1916.

KAVASJI SORABJI v. BAI DINBAI.

Motibai v. *Karsandas Narayandas*[1] and *Dayabhai Tapidas* v. *Damodar Tapidas*.[2] The lower Court has decided this as a preliminary point against the applicant and decided it wrongly.

There is a further question of fact to be answered. The opponent denies that the applicant is a beneficiary under the will or has any interest whatever in the estate of the deceased. If that be so, he would clearly have no *locus standi* in any such proceedings as these. But that question must be dealt with by the learned Judge below.

We set aside his order and remand the application to be disposed of in accordance with the foregoing observations.

Costs to abide the result.

Order set aside.

R. R.

(1) (1893) 19 Bom. 123. (2) (1895) 20 Bom. 227.

APPELLATE CIVIL.

1916.

August 10.

Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and Mr. Justice Shah.

KASHIBAI ALIAS JANKIBAI KOM RAMCHANDRA DINKARRAO GHATAGE (ORIGINAL PLAINTIFF), APPELLANT *v.* TATYA BIN GENU PAWAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 11, 12, 13 AND 14), RESPONDENTS.*

Hindu Law—Adoption—Will in favour of a grand-daughter—Simultaneous execution of adoption deed as well as will—Construction of documents—Adopted son's consent, binding effect of—Disposition good as a family arrangement.

One B died leaving him surviving his widow L and a predeceased son's daughter K (plaintiff). B, before his death, recommended L to adopt A,

* Second Appeal No. 123 of 1914.

1916.

KASHIBAI v. TATYA.

his brother's son. L made the adoption by a deed, dated the 10th June 1895, and simultaneously executed a will in favour of K. On the strength of this will K claimed the properties in suit. The Subordinate Judge decreed K's suit holding that the will being made with the full consent and concurrence of A who was then major must take effect. On appeal the decree was reversed. On appeal to the High Court,

Held, (1) that the adoption deed and the will must be read together, and that, so read, they constituted a single family arrangement.

(2) that the adopted son who was of full age having deliberately accepted the family arrangement and its advantages must be held to it.

Visalakshi Ammal v. *Sivaramien*,[1] referred to.

(3) that the disposition in favour of plaintiff was good not because it was a bequest made by L, but because it was a part of the single family arrangement which all parties accepted.

SECOND appeal against the decision of G. K. Kanekar, First Class Subordinate Judge, A. P. at Sholapur reversing the decree passed by V. P. Raverkar, Subordinate Judge at Barsi.

Suit to recover possession.

The properties in suit belonged to one Bapurao bin Vithalrao. He had only one son by name Nana who predeceased him.

Bapurao died three or four days after Nana leaving him surviving his widow, Lakshmibai, Kashibai (plaintiff) the minor daughter of Nana and the widow of Nana.

Bapurao before his death recommended Lakshmibai to adopt Anna (defendant No. 1), his brother's son. Lakshmibai accordingly passed an adoption deed in defendant No. 1's name on the 10th June 1895, and simultaneously executed a will in favour of plaintiff. The will was attested by defendant No. 1 who was then major, by his father and by his brother who being a

[1] (1904) 27 Mad. 577.

1916.

KASHIBAI v. TATYA.

qualified pleader acted as defendant No. 1's legal adviser in these transactions. It was under this will the plaintiff claimed title to the properties in suit.

Defendant No. 1 did not appear.

Other defendants who were claiming under defendant No. 1 contended that they were *bona fide* purchasers without notice of plaintiff's rights; that as a Hindu widow Lakshmibai could not make the will and therefore plaintiff got no interest in the suit properties.

