

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

1882
March 16.

SOMASEKHARA RAJA, (ALLEGED) ADOPTED SON OF BASLINGA RAJA
(ORIGINAL PLAINTIFF), APPELLANT, v. SUBHADRAMAJI, WIDOW OF
BASLINGARAJA (ORIGINAL DEFENDANT), RESPONDENT.*

Lingayats—Hindu law—Adoption of an only son—Gift in adoption by widow, without an express authority from her husband—Practice—Objection taken for the first time on second appeal.

The plaintiff, a Sudra of the Lingayat caste, sued for possession of certain property, alleging that he had been adopted by the defendant, a widow of the same caste. The defendant denied the adoption, and contended that it was invalid, inasmuch as he was an only son, and had been given in adoption by his widowed mother without an express authority from her husband.

The plaintiff, in support of his adoption, produced two documents executed by the defendant, viz., a deed of adoption and a compromise, in which the defendant had ratified the plaintiff's adoption. It was found that the defendant was very young, and did not act independently in the execution of those documents.

Held that the adoption was invalid on two grounds, viz., 1st, that the mother had no authority to give the plaintiff in adoption, because he was the only son of her deceased husband at the time of the adoption; and, 2ndly, that the defendant (whether an infant or not) was not, either at the time of the alleged adoption or at that of the alleged ratification of it, a free agent, but was subject to undue influence.

In the case of an only son the High Court refuses to imply authority in the mother to give such a son in adoption.

Bayabai v. Bala Venkatesh (1) and *Gopal Narhar v. Hanmant Ganesh and another* (2) referred to.

Lakshmappa v. Ramava (3) approved.

Quere—Whether the plaintiff was incapable of being adopted by the defendant, because his mother was a second cousin of the defendant's husband.

It is too late to make an objection, for the first time in second appeal, that a certain witness, for whose evidence no application had been made in the Courts below, ought to have been examined by the Appellate Court.

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara, reversing the decree of V. V. Wagle, Subordinate Judge of Sirsi.

* Second Appeal, No. 297 of 1880.

(1) 7 Bom. H. C. Rep., Appx., p. 1.

(2) I. L. R. 3 Bom. 273.

(3) 12 Bom. H. C. Rep., 364.

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The plaintiff, Somasekhara, sued for the possession of certain moveable and immoveable property left by one Baslinga Raja, deceased, alleging that he was the adopted son of the said Baslinga, and entitled to his estate. The plaintiff further alleged that Baslinga Raja died in 1869, and that on the 24th December, 1871, the plaintiff was adopted by the defendant, Subhadra, widow of Baslinga Raja. In support of his adoption the plaintiff relied upon two documents executed by the defendant, viz., a deed of adoption (exhibit No. 3), dated the 22nd December, 1871, and a deed of compromise (exhibit No. 4), dated the 10th April, 1875, in which the defendant had ratified the plaintiff's adoption in the presence of the Mamlatdar of Shidapur.

The defendant, Subhadra, denied the plaintiff's adoption by her, and answered (*inter alia*) that the adoption was invalid, because he was an only son, and had been given in adoption by his widowed mother without any express authority from her husband; that the plaintiff was incapable of being adopted by her, inasmuch as his mother (Dewa) was a second cousin of Baslinga Raja; that she was young and inexperienced at the time of the execution of exhibits 3 and 4, and that she was forced to execute the said documents under great pressure and undue influence.

The Subordinate Judge held that the plaintiff was adopted by the defendant; that she was not then a minor; that the adoption was valid; that the deed of adoption and compromise (exhibits 3 and 4) were executed by her without any undue influence. He, accordingly, allowed the plaintiff's claim, and made a decree in his favour on the 12th October, 1878.

In appeal, the District Judge held that Dewa, the plaintiff's natural mother, had no express authority from her husband to give him in adoption; that the adoption, therefore, was invalid; that, at the time of the execution of exhibits 3 and 4, the defendant was young, and acted under great coercion. He, accordingly, on the authority of *Bayabai v. Bala Venkatesh* (1) and *Iaksh-mappa v. Ramava* (2), reversed the decree of the Subordinate Judge and threw out the plaintiff's claim (12th March, 1880).

The plaintiff preferred a second appeal to the High Court.

(1) 7 Bom. H. C. Rep., Appx., p. 1.

