
(1871) 03 CAL CK 0006

Calcutta High Court

Case No: Special Appeal No. 2591 of 1870

Krishna Dyal Ghose

APPELLANT

Vs

Nittianand Ghose

RESPONDENT

Date of Decision: March 21, 1871

Final Decision: Dismissed

Judgement

Bayley, J.

I am of opinion that this special appeal must be dismissed with costs. The main question raised before us is that the mere giving and taking of the son was not sufficient for the purposes of adoption, and that there is no proof on the record of the performance of those ceremonies which are required by the Hindu law to give validity to the adoption in this case, which is admitted to be one of a Sudra. Another point raised is that the suit is barred by limitation. I think it is sufficient for the purposes of this appeal to deal with the first point only.

2. Now, it is clear that the adoption was made in 1247 (1840). It is also clear that this suit has been brought 30 years afterwards. It is also admitted that there was no dispute in regard to this property until the year 1256 (1849), or, in other words that, from the year 1247 (1840) down to the year 1256 (1849), there was an uninterrupted enjoyment of all the rights that belong to an adopted son by the adopted son in this case, and it is not denied that the funeral rites of the father were performed by this adopted boy. It is urged that these funeral rites might just as well be performed by the other members of the family, but this is rather begging the question. Everybody knows that the Sapindas are entitled to perform the funeral ceremonies, but it is equally known that an adopted son fully represents the son of the father; and that on the ground of this very representation, he it is who is ordinarily looked to for the performance of the funeral rites of the adoptive father,

3. We are referred to the case of Bhairabnath Sye v. Mahes Chandra Bhadury 4 B.L.R. A.C. 162 decided by Mr. Justice Loch and myself, but I think that that case has no

bearing upon the question at issue in this case. In that case although the objection taken was that a Sudra adoption is not valid in the absence of certain ceremonies enjoined by the Hindu law, we found that such ceremonies had been performed But see the case of Bhairabnath Sye v. Mahes Chandra Bhaduri, 4 B.L.R. A.C. 162. It is then ingeniously remarked that in that case we gave our opinion that the performance of those ceremonies was necessary to render the adoption valid, but we did not express that opinion with regard to the necessity of the Hindu law, but only with reference to the facts of the case. We substantially said there that it was unnecessary to go into the question whether the ceremonies were absolutely requisite or not, because they were performed in that case, and were referred to as having been performed. On the other hand, we have not been pointed out any decision, nor are we aware of any authority ruling that the same ceremonies, which are necessary to be observed in the case of an adoption in the superior classes, are also necessary in the case of an adoption by a Sudra. In addition to this we have this prominent fact in the present case that the adopted son is a brother's son, a member of the same family, in regard to whom the mere giving and taking may be sufficient to give validity to the adoption, which has been called into question after the lapse of so long a time, in the course of which the question as to whether the necessary ceremonies were performed or not was never raised. The presumption therefore is that all that was necessary to render the adoption valid had been performed, and with this presumption on the one side it entirely lies upon the opposite party to rebut it. Now what do we find that rebuttal consists of? "We have a clear finding of fact by the Subordinate Judge below in the following words:--"The defendant has not been able to adduce any oral and documentary evidence to show that the plaintiff is not an adopted son, and is not in possession of the "other properties left by Nimai and also to substantiate his own pleas."

4. Under these circumstances, we think we should be wrong if now after the lapse of so many years when the adopted son has been recognized as such by all the members of the family, has performed the funeral rites and succeeded to the property of his father, we were to declare the invalidity of his position as adopted son.

5. In this view we think it is needless to go into the question of limitation. It is sufficient to say that the suit has been brought within twelve years from the date of the alleged dispossession. The special appeal is dismissed with costs.

Paul, J.

6. I concur. I consider the decision of the Subordinate Judge to be a sensible and a careful judgment. Without dwelling at present on the question of Hindu law raised, I think that question does not arise in the present case, because it is clear that on the death of Nimai the plaintiff was, by consent of all the male members of the family, allowed to perform the sradh of Nimai and to succeed and get into possession of all the properties left by Nimai. Under such circumstances it would be apparently unjust, and an extremely hard case, if the defendant is now allowed to raise questions in regard to property which

by common consent of all the members had been allowed to the plaintiff on the death of Nimai. With regard to the question of limitation, I have to observe that it has been found by the lower Appellate Court that the former suit was a fraudulent suit, inasmuch as Gabind was not the proper guardian of Nimai. That being so, the decree is not binding, and limitation commences to run from the date of dispossession which is within twelve years of the present suit.