
(1930) 07 BOM CK 0016

In the Bombay High Court

Case No : Letters Patent Appeal No. 13 of 1928

Vishvanath Ramji Karale

APPELLANT

Vs

Rahibai Ramji Karale

RESPONDENT

Date of Decision : 04-07-1930

Acts Referred:

Registration Act, 1908 — Section 17, 58, 60

Citation : (1931) ILR (Bom) 103

Hon'ble Judges : J.W.F. Beaumont, C.J.; Baker, J

Bench : Division Bench

Judgement

Baker, J.—The plaintiff sued to recover possession of the plaint property alleging that he was the adopted son of one Ramji Mayaji, husband of defendant No.]. Defendant No. 1 the widow contested the factum and validity of the adoption. Defendant No. 2 was the husband's brother's wife of defendant No. 1. The trial Judge awarded the plaintiff's claim, holding the adoption proved, but on appeal the decree was reversed by the District Judge of Ahmednagar on the ground that the trial Court had improperly admitted into evidence a certified copy of the adoption deed executed by Ramji, and that the adoption was not proved. Against this decision a second appeal was presented. That appeal was summarily dismissed, and under the Letters Patent an appeal against that decision has been admitted.

2. The sole point in this appeal is whether the first Court acted improperly in admitting into evidence the certified copy of the adoption deed. According to the plaintiff's natural father Ganu the adoption deed after registration was returned to the executant the adoptive father and was taken away by him for the purpose of getting the names transferred in the record of rights and that it was never seen again. The first Court held that it was proved by Ganu that Ramji took away the deed on the pretext that he wanted it for transferring the lands in the name of the adopted boy. He says :-

On this point, Exhibit 28 Ganu Vyanku is not cross-examined and there is no

reason why this story should be disbelieved. The possession of the original document is therefore proved to have been with Ramji and defendant No. 1 being his widow must naturally be in possession of it. She was summoned to produce the original deed, but says she has not got it. It may be pointed out that Ganu Vyanku can have no ulterior motive in keeping back the original document if he had it. The original not coming forward, the plaintiff is entitled to prove the document by producing secondary evidence, namely, the certified copy.

The learned Judge further held :-

A reference to Sections 63, 65, 86, 76 and 89 of the Evidence Act will show that when the secondary evidence produced is a certified copy allowed by law, no further proof of its execution is required. I hold that the certified copy. Exhibit 63, is admissible in evidence. I am satisfied from the oral and documentary evidence that the plaintiff's adoption is proved.

3. The view of the learned District Judge on appeal was that--

the plaintiff says nothing about the adoption deed, but one year and seven months after the plaint, the respondent asks for a summons to the first appellant to produce it. The lower Court places implicit reliance on the plaintiff and allows him to put in a certified copy. The lower Court's argument is that if he had the original he would no doubt produce it. This argument appears to me to assume that the original is a genuine document—a point upon which there is very considerable room for doubt. I think the lower Court was wrong in allowing secondary evidence of the document. The lower Court has not even insisted on proof that any such document was ever executed by the deceased Ramji. The person who is said to have identified him before the Sub-Registrar is not examined. The respondent cited the writer and witnesses, but did not examine them. The result of this extraordinary conduct of the case is that the plaintiff is allowed to accuse his adversary without any proof of having a certain document, and is allowed to take every advantage of this accusation, being exempted thereby from his obligation to prove the execution of the document. I find that the certified copy of the adoption deed was wrongly admitted.

4. It is argued on behalf of the appellant that the discretion as to admitting secondary evidence rests in the trial Court and reference has been made to the judgment of this Court in *Ningawa v. Ramappa* (1903) 5 Bom. L.R. 708, which lays down that the question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and that his conclusion should not be overruled except in a very clear case of miscarriage. In the present case there was the evidence that the adoption deed was handed over to the executant, the adopting father, for a certain purpose and taken away by him and has not since been seen, The witness Ganu was not cross-examined on that point. Moreover, the remark of the learned Subordinate Judge that if the document was in his possession he would certainly have produced it, as it

supports his case, has a good deal of force in it. That the question whether a certified copy should or should not be admitted is one within the discretion of the trying Judge has again been held in the Privy Council case of *Shrimati Rani Hurripria v. Rukmini Debi* (1892) L.R. 19 I. A. 78, on which the judgment in *Ningawa v. Ramappa*, above referred to, is founded, where it is said (p. 84):-

We are of opinion that the present is not a case of such clear miscarriage on the part of the trial Judge as to justify his discretion being overruled by the Court of appeal.

