

(1877) 03 CAL CK 0006
In the Calcutta High Court

Kally Prosonno Ghose

APPELLANT

Vs

Gocool Chunder Mitter and Another

RESPONDENT

Date of Decision : 09-03-1877

Acts Referred:

Citation : (1877) ILR (Cal) 296

Hon'ble Judges : Pontifex, J;Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—The following genealogical table will materially help in setting out the facts of this case:

PTTAMBUB	GHOSH.	Died	August	1825.	
-----					Parbutty Churn Ghose,
Bhugoban Chunder Ghose,	(Died 1851)	(Died October 1855)	Married		
Bindadeboo Dossee Married Potitpaboni Dessee	(Died 1804)			Khetter Mohun	
Ghose Daughter (Died 1855)	Kristo Mohiny Dosseo,	Married Bamasoondery			
Dossee, Died childless between the deaths who, after her husband's death, of					
Parbutty and Bindadehee. in August 1870, adopted KALLY PBOSONNO GHOSM,					
the plaintiff".					

2. The plaintiff in this case is the alleged adopted son of Khetter Mohun, and the defendant is the brother of Bindadebee, widow of Parbutty, whose property is the subject-matter of dispute in the present case. Parbutty died in 1851, leaving him surviving Bindadebeo his widow, Kristo Mohiney a daughter, and Khetter Mohun his brother's son he executed a will before his death, bequeathing all his property to Bindadebee for life, and the remainder to daughter's sons that might be born thereafter. These bequests were subject to certain trusts for carrying out the worship of the family idols mentioned therein. Under this will Bindadebee remained in possession of the disputed property up to the time of her death, in 1804. In the meantime, both Kristo Mohiney and Khetter Mohun died, Childless.

3. Khetter Mohun, it is alleged, before his death executed a will, which contains,

among other provisions, a permission to his wife Bamasoondery to adopt. But the adoption of the plaintiff, in pursuance of this alleged permission, as admitted in the plaint, did not take place until 1876. Bindadebee, who died in October 1864, left all her properties, including those now in dispute, to her brother Issur Chunder. The defendant Gocool, who is the brother of Issur Chunder, has succeeded to them after the death of Issur. Thus, under the will of Bindadebee the properties in dispute have remained in the possession of Issur and Gocool, successively, from October 1864, when Bindadebee died. The plaintiff, it is said, as stated before, was adopted in August 1876, and he claims all those properties as the heir of Parbutty.

4. Various questions have been raised by the defendant, but the issue which we have now to determine is this:--Assuming that the plaintiff is the lawfully adopted son of Khetter Mohun, is he the legal heir to Parbutty?

5. If the plaintiff's adoption had taken place before the death of Bindadebee, there can be little doubt that, upon the facts stated above, he would have been the legal heir to Parbutty. But the question which we have to determine in this case is, whether, he having not been adopted at the time when the succession to Parbutty's estate opened out on Bindadebee's death, his subsequent adoption would confer upon him any right as legal heir of Parbutty to claim these properties from the hands of a person, who, with his predecessor in title, had remained in possession of them for nearly twelve years before the institution of the suit, and is still in possession.

6. In the year 1864, when Bindadebee died, the properties in dispute must have devolved on some person or persons, because there can be no property without an owner. The plaintiff was not then in existence as the adopted son of Khetter Mohun. To whom then did they pass? Putting the will of Bindadebee on one side, because for the purpose of this issue it is not disputed by the defendant that it must be assumed that it did not operate to create any valid title in his favour, the ownership of these properties must have vested either in some person who [303] was under the Hindu law the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

7. The contention of the plaintiff that, on the death of Bindadebee, his adoptive mother became entitled to hold these properties as the trustee of the future adopted son, is not, I think, proved. No texts in the Hindu law have been cited in support of it, and so far as the authority of decided cases goes, the question seems to have been settled conclusively against any such view.

8. In the case of *Bamundoss Mookerjee v. Mussamut Tarinee* 7 Moore's I.A. 169 a Hindu widow, having authority to adopt, brought a suit in her character as widow, to recover possession of her husband's share of the family property. She was met with the objection that the suit brought in her capacity as widow was badly framed, because possessing an authority to adopt, she could only sue on behalf of her future adopted son. This objection was overruled, and it was held,

"that the mere fact of there being authority given by her husband to adopt a son, did not, before an adoption had actually taken place, supersede and destroy her personal right as widow to sue." The point seems to have been more directly decided in two other cases, *Dukhina Doasee v. Rash Beharea Mozoomdar* 6 W.R. 221 and *Gobind Chandra Hurma Mozoomdar v. Anand Mohan Surma Mozoomdar* 2 B.L.R. A.C. 313. On the death of Bindadebee, therefore, the plaintiff's adoptive mother could not claim to hold possession of the properties in dispute in trust for the future adopted son, The ownership in them must have vested then either in some person whose name has not been disclosed in this case, and who was the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

