
(1932) 02 BOM CK 0015
In the Bombay High Court
Case No : Second Appeal No. 392 of 1929

Mallangouda Lingangouda Patil

APPELLANT

Vs

Dundapagouda Mallangouda Patil

RESPONDENT

Date of Decision : 26-02-1932

Acts Referred:

Citation : AIR 1932 Bom 529 : (1932) 34 BOMLR 1009

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—This is an unfortunate litigation, and in my opinion the lower Courts have not appreciated the principles of law applicable to the case, and have not approached it from a proper point of view.

2. The plaintiff brought this suit for a declaration that he was the adopted son of one Mallangowda, the deceased husband of defendant No. 3, and that therefore he was the owner of the properties mentioned in the plaint. He also asked for an injunction restraining defendant No. 1 from taking possession of the suit properties in execution of a decree obtained by him in a previous suit against defendant No. 3 as the widow of her deceased husband. It may be mentioned that defendant No. 1 had filed a suit against Mallangowda, During the pendency of the suit Mallangowda died, and after his death defendant No. 3 adopted the plaintiff. Thereafter defendant No. 3 was brought on the record as the heir and legal representative of Mallangowda, and a decree was passed against her.

3. Defendants Nos. 1 and 3 contested the suit. Defendant No. 1 denied the adoption set up by the plaintiff, and also contended that the suit was barred by res judicata. Defendant No. 3 denied the adoption, and stated that there was no giving and taking, but that a deed of adoption only was taken by the plaintiff from her father, and that the deed of gift was false and collusive.

4. The trial Court raised the following issues on the question of adoption, viz., (1) Does the plaintiff prove the alleged adoption ? and (2) Is the adoption invalid on

the ground that the adoptive mother was incapable of making the adoption for want of proper discretion ? These issues were found in the affirmative and negative respectively. The defendants preferred an appeal, and in appeal it was contended that some witnesses of defendant No.3 to prove that there was no giving and taking and that the alleged adoption in fact had never taken place were not examined by the trial Court. The contention was upheld and the case was remanded for a fresh decision after taking the evidence of defendant No. 3's witnesses. The case then came on before another Subordinate Judge, who stated that his findings on the issues were the same as the findings of his predecessor. As far as I can see, he felt that it was not necessary to consider any other issues except the original issue No. 1, and observed as follows: " For the reasons given by my predecessor before whom the evidence on other issues was led, I have to stick to the findings on these issues." The defendants again appealed, and the learned appellate Judge raised two issues, which are as follows: (1) Whether the alleged adoption is proved; and (2) whether the decree in suit No. 48 of 1920 is binding on the plaintiff. The learned appellate Judge agreed with the trial Court and held that the adoption of the plaintiff was valid. Defendants Nos. 1 and 3 appeal.

5. The admitted facts are that defendant No. 3, the widow, had completed fifteen years of age at the time of the alleged adoption. The plaintiff, the alleged adopted son, was holding an official position in the District as the Circle Inspector, and at the date of the adoption was about thirty-five years of age. The affairs of the widow were apparently managed by her father, and there is no doubt that she was under the control and influence of her father. In a case like this, I think, apart from the question of pleadings, it is the duty of the Court to satisfy itself that the adopting widow who is hardly more than a young girl and hardly out of her teens made the adoption voluntarily and of her free will and after fully understanding the results of the adoption. The correct principles to be observed in such a case are set down in the well known case of *Bayabai v. Bala Venkatesh Bamakant* (1866) 7 B.H.C.R. App. i. Dealing with this question the learned Judges laid down the principles applicable to such a case, and as I am remanding the case, in order that the lower Courts should properly understand these principles I set forth below the observations of the learned Judges in extenso (p. xx):-

Not only was the appellant a Hindu female, whom the law only barely recognises as *sui juris*-so careful does it require that the court should be in ascertaining that she has full knowledge of the nature and consequences of any acts affecting her legal rights, which she has been induced to perform-but she was only seventeen years of age at the time of the alleged adoption (as was admitted in the course of the argument), and she could have had little more experience or knowledge of the world than a mere child. If she adopted, or assented to the adoption of, the infant plaintiff at all, she manifestly did so at the suggestion of the Brahmana, Gumastas, and clerks who surrounded her, and who were the real actors on the occasion, and who were desirous to transfer to their own hands the control and

management of Ramakant's property and firm during the minority of the infant plaintiff.

