
(1913) 10 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 791 of 1912

Pirsab Kasimsab Itagi

APPELLANT

Vs

Gurappa Basappa Kadigi

RESPONDENT

Date of Decision : 07-10-1913

Acts Referred:

Limitation Act, 1963 — Article 91

Citation : AIR 1914 Bom 47 : (1914) 16 BOMLR 111

Hon'ble Judges : Macleod, J; Beaman, J

Bench : Division Bench

Judgement

Beaman, J.—In this case the plaintiff has sued to have certain leases, executed by his adoptive mother Rachava to the defendants, set aside. The material facts are, that in January 1893 or thereabouts, the husband of the lessor and the lessor being then man and wife without issue, adopted the plaintiff with the consent of his natural father, and apparently shortly after the actual adoption executed a writing Ex. 30 in the case. That writing states that the adopting parents possessed certain property, and after their death the adopted son is to obtain the whole of it. In 1894 the adoptive father Basappa died. We have not unfortunately the exact date. According to the plaintiffs own statement in his plaint, within two or three months of the death of his adoptive father Basappa, his adoptive mother Rachava drove him out of the house, and from that time until her death in 1907 the plaintiff resided with his natural father or at any rate never returned to the home of his adoptive mother. In 1902 the lessor executed these two leases to the defendants. It was also in 1902 that the plaintiff attained his majority. In 1907 the lessor, that is to say, the widow, the adoptive mother of the plaintiff, died, and within three years of her death the plaintiff bought this suit to have the leases set aside as being alienation invalid beyond the lifetime of the widow with the life estate. Upon these averments, the lower Courts held that the widow was given a life estate under Ex. 30 and therefore that the plaintiff's suit was within time. We have felt ourselves unable to admit Ex. 30 in evidence for want of registration. Once that paper is out of the

case, the position is somewhat changed. A very neat point of limitation was then very neatly put to us by Mr. Palekar and it arises in this way. He contends that in law the effect of the plaintiff's adoption was to make him the sole heir of his father, the widow being entitled to nothing more than maintenance. But since in 1894 she drove the plaintiff out and thenceforward managed the property herself, her possession from that day unto her death in 1907 must be considered adverse to the plaintiff: see the decision of the Privy Council in *Bajrangi Singh v. Manokarnika Bakhsh Singh* ILR (1907) All. 1:9 Bom. L.R. 1348. Inasmuch as the plaintiff attained his majority in 1902 and adverse possession started in 1894, it is clear that the plaintiff would have been completely time barred by the end of the year 1906 at the latest. Therefore he is not now in a position to question any of the acts done by his adoptive mother during that period. It is true that he is still her heir and would therefore retake the property but would not be in a position to challenge any of the alienations made by her as of her absolute estate. This point of limitation does not appear to have occurred to any of the pleaders or learned Judges concerned with the trial up to the conclusion of the proceedings in the Court of first appeal. The only bar of limitation relied on by the defendants in the first Court appears to have been set up under Article 91 of the second Schedule of the Limitation Act and the would arise in this way. The leases having been made in 1902 and presumably to the plaintiff's knowledge, if he believed them to be in derogation of his rights as heir expectant, he ought to have brought the suit within three years of the date of the leases or after attaining his majority, whichever gave him most time. That period would have ended at the latest at the close of the years 1905. It will be observed that for the purposes of this argument, I have stated that the plaintiff was presumed to have known of the leases. The point however was early dropped and has not been pressed before us. At one time it appeared as though there might have been something in it, but having regard to the fact that actual evidence would have been required to show that the plaintiff had in fact known of the leases more than three years before suit and no evidence of that kind being apparently available, this would clearly be a matter into which we could not go in second appeal.

