

(1943) 02 BOM CK 0022
In the Bombay High Court
Case No : Second Appeal No. 130 of 1941

Shivappa Gurappa Shettar

APPELLANT

Vs

Virbhadrappa Shivarudrappa Kalasapur

RESPONDENT

Date of Decision : 03-02-1943

Acts Referred:

Succession Act, 1925 — Section 86

Citation : AIR 1943 Bom 423 : (1943) 45 BOMLR 844

Hon'ble Judges : Lokur, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Lokur J.

1. The facts of this case are undisputed. The property in suit belonged to one Totappa Karabasappa who died in 1897 leaving behind him two widows Rachawwa and Rudrawwa but no issue. Before his death he made a will to the effect that after his death his two widows should enjoy his moveable property and the income from his Immovable property, that they should not alienate the Immovable property by sale or mortgage, that if they did not agree, they should divide the property equally between themselves, that on the death of one of them the survivor should enjoy the whole property and that on the death of both of them his next heir Gurappa or his heirs should take possession of and enjoy his Immovable property. Gurappa was Totappa's grand-father's brother's grandson.

2. Rachawwa died in 1922 and then the surviving widow Rudrawwa took defendant No. 1 in adoption on March 21, 1927. Gurappa died thereafter in 1934 during Rudrawwa's lifetime, and the plaintiff is his son and heir. Rudrawwa having died on April 1, 1936, the plaintiff brought this suit to recover possession of Totappa's Immovable property from defendant No. 1 and his tenants, alleging that it had vested in his father Gurappa under Totappa's will, and that as the will

contained an implied prohibition of adoption of a son by either of his widows, the adoption of defendant No. 1 by Rudrawwa was invalid.

3. On both these grounds the trial Court found in favour of the plaintiff and decreed his claim, but in appeal the learned District Judge held that Totappa's will contained no bequest in favour of Gurappa, that the property did not vest in him on Totappa's death, and that there was no prohibition of adoption either express or implied, The plaintiff's suit was, therefore, dismissed. He has now come in second appeal, and its decision must depend mainly on the construction of Totappa's will.

4. The relevant part of that will run as follows :-

As a result of an attack of fever since about three months different ailments in my body have been becoming more acute and I am restless and have become very weak. I have doubts as to whether I would survive the disease for long, I have no issue, male or female. I have not taken anybody in adoption. Therefore it appears to me to be proper to make a will relating to the mode (or order, "krama") of enjoyment etc. of the properties, moveable and immovable, of my ownership and in my vahivat after my demise.... I have two wives by marriage, viz. Rachawwa and Rudrawwa.... Neither of them has issue. Both of them have lived with me as good wives. While I have been laid up in bed as mentioned hereinbefore, both have been attending to me with great care. There are no dissensions between them and they are living affectionately. After my death they are my direct heirs to my moveable and Immovable properties. Gold and silver which is their stridhan is in their respective possession. Other moveables... should be enjoyed by both of them as they like and they can also make any arrangement respecting them according to their choice. They and no others are the owners of my moveables also. They should enjoy my Immovable properties during their lifetime. None has any right of interference regarding my Immovable properties during the period of their lifetime. Dues to me from others approximate Rs. 1,500. Both of them should recover them. None else has any right in the matter of recovering them. If there be dispute between them after my demise, they should live separately after dividing equally my moveables, dues from others and the income from Immovable property. My wives have the right to the income of my Immovable properties, but they have no right to alienate them either by mortgage or sale etc. If either of them were to the earlier than the other, then the widow surviving will take her share of moveable and the income of Immovable properties. None else has any right over that. To me Gurappa Sanganbasappa Shettar is the next heir. After my wives, the said Gurappa or his heirs should take possession of my Immovable property and enjoy it; while my wives are alive, neither the said Gurappa nor his heirs shall have any right of interference of any sort in the Immovable property.

5. These are all the pertinent recitals in the will. If Totappa really wanted to prohibit his widows from adopting a son to him, it is strange that after giving all the detailed instructions with such meticulous care to his widows as to how they

should behave after his death and what they should do, he did not tell them what they should not do. It is not that the matter of adoption was not present before his mind or that it had slipped from his memory. He did refer to it and say that he had not taken anybody in adoption. He could have easily avoided all this litigation by adding one sentence that his widows also should not adopt anybody after his death. Possibly he did not want to fetter their discretion and left the matter to their choice.

