Privy Council Appeal No. 133 *of* 1923.

Dhanraj Joharmal - - - - - - - - *Appellant*

v.

Soni Bai - - - - - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 2ND FEBRUARY, 1925.

Present at the Hearing:

LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* MR. AMEER ALI.]

This appeal arises out of a suit brought by the plaintiff, Soni Bai, in the Court of the Additional District Judge of Amraoti, in East Berar, for a declaration that she was entitled by inheritance to the estate of her father, Ramdhan Marwari, who died at Amraoti on the 24th June, 1914. She was a minor at the time and brought the suit by her guardian, her father-in-law, Narain Das, as next friend.

The facts of the litigation may be stated shortly for the purposes of this judgment. Ramdhan, the plaintiff's father, resided at a place called Khanapur, Taluk Morsi, in the district of Amroati and carried on business there; whilst his brother, one Joharmal, lived in the township of Chandur Bazar, in Taluk Ellichpur, where he had a shop. Both were Agarwallas by caste.

Joharmal died in September, 1912, and the defendant Dhanraj claims to have been adopted by him some years before his death. On the death of Ramdhan in 1914, Dhanraj took

possession of his estate, claiming to be entitled to Ramdhan's property as the adopted son of his brother Joharmal. There appears to have been a proceeding under section 145 of the Code of Criminal Procedure with regard to the possession of certain lands belonging to Ramdhan, and by an order of the District Magistrate made on the 17th September, 1914, the defendant was put in possession of that property also.

In order to establish his right to the succession to Ramdhan's estate, in opposition to the claim of Ramdhan's rightful heir, the defendant alleged that he had been adopted in accordance with the rules prescribed by the Hindu Law and that the essential rites were duly performed. He further alleged that Joharmal and Ramdhan were joint and undivided.

The plaintiff's case, on the other hand, is that in the year 1908, when the formal adoption of Dhanraj took place, he was an orphan and as such could not be validly adopted under the Hindu law. She further controverted the defendant's allegation that Joharmal and Ramdhan were joint. She alleged that they were separate in estate and carried on separate businesses and that consequently Dhanraj, even if he had been validly adopted, which he was not, could not claim the estate of Ramdhan. As a contradictor to the allegation of the plaintiff that in 1908, both his parents being dead, he could not be validly adopted, the defendant averred that some years before, viz., in 1903, his mother, who was alive at the time, gave him in adoption to Joharmal, although the usual ceremonies and documents connected with the adoption were completed in 1908. He further contended that Ramdhan was estopped by his conduct from impugning the validity of the adoption and that, consequently, the plaintiff was affected by the same estoppel.

On these respective allegations of the parties a number of issues were framed by the Additional District Judge, three of which only need consideration, viz. : (1) whether the defendant was validly adopted ; (2) whether Joharmal and Ramdhan were joint in estate ; and (3) whether the plaintiff is estopped from challenging the validity of the defendant's adoption.

It is contended on the plaintiff's behalf that, unless the defendant can establish that the " giving and taking " required by the Hindu law took place in the lifetime of his mother in 1903, nothing which occurred in 1908 would constitute him a validly adopted son of Joharmal, or entitle him to the estate of Ramdhan, even if Ramdhan and Joharmal were joint. A mass of evidence was adduced on both sides ; the Additional District Judge was of opinion that the defendant had established the adoption, and accordingly dismissed the suit. On appeal, the Court of the Judicial Commissioner, after a careful analysis of the evidence, came to a totally different conclusion. They have held that the defendant had failed to prove that there was a " giving and taking " as required under the Hindu law in 1903 ; nor were

Ramdhan and the plaintiff "estopped" from impugning the validity of the defendant's adoption. In view of the minute examination of the facts by the learned Judicial Commissioners, their Lordships are relieved of the necessity of discussing them in detail; they, therefore, propose to confine their attention to the salient features of the case.

