ORISSA HIGH COURT

Md. Aftabuddin

Vs

Chandan Bilasini

A.H.O. No.37 of 1975

(R.N. Misra and K.B. Pand, JJ.)

11.10.1976

JUDGEMENT

R.N. Misra, J.

1. There lived one Kalikrishna Sarkar in the town of Cuttack owning substantial properties. He died immediately after executing a Will on 11-12-1905 (Ext.11) in terms whereof some of his assets were given to his mother and other relatives, some to the family deity Sri Radha Binoda Jew and the rest of the properties were meant to go to his wife Chandan Bilasini (plaintiff No. 1). Five executors appointed under the Will were to manage the properties and after meeting the expenses of administration were required to pay the mesne profits to her. The testament absolutely put restriction on alienations by the wife but authorised her to take a son in adoption and in case the first adopted son died, to take another with the approval of the executors. The Will was probated in a proceeding of 1906 and while the executors were in management of the estate of the deceased, plaintiff No. 1 adopted one Sudhansu Mohan Sarkar. The adoptive mother and the adopted son did not pull on well and their relationship became embittered. Late in 1930's, both the widow and the adopted son started claiming possession of the estate which led to a proceeding before the Patna High Court under Section 302 of the Indian Succession Act. The attempt made by the adopted son failed (see *(Sudhansu Mohan v. Harish Chandra[1])).* Plaintiff No. 1 applied to the District Judge for grant of letters of administration in her favour and the adopted son contested the same. The Court allowed the application of the widow on 21-8-1944. On 31st of July, 1961, plaintiff No. 1 sold a pucca building with outhouses in favour of the predecessors of the defendants for a consideration of Rs. 55,000/- (Ext. A). On 7th of March, 1955, Sudhansu Mohan died while still a bachelor. On 24-8-1965, the widow adopted plaintiff No. 2 and on 30th of September, 1965, she executed a registered deed of acknowledgment of adoption (Ext. 4). On 29-4-1966, the widow and her second adopted son as plaintiffs 1 and 2 filed this suit for declaration that the sale under Ext. A was null and void and not binding on them and the defendants have not acquired any right, title or interest in the disputed property by virtue of the said conveyance on the allegation that from 1951, plaintiff No. 1 had been suffering from dotage and she had lost the power of understanding; Sailendra, a sister's son, who was managing the properties on her behalf took advantage of the 1situation, completely dominated the Will of the widow and was abusing his position and the document under Ext A was one of the

several alienations manipulated by Sailendra. It was further alleged that plaintiff No. 1 had no right of alienation and, therefore, the conveyance could confer no title on the alienees. Plaintiffs alleged that they were still in possession. When plaintiff No. 1 recovered from her illness some time in 1965, she came to learn about the fraud practiced on her by Sailendra and, therefore, instituted the suit for the reliefs aforesaid.

2. Defendants in a joint written statement disputed the adoption of the second plaintiff and claimed that Ext. A was a valid sale deed conferring full title on them. They contended that the document was genuine and for full consideration - the consideration amount having been paid before the Sub-Registrar. They asserted that they were in possession. It was further pleaded that the suit was not maintainable in the absence of a claim for recovery of possession and relief of cancellation of the sale deed of which plaintiff No. 1 was sole vendor.

3. Several Issues were framed and the learned Subordinate Judge came: to hold:-

(i) The suit was defective in the absence of claim of consequential reliefs;
(ii) The sale deed (Ext. A) was a genuine transaction and for full consideration;
(iii) Plaintiff No. 1 had only a life estate without any power of alienation, but the sale under Ext. A having been made for legal necessity bound the estate;
(iv) The transfer having been done without the sanction of the Court and in violation of the provisions of Section 307 of the Indian Succession Act, the sale is voidable and not void;
(v) Plaintiffs have failed to establish the adoption of plaintiff No. 2 and the adoption of the second plaintiff by Plaintiff No. 1 was prohibited by Hindu Law inasmuch as plaintiff No. 2 belonged to a different caste.

Accordingly the suit was dismissed.

