SUPREME COURT OF INDIA

Ratanlal @ Babulal Chunilal Samsuka

Vs.

Sundarabai Govardhandas Samsuka

C.A.No.6378 of 2013

(N.V.Ramana and Amitava Roy,JJ.,)

22.11.2017

JUDGMENT

N.V.Ramana,J.,

1. The appellant is before us aggrieved by the judgment and decree passed by the High Court of Judicature at Bombay, in First Appeal No. 1662 of 1996, dated 22.12.2006. The High Court has partly allowed the appeal by setting aside the judgment of trial court and declared that the 1st defendant, who is the appellant herein, was not the adopted son of late Govardhandas Laxmichand Samsuka and consequently the appellant herein was permanently restrained from representing himself as son of Govardhandas and further restrained him from naming himself as Ratanlal Govardhandas Samsuka.

2. A brief reference to the factual matrix necessary for disposal of the case on hand are, late Govardhandas has a brother by name Chunilal Laxmichand who is none other than the father of the 1st defendant/appellant herein. Right from his childhood, appellant used to reside with his paternal uncle Govardhandas. During his life Govardhandas used to carry on business of timber in the name of defendant No. 5 initially and later he inducted into business the appellant and defendant Nos. 2 to 4 as partners. After the death of Govardhandas his wife Sundarabai who is the original plaintiff in the suit was also taken as a partner. When the other partners failed to give her share in the business, she issued notice to all the partners to give accounts of 5th defendant partnership firm and also to pay the amount of her share.

3. In the year 1984, wife and children of Chunilal i.e. brother of Govardhandas issued notice, to Sundarabai and the appellant, stating that appellant is the adopted son of late Govardhandas as such he cannot claim any share in his natural family and further sought for partition of the joint family properties, for that Sundarabai issued a reply notice denying the factum of adoption and thereafter filed the present suit i.e. Special Civil Suit No. 395/1987 for dissolution and accounts of defendant No. 5 partnership firm and also sought for a declaration that the appellant is not the adopted son of late Govardhandas. During the pendency of the suit, Sundarabai died and her daughters were brought on record.

4. The trial court, after a full-fledged trial, has partly decreed the suit declaring that the deceased Sundarabai, original plaintiff had 1/5th share in the assets and liabilities of the partnership firm and passed preliminary decree for taking accounts. But the declaration claimed by the plaintiff that appellant is not the adopted son of late Govardhandas was rejected and the trial court came to the conclusion that plaintiff failed to prove that defendant is not the adopted son of late Govardhandas. The reasoning of the trial court can be summed up as under:

> "a. Plaintiff failed to prove that appellant herein is not the adopted son of late Govardhandas.
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> b. Continuation of biological father's name over adopted father's name even after the 1973 is inconsequential in view of other evidences on record.
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> c. That some letters and invitations were addressed to appellant with his adoptive father's name.
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> d. That the priest [Chaturbuj Sharma] who is alleged to have performed the adoption ceremony has deposed in favor of the appellant.
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> e. Photographs taken at the time of the adoption ceremony are self-explanatory. It is to be noted that in one particular photograph appellant is seen with a garland and absence of Asha or her husband in the photographs clearly proves that adoption had taken place one day prior to the marriage of Asha [daughter of Govardhandas and Respondent]."

5. Aggrieved by the judgment and decree passed by the trial court, the plaintiffs carried the matter to the High Court in First Appeal No. 1662/96. The appellant herein has not questioned the preliminary decree passed for accounts and declaration that late Sundarabai is entitled to 1/5th share in 5th defendant company as such those findings have become final. The High Court, while partly allowing the appeal, concluded that the appellant herein is not the adopted son as the conduct and circumstances surrounding the adoption are suspicious. The following circumstances have weighed with by the High Court in coming to the conclusion that the factum of adoption was not proved with cogent evidence-