2. I shall now proceed to deal in some detail with the new point of limitation taken by Mr. Palekar. But, first, I must explain the reasons for which we have excluded Ex. 30 from consideration. Regarded from the point of view of the adoptive father, we find it impossible to say that this paper could be his will, because rightly analysed it appears to reserve a life interest to himself and after himself to his widow before giving the remainder absolutely to the plaintiff, and any instrument which confers or reserves a life estate to the maker could hardly in strictness, we think, be called a will. Nor can it be said to be a gift in present to the widow. Even were it so, it would certainly require registration, so that in any view, except that of contract, it may be doubted whether this instrument creates any rights at all to which legal effect could be given. Now, there are many cases of a like nature in which similar writings appear to have been treated

by the Courts in India and even by their Lordships of the Privy Council as contracts or quasi contracts between the adoptive widow of the one part and the natural father of the minor adopted of the other. All those are cases of adoptions by widows and this is a different case because here the true adopter was of course the father, the widow having no right whatever during his lifetime to prevent him adopting if he chose to do so. Nevertheless, even in the cases I have adverted to, analysis will, I think, reveal many difficulties. Speaking for myself, I have always found it most difficult to refer these instruments imposing conditions apparently upon an adopted minor logically to any true category of contract. If real contract, then it must be a contract between the natural father of the minor son and the adopted widow, the v" natural father representing his minor son and the resultant contract supposed to be for the benefit of the minor and on that account held to be binding upon him. But I think the very furthest that any such arrangement could be taken under the law of contract would be that it would be open to the minor on attaining majority either to ratify or repudiate, so that if contracts at all, these conditions annexed to adoptions would be contracts only complete when ratified by the minor after attaining majority. But if the minor desired to ratify any such contract on attaining majority, the pre-existing contract would obviously be nugatory, since it would clearly be open to him as an adult to confer upon his adoptive mother a life estate, or, in other words, to abrogate so much of his full rights if he chose to do so. Nor is it easy to understand upon what ground the taking of a son in adoption can be regarded as consideration and when the matter is referred, as it usually is, to a future and expectant ratification, the invalidity of the whole argument becomes more apparent, since, while it is open to the minor to resile from his share of the contract, it is quite impossible for the widow to resile from hers. An adoption once made cannot be unmade. So that it would appear that these instruments of condition sometimes precedent to, sometimes contemporaneous with, sometimes subsequent to an adoption can hardly be regarded as true contracts. Nevertheless, when contemporaneous with or immediately precedent to and particularly when embodied in a deed of adoption, there can be no doubt I think now but that the law has agreed to accept and validate them. They then appear to stand upon some footing entirely peculiar to themselves. Thus the widow is said to be in law entitled to make any reasonable conditions at the time of adoption, such as, reserving to herself a life estate, although that is utterly opposed to the resultant legal effect of an adoption upon the rights of the parties, and having done Su that those conditions must be enforced as binding upon the adopted son. So that here had the adoption been made by the widow and this term incorporated in the deed of adoption or an any writing immediately precedent to or contemporaneous with it we should have felt it hard to say that it was not on all fours with similar writings which have been admitted and acted upon by the highest judicial authority without the need of registration. But having regard to the fact that the estate to be dealt with was at the time of the adoption not the widow's estate at all, it is clear that she at least had no power to make any reservations for her own benefit and in her own interest. Thus it comes out at

last that whatever benefit was to be reserved to the widow, under this adoption deed, must have been either by way of gift from her husband or by way of contract with the minor, and in any case quite clearly there was created in the widow an interest in the Immovable property which she otherwise would not have possessed and could not have possessed, and that interest exceeded in value Rs. 100 and was created by the instrument, Ex. 30. I therefore think that that instrument requires registration and not having been registered is inadmissible in evidence for any purpose whatever affecting the property now in suit.

3. That leaves me now face to face with the point of limitation raised by Mr. Palekar on such facts as remain after the elimination of the explanatory paper, Ex. 30, and it appears to me that his very clear and cogent argument would be conclusive but for one possible reply, and that reply, I think, in turn is equally conclusive. In the first place, I must not omit to notice that contentions of this kind taken for the first time in second appeal are usually viewed with considerable disfavour. It may very fairly be doubted whether a point of limitation like this involving as it does the character of the widow's possession does not really raise a question of fact which can only be answered upon evidence, and were that necessary to be taken, it is quite clear that we sitting in second appeal should be precluded at this stage from reopening the enquiry at any point and inviting or discussing any further evidence. Mr. Palekar replies, however, that no-evidence whatever is needed, that his point is a pure point of law arising upon the materials before the Court, not one of which is in dispute. At first I was disposed to think that the widow's possession, from 1894 to 1902 when the plaintiff attained his majority, might be referred and therefore ought to be referred to her position as his natural guardian. But in view of the plaintiff's admission that she drove him from the house in 1894 since which time he has never resided with her, it certainly does appear to me to be sufficient in itself to negative the ascription of her possession to any such character as that of natural guardian. Still, it may be contended that the character of the possession remains un-determined in the absence of all evidence. Speaking here entirely for myself, I should be inclined to think that the admission of the plaintiff, were there nothing else in the case, would sufficiently indicate the character of the widow's possession, and if that were so, then all the legal consequences upon which Mr. Palekar insists would flow from that possession and the plaintiff would indubitably, in my opinion, have been completely time-barred at the close of the year 1906. Nor do I think that conclusion could be affected by the suggestion that all that the widow obtained by her adverse possession was a life estate. For, after giving my most careful consideration to that point, I am utterly unable to understand or conceive any circumstances in which a widow could possibly acquire by adverse possession a merely limited estate of that kind. Adverse possession of the property would certainly give her absolute ownership, and absolute ownership being larger would of course include the lesser estate. I repeat I cannot conceive any circumstances in which a person could set out consciously to acquire a limited within a larger estate by adverse possession, the

