

(1952) 12 GUJ CK 0002
In the Gujarat High Court
Case No : First Appeal No. 21 of 1951

Mehr Abhu Jetha and Others

APPELLANT

Vs

Merani Vali Mulu and Another

RESPONDENT

Date of Decision : 18-12-1952

Acts Referred:

Citation : AIR 1952 Guj 109

Hon'ble Judges : Mohanlal Ujamshi Shah, C.J.; J.A. Baxi, J

Bench : Division Bench

Advocate : G.B. Joshi and C.H. Doshi, for the Appellant; A.R. Bakshi and D.P. Davda, for the Respondent

Judgement

Shah, C.J.—The suit out of which this appeal arises was filed by the Appellants for a declaration that the adoption of Defendant 2 by Defendant 1 was invalid. One Mulu Khimanand died in about 1937 leaving a widow Defendant 1 and a daughter Jivi by her, and Anr. daughter Rudi by his first wife, also named Vali. The Plaintiffs are the sons of Rudi, who has since died, and of them Plaintiffs 3 and 4, who are minors, are suing through next friend their father Jetha Ala. Defendant 2 is Defendant 1's son by her first husband Jiva Malde who divorced her when Defendant 2 was aged about one year. After the divorce she married Mulu by a "Ghargharna" marriage and took Defendant 2 along with her as an "Angaliat" child. Defendant 2 was brought up by Mulu and Defendant 1, and after Mulu's death he has been adopted by Defendant 1, and the validity of this adoption is now in dispute. The Plaintiffs denied the factum of the adoption and contended that the adoption by Vali of her son by her first husband was invalid under the Hindu Law. The Defendants contended that as Rudi had died Jivi was the only next reversioner of Mulu and that the Plaintiffs being remote reversioners were not entitled to sue. They also contended that all the formalities and ceremonies of adoption had been performed and that the adoption was valid under the Hindu Law. The learned Assistant Judge who tried the suit held that the factum of the adoption of Defendant 2 by Defendant 1 was proved and that

an adoption by a divorced wife of her son by her former husband was valid, and on these findings he dismissed the suit with costs. The Plaintiffs have come up in appeal.

2. On the question whether the Plaintiffs were entitled to maintain this suit it is admitted that of the two daughters left by Mulu, the Plaintiff's mother Rudi has since died and Jivi is the only surviving daughter. Now the Plaintiffs take not as heirs to their mother but as heirs to their maternal grandfather and they are not entitled to succeed if there is a daughter living and capable of inheriting to her father, and since Jivi is alive it is she who succeeds to her father as the next reversioner, and the Plaintiffs become the remote reversioners, they cannot sue unless Jivi refuses to sue without sufficient cause or has connived at the adoption or has colluded with the Defendants. It appears that Jivi was aged about 17 at the date of the suit and a minor at the time, but even so, it was for the Plaintiffs to allege and prove that she refused to sue or has concurred or colluded with the Defendants and unless that is shown the Plaintiffs as the remote reversioners are not entitled to maintain this suit. No such plea has been made and it will not be proper to read into the plaint an allegation that the Plaintiffs are suing as remote reversioners because the next reversioner has either precluded herself from bringing the suit or has refused to do so. We, therefore, accept the lower Court's finding that this suit by the Plaintiffs is not maintainable.

3. There is ample evidence to prove the factum of Defendant 2's adoption. The Defendants belong to Maiyari a village under Kutiyana Mahal and the adoption is alleged to have taken place at Kutiyana on 22-06-1950. The Defendants and Ors. had gone to Kutiyana and Jiva Malde the natural father of Defendant 2 too had come there from Bokhira. The act of giving and taking had duly taken place and the Datta Homa too was performed in a Dharamshala at Kutiyana. Both Jiva and Vali depose to the giving and taking of Defendant 2 and to the fact of Vali having made Defendant 2 sit on her lap and they also speak of the ceremony of Datta Homa having been performed by a priest. Defendant 2 who is aged about twenty six years also deposes to these facts and so do witnesses Abhu Jiva and Karson Viram. The adoption had taken place in consultation with pleader Mr. Harilal Virjibhai of Kutiyana and the said Harilal had at first advised them that Datta Homa was not necessary to be performed because they were Mehars but the Defendants and Jiva themselves insisted on the Datta Home ceremony and therefore Harilal recommended to them one Narbheram Vajeram and the said Narbheram was thereafter called and he performed the Datta Homa Narbheram describes the details of the ceremony and also deposes to the giving of Defendant 2 by Jiva and the taking by Defendant 1. The deed of adoption was also executed by Defendant 1 and Jiva and was duly registered on the same day. Excepting that a photograph was not taken, because there was no photographer at Kutiyana, all necessary precautions were taken to see that the evidence regarding the factum of adoption was complete. Both the giver and the taker were ready to complete the adoption and therefore they would take care to see that the essential parts of the ceremony were not omitted. The learned Assistant

Judge who examined the witnesses was satisfied that Defendant 2's adoption by Defendant 1 was duly proved and this finding is fully justified by the evidence in the case.

