
(1916) 06 CAL CK 0022
In the Calcutta High Court

Madhu Sudan Sinha and Others

APPELLANT

Vs

Kali Charan Sinha and Others

RESPONDENT

Date of Decision : 30-06-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 7 Rule 14

Citation : 46 Ind. Cas. 246

Hon'ble Judges : Richardson, J; Chitty, J

Bench : Division Bench

Judgement

1. The plaintiffs in this suit are the great-grandsons of one Tularam Sinha who, as they allege, was the brother of Khosal Sinha. Khosal died many years ago leaving a widow named Bhagabati and a son named Shibram. Shibram himself died in 1836 leaving a widow, Chhaya Kumari, a mere child, whom he had married as his second wife. There also survived him Fudan Kumari, his daughter by his first wife, and her husband Chet Lall. They had issue, two sons then alive, Ram Lal and Behary Lal, and several daughters born subsequently. Behary Lal died in 1837 and Ram Lal in 1868. Of the daughters Golap Sundari became the mother of a son named Nilkantha, the father of the defendant No. 1, Kali Charan Sinha. Annapurna also had a son whose widow is the defendant No. 2. The defendant No. 3 is in possession of a property, Taraf Raghab Bati (No. 13 in the schedule of the plaint), under colour of a conveyance executed by Chhaya Kumari and Nilkantha Singh in 1887.

2. A genealogical table prepared by the plaintiffs is attached to the plaint. The plaintiffs claim title as reversionary heirs of Shibram on the death of Chhaya Kumari, which occurred in 1899, to three-fourths of the properties specified in the schedule. The title to the remaining fourth is said to be in another great-grandson of Tula Ram who is not represented on the record. There is no dispute as to the descent of the plaintiffs from Tularam. The two principal contentions raised in answer to the suit were, firstly, that Tularam was not the brother of Khosal, and secondly, that in accordance with an alleged verbal permission given

by Shibram, Chhaya Kumari in the year 1872 adopted Nilkantha as his son. The learned Subordinate Judge found against the plaintiffs on both these questions and by his judgment and decree, dated the 13th August 1913, dismissed the suit. The plaintiffs have appealed.

3. At the hearing before us, learned Counsel for the appellants stated that as regards the relationship between Khoshal and Tula Ram he would urge merely that the suit should be remanded to the Court below for the taking of further evidence, on the grounds that evidence, oral and documentary, bearing on this question had been improperly excluded at the trial. He referred to the orders, dated the 14th and the 17th July 1913, in the order-sheet. The order sheet shows that the suit was instituted on the 18th November 1911. On the 20th April 1912, permission was given to the plaintiffs, who, it is said, are mostly serving as peons, that is in comparatively humble and ill-paid posts, to sue in forma pauperis, a privilege which has also been extended to them in appeal. Issues were framed on the 7th September 1912 and the 8th October was fixed for the hearing of the suit on which date the parties were directed to produce their documentary evidence. On that day nothing was done. The suit was adjourned again and again at the instance of one or the other of the parties or both. The dates successively appointed were the 12th November and 12th December 1912, and the 21st January, 24th February, 7th April, 7th May, 9th June and 10th July 1913. On the last mentioned date the case was opened and adjourned to the 14th July, when the hearing was resumed and continued practically *de die in diem* till the conclusion. Now the rejected documents ought to have been produced on the 8th October 1912, but were not in fact produced till the 24th February 1913, a delay which would allow of ample time for their manufacture. The excuse given was that the original plaintiff No. 1, the elder brother of the present plaintiff No. 1, had died on the 4th September 1912 and the documents had been in his custody. The Subordinate Judge directed that the documents "should be kept with the record" leaving the question of their admission to be decided at the trial. On the 14th July 1913 he refused to accept them, stating that the explanation of delay was unsatisfactory. He also said that a list should have been attached to the plaint in which the documents should have been specified. It was suggested that he was wrong in thus applying Rules 14 and 18 of Order VII, because Sub-rule (2) of Rule 18 expressly excepts "documents produced for cross examination of the defendant's witnesses or in answer to any case set up by the defendant." The documents in question have, however, been translated and printed, and it appears it was proposed to use them in aid of the plaintiffs' own case that Tularam was Khosal's brother. In any case the Subordinate Judge might have applied Rules 1 and 2 of Order XIII. As the plaintiffs intended, if they could, to prove the documents as part and parcel of the evidence in support of their claim, they intended to rely on them and under Order XIII, Rule 1, the parties or their Pleaders shall produce, at the first hearing of the suit, all the documentary evidence in their possession or power, on which they intend to rely... and all documents which the Court has ordered to be