natural legal consequences of which would be to confer the latter i.e. full ownership upon him. So that I do not think that the respondents derive any advantage from that line of argument.

4. But I do think that although we have been obliged to exclude Ex. 30 entirely from our minds as proof of any conditions annexed to the adoption of the plaintiff, I cannot ignore the very plain understanding which existed between the plaintiff and his mother as evidenced throughout the whole course of this trial in both the Courts below. Looking to the pleadings, looking to the contentions of the defendants themselves, there can be no doubt that the real truth is this, that the plaintiff believed that his adoptive mother was entitled to a life estate under Ex. 30. It is equally clear that the defendants dealt with her in the belief that she had a life estate, and I think it is quite as clear that the widow herself was really managing the property in the like belief, namely, that she had obtained the estate under Ex. 30. Now, if that was the true belief of the plaintiff and his adoptive mother, the widow, it would follow obviously that her possession so long as she lived would not be adverse to the plaintiff at any period, but merely permissive. That is to say, if the plaintiff honestly believed, though wrongly, that she was entitled to remain in possession for life and if she shared that belief and so remained in possession while he took no steps to disturb her, the principal ingredient in Mr. Palekar's case would be wanting, namely, the intention, to hold adversely in order to acquire an absolute estate, and it is upon that basis that I think the relief prayed for by the plaintiff in this appeal ought to be granted. For it follows that if I am so far right, the plaintiff allowed the widow a life estate, and at the conclusion thereof in the year 1907 no question of limitation could arise either upon the old ground under Article 91 or upon the new ground so ingeniously taken and in my opinion so admirably argued by Mr. Palekar. I think too that the merits and justice of the case point the same way.

5. In my own opinion, therefore, for the reasons I have stated the judgment of the Court below, though arrived at by a" different process of reasoning, is substantially right and this appeal ought to be dismissed with all costs.

Macleod, J.

6. I agree with the conclusion arrived at by my brother Beaman, but I would like to add a few words on the point raised by Mr. Palekar that the plaintiffs claim is time-barred on the ground that the possession of the widow from 1904 was adverse to him. There may be cases where admissions on the pleadings clearly show that the plaintiff's claim is barred under the Limitation Act, but it is very rarely that such admissions appear, and it is only in such cases that the point of limitation on the ground of adverse possession could be raised in second appeal. In this case there is only the allegation in the plaint that the widow some time after her husband's death had treated the plaintiff badly, and driven him out of the house, and that the plaintiff did not thereafter return to live with the widow, his adoptive mother. That is not sufficient by itself to establish a case of adverse possession by the widow, if only because there is no date from which adverse

possession is stated to have begun, and it would be necessary to adduce other evidence to show, not only that the widow possessed the property adversely to the interest of the minor adopted son, but also when such adverse possession began. As the plaint stands, it is quite possible that although the widow did not wish the minor to live with her, still she was willing to recognize his rights, and was willing to manage the property in his interest, or at the most, was desirous of enjoying the life estate which was given her under the adoption deed, while recognizing that the adopted son was entitled to the property after her death. So that before the Court could hold that the widow held adversely to the son, evidence would certainly have to be brought to show precisely that such possession was adverse. There is no evidence in this case, as the point was not even raised in Shah, J. either of the Courts below, and therefore I should dispose of Mr. Palekar's contention on that ground, viz., that there is no evidence before the Court which could induce it to hold that the widow's possession was adverse.