Anandi Ram Pai Vs. Hari Suba Pai and ors.

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Court : Mumbai

Decided On : Mar-18-1909

Reported in : 3Ind.Cas.745

Judge : Chandavarkar and ;Heaton, JJ.

Appellant : Anandi Ram Pai

Respondent : Hari Suba Pai and ors.

Judgement :

1. The sole question argued in this second appeal is whether, under the Hindu Law, governed by the Mitakshara School, the adoptive father or the adoptive mother is the preferential heir to an adopted son. According to the Mitak-shara, when a son dies, leaving his parents as his heirs, the mother succeeds to son's estate before the father. Both the Courts below have, however, held in the present case that the rule in question applies only to the estate of a natural-bron but not to that of an adopted son dying.

2. The learned Subordinate Judge says:

The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators, a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share in the composition of the son, while the Mitak-shara prefers her on the ground of

propinquity.

3. Vijnaneshwara puts the preference of the mother to the father on two grounds, which, as West, J., has rightly observed in his judgment in Lallubhai Bapubhai v. Manhuvar bhai 2 B. 388 p. 439 are of an artificial character. They are (1) that the word pitarau (parents), which occurs in Yajnyavalkya's text specifying the heirs in the case of obstructed succession is the abbreviation of two words forming a conjunctive compound, matapitarau(parents), in which the word mata (mother) comes before the word pitru (father;) and (2) that the mother's propinquity is greater than the father's. (The Mitakshara, Section III, Sections 2 and 3, Stokes's Hindu Law Books pp. 441 & 442).

4. No doubt propinquity does enter into the reasoning of Vijnaneshwara but it does not on that account follow that he intended to deny the same propinquity to an adopted son which he allows to the natural born son. The fallacy of the Subordinate' Judge's reasoning lies in the fact that he gives the go-bye altogether to the legal fiction on which the whole doctrine of adoption in Hindu law is founded. As observed in West and Buhler, the effect of adoption is to sever the boy adopted entirely from his family of birth. His proper residence is with his adoptive parents. He exchanges the gotra of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. He learns the sacred,' invocations in his family of adoption and in the absence of a son by birth completely takes his place.' (West and Buhler's Digest of Hindu Law, 3rd Edition, pp. 934 and 935). The fiction has the effect of bringing about the ties of blood-relationship between the boy and his adoptive parents. If that is so the remark of the Mitakshara (Stokes's Hindu Law Books, pp. 442 and 443) that 'the father is a common parent to other sons, but the mother is not so, and, since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text. To the nearest Sapinda the inheritance next belongs,' must apply in virtue of the legal and Shastric fiction as much to an adopted as to a natural-born son.

5. The text of Yajnyavalkya, in which the heirs in the case of an obstructed succession are specified, applies to succession to an adopted son as much as to succession to a natural-born son. Besides, Vijnaneshwara points out in another

connection that there is a blood tie between art adopted son and the family and collateral kinsmen of his adoptive father. Dealing 'with the twelve kinds of sons recognised by the old but now obsolete Hindu law, he refers to a text of Manu, according to which the first six, among whom are the natural-born and the adopted son, are heirs and kinsmen, and the other six are not heirs, but only kinsmen. Vijnaneshwara then explains the text as follows: 'That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen, (Sapindas and Samanodakas), if there be no nearer heir, but not so the last six. However, consanguinity and the performance of the duty of offering libations of water and so forth on account of relationship near and remote, belong to both alike.' (The Mitakshara, Chapter 1, Section XI, placitum 31, Stokes's Hindu Law Books, page 422). This explanation he supports by another text of Manu relating to an adopted son: A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate; but of him, who has given away his son, the obsequies fail.' (Stokes's Hindu Law Books, page 422, placitum 32). It is true that in these citations from the Mitakushara the reference is only to the father, not to the mother. But that does not mean that the mother is excluded. Vijananeshwara is one of those who held strongly to the principle of the Shastras that the husband and wife form one body. He refers to the principle and its limitations in the Chapter on Debts The Mitakshara: Moghe's 3rd Edition, pages 142 and 143. In the Chapter on Penance he says that the husband and wife form one body by reason of their point rights in matters of religious merit The Mitakahara : Moghe's 3rd Edition page 373, of the Mitakshara, secular affairs, and pleasures.

6. As West, J., points out in Lallubhai Bapubhai v. Mankuvarbhai 2 B. 388 p. 439; Vijnaneshwara 'really accepted the proposition that of him whose wife subsists one-half the body survives as a basis for actual practice.'

7. The learned District Judge, in accepting the view of the Subordinate Judge, has refused to follow what he calls 'the letter of the law' of the Mitakshara on the ground that 'the fiction of the physical reality of an adoption is not always maintained.' But the cases in which it is not maintained are specified and not left to conjecture or inference. Those, again, are cases which form exceptions to the

general rule which is the result of the legal fiction. And it is a rule of construction (Mimansa) according to Hindu law, that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to unduly encroach upon the general rule. See this rule of construction explained in Gangu v. Chandrabhagabai 32 B. 275 : 10 Bom. L.R. 149. The legal fiction, on which the theory of adoption is founded, invests an adopted son with the status of a natural-bom son except in cases excluded from the operation of the fiction either expressly or by necessary and clear implication. The District Judge further observes: The mother appears to be preferred on account of the merit which she possesses in reference to her son, from having conceived and nurtured him in her womb. Clearly this ground is absent in the case of an adoptive mother.' This last sentence begs the whole question. The ground is absent only if we drop the whole theory of adoption, based on a legal fiction according to Hindu law. The same remark applies to the reasoning that because the adoption was made by the adoptive father only and the adoptive mother had nothing to do with it, therefore, the adoption was for the benefit of the former and the latter was no more than the wife of the man who made the adoption.' It is now more or less an exploded theory that a Hindu who has no son born to him adopts merely for his spiritual benefit and that secular objects either do not enter into the act or that they enter incidentally. Whatever the spiritual theory which originally gave rise to adoption in Hindu society, its motives and effects are at least as secular as they are spiritual; and an adoption is made as much for the purpose of having an heir and continuing the family as for spiritual ends. These latter can, according to the Hindu Shastras, be attained by other means than those of adoption As Manu says, 'many thousands of Brahmins having avoided sensuality from their early youth and having left no issue in their families, have sacended nevertheless to heaven' (Manu V, 159. But there is no secular way of continuing a family except by adoption where there is no son born. Assuming that a Hindu adopts a son for his spiritual benefit, what warrant is there in either Hindu law or Shastras for the inference that the spiritual benefit secured to the Hindu by his act of adoption does not enure for the benefit of his wife also? As we have pointed out above, for religious purposes and merit, the wife is identified completely with the husband and they form 'one body.' And this is in accordance with the Dattaka Mimansa: In consequence of the superiority

of the husband by his mere act of adoption, the filiation of the adopted as son of the wife is complete in the same manner as her property in any other thing accepted by the husband.' Dattaka Mimansa, Section I. Section 22. Stokes's Hindu Law Books page 536). Accordingly, a Full Bench of the Allahabad High Court has held in Sham Kuar v. Gaya Din 1 A. 255 that under the Dattaka Mimansa and the Mitaksliara, an adopted son succeeds to property to which his adoptive mother succeeded as heiress to her father.

8. For these reasons the decree appealed from must be reversed and the point on which the District Court has decided the appeal being substantially of a preliminary character the case must be remanded to that Court for disposal according to law. Costs of this second appeal must be paid by the respondents. Other costs to abide the result.