(1924) 04 BOM CK 0007

Bombay High Court

Case No: Suit No. 33 of 1917, First Appeal No. 36 of 1921

Shiddubai Rudragauda Desai	APPELLANT
Vs	
Nilapgauda Bharmagauda	RESPONDENT

Date of Decision: April 3, 1924

Acts Referred:

- Evidence Act, 1872 - Section 111

Citation: AIR 1924 Bom 457 : (1924) 26 BOMLR 622

Hon'ble Judges: Shah, J; Norman Macleod, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Norman Macleod, C.J.

One Rudragauda bin Basangauda Desai of a village in the Parasgad Taluka District Dharwar died in 1909 leaving two minor widows and a very considerable estate. That year the Nazir of the District Court of Belgamn managed the Desai''s property as his guardian during his life-time, and after his death the Collector on behalf of the Court of Wards continued to manage it during the minority of the widows. Nilubai, the senior widow, died in 1916. Shiddubai, the junior widow, filed Suit No. 333 of 1917 in the Court of the Additional First Class Subordinate Judge, Dharwar, against Nilappa-gauda, who, it is alleged, had been adopted by Nilubai the day before she died. She joined as second plaintiff Sanganagauda who is said to have been adopted in 1907. The plaintiff asked for a declaration that the adoption of Njlappagauda did not take place at all and was illegal and that the second plaintiff was the rightful owner of the plaint property in possession of the Court of Wards), The plaintiff alleged that Nilappagauda was setting up a false claim as the adopted son of Nilubai, that Nilubai could not have adopted defendant as she was in a very critical condition of illness, that she had no authority and was not in a position to have any authority to adopt, that she was not in the position of a senior widow for making an adoption, and that the adoption deed relied upon by defendant was false as it was

understood that it was forged after the death of Nilubai.

2. There were other contentions between the parties to which it is not necessary to refer. Nilappa contended that he had been validly adopted by Nilubai as senior widow of Rudragauda, and also filed Suit No. 480 of 1918 asking for a declaration that he was the validly adopted son of Rudragauda.

3. The two suits were tried together and one judgment was delivered. Shiddubai and her co-plaintiff practically gave up the whole of their case before the Court, and really the only issue which arose in Nilappagauda''s suit was whether his adoption by Nilubai was proved and was valid. That was a simple question of fact, and after a lengthy hearing and a very careful discussion of the evidence, the Subordinate Judge came to the conclusion that Nilappagauda bad been validly adopted, and consequently dismissed Shiddubai''s suit and decreed Nilappagauda''s suit.

4. Shiddubai and Sangangauda have filed appeals in both the suits. It is obvious that Sangangauda has no locus standi, the real appellant being Shiddubai the junior widow of Rudragauda. It is important to notice that in the memorandum of appeal which was identical in both the appeals, no mention whatever was made of the contention that undue influence had been exercised over Nilubai by Ningangauda, the uncle of Nilappa, who had been appointed guardian of Nilubai''s person by the Court of Wards. As soon as the appeal was opened before us, it was clear that the case was going to be made out that, assuming that the findings of facts found by the Subordinate Judge were correct, still the proper inference to be drawn from them was that Ningangauda exercised undue influence over Nilubai. Reliance was placed on Section 111 of the Indian Evidence Act but clearly it has no application to the present case. Shiddubai resisting Nilappa''s claim would first have to prove that Ningangauda was in a position to dominate the will of and exercise his influence over Nilubai, and, secondly, she would have to prove that Ningangauda in fact did influence Nilubai to adopt Nilappagauda. There being no issue on these questions, no evidence, and no findings, it is impossible for this Court to adopt the suggestion of the appellants'' counsel and allow the appeal without even giving the respondent an opportunity of adducing evidence on these questions and obtaining a finding on them from the lower Court. Nor considering all the circumstances of the case, is it permissible for the appellants to make out an absolutely new case on a question of fact in appeal, and to ask that the case should be sent down, so that further evidence may be taken on these new issues. It seems to us clear that the appellants were not able to assail the findings of fact by the learned Judge, and consequently they were forced to change their ground before this Court and to endeavour to persuade this Court to come to the conclusion that the aspect of the case now brought before it ought to be decided now, as the appellants had no chance of proving it in the lower Court.

5. The appellants have even gone further and have suggested that the onus lay on the respondent to prove that apart from the factum of adoption by Nilubai no

undue influence was exercised by Ningangauda. That is a position which we think the appellant is not entitled to adopt as the question had never been suggested in the lower Court. It is not the case that Nilappagauda was an entire stranger to Nilubai who was brought in by Ningangauda. Nilappagauda was the first cousin of Nilubai and as the nearest relation she should naturally look to adopt him to her husband''s estate. It is not the case that Ningangauda had obtained any advantage for himself. So that there are no suspicious circumstances on the facts of the case before the Court which would induce the Court to think that it was absolutely necessary that those suspicions should be cleared up before a final decree was passed.

6. On the factum of adoption, certainly it cannot be disputed that Nilubai was very ill, and in those circumstances it might very well be that Ninga, ngauda suggested the propriety of her adopting to her husband before it was too late. She might also well have considered that it was a duty imposed upon her, and she might have thought that it was necessary to adopt immediately. We have Exhibits 189 and 190 which were petitions to the Collector and the Commissioner by Nilubai to adopt. Those petitions originated owing to her having desired to adopt the defendant in 1911. There was no necessity for Nilubai to apply to the Collector for permission to adopt. In any event permission seems to have been refused and therefore the matter remained in suspense. But there would be nothing unnatural in Nilubai''s thinking that it was necessary to adopt to her husband. The question then would be whether she was so ill the day before she died that she did not know what she was doing, and was present at the adoption ceremony in body only and not in mind. On that question we have the opinion of the learned Judge on the evidence of the witnesses who were present at the ceremony. There can be no doubt in our opinion that the ceremony took place and that thereafter the adoption deed was drawn up and signed. We are willing to accept the opinion of the Subordinate Judge that the adoption deed was signed by Nilubai. It might well be that she was not aware of her action. But the learned Judge has found that she was aware of what she was doing, and in spite of the doctor''s evidence, he determined to rely upon the evidence of those witnesses who were present at the ceremony. The doctor''s evidence merely goes to this extent that Nilubai was very ill on the day he visited her. But the opinion of the doctor who visited the patient on one day that she would not be capable of a particular action the next day after his visit must be hypothetical and cannot be implicitly relied upon, or at any rate it must be put into the scale against the evidence of those who actually deposed that the particular act had been done by the patient. We think, therefore, that we are entitle] to accept the decision of the learned Judge on the question of the factum of adoption, that although Nilubai was ill, she was not so ill the day before she died that she did not know what she was doing. The evidence would no doubt have to be considered in a different light, if the claimant had been a complete stranger placed before a dying woman in order that she might be induced to adopt him.

7.We have already pointed out that Nilappa was the nearest relation to be adopted, and Nilubai had already considered the advisability of adopting him to her husband. In our opinion, therefore, Nilappa is entitled to succeed and these appeals should be dismissed.

8. In Suit No. 480 of 1918 there will be an inquiry as to what proper maintenance should be allowed to Shiddubai.

9. On the question of costs, probably this question of adoption had to be decided sooner or later, and considering all the circumstances of the case, we think that the coats in the Courts below should come out of the estate, and there will be no order as to costs of the appeal. Undoubtedly Shiddubai was in the wrong. Nilappa on the other hand has come into possession of a large estate and he can now be generous. This will be on condition that there will be no further appeal. If there is an appeal there will be a decree in favour of Nilappa with costs throughout.