PATNA HIGH COURT

Nathuni Prasad Singh

Vs

Kachnar Kuer

A.F.O.D. No. 152 of 1959

(H. Mahapatra and A.B.N. Sinha, JJ.)

03.10.1964

JUDGMENT

Mahapatra, J.

1. Both the appellants were plaintiffs who instituted a title suit in the court of the Subordinate Judge, Gaya, claiming themselves to be the next reversionary heirs of one Trilok Prasad Singh whose widow Kachnar Kuer is defendant No. 1 and mother Sheo Kuer is defendant No. 3. They claimed a declaration that the adoption of defendant No. 2, Dhiraj Narain Singh, by defendant No. 1 was illegal and void and the transfer made by defendant No. 1 under a registered Arpannama dated the 12th February 1956 in the name of Gopalji through the Shebait, defendant No. 3, was also illegal and void and not binding on the plaintiffs. Their case was that one Sheobalak Singh had three sons and two daughters. Of them, the eldest son died issueless. The second son Deonarain Singh had three sons who are all dead and only the widow of one of the sons Kamta Prasad Singh is alive and she is Sheo Kuer, defendant No. 3. The two plaintiffs are the sons of the third son of Sheobalak, Ramnarain Singh. Kamta Prasad Singh had two sons Trilok Singh and Kedarnath Singh. The latter died issueless, Trilok Singh died in May 1948 leaving his widow defendant No. 1, Kachnar Kuer. On the death of Trilok his widow succeeded to his estate as a limited owner while defendant No. 3 was entitled to maintenance out of that estate. Plaintiffs alleged that defendants 1 and 3 conspired together and with a view to depriving the plaintiffs of their right to inherit the estate left by Trilok Singh transferred those properties to their respective brothers and their heirs by adopting a device of adopting defendant No. 2 who was the minor son of Rajballabh Singh, the brother of defendant No. 1 and of creating a nominal Thakurbari and making defendant No. 3 a shebait thereof for her life and after her Dinesh Prasad Singh, son of the brother of defendant No. 3 as the next shebait and thereafter nominating the son and grandson of the said Dinesh Prasad Singh to be the future shebaits. By this way a considerable part of the estate left by Trilok Singh was transferred. Two documents, one for adoption and another for dedication of properties, were executed and registered on the 12th of February 1956, Plaintiffs challenged the adoption as there was no authority given to defendant No. 1 by her husband before his death for that purpose;nor did he give any direction for constructing a Thakurbari or for endowing any property to the idol.
Further they said that there was actually no adoption of defendant No. 2 and there was no

Thakurbari constructed or any Gopalji idol installed in village Barauli by defendant No. 1. To clear the apprehension the plaintiffs instituted the suit for the two declarations mentioned above so that they may be able to succeed to the estate of Trilok Singh on the death of defendant No. 1.

2. Two written statements were filed; one by defendant No. 1 for herself and as mother guardian of defendant No. 2 and another by defendant No. 3 as shebait of Sri. Gopalji Thakur. All of them pleaded that there was authority given by Trilok Singh before he died of small-pox to his wife, defendant No. 1, to make an adoption of a suitable boy and to construct a Thakurbari and instal a deity and make suitable endowment in his favour. They also asserted that there had been a valid adoption of defendant No. 2 and a valid endowment created. They denied any collusion or any fraudulent motive on their part in bringing about those two things. The suit was instituted on the 24th February 1956 and the written statements were filed on the 4th April, 1956. Thereafter there was an amendment to the plaint and so two additional written statements were filed on the 11th April, 1956.

3. The trial court held that the ceremonies of adoption as also dedication of property to deity had been properly performed and defendant No. 1 had the authority from her husband before his death to make an adoption and also to create an endowment. In that view, the plaintiffs' suit was dismissed. On the question of maintainability of the suit with reference to Section 14 of the Hindu Succession Act, 1956, the trial court held in favor of the plaintiffs who had a cause of action for the suit, Against this judgment and decree the plaintiffs have come in appeal.

> (After considering the evidence, the Court held that defendants had failed to prove that defendant No. 1 was authorized by her husband to adopt a son to him and the ceremony of adoption could not validate the adoption if it was without any authority from the husband (Para 4) and the judgment proceeded.)