On the 25th May, 1908, two deeds were executed, one by Joharmal in favour of the defendant, whose parental name was Ghanasham, declaring that he was being adopted by Joharmal as a son and that thenceforth he would be called Dhanraj; the other was executed by the brothers of Dhanraj, the defendant, in favour of Joharmal, declaring that they had from that day forth given their younger brother Ghanasham to Joharmal in adoption. The deed of adoption executed by Joharmal is Exhibit "D. 63," and the agreement by the two brothers of Dhanraj is Exhibit "D. 62."

This document "D. 62" contains the passage, "Our mother gave him in adoption just in his childhood," on which the defendant's allegation of the "giving and taking" in 1903 mainly, if not entirely, rests. The plaintiff charges that this passage is an interpolation made after its execution for the purpose of corroborating the statements of witnesses as to the "giving and taking" in the lifetime of the mother. The reasoning of the Additional District Judge on this point appears to be open to criticism; he seems to think that as the evidence of the witnesses for the defendant was "consistent" and was corroborated by the passage in question in "D. 62," their statements being thus corroborated he was of opinion that it could not be an interpolation. Relying practically on the statement in question contained in "D. 62," in conjunction with the oral testimony, he came to the conclusion, as already stated, that the defendant had been validly adopted by Joharmal, and that, as Joharmal and Ramdhan were joint in estate, Dhanraj was entitled to the latter's estate.

The Judicial Commissioners consider the passage on which the Additional District Judge rested his decision, as corroborating the story of the defendant's witnesses, was an interpolation.

They also held against the defendant on the plea of estoppel. In view of their decision on the question of fact relating to the adoption, they did not consider it necessary to determine whether Joharmal and Ramdhan were separate or joint.

In the appeal to His Majesty in Council, exception is taken to the conclusions of the Judicial Commissioners on both points. Firstly, it is urged that the factum of a valid adoption in accordance with the rules of Hindu law is conclusively established on the evidence; and, secondly, that Ramdhan was estopped by his conduct and representations from questioning the validity of the adoption, which equally affects the plaintiff.

Admittedly, under the Hindu law, it is essential to the validity of an adoption that the child should be "given" to the adopter

by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else (Mayne's Hindu Law, para. 132). Consequently, a boy who has lost both his parents cannot be adopted.

In 1908 both the parents of the defendant were dead. In order to establish his adoption as valid under the Hindu law, he has put forward two allegations: viz., that his mother before her death went actually through the formal ceremony of "giving," and that before she died she delegated the authority "to give" to his two elder brothers. If she had already given him in adoption, the subsequent delegation of authority would seem to be superfluous. Any such delegation would, however, be invalid. The defendant, therefore, had to establish that in 1903, when his mother was alive, she gave him in adoption to Joharmal, and that consequently he is vested with all the rights that appertain to an adopted son under the Hindu system.

The language of the deed of adoption, to which reference has already been made, requires careful attention. After reciting that he has no male issue and old age has approached, he goes on to say :—

> "I have this day taken you in adoption before the *panchas* and with the consent of your brothers. You are my kinsman and your father was my *gotraj bandhu*. Consequently, for religious purposes and with a view to perpetuate my lineage, I have taken you in adoption, performing the adoption ceremony, presenting you with the turban and giving a feast to all the *panchas*. Therefore you have become the owner of my moveable and immoveable property from this day. You have acquired the same rights as my born son has from this day. None else than you is my heir. You have become the owner of my shop. From this day you will be named Dhanraj, son of Jawharmal Gargoti. May you live long! This is my sincere blessing. I have executed this deed of adoption with my free will and pleasure. It is binding against my estate and heirs. Dated the 25th May, 1908. By the pen of Bhagwant Balaji of Chandur Bazar."

It will be noticed that in this document there is no reference to the essential ceremony of "giving and taking" which, if performed, would naturally occupy the forefront of the deed. It expressly states in so many words that he (Joharmal) had taken the defendant in adoption "this day" (25th May, 1908) "before the *panchas*" (the principal members of the caste). No Brahmin or Jati (priest) is mentioned, and the ceremony performed to effectuate the adoption, "presenting him with a turban and giving a feast to the *panchas*," has no connection with religious rites. The last part of the document is precise in its language and in effect :—

> "You have acquired the same rights as my born son from this day . . . From this day you will be named Dhanraj."