> "a. Non-production of negatives of alleged photographs taken during the adoption ceremony.
>
> b. That the photographs do not portray any ceremony being performed by the priest involving the appellant and his adoptive parents.
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> c. The alleged adoption took place one day before the marriage of Asha (daughter of respondent), which casts shadow on the photographs taken during the ceremony.

d. That there was no evidence on record other than the oral testimony of one Chaturbuj Sharma that he performed the adoption ceremony as a priest.

e. That appellant himself has contradicted the oral testimony of the alleged priest Chaturbuj Sharma concerning the ceremony of taking the appellant into the lap of Govardhandas.

f. That the letters exhibited to show the change of name does not cogently establish the adoption.

g. From the date of adoption up to filing the suit, the appellant continued to use his earlier name without adopting the name of the adopted father.

h. The Income tax returns of the appellant after 1973 indicates that he continued to use his earlier name.

i. No explanation forthcoming from the appellant concerning the above suspicious circumstances.

j. Moreover, the adopted mother herself is contesting the factum of adoption.

6. Learned counsel appearing on behalf of the appellant has argued that-

a. The custom of married men getting adopted is prevalent in Jain community, which has been proved by the priest who performed the adoption ceremony.

b. The custom of adoption of married men was judicially recognized in catena of cases.

c. The appellant has been validly adopted in consonance with the accepted customs.

7. On the other hand, learned counsel appearing on behalf of the respondents has contended that-

a. The appellant has not pleaded any custom in Jain community which allows adoption of married men.

b. That the adoption should be accepted only when it is established with cogent and consistent proof, as it has the potential to alter the succession.

c. The appellant retained his earlier name and acquired properties subsequently in his earlier name itself.

8. In the light of the submissions advanced before us, we are called upon to answer two short questions concerning the alleged adoption of the appellant herein by late Govardhandas in the year 1973. Hence the following issues arise for consideration before this Court-

> 1. Whether the person who alleges the existence of a custom need not prove the same because it is judicially accepted?
>
> 2. Whether the appellant could plead and prove the factum of adoption?

9. In response to the issue number one, first and foremost, we would like to deal with the submission of the learned counsel for the appellant that the custom of giving married man in adoption in Jain community is judicially accepted and hence the adoption need not be proved. It is an admitted fact that the parties concerned in this case are Jains. There is no dispute that Jains are governed by the Hindu Adoptions and Maintenance Act, 1956 [hereinafter 'the Act' for brevity] and therefore certain provisions which may throw some light on the question, have to be looked into. Section 3 of the Act deals with definitions. The term 'custom' is defined as under-

> 3. DEFINITIONS- In this Act unless the context otherwise requires- (a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family; Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;

10. Section 10 of the Act provides thus-

> 10. Persons who may be adopted- No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely-
>
> (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
>
> (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

11. From the aforesaid provisions, it is clear that a person cannot be adopted if he or she is a married person, unless there is a custom or usage, as defined under Section 3(a), applicable to the parties which permits persons who are married being taken in adoption.

12. India has a strong tradition of respect for difference And diversity which is reflected under the Hindu family laws as it is applicable to diverse communities living from the

southern tip to northern mountains, from western plains to eastern hills. Diversity in our country brings along various customs which defines what India is. Law is not oblivious of this fact and sometimes allows society to be governed by customs within the foundation of law. It is well known that a custom commands legitimacy not by an authority of law formed by the State rather from the public acceptance and acknowledgment. This Court in *Thakur Gokal Chand v. Pravin Kumari*[1], has explained the ingredients of a valid custom in the following manner-

> "A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian condition. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality"

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Black's Law Dictionary defines customary law as "customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws." Privy Council in The *Collector of Madura v. Moottoo Ramalinga Sathupathi*[2], has observed that "under the Hindu System of law, clear proof of usage will outweigh the written text of law".

13. As per the settled law under Section 2(a) the Act, the following ingredients are necessary for establishing a valid custom-

a. Continuity.

b. Certainty.

c. Long usage.

d. And reasonability.