9. This being so, the plaintiff cannot succeed in this case, unless he can establish that, on his adoption, the ownership of these properties was divested from the person who had succeeded to them upon the death of Bindadebee, and vested in himself. If this proposition could be established, it would lead in many cases to very mischievous and inconvenient results. There is no limitation of time within which a Hindu widow is bound to exercise the right of adoption, and there might be cases not of unfrequent occurrence, in which persons rightfully succeeding to properties as heirs might, after a long lapse of time, be suddenly called upon to relinquish their possession in favour of a person adopted into the family of the last owner many many years after the death of the latter. A proposition so startling as this is ought to be established by the clearest possible authority.

10. No text from the Hindu law has been cited in its support. On the other hand the definition of "heritage," as given in the *Dayabhaga*, paragraphs 4 and 5 of Chap. I tends to lead to the opposite conclusion. These paragraphs are to the following effect:

11. "The term "heritage," by derivation, signifies what is given. However, the use of the verb (da) is here secondary or metaphorical; since the same consequence is produced,--namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. But there is no abdication of the deceased, and the rest in regard to the goods. Therefore, the word "heritage" is used to signify wealth in which property dependent on relation to the former owner arises on the demise of that owner." When a person, therefore, succeeds to a property by right of inheritance under the Hindu law, in the language of the *Dayabhaga* this consequence is produced,--namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. His right is, therefore, absolute, and carries with it all the natural incidents of ownership, unless otherwise controlled by any other express provision of the law. In the case of succession by females, we know there are such express provisions relating to the right of transfer by sale, gift, &c. But I am aware of no authority in Hindu law books which supports the proposition that this right of ownership is subject to be destroyed by a person being brought into existence subsequently, a person who,

if he had been in existence at the time when the succession opened out, would have been a preferable heir. This is opposed to natural justice and all principles of the Hindu law.

12. In the Full Bench case of *Kalidas Das v. Krishna Chandra Dass* 2 B.L.R. F.B. 103, Sir Barnes Peacock takes the same view of the law. The question in that case was, whether the estate of a deceased person, which, became vested in his nephew, his son having been excluded from inheritance on the ground of congenital blindness, could be divested in favour of the blind man's son born after the succession of the nephew. "There is no case of which I am aware," says Sir Barnes Peacock (page 110), "in which, according to the Hindu law as administered in Bengal, a male who takes by descent takes anything less than a full and absolute estate subject to charges for maintenance, &c, or to show that he is not at liberty to alienate that estate by gift or sale. The cases of widows, and sons adopted after the deaths of their adoptive fathers, were referred to in the course of argument, to show that an estate, less than a full and absolute estate, may be taken by inheritance, and that an estate vested by descent may be divested. But these cases are not analogous. The case of a widow succeeding to the estate of her husband upon his dying without issue, and the case of other females, depend upon particular texts. Baudhayana, after premising a woman is entitled, proceeds not to the heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit." The construction of this passage, a woman is not entitled to the heritage," is, that the succession of the widow and certain others (viz., the daughter, the mother, and the paternal grandmother) takes effect under express texts without any contradiction to this maxim--Dayabhaga, Chap. XI, Section 6, verse 11. The case of a widow adopting a son after her husband's death, and thereby divesting the estate which she took upon the death of her husband without issue, is one in which only her own estate is divested. There is no case in which an estate vested in a male heir by inheritance can be divested by the adoption of a son by a widow after her husband's death, and the case of a widow divesting her own estate by the adoption of a son is not one from which inferences can be drawn by analogy as to the divesting of an estate once vested in a male heir by inheritance." The observations of the Judicial Committee of the Privy Council in *Ram Kishore Acharj v. Mussamut Bhoobun Moyee Debia* 10 Moore's I.A. 279 and in *The Collector of Madura v. Moottoo Havudinga Sathupathy* 2 Moore's I.A. 397 lend considerable support to this conclusion.

13. The facts in the case of *Ram Kishore Acharj v. Bhoobun Moyee Debia* 10 Moore's I.A. 279 are briefly these: One Gour Kishore died, leaving him surviving his widow, Chundrabullee, and an infant son, Bhowanee Kishore. He, before his death, executed an anumati-patro, giving authority to the widow to adopt a son, in case Bhowanee Kishore died childless. After his death, Bhowanee Kishore succeeded to his property, and died childless after having married Bhoobun Moyee. Chundrabullee, after Bhowanee Kishore's death, adopted Ram Kishore. The question that had to be determined in the case was, whether Ramkishore

was entitled to take possession of the properties left by Bhowanee Kishore by evicting Bhoobun Moyee. "The question is," their Lordships observe in page 311, "whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and to all the principles of Hindu law, as far as we can collect them." Again, further on, they say: "If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Dobia, would have been his heir, and the question of adoption would have stood on Quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that, by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession can be defeated and divested." The "ordinary rule" referred to in this passage seems to be, that in no case "the estate of the heir of a deceased "person" vested in possession can be defeated and divested" in favour of a subsequent adopted son, unless the adoption is effected by the direct agency of the former or with his or her express consent.