5. Learned counsel alternatively urged that in view of the willingness on the part of the natural father and defendant No. 1 to adopt defendant No. 2 as revealed from their evidence during trial and the fulfillment of other conditions as laid down in the Hindu Adoptions and Maintenance Act, 1956, the adoption in the present case should be held valid. It is difficult to concede to this argument. The Act is not retrospective. What could be done now under the Act cannot be deemed to have been validly done when defendant No. 2 was adopted by defendant No. 1. At that time the authority from the husband was in law the basis of such adoption. Now the position has changed. If defendant No. 1 would not have then made an adoption and would have decided to make the adoption after the 21st December 1956, when the new Act came into force, the position would have been different. Learned counsel referred to the case of *Suraj Prasad v. Mt. Aguta Devi*[1], Here the plaintiff who brought a suit for redemption of a mortgage claimed to have purchased by an instrument the suit property from one Sarju Lal on the 16th May 1945, hut the same property had been orally sold by Sarju Lal to defendants 4 and 7 and the purchasers had redeemed a usufructuary mortgage executed by Sarju Lal in favour of one Bharduli Singh, a predecessor of defendants 1 to 3. On the date of oral sale Sarju Lal had executed a receipt acknowledging the oral sale and receipt of Rs. 40/- in cash and directing the vendees to redeem the mortgage by payment of Rs. 49/- to Bharduli Singh. There was an endorsement from Bharduli Singh to the effect that the vendees had redeemed the mortgage. The plaintiff's suit was dismissed by the lower courts and the High Court also maintained that. The question that arose

for consideration in that case was whether a mortgagor of a usufructuary mortgage could comply with the requirements of Section 54 of the Transfer of Property Act by making an oral sale of a tangible immoveable property for a value less than Rs. 100/- while that property is in possession of the mortgagee. The answer was in the affirmative. A moveable property is capable of being touched and is, therefore, tangible. An owner as the mortgagor can transfer the property itself subject to the rights which he or his predecessor had transferred to others (like usufructuary mortgage) out of the totality of the rights which the ownership connotes. In that connection this Court in that case came to consider another view which has been consistently expressed in many of the previous decisions. That was to the effect that if the vendee was in possession on the date of the oral sale there Is sufficient compliance with the requirement of "delivery of the property" under Section 54, if the vendor by appropriate declaration or acts, alters the nature and character of the vendee's possession so that he held it as the owner from the date of the sale. It is on this view that learned counsel wanted to rely and to contend that if the adopted son, defendant No. 2, has already been in the same position in which he could now be put on performance of the requirements as laid down in the new Act, his previous position should be taken to have changed into a new position under the new law. I fail to see the correctness of the analogy. I can understand if defendant No. 2 was in possession of the estate of Trilok Singh in some other legal capacity such as a lessee and he was taken in adoption under the new Act by defendant No. 1 as an adopted son to her husband, his possession would take an absolute character. It is different and incorrect to say that his void adoption should be treated as valid because what was performed for the purpose of that adoption, such as the registered instrument and other incidence can be sufficient under the present law to constitute a valid adoption.

6. The conclusion at which I have arrived on this question is that defendant No. 2 was not validly adopted by defendant No. 1 as a son to the deceased Trilok Singh.

7. The other question is about the Arpannama dated the 12th of February 1956 executed by defendant No. 1 in favour of Gopalji through the shebait defendant No. 3. The appellants' argument was that the direction by Trilok Singh both about adoption and endowment was said to have been given only once and on one day to defendant No. 1, his wife. If the evidence in support of such direction in regard to authority for adoption is not acceptable, the direction for creating an endowment must be equally taken as not proved. In that case a limited owner like defendant No. 1 who had a widow's estate could not have made an endowment of an extensive property as she proposed to do under Ext. B, the Arpannama. In view of the previous finding I have to proceed on the basis that the husband did not ask the wife either to instal a deity Gopalji or to dedicate any property to him.

8. A Hindu widow has undoubtedly restrictions on her powers of alienation of the corpus of the estate inherited by her from her husband; but in spite of that she can dedicate or alienate a small fraction of the estate for any religious or charitable acts which are conducive to the spiritual welfare of her husband or for the continuous benefit of the soul of the deceased owner (*Sardar Singh v. Kunj Bihari Lal*[2], may be seen). Whether the property dedicated constitutes a reasonable proportion of the whole estate will depend on the facts and circumstances of this case.

(After scrutinising the evidence on the point (Para 9), judgment proceeded).

10. But a dedication of a large part of the property, more than 18 acres of land, cannot be

defended on the part of a holder of a widow's estate, more particularly when the reason for such endowment has not been proved, that is, the wish of the deceased husband. In that view like the adoption, this dedication even if made after installation of a deity for a Thakurbari was voidable and not binding on the plaintiffs.