produced." Under Rule 2, no documentary evidence... not produced under rule I shall be received at any subsequent stage of the proceeding unless good cause is shown to the satisfaction of the Court for the non-production thereof: and the Court receiving any such evidence shall record the reasons for so doing." Rule 1 speaks of the first hearing of the suit but no difficulty arises as to that, because the word hearing" is one of those comprehensive words which may be used with a more or less extensive meaning according to the context. Order XVII, Rule 1, which gives the Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of evidence. There was a hearing of the suit if not on the day when issues were settled, at any rate on the 8th October 1912, though the hearing resulted only in an adjournment. There is no doubt, therefore, that under the Code the Subordinate Judge had a discretion to refuse to accept these documents and on the question whether the delay in producing them was or was not unreasonable, he, having the parties and their Pleaders before him, was in a better position to judge than we are. We ought not to interfere especially in view of the terms of Rule 2 of Order XIII, unless we are satisfied that the Subordinate Judge exercised his discretion improperly or capriciously, and we are not so satisfied.

4. We may add that we are not, of course, in a position to say whether these documents are authentic or not or to express any opinion on the point. So far, however, as our attention was drawn to them we were not much impressed with the contents. The Subordinate Judge may have been equally unimpressed when the documents were shown to him. It may be mentioned that on the 26th July 1913, the Subordinate Judge permitted the plaintiffs after the close of their case to tender and exhibit two documents of undoubted authenticity, namely, the deposition of Chhaya Kumari and the judgment of the High Court in a suit commenced in 1879 to which we shall refer later.

5. Then as to the oral evidence which it is said was shut out, it appears that on the 17th July 1913, during the trial, when the plaintiffs had come to the end of the witnesses whom they had in attendance, they applied for one day's time to produce two more witnesses. This would have meant a break in the proceedings inconvenient to everybody concerned. The parties had certainly had ample time to prepare their respective cases and to obtain process for their witnesses. The Subordinate Judge was perfectly justified in refusing the application and in going on with the evidence for the defence. No complaint can be reasonably made on this score.

6. As it is conceded, and it seems to us properly conceded, that on the evidence on the record, the plaintiffs have failed to establish the relationship between Tularam and Khosal on which their case depends we might stop here. But it will probably be more satisfactory if we also deal with the question of the adoption of Nilkantha, to which the greater part of the argument before us was addressed. The adoption was not mentioned in the plaint but was plainly set up in the written statement of the defendant No. 1 (paragraphs 11 and 12) and the

defendant No. 3 (paragraph 3). It was to the interest of the defendant No. 2 to deny the adoption and she did so in the written statement which she filed. But as she took no further part in the suit and has not entered appearance in this appeal, her attitude is of little consequence. Curiously enough, among the issues, as they were originally framed, there was none expressly relating to the adoption, though the seventh issue (whether the plaintiffs were the nearest heirs of Shibram and entitled to succeed to the properties left by him) may have been wide enough to cover the question. The Subordinate" Judge says in his judgment that he raised an issue (now numbered 11) after both sides had closed their evidence and during the arguments of the defendants" Vakil. He adds: "I was quite prepared to give time to the parties and adjourned the hearing, but all the parties stated before me that they had no further evidence and hence the hearing was not adjourned."

7. The issue is "whether the adoption of Nilkantha Singh, father of the defendant No. 1, Chhaya Kumari, was legally valid according to Hindu Law."