14. In the other case, *Collector of Madura v. Moottoo Ramalinga Sathupathy* 12 Moore's I.A. 397 : S.C. 1. B.L.R. P.C. 1 I think the same rule has been enunciated. The main question for decision in that case was, whether, in the Dravida country in the Madras Presidency, a widow not authorised by her husband to adopt may adopt a son to him if authorised by the consent of his kinsmen. Having decided this point in favour of the validity of such adoption, their Lordships make the following observation regarding the question: "Who are the kinsmen whose assent will supply the want of positive authority from the deceased husband?" in page 441 they say: "Where the husband's family is in the normal condition of a Hindu family, that is undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will." In the case of succession by the widow to the separate property of her husband, the adoption taking place through her agency, has, in accordance with the rule laid down above, the effect of divesting her estate.

15. Following this rule, this Court, in *Gobindo Nath Roy v. Ram Kanay Chowdhry* 24 W.R. 183 has held, that the subsequent adoption by a widow cannot affect the

right of an alienee from her, the alienation having taken place before the adoption. This case is exactly in point, and is a direct authority against the contention of the plaintiff.

16. The learned Counsel for the plaintiff", in the course of argument) has relied upon the following observation of the Judicial Committee in the well-known case of Tagore v. Tayore. This passage, which is to be found in page 397 of 9 Bengal Law Reports, is to the following effect: "As to the case of adopted children (so much relied upon during the argument) it is distinguishable, because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, as one to stand in the place of a child actually be-gotten by the lather. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the tostator's death, having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the denee must be a person in existence, capable of taking at the time when the gift takes effect." Their Lordships make these observations in connection with the question, whether, by the Hindu law of gift, a gift made to a person not in existence at the time of such gift, is valid; having decided that it is not valid, they say that such gifts by the adopted father in favour of a future adopted son form an exception to the general rule, and the words as if he had existed at the time of the testator's death having boon actually begotten by him" do not refer to a case of collateral succession by an adopted son, but to his right of inheritance to Ins adoptive father's estate.

17. General observations of their Lordships of the Judicial Committee, similar to those quoted above, made in the case of Sri Raghunadha v. Sri Brojo Kishom ILR 3 IndAp 154 have also been pressed upon our attention on behalf of the plaintiff. The passage quoted, to be found at page 193 of the third volume of the Law Reports, Indian Appeals, is as follows: "Their Lordships have deemed it right to make those remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow", not having her husband's express permission to adopt a son to him, which before the decisions in the Uamnad case, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be; in the case of collateral succession, as in the present instance, the rights of parties in actual

possession, dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property." That the rights of parties in actual possession" in this passage do not refer to any vested rights, will be apparent by referring to the particular facts of that case. The property in dispute in that case was not a joint family property, and the surviving members of the joint family unjustly took possession of it, by excluding the widow of the owner, who was entitled by the Mitakshara law to succeed to it. Therefore, "the rights of parties in actual possession" in that case were not vested rights, but merely the reversionary rights to succeed after the death of the widow. That such contingent rights are liable to be defeated by an adoption is not disputed for one moment. These observations, therefore, do not in any way support the contention put forward on behalf of the plaintiff.

18. As a last resort an argument based upon this particular provision in Parbutty's will regarding the worship of certain family idols, has been pressed upon us in support of the plaintiff's right. It has been said that the defendant, being a stranger to the family, is not competent to carry out the direction as to the worship of the family idols. The defendant is a Hindu and a relative of the family; and I am aware of no rule of law or custom which would render him incompetent to carry out the worship of the aforesaid idols as directed in the will of Parbutty. Even if this contention were well founded, I do not see how it would help the plaintiff in establishing his right to inherit to the estate of Parbutty, he having not been adopted when the widow of Parbutty died.

19. For these reasons I am of opinion that particular issue must be decided against the plaintiff.

Pontifex, J.

20. I quite concur in the judgment which has just been delivered by my learned colleague. As our decision is against the plaintiff on that issue, his suit must be dismissed as against Gocool and the Government. But as the principal defendant has not set up any right in himself, but claims to hold Parbutty's property only for the true owner, I think the dismissal should be without costs. For the same reason I think that Gocool should, out of the estate of Parbutty in his hands, pay the costs of the Government, whom I directed to be made defendants, and retain his own costs. The dismissal of the suit against Gocool will be without prejudice to the rights (if any) of the Government in relation to Parbutty's property.