11. There was an issue about the maintainability of the suit in view of Section 14 of the Hindu Succession Act, 1956. The trial court answered that in the affirmative. Learned counsel for the defendant-respondents assailed that and pressed that in view of the plaintiffs' case that there was in fact no adoption and dedication, the properties in the estate of the last male holder that came to the hands of defendant No. 1 became the absolute property of her under Section 14 of the Act as she was in possession of those properties on the date when the Act came into force (17th June 1956). The finding of the trial court was that in fact there was an adoption ceremony and dedication of property to Gopalji Thakur. That finding still holds, although the adoption and dedication have been found by me to be respectively invalid in law and voidable. The two documents by which those two things were performed were executed and registered on the 12th of February 1956 (Exts. A and B). The Hindu Succession Act came into force on and from the 17th of June, 1956. So prior to the Act these two things had happened. It is now well settled that any property acquired by a female Hindu before the commencement of the Act and possessed by her on the day the Act came into force would be her absolute property and she will be full owner thereof irrespective of the fact that before the Act she was only a limited owner of that property. If, however, any such property would have been transferred by such female Hindu before the Act, the alienee would not acquire absolute ownership by such previous transfer of that property because at the time of transfer the female Hindu did not have full ownership in the same but only a limited interest. The important element required under Section 14 of the Hindu Succession Act, 1956, for bestowing full ownership on an erstwhile limited owner female Hindu over any property is that she must be possessed of that property on the elate of the commencement of the Act, that is, on the 17th of June, 1956. Such possession need not necessarily be actual or physical possession of the female Hindu. It would be enough if that is also either constructive possession or possession in law. By the former is meant the kind of interest in the immoveable property which a mortgagor, lessor, licensor, minor, ward or a beneficiary would have in an immoveable property while that property will be in the actual possession of the mortgagee, lessee, licensee, guardian or trustee, as the case may be. In all those cases the former classes of people are taken to be in constructive possession of the property through the person of the latter classes. When some property is descended upon a particular person but that person has not taken actual possession of the same, he is said to be in possession in law (see Strand's Judicial Dictionary, 3rd Edition, Volume III, page 2239 for possession in law). In Wharton's Law Lexicon "possession" has been explained to be 'actual' where a person enters into lands or tenements descended or conveyed to him; 'apparent' which is a species of presumptive title where land descended to the heir of an abator, intruder, or disseisor who died seised; 'in law', when lands, etc., have descended to a man, and he has not actually entered into them; or naked', that is, mere possession, without colour of right. The last type of possession, 'naked possession' cannot come within Section 14 because it speaks of property acquired and possessed by a female Hindu. Acquisition would mean a thing acquired lawfully; the different modes of acquisition have been indicated in the explanation under Section 14, such as, inheritance, device, gift, purchase, prescription or by partition, or in lieu of maintenance. The word 'possessed' employed in Section 14(1) has to be taken in a broad sense and not in the restricted sense of actual and physical possession, see *Kotturuswami v. Veeravva*[3], that is to say, if the possession of a female Hindu in a property

acquired by her was actual, constructive or possession in law on the 17th June 1956, her ownership over that since that date will be absolute (subject of course to what is provided in Sub-Section (2) of Section 14 of the Hindu Succession Act). Learned counsel for the defendant-respondents contended that more than those three kinds of possession can also be envisaged to attract the benefits for a female Hindu under Section 14. He said that if any property had gone out of the possession of a female Hindu before the Act came into force to another person who, however, did not get a legal title to that by the time the Act took effect, such female Hindu can also claim absolute ownership in that property inasmuch as she had a right to possession of that property and could sue for recovery of that possession in Court. The implication of this argument comes to this. If a trespasser was in possession of any property of any female Hindu but did not acquire his title by prescription by the time of commencement of the Act, the female Hindu would claim absolute ownership in respect of that property; so also if a property was transferred by a female Hindu before the Act and that transfer is found to be void or invalid, the possession of the transferee will be that of a trespasser, and in that view the female Hindu will also be entitled to absolute ownership in respect of that property if no title had been prescribed against her by such transferee before the Act came into force. It is not possible to concede to this contention. The possession of a trespasser can never be taken to be either a constructive possession or possession in law of the rightful owner much less her actual possession. Learned Counsel relied very much on an observation by the Supreme Court in AIR 1959 SC 577 where his Lordship said :

> "It is sufficient to say that "possessed" in Section 14 is used in a broad sense and in die context means the state of owning or having in one's hand or power."

I cannot think that the above observation refers to or includes a trespasser's possession. Immediately before making that observation the learned Judge referred to the case of *Venkayamma v. Veerayya*[4], where actual or constructive possession had
been held to come within Section 14 There the learned Judges (of Andhra Pradesh) had also expressed a view that even if a trespasser was in possession of a land belonging to a female owner, it might conceivably be regarded as being in possession of a female owner provided the trespasser had not perfected his title. Referring to that view their Lordships of the Supreme Court said :

> "We do not think that it is necessary in the present case to go to the extent to which the learned Judges went."