The Subordinate Judge held that the adoption of defendant No. 1 was conditional and it was agreed that the suit property should be Lakshmibai's absolute property which she could will away to the plaintiff. He, therefore, decreed the plaintiff's suit on the following grounds:—

"The next question is whether such a condition and agreement is valid in law. The point is covered by a long course of decisions of which it is sufficient to quote *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*, 6 Bom. H. C. R. 224; *Chitko* v. *Janaki*, 11 Bom. H. C. R. 199 (*A. C. J.*); *Basava* v. *Lingangavda*, I. L. R. 19 Bom. 428 and *Lakshmi* v. *Subramanya*, I. L. R. 12 Mad. 490. The present case resembles very materially I. L. R. 12 Mad. 490. In the Madras case the adoptive father (here the adoptive mother) at the time of the adoption executed a document in the nature of a will, making certain dispositions in favour of his widow (here in favour of her minor grand-daughter). There it was found as I find here that the natural father (and here even the adopted son who was major) at the time of the adoption, was aware of the arrangements in the will and consented to them and also but for such consent the adoption would not have taken place. The adoption and the will formed parts of one and the same transaction and the case was thus one of conditional adoption. The condition was upheld. The following remarks of Shephard J. are quite pertinent. 'But for the consent of the natural father, the adoption would never have taken place. To object to the agreement is, therefore, tantamount to objecting to the adoption. The adoption and the disposition of his property by the father (here adoptive mother) being part of one transaction, the son never acquired any interest in the property disposed of...The will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from...the estate and applied to a

particular purpose, which should take effect after his (here Lakshmibai's) death.' The will in the present case being with the full consent and concurrence o defendant No. 1 who was major then must take effect against him and all persons claiming through him."

On appeal, the First Class Subordinate Judge reversed the decree.

The plaintiff appealed to the High Court.

K. H. Kelkar, for the appellant :—I submit the case rests solely on the construction of two deeds executed simultaneously by Lakshmibai, independently of the oral evidence led in the case. The lower appellate Court was wrong in holding that the determination of the case rests solely on the appreciation of the oral evidence. When the two documents, viz., the deed of adoption and the will are read together, they constitute a single family arrangement. Properties have been earmarked in both these documents which are also attested by defendant No. 1 who was then major, by his father and by his brother who acted as his legal adviser. The first defendant having accepted the family arrangement and its advantages is estopped from disputing the transaction : see *Visalakshi Ammal* v. *Sivaramien*.[1]

B. G. Rao, for respondent No. 1 :—The two deeds, viz., the deed of adoption and the will do not constitute any family arrangement when they are read independently of the oral evidence. The oral evidence is disbelieved by the lower appellate Court. Even if they are read together the effect is to confer upon the widow Lakshmibai an absolute power of disposition of property which has been held to be *ultra vires* : see *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*;[2] *Venkappa* v. *Fakirgowda*;[3] *Vyasacharya* v. *Venkubai*.[4] Beyond mere attestation by

[1] (1904) 27 Mad. 577.
[2] (1887) 11 Bom. 381 at p. 403.
[3] (1906) 8 Bom. L. R. 346.
[4] (1912) 37 Bom. 251.

1916.

KASHIBAI v. TATYA.

defendant No. 1, there is no evidence to show that defendant No. 1 assented to any family arrangement; mere attestation of a document does not import any concurrence in the provisions of that document: see *Hari Kishen Bhagat* v. *Kashi Pershad Singh* [1].

BATCHELOR, Ag. C. J.:—The circumstances giving rise to this appeal are these. The plaintiff is the daughter of one Nana, who was the son of Bapurao bin Vithalrao. On Nana's death, his father Bapurao took an absolute estate in the property by survivorship. Bapurao, however, survived his son only four days. On his death, his widow Lakshmibai became entitled for a widow's estate. Bapurao before his death recommended Lakshmibai to adopt the 1st defendant, who is Bapurao's brother's son. At the same time there was a grand-daughter, the present plaintiff, to be provided for. Thus at one and the same time Lakshmibai by two documents made the adoption of the 1st defendant, and also executed what is termed a will, devising certain property to the plaintiff. The 1st defendant did not appear at the trial of the suit, and the contesting defendants now are alienees from the 1st defendant.

In the Court of first instance, Mr. V. P. Raverkar, in a careful judgment decreed the plaintiff's suit. That decree was reversed on appeal to the First Class Subordinate Judge, Mr. Kanekar. But of his judgment it will be enough to say that no one before us has relied upon it, and it has appeared extremely difficult to extract from it any intelligible principle.

