

(1948) 07 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 1174 of 1944

Shamrao Babaji Lokare

APPELLANT

Vs

Bhimrao Kondi Lokare

RESPONDENT

Date of Decision : 20-07-1948

Acts Referred:

Citation : AIR 1949 Bom 311 : (1949) 51 BOMLR 466

Hon'ble Judges : M.C. Chagla, C.J.;Gajendragadkar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.C. Chagla, C.J.—This appeal raises a very interesting question concerning the Hindu law of adoption. The facts giving rise to the appeal are that one Babaji died leaving a widow Anubai and a son Krishna. Krishna married Vitha. Krishna died on October 27, 1918, leaving a son Changdeo. Changdeo died on October 28, 1918, and Vitha died in 1928. Anubai adopted to her husband defendant No. 1 on May 14, 1934, and the suit was filed by the next reversioners challenging the adoption. Both the lower Courts took the view, that the adoption was bad.

2. It is urged by Mr. Desai on behalf of the adopted son that since the recent Privy Council decision a revolutionary change has taken place with regard to the view taken by the Courts in India as to the nature and effect of adoption. Originally decisions on adoption emphasised the property aspect of adoption and those decisions were also coloured by the English view of the law of property. The idea was shocking to an English lawyer that a property which had become vested for a long time should become divested on an adoption taking place. But the Privy Council has now emphasised that primarily the adoption must be looked at from the point of view of its religious and spiritual efficacy and that considerations with regard to the vesting and divesting of property are merely incidental. The Privy Council has also emphasised the Brahminical doctrine that it is the duty of a Hindu to see that his male line is continued and adoption is resorted to in order to give effect to that Brahminical doctrine. Now, in this case

it will be realised that it is the grandmother who is adopting, as when her son Krishna died on October 27, 1918, he left both a son and a widow. Mr. Desai's contention is that on the death of Vitha there was no one who could continue the male line of Babaji and, therefore, the power of Anubai to adopt which was merely suspended so long as Vitha was alive revived and she became capable of adopting after 1928, and, therefore, what she did on May 14, 1934, was with a view to continue the male line of Babaji which, but for the adoption, would have become extinct.

3. Now, this view, if accepted, would be wholly contrary to a full bench decision of this Court in *Ramkrishna v. Shamrao* ILR (1902) Bom, 526 4 Bom. L.R. 315 In that case Mr. Justice Fulton, Mr. Justice Crowe and Mr. Justice Chandavarkar held that where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. Mr. Justice Chandavarkar delivering the judgment of the bench mainly relied for the decision on the judgment of the Privy Council in *Mussumat Bhoobun Moyee Debia v. Ram-kishore Achraj Chowdhary* (1865) 10 M.I.A. 279 and Mr. Justice Chandavarkar points out that in the decision of the Privy Council Lord Kingsdown gives three illustrations to point out when the power of a widow to adopt is extinguished. The first case is where a Hindu dies leaving a widow and a son and where through that son the line is continued down to a grandson. The second illustration is where a Hindu dies leaving a widow and a son and where the line has been continued to a great grandson. And the third illustration was that of the actual facts of *Bhoobun Moyee's* case where a Hindu died leaving a widow and a son and that son died married, leaving a widow as heir. It was pressed upon this bench that the principle that they were laying down was not in accordance with either the letter or the spirit of the Hindu law as expounded in the books or as understood by the Hindus themselves. Mr. Justice Chandavarkar rejected that contention saying that it was not open to the learned Judges to go into that question as they must accept the law as laid down in *Bhoobun Moyee's* case. It is also necessary to point out that Mr. Justice Chandavarkar takes the view that there is and there must be some limit to the power of the widow to adopt, because Mr. Chaubal at the bar argued that a widow could adopt without any limit as to the period within which adoption may be made and her power was never at an end?it was only suspended so long as the estate was vested in others, but directly it came to her from those others it was revived.

4. Now, Mr. Desai's contention is that the law laid down by this full bench is no longer good law especially in view of the decision of the Privy Council in (1933) L.R. 60 I.A. 242 (Privy Council) In our opinion, far from the validity of the Bombay full bench decision being shaken by the Privy Council, the Privy Council has affirmed and emphasised the principle underlying that decision. In the first place, the Privy Council in this case themselves agree that some limit must be placed upon the power of the widow to adopt, and this is what they say at page

249 of the judgment :?

But that there must be some limit to its exercise, or at all events some conditions-in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognised both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has been mainly turned.