4. Plaintiffs carried a first appeal to this Court. During the pendency of the appeal, the widow died and the second plaintiff as the sole appellant continued the appeal. Therefore, the issue of adoption of plaintiff No. 2 became prominent for consideration and adoption was upheld. The learned Single Judge also upheld the plaintiff's contention that under Ext. 11 only a life estate was created in favour of the widow and it was not a widow's estate which could become absolute by operation of the provisions of the Hindu Succession Act. Plaintiff No. 1 had no right of alienation. The question of legal necessity, therefore, was irrelevant. In view of the finding of the trial Court that the plaintiffs were not in possession with which the learned Single Judge agreed, he directed relief of recovery of possession to be granted even though that relief had not been claimed, on payment of appropriate court-fees both in the trial Court as also in appeal. Thus he reversed the decree of the learned Subordinate Judge. Against this judgment and the decree of our learned brother B. K. Ray, J., the defendants have carried this Letters Patent Appeal.

5. Mr. Dutta for the appellants raised the following contentions :-

(1) Under the Will (Ext. 11) Chandan Bilasini had not been given a life estate and as a residuary legatee she derived the full estate;
(2) The learned Single Judge has gene wrong in holding that Section 307 of the Indian Succession Act read with Section 211 thereof had no application to the case;

(3) Even it at the time of alienation there was any defect in the title of the alienor widow, she having become a full owner, the alienation bound her and she was estopped from challenging it;
(4) The suit with a mere declaratory relief when the plaintiffs were out of possession was not maintainable and, therefore, the suit had been rightly dismissed by the trial Court and the learned Single Judge was not entitled to fill up the lacuna by decreeing the relief of recovery of possession even without amendment of the plaint;
(5) The suit was barred by limitation as it had been brought beyond three years from the date of execution of the sale deed;
(6) Adoption of plaintiff No. 2 having not been established, on the death of plaintiff No. 1, he was not entitled to maintain the appeal and the litigation should have been declared to have abated.

6. Counsel for plaintiff No. 2 respondent challenged the tenability of each of the contentions raised by the appellants and lengthy arguments were advanced on both sides supported by series of authorities.

7. The question of adoption, in our view, is the most important one and, therefore, we proceed to deal with it first. As already indicated, the adoption took place on 24th of August, 1965 - long after the coming into force of the Hindu Adoptions and Maintenance Act. Long arguments were advanced before us as to whether the tenability of the adoption has to be examined on the basis of the provisions of the statute of the shastric law. Mr. Dutta maintained by referring to the plaint that the claim of adaption had been advanced on the basis of testamentary authority and not on statutory power. He, however, did not contend in support of the trial Court's finding that the adoption was bad as plaintiff No. 2 belonged to a different caste. The position seems to have been settled against such contention in view of the decision of the Supreme Court in the case of *Kartar Singh v. Surjan Singh*[2], The learned Single Judge nowhere categorically held that the presumption in support of the adoption as provided under Section 16 of the Adoption Act was available. Mr. Mahapatra for the respondent, however, strenuously pressed before us that even if in the plaint in support of the adoption the statutory presumption had not been invoked, as after the Act all adoptions had to be in terms of the statute, if we found that the requirement of Section 16 of the Act had been satisfied, we must give effect to the statutory presumption. This contention was refuted with equal emphasis on appellants' side.
Section 16 of the Adoption Act Provides:-

"Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the
provisions of this Act unless and until it is disproved." In order that the presumption as provided in the section may be raised, the following conditions are to be complied with:-
(i) there must be a document;
(ii) it must be registered under the law in force;
(iii) it must purport to record an adoption which has taken place;

(iv) the document must be signed by both the giver and the taker of the child in adoption and not by only one of them and
(v) it must be produced before the Court.

