

Jagannath Rao - - - - - *Appellant*

v.

Rambharosa and another - - - - - *Respondents*

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 15TH MAY, 1936

Present at the Hearing:

LORD ROCHE.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by LORD ROCHE*]

This is an appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, dated 15th December, 1933, which affirmed a decree of the Additional District Judge, Raipur, dated 16th March, 1927.

The subject matter of the suit is the estate of one Baboo Rao Dani deceased. The plaintiffs in the suit were cousins of the deceased, being his paternal uncles' sons, and claimed his estate as reversioners on the death of his widow Musammat Anandabai who died on 27th November, 1924. The respondent Rambharosa, the defendant in the suit, in opposition to the plaintiffs' claim, relied upon an adoption by the widow of Baboo Rao Dani in April, 1920. The sole question for determination is whether this adoption was a valid adoption.

The material facts and dates are as follows: Baboo Rao Dani was a Hindu resident of Raipur. He had no son. In 1911 he went to Delhi for the Durbar and before setting out he made a will which dealt, amongst other things, with the question of adoption. The will was written out by Baboo Rao Dani himself. It began thus:

"I am going to Delhi for the *Durbar*, therefore I am writing the following conditions about my property. I hope that by the grace of God, such an occasion will not arise, but strange is the course of time. Therefore my friends and (other) persons should make, after me, arrangements according to what I have put down in writing below; and what I have written shall be considered valid in law."

Next followed two pages relating to certain debts and as to his properties and containing directions as to such debts and properties. The will then proceeded and ended thus:

"After all this is done, a boy should be taken in adoption to perpetuate the name of ancestors and manage the estate. No boy has been yet taken in adoption. It is expected that (any) of my paternal uncles' sons may get a son. If he gives (the boy) my wife should take him in adoption. Seven years' time is allowed for this. After seven years Jiawaji's younger son Bhagwati should be taken in adoption.

"After the debts, etc., are paid off, persons of my family should allot for ever property of an income of five hundred rupees to the School Department to preserve my memory for ever, and a boy should be taken in adoption for the rest of the property. This amount (shall) specially (be) for the Maratha caste, not only that, but poor boys of my caste shall have a preferential right.

"Seven years' time has been allowed for adoption, but if Vyenkat Rao Naik, Rao Bahadur Mahdik, Gajraj Singh and Sadashiv Rao Garad, think that (a boy) should forthwith be taken in adoption, there is no objection to my wife's (adopting a boy immediately) according as they may advise. However the debts should be satisfied and property of an income of five hundred rupees should be set aside for the School Department, first, and a boy should be taken in adoption for the remaining property. If it is decided to take (a boy) in adoption, *mauza* Kolar should be reserved for my wife and for the maintenance of the adopted boy (the property) should afterwards be placed under the management of the Court of Wards or of *panches* of whom Vyenkat Rao Naik should be the *sir panch*. The boy should be very well educated. He should be sent to England if possible. If this boy does not exist which God may forbid, any boy can be taken in adoption.

"The property to be allowed to the School Department should remain in charge of Government.

"I have executed this Will with my free will and pleasure. It should be completely executed after me. My paternal uncles' sons or any one else has no right to my property. I am myself the owner. I had full rights to dispose of my estate as I liked.

"Dated 26th November, 1911. (Sgd.) Baboo Rao Dani".

After the Durbar, Baboo Rao Dani returned safe to Raipur and lived for several years and died on 6th November, 1918. On 25th April, 1920, Rambharosa the defendant was adopted by the widow purporting to act in accordance with her deceased husband's wishes. Rambharosa was the eldest son of one Jiawaji, a maternal uncle of Baboo Rao Dani, who died before the date of the adoption. On 27th November, 1924, the widow Musammatt Anandabai died. The will had been entrusted by Baboo Rao Dani at the time of its execution to a friend for safe custody but on his return from the Durbar it was said to have been lost or mislaid and it was not found or seen again either in the lifetime of Baboo Rao Dani or in that of his widow. In 1925 it was said to have been found by a son of the friend to whom it had been entrusted and to have been shown to the plaintiffs. This suit was begun in the year 1926. The Trial Judge found that the widow was not informed of the terms of the missing will but there had been conversations in Baboo Rao Dani's

lifetime between him and his wife as to adoption and the Trial Judge found that these were to the same effect as the instructions contained in the will. It is clear, however, that the defendant Rhambharosa, who was not mentioned in the will, was mentioned in these conversations by Baboo Rao Dani as a possible and proper boy to be adopted as was also his younger brother Bhagwati who was mentioned in the will. Baboo Rao Dani had paid attention to the nurture and education of both these lads during his lifetime presumably with this object in view. But their Lordships proceed upon the assumption that at all times Baboo Rao Dani expressed a preference for Bhagwati for the purposes of adoption. Before adopting the defendant the widow tried to secure Bhagwati in adoption but, as both Courts have found, his mother a widow definitely refused to give that son Bhagwati in adoption and the defendant was only adopted after and in consequence of that refusal.

The rights of all parties to the suit are governed by the rules of the Bombay school of Hindu law. The effect of those rules on the matter of adoption is quite clear and when this matter was before this Board on an earlier occasion on appeal on another issue the rule of law was thus stated by their Lordships then advising His Majesty: that a widow has in herself power to adopt, subject only to such restriction, if any, as may have been imposed upon her by her husband.