(2) 12 Bom. H. C. Rep. 364.

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Shantaram Narayan (with him *Shamrav Vithal*) for the appellant.—The *factum* of the plaintiff's adoption, as shown by exhibit No. 3, is held proved by the Courts below. The defendant by various voluntary acts has recognized the plaintiff's *status* as her adopted son. She fully ratified the adoption by executing the deed of compromise (exhibit No. 4) in the presence of a public officer. It is not now open to her to deny the validity of the adoption. The District Judge ought to have given the appellant (plaintiff) an opportunity to examine the Mamlatdar in whose presence exhibit No. 4 was executed by the defendant.

Ghanasham Nilkanth for the respondent.

The following is the judgment of the Court:—

WESTROPP, C. J.—The parties to this suit belong to the Malva sub-division of the Lingayat caste, and being Lingayats are, therefore, Sudras by class—*Gopal Narhar v. Hanmant Ganesh and another* (1). The plaintiff, Somasekhara, was, at the time of the death of his natural father, Chanbasapa, the only surviving son of the latter. It has not been alleged that Chanbasapa authorized his wife Dewa, who survived him, to give the plaintiff in adoption to any person: nevertheless Dewa, on the 24th December, 1871, when the plaintiff was about fifteen years old, appears to have gone through the form of giving him in adoption to the defendant, Subhadra, the elder widow of Baslinga, then recently deceased, at an early age. Subhadra is by the Subordinate Judge found to have been, at the time of the ceremony of adoption, only fifteen years old; and the finding of Mr. Spens, the District Judge of Kanara, is that she was not, at the utmost, more than seventeen years of age at that time. Vira, the other widow of Baslinga, was junior to Subhadra. Baslinga was also survived by his stepmother, Chinamaji, the sister of the plaintiff. Dewa, the natural mother of the plaintiff (Somasekhara), was the second cousin of Baslinga. There is, on behalf of the plaintiff, evidence that Baslinga, when dying, asked Dewa to give the plaintiff in adoption; but the District Judge, for reasons which it is difficult successfully to contravene, seems not to have accepted that evidence as trustworthy. Even, however, if Baslinga had made such a request, and Dewa had promised compliance, there remains

(1) I. L. R., 3 Bom. 273.

the absence of express authority from Chanbasapa to Dewa to make such a gift in adoption. In the case of an only son the Court, for the reasons assigned in *Lakshmappa v. Ramava* (1), which case has been, as we think, rightly followed by the District Judge, refuses to imply authority in the mother to give such a son in adoption. That case does not appear to have been cited to the Subordinate Judge.

The learned pleader for the plaintiff endeavoured to surmount that objection by contending that defendant was, by her conduct and more especially by her execution of the deed of adoption (exhibit No. 3), and by her having entered into a compromise (exhibit No. 4) in the presence of the Mamlatdar of Shidapur, estopped from denying the validity of the adoption. The District Judge, however, has found that the defendant was not on either of these occasions acting independently. This Court is bound by his finding; but, even if this were not so, we fail to perceive any sufficient reason for supposing his conclusion to be incorrect. The point made in this Court, that the Mamlatdar ought to have been examined, was not made in the Courts below, nor does there appear to have been any application, on behalf of the plaintiff, that the Mamlatdar should be examined. It is quite too late to make such an objection on second appeal.

Upon the following two grounds—viz., 1st, that Dewa had not any authority to give her son, the plaintiff, in adoption, he being, at the time of the alleged adoption, the only existing son of her husband (then deceased) his natural father; and, 2ndly, that the defendant, Subhadra (whether an infant or not) was not either at the time of the alleged adoption or at the time of the alleged ratification of it a free agent (see *Bayabai v. Bala Venkatesh* (2)), but was subject to undue influence—we affirm the decree of the District Judge, which holds the alleged adoption to be invalid.

We do not consider it necessary to give any opinion on the question whether the plaintiff was, by reason of the alleged relationship of his mother Dewa to Baslinga Raja, incapable of being adopted as son of Baslinga Raja, inasmuch as the points already decided are sufficient to dispose of the case.

The decree of the District Judge is affirmed with costs.

(1) 12 Bom. H. C. Rep. 334.

(2) 7 Bom. H. C. Rep., Appx., p. 1.

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