If any of these ingredients is wanting, the presumption does not arise. In the instant case, all these requirements seem to be satisfied except that the deed of acknowledgment of adoption (Ext. 4) was not signed by the natural parents of the second plaintiff. To obviate this difficulty, a registered deed of admission of adoption has been executed on 15-4-1967 by the natural parents of the second plaintiff. On the basis of Exts. 1 and 4, Mr. Mahapatra contends that the requirement of Section 16 that the document must be signed by both the giver and the taker of the child in adoption is satisfied. In Section 16, the relevant words are 'any document'. According to counsel for the respondent, any document may cover one or more documents end for this purpose he has relied upon some authorities. In the case of *Satyanarain Biswanath v. Harakchand Rupchand*[3], the word 'any' in Rule 10 of the Bengal Chamber of Commerce Rules of Tribunal of Arbitration was being construed and the Court held that the word takes within its ambit one or more out of several and includes all. In the case of *Chief Inspector of Mines v. K. C. Thapar*[4], the phrase any one of the directors' occurring in the Mines Act was being construed and the Court held that any one of the directors meant every one of the directors. To the same effect was the decision of the Supreme Court in the case of *Banwarilal v. State of Bihar*[5], On this principle, Mr. Mahapatra claims that any would take within its fold more than one and, therefore, if the adoptive parent and the natural parents signed two separate documents for the same purpose, the requirement of Section 16 of the Adoption Act was satisfied. We do not think the submission of Mr. Mahapatra is acceptable. In Section 16 of the Act, the Parliament intended to provide a particular mode of recording of an adoption and when the said condition was satisfied, a statutory presumption flowed. With a view to avoiding frivolous claims relating to adoption and with a view to making an adoption when made easy of establishment, the Act has made the aforesaid provision. The consent as to adoption of the giver and the taker is intended to be expressed in a document. There is no scope for the same to be covered by two separate documents and more so, documents executed independent of each other with a large time-lag. In this case, Ext. 1 has been executed and registered after the litigation began. In this view of the matter, we hold that one of the requirements of Section 16 of the Act having not been satisfied, the statutory presumption under Section 16 is not drawable and the adoption has to be established as a fact without the aid of Section 16.

8. Undoubtedly, if Section 16 applied, the burden to disprove adoption would have been on the defendants, as has been held by a Bench of this Court in the case of *K. Laxminarayan v. K. Padmanay*[6], Law is well settled and even Mr. Mahapatra for the respondent does not doubt it that as by an adoption the natural line of succession is disturbed, heavy onus lies on the party propounding an adoption. See *Kishori Lal v. Mt. Chalatibai*[7], The burden to prove adoption, therefore, in this case lay on the plaintiff No. 2. We shall now proceed to deal with the claim of adoption as a fact.

9. The adoption in issue is of the year 1965-a recent one. The settled position of Hindu Law is that an adoption has to be established by giving and taking. The evidence in support of adoption in the instant case is both documentary and oral. As far as the documentary evidence is concerned, it consists of two registered deeds. Ext. 4 is the deed of acknowledgment of adoption

executed by the adoptive mother on 29-9-1965 while Ext. 1 is the deed of admission of adoption executed by the natural parents of the adoptive child (plaintiff No. 2) dated 15-4-1967. The adoptive mother was an illiterate aid lady of 84 at the time of execution of the document Ext. 4. She did not come before the Court to support the document. The scribe Chaturbhuja Mohanti who claimed to have read over the contents of the document before obtaining the L. T. I. of the lady has also not been examined. It is true that P. W. 6 Madhab Chandra Mohanti has attested the document. His evidence so far as the document is concerned, reads thus:

> "... ... ... In August, 1965, the aforesaid adoption took place. Chaturbhuja Mohanti scribed this deed of admission of adoption. The scribe read over and explained contents of that deed to plaintiff No. 1 who put her thumb impression in that deed in my presence. Gopal Chhotrai and myself attested the said document which is marked as Ext. 4."

The witness had no acquaintance with the lady from before and on his own showing he had been invited both to the adoption ceremony as also on the occasion of execution of the document by Shiba Shekhar Sarkar. Shiba Shekhar is not an attesting witness to the document, though indeed, according to P. W. 6, it is Shiba Shekhar who had required P. W. 6 to attest the document. The trial Court did not attach importance to the evidence of P. W. 6. The only other document is the admission by the natural parents under Ext. 1. This document came during the pendency of the suit. Obviously the natural parents were vitally interested in propounding the adoption. Undoubtedly, the adoptive mother who was an old widow was possessed of substantial properties and this document was intended only to fill in the lacuna in Ext. 4. This document, therefore, cannot be given any undue importance. It is material to notice here that no change was made in the School Admission Register though admittedly the plaintiff No. 2 was then a student and there is no other independent documentary evidence to support the claim of adoption.