As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few-general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice more or

less common. The acts required for the establishment of customary law ought to be plural, uniform and constant.

14. Custom evolves by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law. The characteristic of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted, but from practices prompted by the convenience of society. A judicial decision recognizing a custom may be relevant, but these are not indispensable for its establishment. When a custom is to be proved by judicial notice, the relevant test would be to see if the custom has been acted upon by a court of superior or coordinate jurisdiction in the same jurisdiction to the extent that justifies the court, which is asked to apply it, in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration. In this case at hand there was no pleading or proof which could justify that the above standards were met.

15. It would not be out of context to observe certain judicial decisions which throw some light on the issue raised in this case instant. In *Rup Chand v. Jambu Prasad*[3], Privy Council held that- "The custom alleged in the pleading was this: " Among the Jains Adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them." And that appears to be the custom found by the High Court to exist. But upon the argument before their Lordships it was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centers of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved. In their Lordships' opinion there is great weight in these criticisms, enough to make the present case an unsatisfactory precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming".

16. In *Sheokuarbai v. Jeoraj*[4], Privy Council observed that, among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption, and the adopted son may at the time of his adoption be a grown-up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son.

17. It is very much evident that the appellant in this case has failed to produce any evidence to prove that such practice has attained the status of general custom prevalent among the concerned community. Custom, on which the appellant is relying, is a matter of proof and cannot be based on a priori reasoning or logical and analogical deductions, as sought to be canvassed by the appellant herein. Hence the issue is answered against the appellant.

18. In response to issue number two, we are concerned here with the custom of adopting married sons in the community of the appellant. The only evidence, the appellant has adduced, is his own testimony and a word of a priest who had performed the ceremony. A general custom which the appellant intends to prove requires greater proof than the one appellant adduced before the court. Moreover, there is no dispute with regard to the fact that

the appellant did not plead in his written statement about existence of any custom as such. Parties to a suit are always governed by their pleadings. Any amount of evidence or proof adduced without there being proper pleading is of no consequence and will not come to the rescue of the parties.

19. At this juncture it would be necessary to observe the law laid down by this Court in numerous cases that the burden of proving adoption is a heavy one and if there is no documentary evidence in support of adoption, the Court should be very cautious in relying upon oral evidence. This Court held so in *Kishori Lal v. Mst. Chaltibai*[5], We can do no better than to quote the relevant passage from the above judgment which reads as under :-

> "As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance.
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> (emphasis supplied)

20. In *Rahasa Pandiani (dead) by LRs. and Ors. v. Gokulananda Panda and others*[6], aforesaid aspect was observed as under:

> "When the Plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the Court has to act with a great deal of caution and circumspection. Be it realized that setting up a spurious adoption is not less frequent than concocting a spurious will, and equally, if not more difficult to unmask. And the Court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion. the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the Court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a will. there have been spurious claims about adoption having taken place. And the Court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the. suspicion of the Court and the conscience of the Court is not satisfied that the evidence preferred to support such an adoption is beyond reproach" .

(emphasis supplied)

21. In the light of the above precedents, it would be necessary to observe statements of certain witnesses. Appellant, himself, got examined as a witness, which is marked as Ex. 121. He stated that after death of his biological father in 1972, he came to Nasik to continue his education while living with Govardhandas at his residence. As per his evidence, during the marriage of Asha, Govardhandas decided to adopt the appellant and the ceremony was held on 08.07.1973, one day before the marriage. The adoption ceremony was held at the residence of Govardhandas. As appellant and Govardhandas were from the Jain community, there was no bar in their community either for adoption of a married son or concerning the age of the adopted son. It is stated that there is no custom in their community to reduce the adoption in writing. One Chaturbuj Maharaj was the priest who performed the said ceremony in the presence of his biological mother, sisters and other relatives. His biological mother gave appellant in adoption to Govardhandas and Sundarabai i.e. the original plaintiff. Govardhandas and Sundarabai performed the pooja of the said ceremony. Said ceremony was held with the desire and consent of Sundarabai and Govardhandas. After the appellant was given in adoption to Govardhandas, appellant was instructed by the priest to sit on the lap of Govardhandas and Sundarabai. After the ceremony, lunch was served to all persons, who had attended the ceremony. It is to be noted that invitation cards were printed but the same were sent separately and not with the marriage invitation card. In the cross examination he states that even though the marriage was held on 09.07.1973, certain marriage ceremonies were held as per community traditions on 08.07.1973. That he was aged thirty-two when he was allegedly adopted and he does not know of any examples of adoption of a thirty-two-year-old man. He admits that he did not submit any document to show that he was using his adoptive father's name after 1973. He further states that he had filed an application before the municipal council for succession rights, but the same was not produced in the suit. Moreover, he states that he was filing income tax returns in his earlier name 'Ratanlal Chunilal'.