8. The factum of the adoption with the performance of the usual ceremonies is admitted and the points which arise are:

1. Whether Chhaya Kumari had the necessary authority from her husband to make the adoption, and

2. Whether a daughter's daughter's son can be legally and validly adopted under the Hindu Law by which the parties are governed.

9. As to the first point, the permission relied on is a verbal permission and there are now no witnesses alive who can speak with personal knowledge on the subject. The evidence for the defendants or the contesting defendants consists of mostly of transactions which extend over a long period of time and illustrate the conduct of members of the family and those most competent to form an opinion on the validity of the adoption. From those transactions it is sought on behalf of the defendants to draw the inference that Chhaya Kumari was capable of making, and did in fact make, an adoption valid not only in point of form but also in point of authority. Perhaps not less important is the long inaction of the plaintiffs and their predecessors-in-interest.

10. The principal facts in the history are as follows:

11. Shibram died on the 9th August 1836.

12. On the 5th September 1836 an application was presented to the Collector by Bhagabati (Shibram's mother) and Chhaya Kumari for the substitution of their names in the revenue registers in place of that of Shibram "as his heirs." Bhagabati was not an heir and it is not clear why she joined in the application unless the extreme youth of Chhaya Kumari supplies an explanation. The application stated that Shibram had given Chhaya Kumari general permission to adopt.

13. After the death of Behary Lal in 1837 there were further proceedings in the Collectorate taken by Fudan Kumari, Chet Lal and Ram Lal. They founded on an alleged adoption of Behary Lal by Chhaya Kumari and were successful in obtaining an order in their favour. The result was that sometime after Bhagabati's death (in 1839), Chhaya Kumari instituted a suit against them (No. 30 of 1844) to have the order set aside. They then set up in defence, not apparently the adoption of Behary Lal which would have been invalid as being the adoption of a daughter's son, but an alleged Will of Shibram. The suit ended in a compromise and a decree founded thereon dated the 11th August 1845. Under the compromise the properties left by Shibram were divided in moieties between Chhaya Kumari and the defendants. It is not now disputed that the estate taken by Chhaya Kumari in her half share was the ordinary estate of a Hindu widow. As to the other half share it may be mentioned that many years afterwards a Will made by Ram Lal (who died in 1868) led to litigation which came before the Privy Council [Bhagabati Barmanya v. Kali Churan Singh 10 Ind. Cas. 641 : 38 I.A. 54 : 15 C.W.N. 393 : 9 M.L.T. 411 : 13 C.L.J. 434 : 21 M.L.J. 387 : 8 A.L.J. 433 : 13 Bom. L.R. 375 : 38 C. 468 : (1911) 2 M.W.N. 295(P.C.)].

14. On the 18th October 1871 the natural father of Nilkantha executed a deed formally surrendering Nilkantha to Chhaya Kumari for the purpose of being adopted by her. The deed recites that Nilkantha had been given to Chhaya Kumari in Baisakh 1269 (1862) since when the boy had been under her care. The actual adoption took place on the 19th April 1872, when the ceremonies were performed.

15. In 1877 and 1878 we have a number of Land Registration orders (C series), which show that Chhaya Kumari publicly admitted Nilkantha's title to the moiety of the various properties in her possession. At her instance the entries in the Collectorate books were rectified and she was registered as "guardian and manager on behalf of Nilkantha Singh minor." Fudan Kumari and Bhagabati (widow of Ram Lal) objected but without success, as she was in possession.

16. In 1879, however, Chhaya Kumari's attitude underwent some change. In that year or at the end of the preceding year, a suit (No. 85) was instituted by Fudan Kumari against Nilkantha and Chhaya Kumari, for the setting aside of the proceedings in the Collectorate and for a declaration that the adoption of Nilkantha was illegal. The plaintiff succeeded in the trial Court, but on appeal the decree of the Subordinate Judge was reversed by the judgment of this Court dated the 14th June 1881, to which reference has already been made. In the course of the suit Chhaya Kumari was examined on commission on the 8th March 1879. She then distinctly denied more than once that she had permission to adopt. It is not surprising that on application to the Judge, she was deprived (by an order dated 17th March 1879) of her functions as guardian ad litem for Nilkantha. The boy's natural mother was subsequently appointed in her place and in the appeal her name appears as a respondent. Though the High Court held that the evidence before them was insufficient to prove that Shibram had

given his widow a power to adopt, they refused to make the declaration asked for and dismissed the suit.