10. The entire oral evidence in regard to giving and taking comes from P. Ws. 1, 2 and 6. P. W. 1 is the natural father of plaintiff No. 2. P. W. 2 claims to be the priest who performed the adoption ceremony and P. W. 6 is an employee of the Cuttack Station of the All India Radio - a friend of Shiba Shekhar Sarkar. P. W. 2 admittedly was not the family Priest. A barber is said to have been present on the occasion (as
spoken to by P. W. 6) who has not been examined. There is no explanation as to why the adoptive mother was not examined though she was alive. Undoubtedly she was the most important witness in the dispute and if she had been examined, the Court would have had the best evidence on the matter in dispute. The explanation of Mr. Mahapatra for the respondent that she was too old is no justification to withhold the witness from the Court. Admittedly she had recovered from her dotage and the only illness from which she was suffering at the relevant time was the sickness of old age. The doctor's evidence sumptuously referred to in Court shows that when assisted she was able to move about. If she was not capable of coming to Court, she could have been examined on commission and her evidence should have been subjected to cross-examination. Non-examination of the adoptive mother in the facts and circumstances of the case has rightly been pressed upon as a very adverse circumstance. Similarly, non-examination of Shiba Shekhar who was admittedly present on the occasion of giving and taking goes unexplained. When the burden lay on the plaintiffs to establish the adoption, cogent and dependable evidence should have been placed before the Court to support the claim of adoption and plaintiffs should not have rested content by examining the natural father (P. W. 1) who was

vitally interested in supporting the claim of adoption and a priest admittedly not of the family and another stranger. In fact, when P. W. 1's evidence is kept away, the only evidence is of the priest who for the first time entered into the family house of the plaintiffs and P. W. 6, a stranger to the family, who had been called in by a friend of his who was also interested in the adoption. This evidence had not impressed the learned trial Judge to find adoption and we also are not in a position to accept the claim of adoption on the basis of the testimony of P. Ws. 2 and 6.

11. The learned Single Judge disposed of the question of adoption by saying :-

> "The only other question which remains for consideration in this connection is as to whether the adoption of plaintiff No. 2 by plaintiff No. 1 has been proved. The relevant evidence on the side of the plaintiffs in this connection is that of P. Ws. 1, 2 and 6. The trial Court has discarded their evidence on the ground of minor discrepancies, because they said that plaintiff No. 1 stood up to ask for the boy being given in adoption while D. W. 9, the doctor, deposed that she was unable to stand and could only crawl. The trial Court did not take into consideration the deposition of D. W. 3 that at times of urgent necessity plaintiff No. 1 used to go to his office and that with the help and support of two persons she was able to walk. Thus, the story told by P. Ws. 1, 2 and 6 to the effect that plaintiff No. 1 stood up when she asked for the boy to be given in adoption cannot be thrown out. Nothing has been brought out against P. Ws. 2 and 6 to discredit them. After going through the evidence of these witnesses carefully, I am satisfied that the Physical act of giving and taking of plaintiff No. 2 at the time of his adoption by plaintiff No. 1 has been amply proved and must be found to be an established facts. ... ... "

The learned trial Judge had not discarded the evidence merely on account of discrepancy in regard to whether the adoptive mother was able to stand up or not at the time of giving and taking. He had assessed the evidence as a Court of fact. The learned single Judge as the final Court of fact was entitled to differ from the learned trial Judge for good reasons to be given. We do not think, there has been a proper consideration of the evidence on the plaintiffs' side for reversing the decision of the trial Court and for holding that the heavy burden which lay on the propounder of the adoption had been discharged. On an assessment of the evidence, keeping in view the burden of proof, we hold that the plaintiffs have miserably failed to establish the claim of adoption and accordingly the finding of the learned Single Judge on this count must be vacated and that of the trial Court restored. As a consequence of our finding that the second plaintiff is not the adopted son of the widow (plaintiff No. 1), the appeal before the learned single Judge was to abate, because no other legal representative of the deceased-plaintiff No. 1 was brought on record and but for adoption, the second plaintiff is not an heir of plaintiff No. 1.

12. Though the appeal can be effectively disposed of with this finding, we think it appropriate to briefly indicate our findings on the other contentions enumerated in paragraph 5 of our judgment. According to Mr. Dutta for the appellants, under the Will, plaintiff No. 1 had not got a life estate. The Bench decision of the Patna High Court reported in AIR 1940 Patna 194 did decide against the defence contention. The ratio of an earlier decision of the Patna High Court in the case of *Kali Prashad Gope v. Ram Golam Sahu*[8], also supports the same conclusion. We would accordingly hold that there is no force in the contention of Mr. Dutta and the finding of the Patna

High Court is correct.