5. Then as to the proof, the document, in this particular instance, has been registered and bears the necessary endorsements by the Sub-Registrar before whom the executant was identified by the Kulkarni of the village. The effect of registration has been considered by this Court in *Tama Vs. Govind Bilal*, where it was held that Sections 58, 59 and 60 of the Indian Registration Act provide that the facts mentioned in the endorsement may be proved by those endorsements provided the provisions of Section 60 have been complied with. The endorsement of the Sub-Registrar in the present case shows that Ramji the executant admitted execution of the document and gave his thumb impression and that he was identified before the Sub-Registrar by Keshav Hari Talati who was known to the Sub-Registrar. In these circumstances the view of the first Court that the copy of the adoption deed is admissible in evidence and that is sufficiently proved appears to be correct.

6. However, a second objection was taken to the admissibility of this document by the learned District Judge u/s 63A of the *Dekkhan Agriculturists' Relief Act*. The parties in this case are agriculturists and Section 63A provides that when an agriculturist intends to execute any instrument required by Section 17 of the Indian Registration Act, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate and the document must be written either by the Sub-Registrar or in his presence in accordance with the provisions of Sections 57 and 59 of the Act and then be registered under the Indian Registration Act. The effect of this provision is that such documents as are required by Section 17 of the Indian Registration Act to be registered must in the case of agriculturists be written either by or in the presence of the Sub-Registrar and be subject to certain formalities. Now, admittedly, this document was not written in the presence of the Sub-Registrar or by him, and the question then would be whether an adoption deed of this nature requires registration. u/s 17 of the Indian Registration Act, adoption deeds in themselves are not compulsorily registrable, but it is contended that by this adoption deed Ramji the adopter created an interest of Rs. 100 or upwards in Immovable property and therefore the document would be compulsorily registrable. The answer to that is that it is not the adoption deed which confers the status of an adopted son or any interest in the property of the adoptive father, but the adoption itself which in this case had taken place some days earlier. A perfectly valid adoption can be made

without an adoption deed and any status which the adopted son gets by the adoption is due to the proper ceremonies being performed and not to any deed passed as evidence of that adoption. It has been suggested, however, that the case of Pirsab valad Kasimsab v. Gurappa Basappa ILR (1913) 38 Bom, 227 : 16 Bom L.R. 111 leads to a contrary conclusion. But that case supports my view. It says that a deed of adoption by which an interest is reserved to the wife of the adopter in Immovable property which she otherwise would not have possessed and could not have possessed, when such interest exceeds in value Rs. 100, requires registration. That, however, is a case in which the adoption deed created an interest in a third person and not in the adopted son and therefore it does not in any way conflict with the principle that it is the act of adoption and not the adoption deed which gives rise to the rights of an adopted son. There can, therefore, be no question that the adoption deed does not purport to create, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards in Immovable property. It has, however, been suggested that it operates to declare such interest and the question will therefore arise, what is meant by declaring an interest in Immovable property V On this point we have a ruling of this Court in Sakharam Krishnaji v. Madan Krishnaji ILR (1881) 5 Bom. 232, where it is laid down (p 236):

There [i. e., in Section 17 of the Indian Registration Act III of 1877] "declare" is placed along with "create", "assign", "limit", or "extinguish" a "right, title or interest," and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to....It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section...it is not the expression or declaration of will by which the right is constituted.

Applying these principles to the present case it will be seen that the adoption deed is not the expression or declaration of will by which the right is constituted but merely a recital of an act which has already taken place. As I have already pointed out, it is not the adoption deed by which the rights of the adopted son are created but the adoption itself and any wording in the adoption deed cannot either create or limit any rights which the adopted son gets by his adoption. The result of this is that the adoption deed must be regarded as admissible in evidence, and, taken in conjunction with the oral evidence, is sufficient evidence of the proof of the adoption We would, therefore, set aside the decree of the lower appellate Court and restore the decree of the first Court with costs throughout. The rule for stay of execution is made absolute with costs.