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Padajirav Vs. Ramrav

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Court : Mumbai

Decided On : Aug-09-1888

Reported in : (1889)ILR13Bom160

Judge : Charles Sargent, C.J. and; Nanabhai Haridas, J.

Appellant : Padajirav

Respondent : Ramrav

Judgement :

Charles Sargent, C.J.

1. The litigation in this suit arises out of the rival claims of the parties to be the adopted son of one Bhavanjirav Raje Deshmukh, who died on the 1st September, 1865, the plaintiff claiming to have been adopted on the 1st July, 1866, by his youngest widow Bachabai acting under her husband's order and with the consent of Lalitabai, his senior widow, and. the defendant claiming to have been adopted on 12th August 1869, by his senior widow Lalitabai. The First Class Subordinate Judge found that the plaintiff's suit was barred by the Statute of Limitations and also by the fact of the plaintiff's having instituted a suit, No. 231 of 1878, without claiming any property therein as he has done in the present suit, and, lastly, that the plaintiff was not the true and rightful adopted son of the deceased Bhavanji Raje, and as such entitled to the property in dispute. The second ground upon which the Subordinate Judge based his conclusion was admitted to be not

sustainable by counsel for the respondent.

2. As to the plea of the Statute of Limitations, the present suit was brought two days before the expiration of twelve years from the 12th August, 1869, the date of defendant's alleged adoption, the factum of which is not denied, and constituted, as the plaintiff says, his cause of action. The Subordinate Judge applied Article 144 of the Statute of 1877, and holding that the adverse possession of defendant since his adoption might be tacked on to that of Lalitabai prior to that event decided that defendant had thus been in adverse possession for more than twelve years before the suit.

3. Now it is plain, we think, that neither plaintiff nor Bachabai on his behalf has ever been since his adoption in actual or constructive possession of the property. Although Bachabai may have been constructively so prior to plaintiff's adoption on the ground that Madhojirav was originally put into possession on the strength of yadi 38 on behalf of the three widows, it is plain from Lalitabais letter (Exhibit, 111) Madhojirav's letter, (Exhibit 189), and the plaintiff's own admission, that since plaintiff's adoption Lalitabai has been either actually, or constructively through Madhojirav, not only in exclusive possession of the property, but also that so far as plaintiff claimed to be the adopted son, or Bachabai herself might claim to represent him during his minority, such possession was distinctly adverse to both of them up to the time when defendant was adopted and put into possession. The question whether the defendant can supplement his own adverse possession since his adoption by the adverse possession of Lalitabai must depend upon whether he can be said to derive his liability to be sued from or through Lalitabai so as to bring himself within the definition of a defendant, as provided by the interpretation clause (Section 3) of the Limitation Act XV of 1877. We are inclined to think that the defendant might, under the circumstances under which he obtained possession, be held to do so.

4. Before leaving this part of the case w e think it will be useful to notice the view pressed upon us in argument by defendant's counsel, that Article 119 of the Act of 1877 was the article applicable to the case, and that taken in connection with the ruling in Jagadamba Chowhdrani v. Dakhina Mohun 13 I.A. 84 : I.L.R. S.C. 13 Cal.

308 the plaintiff's suit, although one to recover the land, was barred six years after plaintiff came of age. That case, however, was decided under Article 129 of the Act of 1871, and was held by the Allahabad High Court, and we think rightly, to have no application to sections 118 and 119 of the Act of 1877, which are confined in terms to suits for a declaration - Ganga Sahai v. Lekhraj Singh I.L.R. 9 All. 253 .

5. Passing, however, to the merits of the case we entertain no doubt that the plaintiff cannot succeed. The plaintiff was unanimously, selected by the three widows for adoption after the death of their husband. This appears from the letter of the 5th May, 1866, and the correspondence down to 11th May, 1866, shows that this unanimity continued at any rate down to that date. Between the 11th May and 30th June, 1866, there is no evidence one way or the other: but on the latter date the elder widow wrote (Exhibit 36) to the Collector complaining that the plaintiff had been spirited away by Bachabai, and saying that if adopted by her she would not consent to it. On the 1st of July, Madhojirav also writes to the Collector (Exhibit 190) to the same effect arid begging him to prevent plaintiff's adoption by Bachabai. There can be no doubt, therefore, that plaintiff's adoption was effected, without the consent of Lalitalbai, the elder widow. Nor is there any evidence that she in any way subsequently ratified the adoption.

6. The question, therefore, which arises on this state of facts is whether the adoption by a younger widow, without the consent of the eldest widow, of a boy who had previously been selected by all the widows for adoption, can be supported against the wish of the elder widow. It was scarcely disputed by the appellant that the eldest widow has the superior right. The answers of the Shastris set out in West and Buhler, p. 977, are to the effect that the right of adoption belongs to the elder widow; and in Rakhmadbai v. Radhabai 5 Bom. H.C. R. A.C.J. 192 it was accordingly held that the elder widow could adopt without the consent of the younger. In Steele on Hindu Customs, p. 48, it is stated that 'if there be two widows, they ought to adopt by mutual consent; otherwise the elder should have the preference in point of right.' The practical and logical conclusion from these propositions is that the younger widow cannot adopt without the consent of the elder.

7. It has, however, been contended that the right of the widow to adopt is merely the right to select; and that in any case it is only a preferential right, and that consequently the doctrine of factum valet applies. The superior right of the elder widow is doubtless based upon her being the patni wife, and as such enitled to take part with her husband in all religious ceremonies, and the mere circumstance that by the decisions of the English Courts religious ceremonies although usually observed are not, essential to the validity of an adoption cannot affect the above reason for recognizing her superior right. Nor is there anything in the language of the replies given by the Shastris or in the reasoning of the judgment in Rakhmabai v. Radhdabai which can justify the restriction of the elder widow's right to mere selection. Adoption of course implies selection of the child, but there is no complete adoption until the mutual acts of giving and receiving the child are accomplished; and until they take place there is necessarily a locus penitentice for the elder widow of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her, would be tantamount to' enabling her to force the hand of the elder widow, and compel her to complete the adoption which, at the most, was only in fieri.

8. It was said, however, that the elder widow's right is only a preferential and not an exclusive right, and, therefore, that the doctrine of factum valet applies. But it is plain that until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. In Lakshmappa v. Ramava 12 Bom. H.C. R.364,A.C.J which was referred to With approval in Gopal v. Hanmant I.L.R. 3 Bom. 293 it was said in discus, sing the application of the rule of factum valet to cases of adoption, 'that its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption.' In the present case, therefore, as the widow Bachabai had no authority to adopt without Lalitabai's consent, which was clearly wanting, the principle of factum valet relied on by the appellant cannot assist the validity of his adoption. The decree of the Court below must, therefore be confirmed with costs.

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