The agreement executed by Kaluram and the other brother of the defendant is as follows :—

> "We both and Ghanasham are three real brothers. You and we are kinsmen of the same caste. You having no male issue, we have, with

a view to perpetuate your line, given you in adoption our younger brother Ghanasham, 13 years of age, with our free will and pleasure this day, and having his adoption ceremony performed with our free will and consent have presented him with a turban. Ghanasham being regarded as your son has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property from this day. We both have ceased to have any interest whatsoever in that boy. And that boy has ceased to have any ownership to our property henceforward. The boy in question is given in adoption in the presence of you and us and the village *panchas*. Our mother gave (him) in adoption just in his childhood. From this day the boy in question is named Dhanraj, son of Jawharmal, and will be so called in future also. May this family thrive!

"Our right of brotherhood to the said boy has been given up from this day. We have ceased to have any ownership whatsoever henceforward. If we set forth any right, it will be null and void by virtue of this document. We have executed this agreement with our free will and consent. It is binding against our estate and heirs. Dated 25th May, 1908. By the pen of Bhagwant Balaji of Chandur."

It will be noticed that it declares :—

"Ghanasham, being regarded as your son, has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property *from this day*. That boy has ceased to have any ownership in our property *henceforward*. The boy in question is given in adoption in the presence of you and us and the village *panchas*."

After the passage charged by the plaintiff as having been interpolated, comes the following :—

"*From this day* the boy in question is named Dhanraj, son of Joharmal, and will be so called in future also."

Then comes the following passage :—

"Our right of brotherhood has been given up from *this day*. We have ceased to have any ownership whatsoever henceforward."

The reference in D. 62 to the giving of the boy by the mother, considering the importance of the ceremony under Hindu law, strikes one as cursory and creates the impression that the casualness of the reference was due to its compression owing to the exigencies of space. It is in these words : "Our mother gave him in adoption just in his childhood." This solitary reference to a vitally important ceremony has been held by the Judicial Commissioners to be an interpolation. They point out that it was perfectly possible to insert this sentence immediately after the previous words. However that be, there is great force in their observation that the words alleged to be interpolated are quite inconsistent with the main purpose of, and the statements in, the documents "D. 63" and "D. 62." These two deeds, in their Lordships' opinion, instead of supporting the evidence on behalf of the defendant, appear to contradict the allegation of a ceremony, and a real effective ceremony, in 1903.

Bhagwant, the writer of the two deeds, was cross-examined respecting the reason why he had omitted in "D. 63" all reference to the ceremony by the mother. His answer, in their Lordships' opinion, is most unsatisfactory. He said as follows :—

> "There were two drafts. It did not strike me then that there was any difference between the actual facts and the recitals of the drafts. The recitals in the deeds were not inaccurate at the time of writing. (The recital about the name of Dhanraj starting that day is read out.) Strictly speaking, there is a mistake. It is customary to write in this way that the name is changed from the date of writing, and so I did not object to it. I do not remember which of the two documents was written first. Though I knew that the boy had been actually adopted I did not insert that as it was not in the draft. I have been writing documents for the last 35 to 36 years."

Bhagwant professes to have been present at the ceremony said to have been performed in 1903. But neither Kaluram nor Chaturbai, the widow of Joharmal, who is supporting the defendant, mentions him. He is a professional "petition writer" and he gives no reason why, if he was present, no document was executed on that occasion. Another statement of his, to say the least, is extraordinary. He said, evidently in answer to a question why the ceremony of adoption was not completed in 1903 :—

> "The boy was given in adoption on Dashera day in Sambat 1960, but no writing was made that day. His mother and his brothers had come there. His mother gave the boy in adoption to Jowarmal. No document was written then as they wanted to wait for an auspicious year. Jowarmal executed Exhibit D. 63 in my presence. Kaluram and Jowarmal (his brother) executed Exhibit D. 62 in my presence."

