed between the date of suit and the date of the decree. After the date of the decree we consider that if

the defendants continued to make payments they did so at their own risk.

16. Then as regards costs, the trial Court's order was that the trustee-defendants were to pay the costs both of the plaintiff and of defendant No. 3. But it was the duty of the defendants as trustees to take all steps reasonably requisite for the preservation of the trust property and the assertion or protection of the title thereto (Section 13 of the Indian Trusts Act, II of 1882). They were therefore bound by law to defend the plaintiff's suit which sought to put an end to the trust. Section 32 of the same Act provides that every trustee may reimburse himself, or pay or discharge out of the trust property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust property. This being the law it is unreasonable that the defendants should be made to pay the costs of the suit out of their own pockets. We think the proper order to make as to the costs of the trial Court is that the costs of plaintiff and all the defendants including defendant No. 3 should come out of the estate and we order accordingly. On the other hand we consider that there is no substance in the appeal except on the minor points to which I have referred, and we are not prepared to direct that the costs in this Court should come out of the estate. The order as to the appeal will be that the appeal is dismissed with costs, but we direct that there should be one set of costs, payable to the plaintiff.