(1936) 10 BOM CK 0014

Bombay High Court

Case No: Second Appeal No. 1023 of 1932

Radha Hambirrao Patil		APPELLANT
	Vs	
Dinkarrao Hambirrao Patil		RESPONDENT

Date of Decision: Oct. 6, 1936

Citation: AIR 1937 Bom 208 : (1937) 39 BOMLR 147

Hon'ble Judges: Wassoodew, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Wassoodew, J.

The common question raised in these three appeals Nos. 918, 919 and 1023 of 1932 relates to the validity of the adoption of one Dinkarrao by one of the three surviving, widows of Hambirrao by name Guna. In one of the suits, the adoptee Dinkarrao has claimed to recover possession of certain property from the co-widows of his adoptive mother, and the other two suits are for a similar relief by the two transferees from the said Dinkarrao.

2. The material facts leading to these suits, which are not disputed, are these. Hambirrao, who possessed considerable property, died in 1918, leaving behind him three widows, the adoptive mother Guna, who was the most senior in age, and two others, in order of seniority, Radha, defendant No. 1, and Savitri, defendant No. 2. Guna claiming to be the most senior widow on account of her alleged marriage with Hambirrao before the two others,adopted one Subrao in 1919, who was the sister''s son of the said Hambirrao. The status of Subrao was challenged by the co-widows of Guna, and the suit which was filed by him in 1921 for possession of Hambirrao''s property was dismissed, and the adoption was held invalid on the ground that amongst the Kshatriyas, to which caste Hambirrao''s family belonged, the adoption of the sister''s son was illegal. It was also held in that suit that Guna was the seniormost widow.

3. After that adoption was declared invalid, Guna adopted a second boy, the present plaintiff Dinkarrao. Both the Courts below in these suits have held that Dinkarrao has been validly adopted with proper form and ceremonies, that his caste is the same as that of Hambirrao and that Guna being the senior-most widow was competent to adopt a son to her husband. The rival adoption set up by Savitri, the youngest widow, with the consent of Radha, defendant No. 1, was held to be invalid. Upon the contest as to whether Guna or Radha was senior, the lower appellate Court did not express any opinion, perhaps, as I understand its judgment, that point was given up expressly before it,&#65533;as also the other points, more or less important,&#65533;the appeals being confined to the question whether there was inferiority in the caste of Dinkarrao disqualifying him for the purpose of adoption. In view of those findings, the decrees for possession with mesne profits and costs were confirmed in the first appeal. Against those decrees, the defendants,&#65533;principally the co-widows of Guna, and the son adopted by Savitri,&#65533;have filed these appeals.

4. As regards the effect of the previous judgment in the suit filed by Subrao, it is conceded that when Subrao''s suit was dismissed, the issues decided against the defendants, namely Guna''s co-widows, could not operate as res judicata in a subsequent suit, for, the successful defendants could not appeal from a finding on any such issue. Consequently, the finding in the previous suit that Guna was the most senior widow would not operate as res judicata, and the contrary assumption by the Courts below is wrong.

5. Mr. Abhyankar for the appellants has questioned the status of Guna as the seniormost widow, and on account of the omission to decide that status in the first Appeal Court, has asked me to decide it on the evidence recorded. But the main question of law argued, which was made interesting on account of its novelty, was that Guna was incompetent to adopt for the second time during the lifetime of Subrao, because although he was imperfectly adopted, he had suffered a change of status, and the adoptive father could not be regarded as sonless during the existence of that imperfectly adopted son. Mr. Abhyankar has not challenged the findings of the lower Courts as regards the performance of ceremonies of adoption, and the qualification of Dinkarrao to be adopted in Hambirrao''s family.

6. With regard to the status of Guna, it is not denied that in point of age, she is the oldest amongst the surviving widows of Hambirrao,&#65533;the difference between her age and that of the next senior widow being about twelve years. The witnesses to the fact of the marriages of Guna and the competing widow Radha, were more or less interested, namely, the widows themselves and the relatives of the rival adoptees. It is in evidence that in 1918 Hambirrao was nearly sixty and Guna was between thirty and thirty-five, and Radha not more than eight or nine years of age. Having regard to their relative ages, and the probabilities adverted to by the learned trial Judge, the statement of Guna that she was married before the rest appears reasonable and true, and I accept the conclusion of the trial Court on the point.

Consequently, there is no doubt about her capacity to take Dinkarrao, who was otherwise qualified, in adoption to her deceased husband.