According to him the auspicious year did not occur until 1908 !

The boy's family lived at the village of Thugaon. The school register produced by the schoolmaster of that place shows that between 1903 and 1907 long after the alleged "giving and taking" he lived in his parental home in Thugaon. As the Appellate Court points out, this circumstance is wholly inconsistent with his having been adopted in 1903, when it is said he was actually made over to Joharmal. Had he been then given in adoption he would have resided with his adopting parents, his name would have been changed, and he would have taken up his position as the adopted son of Joharmal. In the school register he is entered in his original name of Ghanasham. The question, why was he entered as Ghanasham if he had been adopted in 1903, is answered by the deeds executed on the 25th May, 1908.

The statement of Chaturbai, the widow of Joharmal, contradicts in material particulars those of Kaluram, the brother of Dhanraj. In their Lordships' opinion the oral evidence regarding an adoption in 1903 is wholly unworthy of credit.

Their Lordships agree with the Judicial Commissioners in holding that the defendant has failed to establish his allegation of the adoption in 1903.

But it has been strongly contended that Ramdhan and his heir are estopped by the provisions of section 115 of the Indian Evidence Act (1 of 1872) from questioning the adoption.

That section runs as follows :—

" Where one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

What are the " declarations, acts or omissions " of Ramdhan which are said to constitute the estoppel ? It is not necessary to decide in this case whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Assuming, however, that such a status can be established by applying the doctrine of equitable estoppel embodied in section 115, so as to affect the rights of persons other than the adopter, it is necessary to consider in the first place what actually happened in 1908, and what were the acts and representations of Ramdhan which created the estoppel. He is said to have brought the boy to Chandur Bazar from his native village, to have become a witness to the deed of adoption ; allowed him to perform the cremation ceremony of Joharmal ; and at the time of his marriage represented him to be the adopted son of Joharmal.

The parties to this litigation belong to the caste or sect of Agarwallas. These Agarwallas, as has been pointed out in the case of *Bhagwant Das Tejmal* v. *Rajmal*,* generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *Shraddh*, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

The Agarwallas are said to be divided into a number of sub-castes or sects. In the case of *Sheosingh Rai* v. *Mussamat Dakho*† in the High Court of Allahabad, which afterwards came before the Judicial Committee, and the judgment of the learned Judges was affirmed by this Board, the parties belonged to the Saraoji sub-caste. In the present case it is not clear to what sub-sect Joharmal adhered, but the evidence shows that the defendant belongs to the Sekhavati sect. The majority of the defendant's witnesses appear to be Moheshris. Whatever difference there might be between these sub-sects in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole. The learned Judges, who decided in the High Court of Allahabad the case of *Mussamat Dakho*,‡ state the difference between the Brahminical Hindus and the Jains in the following words :—

" They differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of the progenitor, and consequently adoption is a mere temporal arrangement and has no particular object."

* 10 Bombay High Court Reports, p. 21. † 6 N.W.P., H.C.R. 382.
‡ 6 N.W.P., H.C.R., p. 382.

Among the Agarwallas the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the *panchas*) and giving them a feast. According to the document D. 63, as well as the agreement D. 62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in *Mussamat Dakho's* case.*

Their Lordships have no doubt on the evidence that the story about a regular Hindu or, rather, Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwalla adoption, the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu law.

If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in 1908, and so far as the representation and acts of Ramdhan are concerned, they only relate to that adoption.

This Board in the case of *Gopee Lall* against *Mussamat Sree Chundraolee Buhoojee,*† on the question of estoppel, urged in similar circumstances, said as follows :—

> "It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favour, inasmuch they have represented in former suits and in various ways, by letters and by their actions, that Luchminjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchminjee or the defendant on any matter of fact. They are alleged to have represented that Luchminjee was adopted. The plaintiff's case is that Luchminjee was in fact adopted. So far as the fact is concerned there is no misrepresentation, it comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties."

