(1863) 06 CAL CK 0002

Calcutta High Court

Case No: Regular Appeal No. 363 of 1860

Iswar Chandra Mitter and Others		APPELLANT
	Vs	
Shamasundari Dasi		RESPONDENT

Date of Decision: June 12, 1863

Judgement

1. This is a suit for determination of the title to, and possession of, moveable and immoveable property, and for setting aside an illegal adoption. The plaintiffs allege that their maternal grandfather Ramjiban being in possession of the property claimed in the suit, died, leaving a son, plaintiffs'' uncle Jairam, and a daughter, their mother Gaurmani; that Jairam became sole possessor of the estates of Ramjiban; that in his lifetime Jairam adopted a son Nilkamal, and afterwards executed a will dated the 26th Bhadra 1240, B.S., in favour of his wife Kanak and his adopted son Nilkamal; that the following were the conditions of the will; that in case Nilkamal should die childless, Kanak should make successive adoptions for the benefit of Jairam; that on Jairam''s death the plaintiff''s aunt Kanak and Nilkamal should hold jointly a moiety of the whole property; and that in case of disagreement between them, Kanak during her lifetime should hold one separate moiety, and Nilkamal the other, with benefit of survivorship.

2. It is further stated that Jairam died on the 4th of Paush in the same year, and Nilkamal and Kanak went into joint possession of the property devised, according to the conditions of the instrument, and had their names registered as joint proprietors in the Collector''s books.

3. The plaintiffs admit the construction of the will to be not adverse to the fact that if Nilkamal had issue his heir would take the moiety of the estates on his father Nilkamal''s death, and the residue being the other moiety deviated to Kanak would vest in him, and be would become entitled to succeed to the same upon her death The plaintiffs admit this would be the fate of the property under the terms of the will should Nilkamal leave an heir. However the plaintiffs allege that Nilkamal died childless on the 13th Baisakh 1249, B.S., leaving Kanak surviving, whereupon Kanak,

according to their allegation, became seized and possessed under the terms of the will of the whole of the ancestral estates so devised by Jairam, together with the accumulations made in Jairam''s lifetime.

4. At this, stage of the family history, the plaintiffs assert that Nilkamal''s widow Shamasundari, one of the defendants to this suit, during the lifetime of Kanak, fabricated a deed of permission from Nilkamal to make successive adoptions, and on the foundation of this deed petitioned the Collector, praying for her name to be registered with Kanak in the books of the Collectorate. That the plaintiffs being informed of this petition resisted the application, but failed owing to the assent of Kanak which, plaintiffs as assert was obtained fraudulently, Kanak being then, as they allege, insane. The Collector on the 21st July 1842 passed an order to insert the name of the defendant Shamasundari in the books of the Collectorate, and on an appeal the order was confirmed.

5. The plaintiffs show that Kanak never adopted under the powers conferred on her by the will of Jairam, and died on the 25th Paush 1264, B.S., and contend that they are the legal heirs to the estate left by their uncle Jairam under the events that have happened.

6. The defendants to the suit are Shamasundari and Jankeebalabian adopted son. Their case, on the pleadings, is shortly as follows, They assert that Nilkamal gave a valid power by deed dated 11th Baisakh 1249 to his wife, the defendant Shamasundari, to make three successive adoptions; that after his death, viz., in 1250, in pursuance of the power and immediately upon the insertion of her Dame in the Collector''s, books under the circumstances before stated, his widow adopted a son; that this adopted child died in 1256, whereupon and in the same year she made a second adoption; that this child died in the year 1259, and on the 3rd Jaisti 1259, she adopted the present defendant Jankeebalab; that under the events that have happened, the last named defendant is heir to Nilkamal, and entitled to resist successfully the claim of the plaintiffs; and in addition to defending the suit on the merits, the defendants rely on the Statute of Limitations as a flat bar to the action, and insist that the adoption by the widow defend-ant in the year 1250 extinguishes and bars the plaintiffs'' right to recover in the present suit which was instituted on the 17th day of Asar 1265, corresponding with the 30th June 1858; and further aver that the plaintiffs well knew of the widow defendant''s power to adopt and of the first adoption in the year 1250, which in incontestably established by the fact that the plaintiffs resisted the insertion in the Collector''s books of the name of the widow defendant with Kanak by force of the power to adopt set up by the widow, and which occurred, according to the defence, on the English date 21st July 1842, and which fact is stated in the plaint in this suit. That after the first adoption in 1250 the plaintiff Iswar Chandra for himself and as guardian for his brother, the other plaintiff on the 20th May 1845 corresponding with 29th Chaitra 1251, petitioned the Civil Court to sue in forma pauperis upon the same ground as they allege in this suit

now before the Court, and therefore it is manifest from the plaintiffs'' own acts and pleadings that they knew of the existence of an heir to Nilkamal as far back as 29th Chaitra 1251.