7. Turning then to the question of the capacity of Guna to adopt during the lifetime of Subrao, it is necessary to state that the notion of sonship in Hindu law is based on the capacity to present oblations and to participate in heritage. There is a trend of modem decisions to trace the foundation of the doctrine of adoption to the notion of providing for the spiritual welfare of the souls of the ancestors. It was held in Amarendra Man Singh Bhramarbar Rai Vs. Sanatan Singh, , p.c that the validity of the adoption must be determined by spiritual rather than temporal considerations, the consequent devolution of property on the adopted son being merely accessory to it, and altogether a secondary consideration. Therefore, if the essential capacity is wanting, the mere existence of filial relationship is not sufficient. On that ground, the existence of congenitally blind and congenitally dumb sons has not prevented according to the Shastras the adoption to their fathers (see Dat. Mim. II. 6; Yajnavalkya II. 33 : M''it. I, xi, 21, 1 Strange, Hindu Law, 77 and 152). In Surayya v. Subbamma ILR (1919) Mad. 4 the rule of Hindu law which prevented a congenitally blind person from inheriting was regarded as obsolete. The texts on the subject have been examined recently in Bharmappa v. Ujjangauda (1921) ILR 46 Bom. 455 : 23 Bom. L.R. 1320, where Shah J. very admirably summarised the effect of the texts of Atri, Manu and Saunaka which laid down that the adoption could be made only by a person who has no son (aputrena), that is who never had a son or whose son is dead. Then in the following passage, the doctrine of Yajnavalkya and Vijnanesvara has been set out (p. 459) : It is clear from these passages that neither Yajnavalkya nor Vijnanesvara would have favoured the view that a person having a son subject to any of the defects mentioned by them would be treated as sonless. Indeed it appears from Visvarupa''s commentary on these verses of Yajnavalkya that those who are excluded from inheritance are not necessarily incompetent to perform sacrifice, etc." And the learned Judge then thus concludes on the point before him : "that a person having a grandson who is subject to the defect of dumbness from his birth as in this case cannot correctly be described as sonless so as to make an adoption by him during the lifetime of the grandson valid.

8. It is urged that in the same way, a person who has got a son, though imperfectly adopted, cannot be described as sonless, so as to make the adoption by him or his widow during the lifetime of the said son valid. It might be said that the decision in Bharmappa''s case is not unfavourable to the view that a person having a disqualified son can never be considered sonless. In his Law of Adoption, Mr. Kapur has quoted the following passage from Sutherland on this question (see Sutherland''s Synopsis of Hindu Law, p. 212)) :

The Primary reason for the affiliation of a son being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father on which the salvation of a Hindu is supposed to depend, it is

necessary that the person proceeding to adopt should be destitute of male issue capable of performing those rites. By the term ''issue'', the son''s son and grandson are included. It may be inferred that if such male issue although existing were disqualified by any legal impediment from performing the rites in question, the affiliation of a son might legally take place.

9. The learned advocate has relied upon a passage in Mayne''s Hindu Law, which is indirectly suggestive of the view propounded, namely, that if upon an invalid adoption, there is a change of status by reason of the performance of necessary ceremonies, and which change prevents the adoptee from going back into his natural family, he might be regarded as a son with certain privileges : (see paragraphs 176 to 178 of Mayne''s Hindu Law and Usage, 9th edn., pp. 243 to 245). But the learned author does not consider the effect of an invalid adoption, on the right of the adoptive father to adopt another in succession.

10. The effect of an invalid adoption has been considered in Mulla''s Hindu Law (8th edn., paragraph 510, at p. 559), and upon a consideration of the authorities it is stated that all that the son is entitled to in the adoptive family is maintenance. Assuming that the change of status establishes a right to maintenance in the adoptive family, the question is whether the adoptee could on that account be regarded as a son with a disqualification preventing a subsequent adoption. I do not find any authority or text putting such an invalidly adopted son in the same position as a congenitally blind or dumb son, assuming that cases such as Bharmappa v. Ujjangauda represent the more progressive view in modern times on the point. The authorities on the other hand support the view that the existence of an invalidly adopted son is no impediment to the subsequent adoption. In Bhujagonda v. Babu Bala (1919) 22 Bom. L.R. 817 it was held that a widow could not adopt a son to her husband when there was in existence a son adopted by her husband. In that case, which discouraged successive adoptions, it was pointed out that the widow''s right to adopt to her husband would not arise until that adoption was set aside, and that adoption could not be treated as invalid justifying a second or successive adoption. A similar expression of opinion is contained in Bhau v. NarasaGouda ILR (1921) 46 Bom. 400 : 23 Bom. L.R. 1272, where it was held that under Hindu law, a widow could not adopt a son during the lifetime of a son adopted by her husband, even though the validity of the adoption by her husband was doubtful; and it was pointed out that a widow could not adopt any other boy during the lifetime of the adopted boy or until the adoption was declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate. Those decisions rather support the view that upon a declaration that the adoption is invalid, a person to whom the adoption is made would be regarded as sonless, and that his widow would then be competent to adopt a son to him. That is more consistent with the doctrine of spiritual welfare, and is in line with the current of authority in this presidency. Therefore on the second point, the appellants fail.

11. For the above reasons, the lower Courts'' decrees are confirmed, and these appeals dismissed.