APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Macklin.

1937
August 9

AYUSHA WALAD AMIRSHA JAMADAR AND OTHERS (HEIRS NOS. 1 TO 5 OF ORIGINAL PLAINTIFF), APPELLANTS *v.* BABALAL MAHABUB (NOW CALLS HIMSELF AS BABALAL HASAN) AND OTHERS (ORIGINAL DEFENDANTS AND HEIR NO. 6 OF PLAINTIFF), RESPONDENTS.*

Mahomedan law—Adoption—Parties residing in Kolhapur State—Property situate in British India—Validity of adoption—Mahomedan law to apply, unless varied by custom—English rule of lex loci*—Bombay Regulation IV of 1827, section 26.*

A Mahomedan lady, a resident of the Kolhapur State, had landed property both in that State and in British India. In 1912, she took defendant No. 1 in adoption. There was then between the lady and the defendant a litigation in the Kolhapur State which ended with a decree that the adoption of defendant No. 1 was valid according to a custom prevailing in the Kolhapur State and that he was entitled to succeed to the lady's estate in that State.

In 1930, a collateral of the lady claiming to succeed to her property in British India, sued to recover from defendant No. 1 possession of a plot of land situate in the Belgaum District. The defendant having contended that he was the validly adopted son of the lady and as such entitled to succeed to her property :—

Held, (1) that the law of British India for the succession to Mahomedans was the Mahomedan law as varied by custom;

(2) that defendant No. 1 had not succeeded in proving that adoptions by Mahomedans in the Chikodi Taluka of the Belgaum District were customary.

The rule of adopting the *lex loci* for the discovery of the right heir to land is not confined to England. It appears to be the law of India also.

FIRST APPEAL from the decision of G. M. Phatak, First Class Subordinate Judge, Belgaum, in Civil Suit No. 357 of 1930.

Suit to recover possession of land.

The parties to the litigation were residents of Khidrapur in the Kolhapur State.

The land in suit, situate at Shahapur in the Belgaum District, originally belonged to a person called Gundu who died leaving him surviving a widow (Ameena) and a daughter (Bibisha). The widow too died and on her death the land came to be held by Bibisha.

* First Appeal No. 56 of 1934.

In 1910, Bibisha mortgaged the land to Bharma Raghu (defendant No. 4).

On August 30, 1912, Bibisha took Babalal (defendant No. 1) in adoption. There was then a dispute as to the transfer of her property to the name of defendant No. 1 and Shri Jagadguru of Sankeshwar Math, in his capacity as Inamdar, directed defendant No. 1 to establish in a Civil Court his title to succeed to Bibisha's property as her adopted son.

Defendant No. 1 accordingly filed suit No. 246 of 1917 in the Shirol Court in the Kolhapur State. He failed in the trial Court, but succeeded in first appeal and the appellate decision was affirmed by the Court of His Highness the Chhatrapathi Maharajasaheb of Kolhapur.

Bibisha died in 1920.

In 1929, defendant No. 1 paid to defendant No. 4 Rs. 900 due to the latter under the mortgage of 1910.

In 1930, Amirsha sued to recover from defendant No. 1 possession of the suit land on the allegation that he was an heir of deceased Bibisha and that defendant No. 1 was not her adotped son.

Defendant No. 1, relying upon his title as an adopted son, contended *inter alia*, that the question as to factum and the validity of his adoption had been finally decided in his favour by the Kolhapur Court and that, in any event, he was entitled to be reimbursed as to Rs. 900 paid by him to defendant No. 4.

The trial Judge dismissed the suit and in deciding the issue as to whether the adoption was valid, he gave his reasons as follows :—

"The fourth issue is whether the adoption of Defendant No. 1 by Bibisha on 30th August 1912 is valid. Exhibits 27 and 37 leave no doubt whatever that adoptions, even by Mahomedans, are recognised in Kolhapur State, within which lies Khidrapur, the residence of the parties, as stated in paragraph 15 above.

1937

AYUSHA v. BABALAL

Mr. Deshpande for the plaintiffs further argues that the status as adopted son which defendant No. 1 might possibly claim as regards property situated in Kolhapur State is not available to him as regards the property in suit, which is situated within the British Terr tory.

I cannot agree with that argument: see A.I.R. 1929, Lahore 230; I.L.R. 16 Allahabad, 379.

I find issue No. 4 in the affirmative."

Heirs of original plaintiff appealed.

S. A. Desai, with *G. A. Desai* for *A. G. Desai*, for the appellants.

G. P. Murdeshwar and *C. S. Hattyangadi*, for respondents Nos. 1 and 2.

S. A. Desai, with *G. A. Desai* for *A. G. Desai*, for respondent No. 4.

BARLEE J. The dispute in this case is about the succession to the property of a lady called Bibisha, who was a resident in the Kolhapur State. She had landed property both in the Kolhapur State and British India, i.e., in the Chikodi Taluka of the Belgaum District. The plaintiff, a collateral, claims the property as her nearest heir. Defendant No. 1 pleads that he has become her son by adoption.