Looking at the effect of adoption upon the rights of a Hindu woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them ;-an act which reduces her from the position of complete and absolute mistress of her husband's moveable property, and tenant, for life at least, of his Immovable property, to a mere right of maintenance.

Hindu women should be shielded from cajolery and undue influence with nearly all the jealous strictness with which the rights of a minor or other person not sui juris are watched-not an iota of which strictness should be abated in the instance of a widow just emerging from infancy, as was the case with the appellant at the time of the alleged adoption. Some relaxation of this strictness would, of course, be allowable in the case of a Hindu woman whose husband has directed that she should adopt. She is then under at least a moral duty to adopt, and the act of adoption by her is one which may justly be expected. It is different in the case of a woman whose husband leaves no such direction, because the act is one in derogation of her own right, and not in obedience to any order of her husband, and especially so in this case, in which the husband, from an anxiety to preserve his estate intact for his wife, has positively refused to adopt. If the conscience of the court were satisfied that the widow voluntarily performed the ceremonies absolutely essential for adoption, and had been previously fully informed, first, of her rights, and secondly, that the effect of an adoption upon them would be wholly to divest her of those rights and to reduce her to a maintenance, it would be the duty of the court to uphold that act of adoption, supposing the law to be that a widow may, at this side of India, adopt a son without the express authority of her husband-a question on which we do not consider it necessary, nor do we propose now, to express any final opinion.

6. This case was followed in *Ghanshyamdas Vishnudas Gandhi Vs. Laxmibai Vishnudas Gandhi*, There the adopting widow was sixteen years and eight months old. Macleod C.J. observed as follows (p. 726):

But we should have thought that the very fact that the adopted son was the son of a certificated guardian would be quite sufficient to throw suspicion on the whole transaction, and would throw the onus on the plaintiff to show that it was a valid adoption brought about with the free consent of the first defendant.

7. The learned Chief Justice then referred to the case of *Bayabai v. Bala*, and observed as follows (p. 728):-

Therefore that case is a clear authority for the proposition that in the case of a Hindu widow of immature age, the Court is bound to consider all the circumstances surrounding the adoption set up, which she disputes as not having been made by her of her own free will; and it is difficult to imagine a stronger case than this, in which the adopted son is the son of a certificated

guardian. We should have thought ourselves that the onus would certainly lie on the plaintiff to satisfy the Court that all the precautions had been taken which were necessary to satisfy the Court that the adoption was made with the free consent of this girl.

8. In my opinion, these principles are in accordance with the Hindu law. It has been stated that the adoption of a son, however beneficial it may be to the soul of the deceased husband, is not absolutely necessary for the spiritual benefit of the widow, and, on the other hand, it is highly detrimental to her temporal interests as it results in divesting her estate. A very high authority has expressed an opinion after referring to the case of *Bayabai v. Bala* that an adoption by an infant widow if not at initio void, is void in law. Of course, it is true that as a matter of law, there is nothing to prevent a widow who is not *mi juris* from adopting, and that the non-age of a widow is not an obstacle to an adoption by her. In this case it is even doubtful whether the widow was major according to the Hindu law, for there is some difference of opinion as to whether minority in the Hindu law ends on the completion of the 15th year or on the completion of the 16th year. To hold that an adoption in which an infant widow is caused to take part mechanically is valid in law would be legalising a pious fraud, because in the case of such an adoption it cannot be said to be an act of the widow, but must be an act of those who surround her and are in a position to dominate her will.

9. Mr. Jahagirdar for the respondent contends that it was not alleged by the widow nor defendant No. 1 that the adoption was not made by her of her free will, and that being the case, it is not now open to the appellant in second appeal to raise that question. I have already referred to the substance of the written statement of defendant No. 3, It is well known that pleadings in the *mo-fussil* are not drawn up with that preciseness with which one is familiar in the Presidency towns, and the Privy Council has laid down that they should not be strictly construed. But on the record it seems to me to be clear that there is no substance in this contention. The statement of the widow was in effect that she made no adoption, but that deed was obtained from her father by the plaintiff, who was holding an official position in the district, and to use her words, that deed was "false and collusive". In appeal this very question was argued before the learned appellate Judge. This is what the learned Judge says in his judgment:

I am told that defendant No. 3 was not a free agent and it is not a valid adoption as the consent of Rayawa was suborned by her father's imperative injunctions and it was obtained by misrepresentation and fraud. But there is nothing to show that there was any fraud practised or that the assent was by misrepresentation. The learned Subordinate Judge has dealt with the power of discerning and at that age of 15 or 16 a girl who has seen enough of matrimonial life realises the need of a son.

