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Putlibai Vs. Madhu

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Court : Mumbai

Decided On : Oct-09-1908

Reported in : 1Ind.Cas.659

Judge : Scott, C.J. and ;Heaton, J.

Appellant : Putlibai

Respondent : Madhu

Judgement :

1. The question in this appeal is whether the plaintiff has been validly adopted as a son to his deceased maternal grandfather Sadashiv. The question has been answered in the affirmative in the lower Court.

2. The material facts are as follows:

3. The plaintiff is the natural son of Anna and Bhagi. Bhagi is the daughter of Sadashiv. Anna, Bhagi and the plaintiff lived with Sadashiv, Bhagi says that her father intended from the first to adopt the plaintiff, that her husband asked him to do so and when attacked with plague told Sadashiv that the boy was given to him. This story is highly probable for Sadashiv was a well-to-do man possessed of property worth Rs. 25,000 or Rs. 30,000 while Anna had no property whatever. At intervals of a few months the deaths occurred of, first, Anna, then, Sadashiv and lastly, Bhowani, Bhagi's mother. Sadashiv had another wife Putli, the defendant in this suit. After Sadashiv's death Putli and Bhagi and the plaintiff lived together in

Sadashiv's house until they were driven out by Balu, the divided brother of Sadashiv. Balu's action led to litigation between him and Putli in which Putli eventually secured from him all Sadashiv's property. For abut 3 years Putli continued to treat the plaintiff as before as the son of Sadashiv. She also in April 1906 went through a formal adoption ceremony in which the plaintiff was given by Bhagi and taken by Putli as son to Sadashiv. A deed of adoption was then executed by Putli in the plaintiff's favour.

3. At this time Bhagi was no longer the widow of Anna, having re-married about a year previously. In August 1906 previously Putli denied the validity of the adoption and this suit was then filed on behalf of the plaintiff to establish it.

4. The plaintiff's adoption is challenged by the defendant on the ground that he was owing to his mother's re-marriage an orphan in the eye of the law at the time of the adoption ceremony, without any parent capable of giving him in adoption.

5. We will first consider the right of a mother to give her son in adoption according to the Hindu Law.

6. According to the texts the right of the female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Thus Manu IX, 168 'that (boy) equal by caste whom his mother or his father affectionately gives with water in time of distress as son mast be considered as an adopted son.'

7. Yajnavalkya II, 130 the son whom his father or mother gives becomes Dattaka. 'Vashista XV, 1, 2 man formed of uterine blood and virile seed proceeds from his mother and his father as effect from cause, therefore the father and the mother have power to give, to sell and to abandon their sons.' The Mitakshara which is the paramount authority in that part of the country to which the parties belong has the following comment--Bk. 1, Section XI, 9 and 10: 9. He who is given by his mother with her husband's consent while her husband is absent or incapable though present or without his assent after her husband's decease or who is given by his father or by both being of the same class with the person to whom he is given becomes his given son; so Manu declares He is called a son given whom his

father or mother affectionately gives as a son being alike by class and in a time of distress confirming the gift with water.' 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver, not the taker.'

8. Thus apart from the effect of special legislation which we will next consider, the maternal relationship of Bhagi justified the gift in adoption.

9. In Mandlik's Hindu Law, p. 468, we find the following passage which accords with, the conclusion at which we have arrived. 'The widow's power of giving in her own right has, by some, been questioned, but, as it seems to me, on very insufficient grounds. In point of fact, even the texts by themselves are more clearly in favour of her competency to give, than her ability to take, and all the Digests, held authoritative on this side of India, are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's text being express in favour of the mother or the father being able to give, the widow has the right to give.'

10. It has, however, been argued before us that the effect of the Hindu Widow Re-marriage Act XV of 1856 is to deprive a re-married widow of all rights resulting from her first marriage and even of the right to act as guardian of her child. We are unable to agree with this contention.

11. Section 3 of the Act is as follows:

On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in

the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

12. It is to be observed first that the proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children: secondly, that even where there is a property of the children the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother.

13. Her right as mother to act as guardian of children not possessed of property is therefore but slightly affected by the Act.

14. Assuming that the mother has by Hindu Law a night to give her son in adoption, we do not think that the Act affords any indication that the legislature intended to deprive her of it. Section 5 says that a widow, except as in the three preceding sections is provided, shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled. Accordingly a re-married woman has been held entitled to succeed as heir to her son by her first husband: see Chamar Haru Dalmel v. Kashi 26 B. 388 and Basappa v. Rayava 29 B 91.

15. The right of guardianship which under the provisions of Section 3 (one of the sections excepted in Section 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption for that is a right which can only be exercised by a parent.

16. It is, however, contended that the matter is not open to argument because it has been held by a Bench of this Court in Panchappa v. Sanganbasawa 24 B. 89 that a Hindu widow has no power after her re-marriage to give in adoption her son by her first husband unless he has expressly authorised her to do so. These are the terms of the head note and appear to express the opinion of Parsons, J., one of the Judges who decided that case.

17. In our opinion the evidence to which we have referred in the earlier part of the judgment is good evidence of an express authority from Anna to Bhagi to give the plaintiff in adoption to Sadashiv. The adoption would, therefore, according to the opinion of Parsons, J., be valid.

18. For the above reasons we dismiss the appeal with costs.

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