The question before us is whether the plaintiff is entitled to the property that she claims. The claim in the plaint is based upon the provisions of the will of Lakshmibai. But in reality what we have to

[1] (1914) 42 Cal. 876.

consider and determine is the effect of the two contemporaneous documents executed on the 10th June 1895 in the presence of many witnesses. It appears to me indisputable that these two documents must be read together, and that, so read, they constitute a single family arrangement disposing of the properties to which they refer. Certain of those properties are specified in the instrument in the plaintiff's favour, while the others are similarly specified in the deed of adoption of the 1st defendant. In this latter deed it is made quite clear that the 1st defendant as the adopted son of Bapurao bin Vithalrao will be entitled, not to the whole property of his adoptive father, but only to that particular portion of it which is described in the document.

The will in favour of the plaintiff is attested by the 1st defendant, by his father, and by his brother, that brother being a qualified pleader, who was the 1st defendant's legal adviser in these transactions. It must, therefore, in my opinion, be inferred that the 1st defendant, who was then of full age, deliberately accepted this family arrangement, and that he took the advantage which the arrangement conferred upon him. That being so, it appears to me that in this appeal we are not concerned with that class of cases which consider the position when a bargain made between the adopting widow and the guardian of an adopted infant diminishes the estate which the adopted son would otherwise take. The essential fact here is that the adoptee at the time of his adoption was of full age. There appears no particular authority in which the legal position of such an adopted son is formally considered, but in *Visalakshi Ammal* v. *Sivaramien*,[1] Sir Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Benson in making the reference to the Full Bench expressed the following opinion upon the point:

[1] (1904) 27 Mad. 577 at p. 582.

1916.

KASHIBAI v. TATYA.

"Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent." This expression of opinion favours the view which I am taking, that the 1st defendant having deliberately accepted the family arrangement and its advantages must now be held to it. It appears to me no answer to say that the widow Laxmibai was not empowered to bequeath her husband's property to the plaintiff, and that if she had no such power in law, she certainly did not obtain it by reason of the adoption. It must be admitted that Laxmibai had no such power. But the disposition in the plaintiff's favour seems to me to be good, not because it was a bequest by Laxmibai, but because it was part of the single family arrangement which all the parties accepted, including the 1st defendant. The ground of the plaintiff's successful claim seems to me in other words to be, not Laxmibai's will, but that of which this will is evidence, namely, the family arrangement. Mr. Rao has called our attention to the well-known decision of their Lordships of the Privy Council in which it was laid down that the mere attestation of a document must not be taken to import any concurrence in the provisions of that document. But our decision is far from infringing this pronouncement. For in this case we have, in order to prove the 1st defendant's acquiescence in the arrangement, not only the attestations of himself and his legal adviser on Laxmibai's will, but also the more eloquent fact that he was content to accept the deed of adoption, which in terms restricted the property to which he was entitled.

1916.

KASHIBAI v. TATYA.

On these grounds it appears to me that the trial Court's decision is right, and that the plaintiff under the arrangement made is entitled to the property which she claims. I would, therefore, reverse the decree under appeal and restore that of the Subordinate Judge of trial with costs throughout.

SHAH, J. :—I agree.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

KASHINATH KRISHNA JOSHI (ORIGINAL DEFENDANT), APPELLANT *v.* DHONDSHET BHAVANSHET SHETYE (ORIGINAL PLAINTIFF) RESPONDENT.*

1916. *August* 14.

Res judicata—*Civil Procedure Code (Act V of 1908), section 11—Sale of Khoti lands on the basis that they are alienable—Subsequent suit between the parties on the allegation that the lands were inalienable—Khoti Settlement Act (Bombay Act I of 1880), section 9.*†

Certain Khoti lands were sold in execution proceedings between the parties on the footing that they were alienable, and purchased by the defendant.

* Second Appeal No. 1118 of 1915.

†9. The rights of Khots, Dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable without the consent of the Khot, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the Khots, at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66, or, unless, in the case of an occupancy-right conferred by the Khot under section 11, the Khot grants such right of transfer of the same :

Provided that an occupancy-tenant may without the consent of the Khot grant a lease for a term not exceeding one year.