With respect, the Privy Council in this case has addressed itself to that difficult question and has drawn the line and has stated a principle which goes to show the limit of the widow's power to adopt, and the principle that they have laid down is that when at the death of her son there is his widow or a grandson, then, the power of the widow is extinguished and cannot be revived. Therefore, in order to determine whether a widow has the power to adopt or not on the death of her son, the test that has got to be applied is, has that son left a grandson or has that son left a widow? If either of the contingencies is present, then the widow has no longer the power to adopt. According to Mr. Desai the power is not extinguished but merely suspended so long as the grandson or the widow of the son are in existence, but on the death of both the suspended power revives and the widow again becomes capable of adopting. In our opinion, this submission is contrary to the express words used by the Privy Council stating that the power of the widow is not suspended but extinguished. At page 259 their Lordships consider at what particular moment in the son's life is the mother's power to adopt extinguished, and the conclusion they come to is stated at page 260, viz. that the power of adoption would be extinguished and not merely suspended on the son's death by the survival of either a grandson or the son's widow. This conclusion their Lordships arrived at after a careful consideration of the earlier decisions of the Board itself and also various decisions of the Indian High Courts including the decision in *Ramkrishna v. Shamrao*. Therefore it is no longer a matter of doubt or dispute or a matter for speculation as to what is the limit of a Hindu widow's power to adopt. The doubts and difficulties are set, at rest and the principle has been clearly enunciated by the Privy Council. Mr. Desai has relied on a passage in the case of *Bhoobun Moyee*, where their Lordships say that as long as the wife survives one-half of the husband survives, and according to Mr. Desai, so long as Anubai survived, in her one-half of Babaji survived, end when Changdeo and Vitha were no longer in existence she could continue the male line as much as Babaji could have if he had been alive. Now, it would be erroneous to compare the powers of Babaji himself to adopt with those of his widow. Although she is given power under Hindu law to continue the line of her husband, those powers are by no means "unlimited or unrestricted. There are many circumstances under which Babaji could have adopted whereas Anubai could not have. It is also true that the well known doctrine of Hindu law is that the male line of a Hindu is not extinguished so long as there is a potential mother. But the whole question that

has got to be determined in every case is whether the potentiality of the mother has come to an end or not. It is not as if the mother continues to be potential throughout her life and her potentiality never comes to an end. The principle enunciated in Amarendra's case is reiterated and re-emphasised in the later decision of the Privy Council in (1935) L.R. 62 I.A. 161 (Privy Council) and at page 165 their Lordships of the Privy Council enunciated the principle of Amarendra's case in these words:?

As observed by this Board in Amarendra Mansigh's case, the power of a widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her.

5. Our attention has been drawn to two cases which, according to Mr. Desai, go counter to the principle laid down in Ramkrishna v. Shamrao, The first is a decision which I gave sitting singly reported in Pandurang Bhau Balvadkar Vs. Changunabai, . The facts of that case were very peculiar. There a Hindu father had two sons and he died leaving those two sons and his widow. The elder son died leaving a widow and two days later the younger son died unmarried and the mother made an adoption, and the question was whether the adoption was good, and the view I took was that as the younger son had died without leaving a widow or a son, the mother's power of adoption had not come to an end and she could, therefore, validly adopt the plaintiff. It will be noticed that at the date of the death of the younger son there was neither a widow, either his or the elder brother's, nor a grandson who could continue the male line, and it should also be noticed that so long as the younger son was alive there would be no question of the power of the widow of the elder son as far as the continuation of the line of the father was concerned because the younger son was there to continue the line. The next case on which reliance was placed is a decision of the Nagpur High Court in Bapuji v. Gangaram [1941] Nag. 178 In that case a Hindu died leaving a widow and a son and the son died leaving a widow only. It was held that on the remarriage; of the widow of the son the power of the mother to adopt revived. Now, with very great respect to the Nagpur High Court, what the learned Judges attempted to do was logically to extend the principle in Amarendra's case. It is not always safe to extend logically the principle to be deduced from a particular decision. A decision is good for the facts of that particular case, and to apply it to a different set of facts with regard to which different considerations would apply is not always a sound principle. It is perfectly true that every case does not merely decide with regard to the particular facts, but there also can be enunciated and deduced a principle arising out of that case. But to extend that principle merely because logic requires it, is an attempt which is always a rather hazardous one, and according to the Nagpur High Court the true rule that they deduced from the Privy Council decisions and the other decisions of Indian High Courts which they considered, is that the grandmother's power is suspended by

the interposition of various persons, son, son's widow, son's son, and revives with the removal of the obstacle. Now, with great respect again, this rule is quite contrary to what is expressly stated by the Privy Council in Amarendra's case to which we have drawn attention. Our High Court also considered Amarendra's case in Ramchandra v. Murlidhar (1936) 39 Bom. L.R. 599 and on facts similar to the facts before the Nagpur High Court came to a contrary conclusion.

6. Applying therefore the principle, which in our opinion is deducible from the decision of the Privy Council in Amarendra's case, to the facts of the case before us, the question that we have to ask and answer is, what was the position when Krishna died on October 27, 1918. The answer to that question is that there was a widow and a grandson capable of continuing Babaji's line. As that was the position on the death of Krishna, Anubai's power to adopt came to an end and was extinguished, and the fact that both Changdeo and Vitha died did not bring about a revival or renewal of that power to adopt which had already come to an end. The result, therefore, is that the adoption of defendant No. 1 by Anubai was not a valid adoption. We agree with the decision of both the lower Courts. The appeal fails and must be dismissed with costs.