10. It is clear from this that this very question was raised before the learned Judge. His answer to it was that the learned Subordinate Judge had dealt "with

the power of discerning."

11. I am unable to follow what is exactly meant by this remark, but I think what the learned Judge meant to say was that the learned trial Judge had dealt with the question as to whether the widow had attained the age of discretion, and nothing else. Then he seems to confuse the question of the widow having attained the age of discretion, and the question whether her consent was obtained by fraud and misrepresentation. It is clear to me on his judgment that he has not applied his mind to the principles to which I have referred, viz., that it is a conscience of the Court that has to be satisfied in the case of an adoption by an infant Hindu widow on the question that she was acting as a free agent, and further that she understood and was made to realise what difference it would make to her position from a temporal point of view if she made the adoption.

12. Coming to the trial Courts judgment on which apparently the lower appellate Court relies, the position is still worse. At page 15 of the print the learned Subordinate Judge observes as follows:

The next question is whether it is invalid on the ground that the adoptive mother was minor. A minor widow can adopt provided she has attained the age of discretion, that is to say, she must be able to realise the importance of her not to make up her own mind as to the person she ought to adopt, side 44 Bom. 387. Ordinarily a Hindu girl attains this discretion at the age of 15, vide 43 Bom. 481. In this case as in the case last quoted, Rayawa had passed her 15th year when she made the adoption and she had enjoyed married life of some years. Hence the presumption is that she must have attained sufficient maturity of understanding to know the nature of her act which was to take a son in place of a natural son. There is no material to rebut this presumption. Hence, in my opinion, there is no reason to say that the adoption the question was invalid on the ground that the adopting widow had not reached (sufficient) discretion.

13. It is clear from (Sic) that the question which was present to the mind of the learned Judge was the question whether the widow had reached the age of discretion. But that the learned Judge on the evidence felt suspicious about the adoption is perfectly clear from what he says in the following paragraph. Says he:

But there are reasons in the case to say that the adoption could not have been by the free will of Rayawa, the adoptive mother. For, at the date of adoption Rayawa was only 15 years of age whereas the plain till was a middle-aged man of 35, Adoption being the outcome of natural affection, it is not reasonable to expect that a girl of such tender years will select a man of middle age for an adopted son, Rayawa expressly stated this to the Court when she was examined. Hence the adoption in question must undoubtedly have been forced upon Rayawa by her father by the exercise of parental authority.

14. Having arrived at this finding, it is inexplicable to me how the learned Judge came to the finding that the adoption was valid. I should have thought that he would have called upon the plaintiff to prove (1) that Rayawa made the adoption

of her free will, and (2) that the result of the adoption and the change in her position was properly explained to her by those who were advising her to adopt, and that it was after fully understanding the same that she gave her consent to the adoption. The learned Judge, however, disposes of this finding in a manner, which seems to me, to say the least, to be perfunctory. He says that as this contention was not raised by the defendants he did not consider it. This seems to me, with respect to the learned Judge, contrary to the principles laid down by the authorities to which I have referent

15. Under these circumstances, it is impossible for me to accept what is contended to be a finding of fact in this case, a finding which has been arrived at in entire disregard of the fundamental principles applicable to such (Sic) I must, therefore although I regret the result,-for this case has been travelling up and down from one Court to another since 1922,-remand three case to the trial Court to try and determine the following issues:

(1) Whether Rayawa had full knowledge of the nature and consequences of the proposed adoption as affecting her legal rights ; and

(2) Whether it was after understanding and being informed of her rights and the effect of the act of adoption upon them that she voluntarily performed the ceremonies essential to the adoption.

16. Liberty to the parties to adduce fresh evidence on the issues. Findings to be returned within four months.