It has been established in a suit in the Kolhapur State that Bibisha went through a ceremony of adoption and purported to take defendant No. 1, Babalal, as her adopted son. This action of hers led to litigation, for apparently she resiled from her choice; and Babalal, while a minor, had to file a suit against her for a declaration that he was her adopted son. The question was then agitated whether an adoption by a Mohamedan was in accordance with the custom of the Kolhapur State, and should be recognized as legal; and the litigation ended with a decree that the adoption was valid and that the adopted son Babalal, now defendant No. 1, was entitled to succeed to Bibisha's estate in the Kolhapur State. Bibisha then died and the question of succession to her estate in British India is for decision

in the present case. The trial Court has decided that the adoption was valid and that the adopted son Babalal is entitled to succeed to the estate in suit. Against this decision there has been an appeal.

The learned trial Judge has decided in favour of Babalal on the ground that it had been proved conclusively by the production of the judgment of the Kolhapur State that adoptions by Mohamedans are recognised in the Kolhapur State, and has rejected the argument put forward on behalf of the plaintiff, that a status recognised in Kolhapur is not available to Babalal as regards the lands in British India. The reasoning of the learned Judge has been developed by Mr. Murdeshwar in this Court, and is in effect, that the question whether Babalal is a validly adopted son has to be decided by the personal law of the parties, and for the personal law of the parties we must look to the country of their domicile, i.e., Kolhapur. If the learned advocate is correct, then his client was bound to succeed, for the status of the defendant, Babalal, in Kolhapur has been conclusively determined by the suit between him and the present plaintiff in the Kolhapur Court. But it appears to us that the learned Judge was wrong and that Mr. Murdeshwar's argument is incorrect. The rule of private international law adopted in English Courts, as stated by Dicey and Westlake, is that the succession to land in England is governed by the law of England; and the English Courts have gone so far as to say that they will only recognize as an heir to land in England a man who is legitimate by the law of England and will not recognize a man who is illegitimate in the eyes of that law even though he be legitimate according to his personal law. This rule of adopting the *lex loci* for the discovery of the right heir to land is not confined to England, (see Dicey). It appears to be the law of India also or rather of the Bombay Presidency with which we are concerned; for it is enacted in Bombay Regulation IV of 1827, that

1937

AYUSHA v. BABALAL

Barlee J.

the law to be observed in the trial of suits shall be Acts of Parliament, etc.; and in the absence of such Acts and Regulations, the usage of the country in which the suit has arisen. It follows that the personal law of the defendant can only be taken into consideration in the absence of an usage of the country in which this suit has arisen, i.e., of British India.

We have to decide this matter, then, by the law of British India, and the law of British India for the succession to Mohamedans is the Mohamedan law as varied by custom. But it is the Mohamedan law, pure and simple, unless a variation has been introduced by custom. Therefore the main question in this appeal is whether the defendant had succeeded in proving that adoptions by Mohamedans in the Chikodi Taluka of the Belgaum District are customary, and if so, whether the custom satisfies the legal requirements of a valid custom. This in our opinion he has failed to do. It is proved that the custom exists in the Kolhapur State near the border and the evidence of the custom proved in the Kolhapur State would be of very great use to him if he had been able to produce similar evidence in the Belgaum District. But he has not produced any evidence of that sort. He has given a list of adoptions of Mohamedans at page 25 of the paper book, and two of the persons named were persons living in the Chikodi Taluka. But he has not made it clear whether those took sons in adoption or gave sons in adoption to Kolhapur Mohamedans and that is the defect in their evidence which renders it useless. We notice that he promised to call witnesses to prove these adoptions, but eventually he called none. We are left, therefore, with the evidence that there is a custom of adoption amongst the Mohamedans of the Kolhapur State, but no evidence that there is any such custom in the Belgaum District; and, though the former evidence may be suggestive, it is not sufficient to prove the defendant's case; particularly as with the exception

1937

AYUSHA v. BABALAL

Barlee J.

of a brief period at the beginning of the 19th century the Belgaum District and the Kolhapur State have been under different jurisdiction for centuries. It is quite possible that under the Maharajahs of Kolhapur a custom has arisen, which did not arise under the Peshwas who were the sovereigns of what is now the Belgaum District up to 1818.

We, therefore, must disagree with the decision of the learned Judge, and the result of our finding is that the case must be remanded to the lower Court. The land in dispute was mortgaged to defendant No. 4 and was redeemed by defendant No. 1. He is entitled to stand in the shoes of the mortgagee, and must be redeemed by the plaintiff before he can be required to give it up, and therefore the lower Court must frame a preliminary mortgage decree. The plaintiff has an interest which entitles him to redeem.

Our order is that the decree of the lower Court is set aside and the suit be remanded under Order XLI, rule 23, for disposal according to law.

The appellant must get his costs up to date including the costs of this Court.

Decree set aside : suit remanded.

Y. V. D.

APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Macklin.

1937

September 7

VITHABAI KOM DATTU PATAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 3 TO 8), APPELLANTS *v.* MALHAR SHANKAR KULKARNI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 9), RESPONDENTS.*

Indian Evidence Act (I of 1872), sections 107 and 108—Woman succeeding as widow of gotraj sapinda*—Widow alleged to have died in 1921-1922—Death, presumption of—No presumption as to date of death—Transfer by heir of last male holder in 1929—Suit by transferee in 1932—Transfer of Property Act (IV of 1882), section 43.*

A widow succeeding to certain property as the widow of *gotraj sapinda* transferred in 1918 the whole of her interest in the estate in favour of her step-daughter who

* First Appeal No. 83 of 1934.