6. But Mr. Jathar argues that the very fact that he disposed of his entire property by his will amounts to an implied prohibition of adoption of a son to him after his death, and he relies upon the ruling in *Malgauda Paragauda v. Babaji Dattu* ILR (1912) 37 Bom. 107. In that case the testator had made a complete disposal of his property in his daughter's favour, and it was held that any adoption to him by his widow could not be upheld without giving the go-by to the testator's expressed wishes. In the will in that case, not only was there a complete bequest of the whole of the estate to the daughters but the widow was in terms prohibited from disposing of the property to anyone except the daughters. When that case was decided, it had not yet been realised that a widow could validly adopt a son for the spiritual benefit of her husband, though such a son might not get his property by the adoption. In (1933) L.R. 60 I.A. 242 (Privy Council) the Privy Council has laid down that the validity of an adoption depends on spiritual considerations and the devolution of property is only accessory and that the power of a Hindu widow to adopt a son does not depend on the vesting or divesting of property. Hence the trend of recent decisions is to avoid as far as possible construing a will so as to imply prohibition of adoption, even though it may purport to dispose of the entire estate of the testator. Thus in *Vithagouda Lingappa Sardesai Vs. The Secretary of State for India*, , though the testator had expressly given all his estate, both watan and nonwatan, to charities and, therefore, evidently intended that no son should be adopted, it was held that as he could not validly bequeath his watan property, there was no implied prohibition of adoption by his widow. The learned Chief Justice observed (p. 822) :-

No doubt the Court may in a proper case imply a prohibition against adoption, but it can only do that if it comes to the conclusion that on the true construction of the will the intentions of the testator can only be given effect to by treating the right to adopt as prohibited, and any implied prohibition must be restricted to the purposes for which prohibition is held to be required.

7. In the will in that case the testator had recited not merely that he had not taken any son in adoption but that he was not going to adopt and that he had neither given nor was he going to give authority to make an adoption either to his wife or to anybody else, and yet it was held that as his disposition of the watan property was not tenable, an implied prohibition of the adoption could not be inferred.

8. In *Kriskna Yelagouda v. Ramagouda Kadagouda* (1940) 43 Bom. L.R. 483

Broomfield J. observed that if the Court could say no more than that the testator might have, or even probably would have, prohibited adoption in any circumstances or in those particular circumstances, it could not be said that his statements or his actions were equivalent to a prohibition. In *Yadao v. Namdeo* (1921) L.R. 48 IndAp 513 their Lordships of the Privy Council observed at p. 522 that a direction in a will to operate as a prohibition against the testator's widow adopting any boy to him as a son except the boy named by him "must be explicitly made and clearly intended by him to limit the discretion of his widow for all time", This observation was quoted with approval by their Lordships in *Jagannath Rao Vs. Rambharosa*, .

9. As stated by the Privy Council in *Jaganath Rao v. Rambharosa*, according to the Bombay school of Hindu law, a Hindu widow has in herself power to adopt, subject only to such restrictions, if any, as may have been imposed upon her by her husband. In the absence of such restrictions, the widow's power to adopt is presumed and the cases cited above have effected a reconciliation between the continuation of that power and the disposal of his entire property by her husband. The case of *Malgauda Paragauda v. Babaji Dattu* is still good law and the principle laid down in it has not been upset by any of those cases, But it will be no surprise if a full bench or the Privy Council were to over-rule it in view of the recent decisions regarding the validity of an adoption for spiritual purposes only. It is, however, not necessary to anticipate it in this case,

10. As observed by Broomfield J. in *Krishnawa Yelagouda v. Ramagouda Kadagouda* (p. 490) :-

...when, as in this case, the husband has said nothing about an adoption one way or the other and the prohibition of adoption is sought to be inferred from statements about other matters or from conduct, it stands to reason that the inference suggested, if it is to be acted upon, must be a necessary inference. The Court must be able to say with confidence that what the husband has said or done shows that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them.

11. The test to be applied in such cases is definitely laid down by the Privy Council in *Jaganath Rao v. Rambharosa*, At p. 780 their Lordships say that the question for decision is, "Was the adoption so contrary to the directions of the testator as to have been prohibited by him ?" The answer to this question necessarily depends on the construction of the particular will in each case.

12. There is no doubt that Totappa intended by his will to arrange for the smooth enjoyment of his property by his widows after his death. But did he intend to make Gurappa his sole legatee after the death of his widows? The will read as a whole does not intend to divert the devolution of his property. Totappa says that after his death his two widows are his direct or natural heirs. He then proceeds to describe how they should enjoy the property and what they should do if they

cannot pull on amicably. Regarding Gurappa he says that he is his next heir, and that after his wives either he or his heirs should take possession of his Immovable property and enjoy it, but while his wives are living, neither he nor his heirs should interfere with his Immovable property in any way. This shows his anxiety to protect his widows against any interference by Gurappa during their lifetime. He did not expressly bequeath his Immovable property to Gurappa, but stated that Gurappa was his next heir and that he would (in any event) take his property after the deaths of his widows, but he warned him against disturbing the widows' possession until then. This was apparently the only object of introducing Gurappa's name in the will.