In the case of *Yadao v. Namdeo* (48 I.A. 513) this Board put the matter thus: "A direction to operate as a prohibition against a Hindu widow adopting any boy to her husband as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption for him". The question for decision, therefore, is, was the adoption of the respondent so contrary to the directions of Baboo Rao Dani as to have been prohibited by him?

The previous course of the litigation should be briefly referred to. The Additional District Judge decided the suit in favour of the defendant and in so doing decided the question now in issue in the negative. The adoption was therefore held to be valid. On appeal the judgment was affirmed on an entirely different ground, viz., that the will was a contingent will only intended to come into operation if the testator died during his visit to Delhi for the Durbar. Upon appeal to His Majesty in Council the decision as to the contingent nature of the will was reversed and the suit remanded to the Court of the Judicial Commissioner to deal with the other matters upon which that Court had not passed. On the hearing of the case on remand in the Court of the Judicial Commissioner the Court concurred in the findings of fact and law of the Trial Judge and held that the adoption was valid. Hence this further appeal now to be decided by their Lordships.

Both Courts have decided this case on the construction of the will and on the assumption that it was the will which governed the rights of the parties and affected and controlled the powers and rights of the widow. Their Lordships propose to deal with the matter upon the same assumption but before proceeding to a consideration of the contentions of the parties and the effect of the will, their Lordships think it right to make some observations on another matter.

In this case, as has been already stated, the will was not available to the widow when she made the adoption and the Trial Judge found that its contents were not communicated to her. It seems to their Lordships that the effect of such a state of facts and the bearing of unknown prohibitions upon the powers and rights of a widow are matters which may hereafter arise for decision and will then require very careful consideration. But if such a case were to arise before this Board, their Lordships then sitting would doubtless have what is absent here—the benefit of the opinions of judges in India on such important matters after evidence and argument and after consideration of the applicability to such a case of the doctrine of *factum valet* and of any other principles of the Hindu law bearing upon the case. Here it is not only undesirable to express any conclusion on this point but it is also unnecessary because their Lordships are of opinion, for reasons they will presently state, that assuming the will governs the matter, as the appellant claims that it does, the adoption of Rhambharosa was not prohibited and was valid.

On the argument of this appeal, two contentions were urged against the validity of the adoption. They were as follows :—

Firstly.—It was said that the phrase in the will “ seven years’ time is allowed for this ”, meant that the widow was to wait for seven years after the death of Baboo Rao Dani and not merely for seven years from the date when the will was made to see whether the plaintiffs, who were the paternal uncle’s sons referred to, would either of them have a son in which case he was to be adopted : that the adoption of Rhambharosa was within the seven year period computed as the plaintiffs said it ought to be computed.

Secondly.—It was said that Bhagwati had not died and unless he died any other adoption was prohibited.

As bearing on both of these contentions it is to be observed that in their Lordships’ view the dominating idea and object of Baboo Rao Dani as expressed in the will was that there should without fail be an adoption for good reasons which are plainly expressed by the testator himself. The will if construed as the appellant desires would be one well adapted to defeat the very object which the testator desired and would in fact have defeated that object.

Bearing this in mind the first contention may be examined.

Of course it is true that this will like all other wills speaks, that is to say, operates from the date of the death of the testator. But this and any other will may speak of or about any other date and may make stipulations as to time which may run from any date from which the testator meant that it should run. Here, as was pointed out in the Courts below, many matters in the will are dealt with as and from the date of the will. What is perhaps most important is the user of the present tense in the words "It is expected" relating to the possibility of sons being born to the plaintiffs. Close upon those words follows the provision allowing seven years for realisation of the expectation. Those seven years had all but expired when Baboo Rao Dani died. The plaintiffs were still without sons and are without sons to the present time. Moreover, the power to abridge the time of seven years was insensible and incapable of exercise if the seven years were to run from the date of death. Two of the persons empowered predeceased the testator. Their Lordships have no doubt that the Courts below were right in holding that the seven years expired in November, 1918, some year and a half before the adoption. Whilst deciding this as a matter of construction their Lordships think it is not without significance that the contention to the contrary was not raised either in the pleadings or in argument at the hearing or when the matter first went on appeal to the Court of the Judicial Commissioner. It first presented itself as a possible construction and was raised as a contention when the matter was on the former occasion brought on appeal to His Majesty in Council.

As to the second contention : The sentence relied upon is the sentence beginning "If this boy (Bhagwati) does not exist" which sentence is an interlineation in the will. It seems to be a forced and entirely inadmissible construction to extract from a parenthetic note providing for Bhagwati's possible death, and permitting another adoption if that occurred, a prohibition of any other adoption if Bhagwati's adoption proved as it did prove, to be impossible for a reason of which the testator had probably never thought at all. The language used by this Board in the case of *Yadao v. Namdeo (supra)* already cited is much in point. There was here no direction either explicitly made or clearly intended to limit the discretion of the widow in such a case as in fact occurred.

For these reasons the decision appealed from is in the opinion of their Lordships unimpeachable and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

JAGANNATH RAO

v.

RAMBHAROSA AND ANOTHER

DELIVERED BY LORD ROCHE.

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