13. We endorse the view of the learned Single Judge that Section 307 of the Indian Succession Act had no application to the case and the alienation under Ext. A does not receive any support from the said provision.

14. Mr. Dutta had next contended that even if there was any defect in the title of the alienor, when Sudhansu, the first adopted son in whom the property was to vest absolutely died, the entire residuary interest vested in the widow and the widow became a full owner. Any defect of title in 1961, when the sale was effected under Ext. A, was wiped out by the time of suit and plaintiff No. 1, the vendor was estopped from challenging her own transaction. The doctrine of feeding the estoppel was invoked as the foundation for this argument. The Will in terms did not confer any title on the adopted son and it was only on the death of plaintiff No. 1 that the interest of the adopted son emerged. In the face of such a term in the Will, Sudhansu did not have title to the property and on his death, the widowed mother did not receive any additional rights so as to perfect her title to alienate. This contention of Mr. Dutta has, therefore, no force.

15. Long arguments had been advanced before us that a suit merely for a declaratory relief when the plaintiffs were out of possession was not maintainable. Reliance had been placed on the provisions of Section 34 of the Specific Relief Act. While Mr. Dutta contended that the said bar applied to the suit, Mr. Mahapatra for the respondent claimed that it was not a suit covered by Section 34 of the Specific Relief Act. It is true that the plaintiffs had alleged that they were still in possession notwithstanding the alienation. The Court, however, found that plaintiffs were not in possession. Undoubtedly, plaintiffs were obliged to ask for recovery of possession in order to have an effective decree. Mr. Mahapatra's contention that the bar of Section 34 of the Specific Relief Act would not arise where in the plaint there is an assertion that possession is with plaintiff though as a fact it is not, does not appeal to us as a sound proposition in law. Finding this defect and relying upon the general prayer in the plaint and keeping in view the power of the Court to grant such reliefs as a party before it may be found entitled to, the Court directed the plaintiffs to recover possession on payment of the requisite court-fees. We agree with Mr. Dutta that if an amendment of the plaint had been asked for, it would have been more appropriate than the Court exercising suo motu jurisdiction. But we are not inclined to agree that the Court had no jurisdiction to do what has been done. Mr. Dutta was not in a position to indicate to us what prejudice has been caused to the defendants by not requiring the plaintiffs to make a formal application for amendment for addition of the relief of recovery of possession and in not giving an opportunity to the defendants to file a counter. In this view of the matter, we are not inclined to accept the contention of Mr. Dutta that the learned Single Judge committed an error of jurisdiction in allowing the relief of recovery of possession.

16. The next contention has been that the suit was barred by limitation. The sale deed (Ext. A) is dated 10-10-1961. The suit was instituted on 29-4-1966 - after a period of three years. According to the plaintiffs, the appropriate Article to apply was Article 59 of the First Schedule where the prescribed period is three years and limitation runs from the date when the facts entitling the plaintiff to have the instrument cancelled first become known to him; while the defendants claim that the appropriate Article to apply is Article 58 and the three year, period runs from the date when the right to sue first accrues. We are prepared to agree with Mr. Mahapatra that in the facts of the case, the appropriate Article to apply is Article 59 and there is material to show that the

plaintiff No. 1 was not aware of the real effect of the transaction under Ext. A until she discovered facts on getting cured. In these circumstances, we would not agree with the contention of Mr. Dutta that the suit was barred by limitation.

17. Though on all other scores, plaintiff No. 2 succeeds, in view of our finding that he is not the adopted son, the suit has to fail. Accordingly we allow the appeal, set aside the judgment and decree of the learned Single Judge and dismiss the suit. As success is divided, we direct parties to bear their own costs throughout.

Panda, J.

18. I agree.

Appeal allowed.

Cases Referred.

[1] AIR 1940 Pat 194
[2] AIR 1974 SC 2161
[3] AIR 1955 Cal 225
[4] AIR 1961 SC 838
[5] AIR 1961 SC 849
[6] AIR 1973 Ori 3
[7] AIR 1959 SC 504
[8] AIR 1937 Pat 163