4. One Bhima, son of Mulu's brother, had filed suit No. 66 of 1950 in the Kutiya Court disputing this adoption, but the suit was dismissed on the ground of want of jurisdiction. In the present suit too the validity of the adoption was in dispute. It appears that as no photograph of the ceremony was taken the Defendants were apprehensive and they, therefore, went through a fresh ceremony of the adoption and of Datta Homa again at Porbandar on 03-01-1951, and took a photograph of the ceremony, Ex. 39. This was intended mainly for arming themselves with the evidence of the ceremony of the adoption in the shape of a photograph and it does not detract from the fact of the adoption that had already taken place, nor does it indicate that the ceremony thereof was defective. Ravishanker Rewashanker who officiated as the priest at this ceremony at Porbandar speaks of the fact of the Datta Homa having been performed in accordance with the rituals. Datta Homa can be performed at any time after the physical act of giving and taking, and therefore even if originally Datta Homa was not duly performed, the deficiency would be made good. However it is clear to our mind that this was done by way of extra precaution and it by no means indicates that Datta Homa had not been performed originally. We agree, with the trial Court that the factum of the adoption of Defendant 2 by Defendant 1 has been duly proved.

5. The important question for consideration in this case is whether a widow can adopt to her husband her natural son by her first husband who has divorced her. There is nothing in the ancient texts on Hindu Law, at any rate none has been cited to us, bearing on the point probably because the Smriti writers did not permit the remarriage of a Hindu widow. Mr. Joshi for the Appellants has cited to us the decision of the Bombay High Court in *Fakirappa Veerbhadrappa v. Savitrewa Sangappa* AIR 1921 Bom 1 (FB) (A). The question which arose there was whether a Hindu widow after her remarriage had the power to give in adoption a son by her first husband, a case which was converse to the present case where a divorced wife has taken her son of the 1st husband in adoption to her second husband. No doubt a woman on being divorced by the husband ceases to be the wife of that husband and so far as he is concerned she can be taken as civilly dead. Therefore if it was a question of her giving in adoption her son by the first husband she would be on the same footing as a Hindu widow who has remarried and will have no right to give the boy in adoption because the necessary link with the first husband has broken. This question has been discussed at length by Ranade J. in -- *Panchappa v. Sanganbasawa* 24 Bom 89 (B), with whose reasoning and conclusions Shah J agreed entirely in his judgment in -- *Fakirappa v. Savitrewa Sangappa* (A) With respect, I agree with the decision in the above Bombay cases. However the case here is a converse one where a divorced wife is not giving in adoption her son by the first husband and is not laying a claim as a divorced wife. The giver of the boy is Jiva, the first

husband, and he gives his own son in adoption which he is entitled to under the Hindu Law. Defendant 1 is the taker of the boy in adoption and so far as she receives the boy in adoption, she does not do it as the mother of the boy but as the widow of her second husband. An adoption may be made by the man himself or by his widow on his behalf, and Defendant 1 here makes it on behalf of her husband the deceased Mulu. Mulu could have married Defendant 2's mother, and here he has actually done it, and therefore he could have himself taken in adoption Defendant 2 during his lifetime; and if that is so, there is no reason why his widow cannot do it after his death. Defendant 1 had lawfully married Mulu in accordance with the custom of the community after being divorced by Jiva and she was the legally wedded wife of Mulu. No question of her right to take a boy in adoption as the widow of Mulu can arise therefore, and it is immaterial whom she adopts so long as the boy could be taken in adoption. The fact that the boy taken in adoption is her natural son by the first husband can be no bar because it is to her husband that the boy is taken in adoption and not to herself and she merely acts on her husband's behalf. Therefore while the claim of a Hindu widow after her remarriage to have a right to give a son by her first husband in adoption may be opposed to the spirit and the basic principles of Hindu Law, there is nothing to prohibit the converse namely a divorced wife taking her son by the first husband in adoption to her second husband, and in our view the adoption of Defendant 2 by Defendant 1 is not invalid.

6. Mr. Joshi lastly urged that Mulu had already adopted Defendant 2 during his lifetime, and Vali could not therefore adopt Defendant 2 once again, and such an adoption is invalid. This plea has not been taken in the plaint and there is no issue and no finding of the lower Court, though it appears that some stray questions were put to the witnesses at the trial. In fact the parties have not joined issue on the point and properly speaking no questions should have been permitted to suggest that Mulu had once adopted Defendant 2. The Defendants had no opportunity of meeting the case in the lower Court. The ground is also not taken in the memo of appeal and the Appellants cannot, therefore, be permitted to urge it before us. On the merits of the question raised, it appears that Mulu had brought up and had treated Defendant No. 2 as his own son and he was anxious to see that his property passed to him. He had even applied to the revenue authorities for transferring the property to Defendant 2's name, but his request had not been granted. It appears that he had collected some persons and had expressed his desire to take Defendant 2 in adoption, but beyond a mere desire nothing had taken place. It is not alleged that Jiva was present at the time, nor is there anything to suggest that any ceremony was performed. There is thus no substance in this plea and the question of Vali's competence to take the boy in adoption in the face of a former adoption of the same boy by her deceased husband does not arise therefore.

7. In the result we hold that the adoption of Defendant 2 by Defendant 1 is valid. On both grounds, therefore, the Appellants are not entitled to any relief and the appeal is accordingly dismissed with costs.

Baxi, J.

8. I agree.