A number of rulings of this Board and a decision of the Madras High Court have been referred to in support of the contention that the plaintiff is estoppel. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Rani Dharam Kunwar* v. *Balwant Singh*‡ the estoppel was considered purely personal.

Their Lordships are in entire agreement with the ruling of the Board in *Gopee Lall's* case (*supra*), and think that there is no sub-

* L.R. Reports, 5 I.A., p. 87, 6 N.W.P., High Court Reports, 382.
† 19 W. D. R., p. 12.
‡ L.R. 39 I.A., 142, 148.

stance whatever in the plea of estoppel raised by the defendant. On the whole they are of opinion that the judgment of the Court of the Judicial Commissioner is sound and that this appeal should be dismissed with costs.

The appellant has, however, taken some exception to the decree made by the Appellate Court. No such objections were either embodied in the grounds of appeal or brought to the notice of the learned Judges. It was only shortly before the hearing of the appeal here that notice was given to the respondent to the effect that objections would be urged against the decree on the hearing. Their Lordships think that to allow a litigant to bring forward at this stage exceptions to a decree, which have never been urged before, is open to very grave objection. The course adopted in the present case was reprehended by the Board in the case of *Mussamat Dakho* already referred to, and their Lordships propose to adhere to the principle laid down there. It seems, however, necessary that the decree as framed should be put into a more practical shape in order to avoid difficulties in the execution Court.

The plaintiff attached six schedules to her plaint. Schedule "A" sets out the amount standing to the credit of the plaintiff's mother in the books of Ramdhan including her ornaments. Schedule "B" refers to immoveable property consisting of fields, etc. Schedule "C" includes money lent on mortgages, etc.

Schedule "D" relates to outstandings on current accounts decrees, etc. Schedule "E" gives the amounts due by the plaintiff to certain specified people, and Schedule "F" relates to moveable property alleged by the plaintiff to have been taken by the defendant.

The appellant in his reply denied that he took forcible or unlawful possession of the property in dispute. He did not deny the fact that he did take possession of the property. In paragraph 6 of his reply he denied that the property mentioned in Schedule "A" was the property of the plaintiff's mother. In paragraph 7 he stated that he had not removed any ornaments and cash from the safe of Ramdhan. In paragraph 8 he stated that the ornaments pledged by Ramdhan to Kaluram belonged to the joint estate of the defendant and Ramdhan and that he was entitled to them; in paragraph 11 he says that the property mentioned in Schedules "B," "C," "D," "E," and "F" does not belong to the plaintiff but to the defendant. Practically he admits having taken possession of all the property which the plaintiff claimed to belong to the estate of Ramdhan. In these circumstances their Lordships think that the decree should run in the following terms:—

(1) that it should be declared that the plaintiff is entitled by right of succession to the estate of her father Ramdhan; (2) that there should be a decree for possession of the immoveable properties claimed by the plaintiff; (3) that there should be a decree for the delivery of the ornaments and other moveable property taken

possession of by the defendant; (4) that the defendant should deliver to the plaintiff all documents of title, securities for loans such as mortgages, decrees, etc., which came into his hands as appertaining to Randham's estate; (5) that if necessary there should be an enquiry as to what was the *stridhan* property of the plaintiff's mother; an account of what is due to Kaluram on the ornaments pledged to him, and (6) an account of the debts of, and outstandings belonging to, Ramdhan's estate realised by the defendant with liberty to the parties to apply to the Court for directions.

In case any of the debts have been barred by the wilful neglect or default of the defendant he would necessarily be liable for those debts. For the purpose of taking these accounts and giving effect to the decree generally a Receiver should be appointed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that the amendments they have indicated should be embodied in the decree.

In the Privy Council.

DHANRAJ JOHARMAL

v.

SONI BAI.

DELIVERED BY MR. AMEER ALI.

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