17. The result, therefore, was indeterminate and in spite of what the High Court had said, things went on as before and Nilkantha's position as adopted son was never again challenged in his lifetime.

18. In 1883 Chhaya Kumari and Nilkantha executed an instalment bond in favour of Kumar Indra Narayan Singh, the predecessor-in-interest of the defendant No. 3, in which Nilkantha is described as "adopted son of late Babu Shibram Singha." A decree was obtained on this bond, which was put in execution and was finally satisfied by the sale of the moiety of Taraf Raghab Bati to Kumar Indra Narain on the 3rd October 1887. In one of the recitals in the conveyance Chhaya Kumari describes herself as guardian of my adopted son Srimanta Nilkantha Singh during his minority."

19. By another instrument of the same date Chhaya Kumari purported to relinquish to Nilkantha the management of the properties of which she had been in charge on his behalf. From this instrument it appears that Nilkantha had previously come of age. The properties are described as his paternal properties.

20. In 1888 we have another series of Land Registration Orders. Chhaya Kumari's name was expunged from the register and that of Nilkantha substituted. The applications for these orders were made on the ground of succession by inheritance. This time the orders were made without opposition from anyone.

21. In 1890 a suit (No. 16/46) was filed by a servant of Nilkantha named Ram Lal against Nilkantha and others for specific performance of a contract or promise to grant a Dar-patni of a Patni Mehal. The promise was alleged in the plaint to have been made by Nilkantha in consideration of services rendered, particularly in bringing about a settlement of a dispute between him and his adoptive mother. Chayya Kumari was examined in this suit on the 8th June 1891, when she said, "I have no quarrel with Nilkantha Singh now. Formerly I had a quarrel. Twelve or thirteen years ago I had a quarrel." She further stated that the plaintiff was a relative who had been in her house for forty years, that she trusted him and without his advice would not have released the estate in favour of Nilkantha. The result of the suit does not appear and is not material.

22. The present suit was instituted on the 18th November 1911, just within twelve years of the death of Chhaya Kumari which occurred in December 1899. Nilkantha had died in the meanwhile and the principal defendant on the record is, as already stated, his son.

23. For the appellants much stress was laid on the judgment of the High Court of 1881. It was said that if the evidence, which could then be produced, was insufficient to prove an authority to adopt much less could such an authority be proved now. In a sense that is true, but the argument leaves out of account the

whole subsequent course of events. It leaves out of account the fact that the adoption was never again contested by any of Shibram's descendants and that till the present suit was brought it never had been contested by the plaintiffs or their predecessors. To paraphrase the language of Sir Arthur Wilson in *Har Shankar Partab Singh v. Lal Raghuraj Singh* 34 I.A. 125 : 6 C.L.J. 13 : 11 C.W.N. 841 : 9 Bom. L.R. 757 : 17 M.L.J.354 : 4 A.L.J. 497 : 29 A. 519 : 2 M.L.T. 391 : 10 O.C. 343 (P.C.), the evidence does not exclude, it rather discloses an initial probability that the adoption was likely to have been validly made (that is, made with the necessary authority) and the conduct of the parties cognizant of the facts has certainly been consistent with such an hypothesis. The judgment of the High Court raises no question of *res judicata* and though the Judges were of opinion that the evidence was insufficient to prove a general authority to adopt, they observed towards the end of the judgment that even Fudan and her husband Chet Lall admitted Chayya Kumari had some permission to adopt, though they refer that permission only to Shibram's alleged Will," and they ended by refusing to declare that the adoption was invalid. The alleged Will, it may be mentioned, purported to direct the adoption of Behari Lal. Chhaya Kumari may, or may not, have been cognizant of the application made to the Collector in 1836 in her name and the name of her mother-in-law. It matters little whether she was not, because it is clear that an adoption was contemplated as a possible event soon after Shibram's death. It is even possible that Behary Lai was actually adopted. Then again in the litigation which followed Behary Lai's death Chhaya Kumari's case was, as appears from the High Court judgment, that "she was absolutely entitled to a widow's estate with a right to adopt." That litigation may have put impediments in the way of her acting or any authority which she had received. It continued till 1845, when she was sharer of half the properties left by her husband. No doubt sometime still elapsed before an adoption was actually made but the adoption of Nilkantha seems to have been decided upon some years before 1872. As to Chhaya Kumari's denial of the right to adopt in 1879, the denial is explained by her subsequent statement that she was then on bad terms with Nilkantha. In all the circumstances we see no reason to disturb the conclusion arrived at by the learned Subordinate Judge.