7. This Court need not notice the other defence put forward, viz. that the alleged will of Jairam propounded by the plaintiffs is a forgery, and that Nilkamal took all the estates absolutely, and gave his mother Kanak a share of the property out of affection, thus accounting for the insertion of her name in the Collector''s books. Nor need we pass any judgment on the allegation of the plaintiffs that the deed of adoption alleged to have been executed by Nilkamal is a forgery. With these unpleasant issues importing forgery on each side we have nothing to do, as the lower Court has dismissed the plaintiffs'' suit holding that they are barred in the events that have happened from maintaining their action, and that the defendants'' plea of the Statute of Limitation is an answer in law to the further maintenance of the suit. This is the only point we need decide on this appeal.

8. The appellants urge that the lower Court was wrong; that the plaintiffs'' right of action did not accrue until the death of their aunt Kanak, as under Jairam''s will his widow having survived Nilkamal took the whole property, and as she did not die until 25th Paush 1264, plaintiffs were not entitled as heirs to Jairam to sue for possession until that date, or disturb any adoption made by Shamasundari, nor could they be prejudiced by any laches or neglect on their part during the lifetime of Kanak they being reversionary heirs, and that it was immaterial to them what acts took place during her lifetime either with or without her assent or by her connivance. Whereas the defendants, the respondents, insist that the plaintiffs relying on the will of Jairam are bound by it, that they admit that, under the construction of the will if Nilkamal has heirs, those heirs shall inherit and take one moiety absolutely on the death of Nilkamal, which event happened in the year 1249, and a vested interest in the other moiety. Thus they say the title to the whole estate became vested in Nilkamal''s heir upon the first adoption in 1250, and the plaintiffs as Jairam''s heirs have no further interest in the estates and property that passed under his will to Nilkamal''s heir, and that inasmuch as they permitted the adoption of a son to remain unchallenged as far back as 1250 they are now barred by that laches. The respondents also cite an authority in their favour of the late Sudder Court dated the 26th day of May 1856.

9. It certainly appears from that case that the person who would be the heir of the deceased if he had died without a widow, and, without a son born or adopted, is entitled to contest the succession during the lifetime of the widow, and the time of limitation will run against him from the date of the widow''s assent, for the alleged son takes not as assignee of the widow, but as successor to his father. See also Macpherson''s Civil Procedure, pages 73, 74, 4th edition. We therefore hold on the above authorities and on the admitted facts of this case that the plaintiffs are barred by the law of limitation. The plaintiffs'' reversionary title was gone in the whole

estate on the construction of the very will they themselves propound and rely upon, the very moment that Nilkamal had an heir, and an adopted son is under Hindu law as good an heir to all intents and purposes as the heir of the body begotten. It is perfectly clear that the plaintiffs had full notice and knowledge both from the contents and construction of the will and the act of adoption, that their rights were affected and jeopardized by the adoption of a son in 1250, They knew that their title to the estates depended on the failure of issue of Nilkamal they knew that the instant an heir to Nilkamal came into being, either begotten by him or raised under a power of adoption, all their rights were utterly extinguished. Upon this matter on this single yet vital fact, all their right and title depended. The act alone against which they can complain is the act of adoption; this is their cause of action, and the wrong they should have Bought to remedy had they any just grounds for impugning the validity of the adoption. They appear also to have well known this, for they make an attempt on 20th May 1845 to complain of this act and to sue in forma pauperis, but fail, and in has been ruled that a petition for permission to sue in forma pauperis is not a step in a cause so as to prevent the law of limitation from running against a plaintiff in a regular suit. The plaintiffs therefore must suffer from their own laches, and having permitted more than 12 years to elapse before they bring their suit to test the validity of the adoption which took place under the circumstances detailed in this judgment in the year 1250. B.S., they are now too late. As regards the contention that a fresh right of action accrued to the plaintiffs on each successive adoption, and as the last adoption took place in the year 1259 they are not late in bringing their suit. We hold that the adoption of 1250 vested all Jairam''s property in Nilkamal''s heirs and extinguished the line of descent in the plaintiffs'' channel, and therefore the act that happened, which prejudiced their rights, and gave them a locus standi in Court, was the act of adoption which provided a successor to Nilkamal in 1250 and cut off the heirs of Jairam effectually, and it was from that period from which the law of limitation began to run against Jairam''s heirs. Appeal dismissed with coats.