13. Mr. Jathar rightly points out that even in connection with his widows Totappa has said that they should be in enjoyment (upabhog) of his property after his death. Thereby he meant that they should be owners of his property after his death and he has used the same expression in the case of Gurappa also. So he argues that, according to Section 86 of the Indian Succession Act, 1925, when the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears. In the first place, as I have stated, even in the case of his widows Totappa did not purport to bequeath his property to them, but merely gave them instructions as regards the mode of enjoyment, after reciting that they were his natural heirs after his death. In the case of Gurappa, his intention is to be gathered from the context. The three sentences quoted above have to be read together, and they show that he recognised that after the deaths of his widows Gurappa would be the next heir, and wanted that until he thus succeeded to the property, he should not interfere with its enjoyment by the widows. It is significant that he did not purport to expressly give his property to Gurappa individually, but he thought that Gurappa would be his next heir if he survived the widows and would naturally take possession of his property after the death of the survivor of his two widows. But he wanted him to wait till then. He also contemplated the possibility that Gurappa may not survive the widows and therefore he said that the property should be taken possession of by Gurappa or his heirs. He did not bequeath his property to Gurappa "and" his heirs, and the use of the word "or" shows that he was in doubt as to whether the property would eventually go to Gurappa after the deaths of his widows. Thus, if Gurappa would not be the next heir after the death of the surviving widow, he did not mean to deprive the rightful heir, whoever he may be, of his inheritance. When he mentioned Gurappa, he did not refer to him in his individual capacity, but as his possible next heir. Such a question often arises as to whether a gift to an adopted son is a gift to him for fulfilling that character or to him personally, and, as observed in (1885) L.R. 12 I.A. 72 (Privy Council) in such cases, "the distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances". In *Lali v. Murlidhar* ILR (1906) All. 488 a Marwari Brahmin adopted his sister's

son, and seven years later he made a declaration that he was his heir and successor. The Privy Council held that the intention was to give him the property as his adopted son, and as the adoption was invalid, the gift did not take effect. Similarly in *Kalyantai v. Shivappa* AIR [1924] Bom. 516 one Maralswami, the head of a Lingayat Math, had an illegitimate son born of his permanently kept mistress, and as he was held to be a *dasiputra*, not entitled to the Gadi of the Math, Maralswami took him in adoption and then made a gift of all his property to him as his son "given in adoption to him by the natural mother". It was held that the gift failed as the adoption was "clearly invalid".

14. Mr. Jathar points out that in the event of such an interpretation of the will there would be an intestacy and a will should be so construed as to avoid intestacy. But where the intention of the testator is obvious and the words used are not inconsistent with it, effect should be given to, the words so as to carry out the intention. As laid down by the Privy Council in *Rameshwar Baksh Singh Vs. Balraj Kuar*, :-

It is the duty of the Court, in interpreting a testamentary instrument, to find out the intention of the testator. The intention is to be gathered from the language used by the testator, because it is the words used in the instrument, by which he has conveyed the expression of his wishes. The meaning to be attached to the words may, however, be affected by surrounding circumstances; and, when this is the case, those circumstances, should be taken into consideration. The meaning of any clause in a will is to be collected from the entire instrument; and all the part; of a will are to be considered with reference to each other and so as, if possible, to form one consistent whole.

15. Mr. Jathar cited several English and Indian cases as regards the construction of wills. As observed by Kay L.J. in *In re Stone : Baker v. Stone* 'one will ought not to be construed by another where the language of the two is not identical, and we ought to abide by the language used by the testator in his will. Applying these tests and reading the will as a whole, there is no doubt that Totappa was not anxious to make a bequest in favour of Gurappa but only to see that his lawful heirs succeeded one after another, but during the lifetime of his widows their enjoyment would not be interfered with by any one.

16. It is pointed out that the very fact that Totappa enjoined his widows not to alienate the property shows that he wanted them to leave the property intact for the benefit of Gurappa. Such an inference does not necessarily follow. It may be that he wanted that his property should not go out of his family and, therefore, prohibited his widows from alienating it. From this it cannot be inferred that he intended that it should go to Gurappa even if he was not his heir at the time of the deaths of his widows.

17. It is contended that u/s 119 of the Indian Succession Act, as Gurappa was to take the property after the life estate of his widows, he took a vested interest, and, therefore, after his death, it passed to his son and heir, the plaintiff. This

presupposes a bequest in favour of Gurappa to take effect after the deaths of the testator's widows. But, as I have pointed out, Totappa did not intend to bequeath his property either to his widows or to Gurappa, but merely to see that his widows' enjoyment after his death as his natural heirs was not disturbed by any one and he also advised them as to what they should do if there were dissensions between them. I, therefore, hold that there was no bequest in favour of Gurappa and the property was not vested in him after Totappa's death. It follows from this that there was no implied prohibition against the adoption of a son by his widows. The factum of defendant No. 1's adoption is not disputed. He is, therefore, the lawful heir of Totappa, and the recital in the will that Gurappa would take as his next heir after the deaths of the widows cannot be given effect to.

18. The plaintiff's suit is, therefore, rightly dismissed, and I dismiss the appeal with costs.