24. Something was said in the course of the argument as to the admissibility in evidence of some of the documents to which we have referred, though no question of the kind seems to have been raised in the trial Court. Clearly any transaction by which the right of Chhaya Kumari to adopt "was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence" is evidence u/s 13, Clause (a) of the Evidence Act. And under Clause (7) of Section 32 of the same Act, statements of relevant facts made by deceased persons are themselves relevant "when the statement is contained in any deed, Will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a)." Regard being had to the part which Chhaya Kumari played in making the adoption, any recorded statement of hers is admissible in evidence u/s 158 of the Act. This applies to the statement in the

application of 1836, so far as it can be regarded as a statement of hers, to her pleadings in the litigation of 1844-45 and her later depositions of 1879 and 1891. The deed of gift executed by Nilkantha's natural father in 1871 was certainly a transaction or part of the whole transaction of adoption by which the right was directly and positively asserted and acted upon. Statements in that document made by the father are, therefore, admissible in evidence for what they may be worth. We have used them merely to show that the adoption was contemplated some years previously.

25. After the adoption, the various applications made to the Collector for the purpose of rectifying the land register and Chhaya Kumari's deed of relinquishment were again transactions by which Nilkantha's rights and possession as adopted son were actively asserted. So, too, were the instalment bond of 1883 and the conveyance of 1887.

26. Moreover, it must be borne in mind that the judgment of 1881 was one of the only two documents which the plaintiffs exhibited. It recounts the earlier facts and cannot be properly understood without reference to those facts. The plaintiffs did not use it merely as evidence of a suit or transaction in which the power to adopt was denied and the Court finally refused to pronounce against the validity of the adoption. So used it would be evidence against them. The other document put in by the plaintiffs was Chhaya Kumari's deposition of 1879. That must be read with her other deposition of 1891. Perhaps neither deposition is of much importance compared with what was actually done by this lady.

27. We do not, of course, desire to encourage any laxity in the admission of evidence, but in cases of this kind it is often difficult to shut out the only sources of information available to the parties. At the trial both parties use what evidence there is indiscriminately according to their interest or convenience and it is only the unsuccessful party who afterwards objects.

28. As to the legality of the adoption of a daughter's daughter's son, the question was not completely argued before us. It may be conceded that the respondents have failed to prove any special family custom such as that set up in paragraph 12 of Kali Charan's written statement. But as the family is governed by the Mitakshara and comes from Rajputana in Western India, we may be guided by the current of authority in the Bombay High Court and hold that the adoption of a daughter's daughter's son is not illegal [Ramchandra v. Gopal 32 B. 619 : 10 Bom. L.R. 948, Yamnava Govind Appaji v. Laxuman Bhimrao 16 Ind. Cas. 180 : 36 B. 533 : 14 Bom. L.R. 543, Gajanan Balkrishna v. Kashinath Narayan 23 Ind. Cas. 978 : 39 B. 410 : 17 Bom. L.R. 372].

29. According to the view we take it is not necessary to deal with the particular case of the defendant No. 3. If we had to come to a determination upon it, we should agree with the Subordinate Judge. In fact the appeal as against this defendant was not pressed.

30. In the result the appeal must be dismissed with costs. There will be one set

of costs to be divided between the defendants Nos. 1 and 3.