22. One Chaturbuj Laxminarayan Sharma was examined as witness no. 2 on behalf of the appellant. His deposition was marked as Ex. No. 152. He stated that he knew Govardhandas for 30 years. He used to perform ceremonies for his family including the adoption ceremony of the appellant which had taken place at the residence of Govardhandas. He deposed that the ceremony was attended by a gathering of 100 to 200 people. According to him he had performed Navgrah pooja, Kuldevi pooja, Laxmi-narayan pooja, havan and sankalp as part of adoption. Thereafter, name of the appellant was changed from Ratanlal Chunilal to Ratanlal Govardhandas. At the time of the ceremony, mother of the appellant gave hand of the appellant in the hands of Govardhandas. Photographs were taken at the time of the ceremony. In the cross examination he stated that invitation card for the ceremony was published and distributed. He was unable to tell who decided to perform adoption ceremony by giving hand of the appellant. He admits that in Jain community, person to be adopted has to be seated on the lap of the adopting father. But he stated that Ratanlal was not asked to take a seat on the lap of Govardhandas as he was weak and defendant No. 1 (Ratanlal) was healthier; this is a glaring contradiction between the evidence of appellant and the priest. One

Harakchand Bhansali of Kapoorgaon was adopted after he was married. He was not able to give particulars of such adoption. Further he states that he does not know of any other example of adoption of a married person.

23. Girjappa Gangaram Kothule, who was examined as defense witness No. 3, stated that he knew Govardhandas for many years. He recollected that many years ago Govardhandas had discussed the matter of adopting the appellant with him. He was present during the ceremony. He could not recollect whether invitation cards were printed for the adoption ceremony. According to his statement, the adoption ceremony was performed at the residence of the Govardhandas wherein 200 to 300 persons attended that function. He further stated that no religious ceremony relating to the marriage had taken place prior to the day of marriage. It is to be noted that Mohanlal and Ajith have deposed on the same lines in favour of the appellant.

24. The evidence as discussed above makes it clear that there are lot of contradictions in the evidence of witnesses on all material aspects of adoption. A thorough glance at the entire evidence makes it clear that the appellant who asserts the fact that he is adopted by late Govardhandas failed to plead and prove the factum of adoption. All the circumstances pleaded by the appellant are not properly explained by adducing cogent evidence to the satisfaction of the Court. The trial court placed burden on the plaintiff to prove the adoption which is contrary to law. The appellant failed to satisfy the Court that any question of law much less substantial questions of law arise in this appeal which warrant interference of this Court.

25. Having regard to the evidence available on record and the circumstances elucidated herein above, the view taken by the High Court, being convincingly reasonable, we see no reason to interfere with the judgment of the High Court. Accordingly, this appeal is dismissed. There shall be no orders as to costs.

Judgment Referred.

[1]*AIR 1952 SC 0231*
[2]*12 MIA 397 (1868)*
[3]*(1910) ILR 32 0247*
[4]*AIR 1921 PC 0077*
[5]*AIR 1959 SC 0504*
[6]*AIR 1987 SC 0962*