Therefore, it cannot be suggested with any justification that their Lordships of the Supreme Court wanted to include a case where a trespasser was in possession of a property of a female Hindu at the commencement of the Act within the ambit of Section 14 or of the phrase "the State of owning or having in one's hands or power". Even in the case of AIR 1957 Andhra Pradesh 280 the learned Judges of the Andhra Pradesh High Court did not actually accept such a case to attract the benefits of Section 14. They observed like this :

> "Of course, the possession referred to in Section 14 need not he actual physical possession or personal occupation of the property by the Hindu female, but may be possession in law. The possession of a licensee, lessee or mortgagee from the female owner or the

> possession of a guardian or trustee or agent of the female owner would be her possession for the purpose of Section 14. The word 'possessed' is used in Section 14 in a broad sense and in the context 'possession' means 'the state of owning or having in one's hands or power'. It includes possession by receipt of rents and profits. Even if a trespasser is in possession of land belonging to a female owner on the date when the Act came into force, the female owner might conceivably be regarded as being in possession of the land, if the trespasser had not perfected his title by adverse possession before the Act came into force. It is not however necessary for us to express an opinion on this point".

The last sentence in the quotation above clearly shows that a trespasser's possession was not held to be taken as possession of the female Hindu owner for the purpose of Section 14 of the Hindu Succession Act. So, neither, according to the learned Judges of the Andhra Pradesh nor the learned Judges of the Supreme Court a trespasser's possession can be taken as the possession of the female Hindu, owner .In Words and Phrases (Permanent Edition Vol. 38 page 75) it has been stated :

> " 'Possession' means simply the owning or having a thing in one's power; it may be actual or it may be constructive. Actual possession exists when the thing is in the immediate possession of the party; constructive possession is that which exists without actual personal occupation."

This has been taken from a judgment in *Brown v. Volkening*[5], At page 104 of that volume it has been stated that actual possession exists when the thing is in the immediate occupancy of the party or his agent or tenant, while constructive or possession in law is that possession which the law annexes to the legal title or
ownership of property when there it a right to the immediate actual possession. The meaning for the word 'possession' was first mentioned in Johnson's dictionary as "the state of owning or having in one's hands or power property" and that meaning with slight modifications has been repeated ever since in every other dictionary (see *In re Egan Mills v. Penton*[6],). Wharton in his Law Lexicon has also given the same meaning to possession. The state of owning is equated with having a thing in one's own hands or power. It cannot, therefore, include a situation where a thing is in the hands of another person. In other words, it would not include a mere right to possession or to recover possession through the assistance of a Court of law. At page 81 of Words and Phrases (Volume 33) the state of owning has been shown as synonymous with controlling. When a man is in possession he may use force to keep out a trespasser but if a trespasser has gained possession, the rightful owner cannot use force to put him out but must appeal to law for assistance. In such a case the owner cannot have a right of the immediate actual possession of the property. He has to wait till he succeeds in an action in Court against the trespasser and recovers possession. There cannot be any doubt that the words "state of owning or having a thing in one's own hands or power" cannot mean or include a case where the actual possession is with the trespasser. Reading both the judgments of the Andhra Pradesh High Court AIR 1957 Andhra Pradesh 280 and the Supreme Court AIR 1959 SC 577 to which I have already referred, such meaning was also not given, as it could not be, to that expression by the learned Judges. The contention of Learned counsel before us that the benefits of Section 14 can be availed by a female Hindu even when her possession over a property at the time of commencement of the Act

was not actual, constructive or in law, but the possession was at that time with the trespasser cannot be correct. Learned counsel, however, referred us to the case of *Harak Singh v. Kailash Singh*[7], The facts of that case were as follows. Thai plaintiffs asked for a declaration that a deed of gift dated the 30th of March 1949 executed by defendant No. 2, widow of Rambarat Singh, in favour of defendant No. 1 was not valid beyond the lifetime of the widow and was not binding upon the plaintiffs who were the next reversioners to the estate of Rambarat Singh. The trial Court dismissed the suit holding that the plaintiffs were not the next reversioners. Against that the appeal came to the High Court and the Division Bench which first heard that case held that the plaintiffs could maintain that suit though they were not the next reversioners because the next reversioner who was defendant No. 1 could not have asked for setting aside the alienation in his own favour. But the following question was referred to a larger Bench :

> "Whether the right of an heir of a last male holder to succeed to the property which was in-validly transferred by sale, gift or any other mode of absolute transfer by a Hindu female before the coming into force of the Hindu Succession Act of 1956 (Act 30 of 1956), and his claim for possession thereof from the transferee on the death of the female, or on otherwise extinction of the woman's estate, has been adversely affected and taken away by Section 14 of the Act of 1956."

That question, however, was altered by the Full Bench to this form :

> "Whether the right of an heir of the last male holder to repudiate an absolute alienation of property by way of sale or gift made by a female Hindu without legal necessity before the corning into force of the Hindu Succession Act of 1956 (Act 30 of 1956) and his claim of possession thereof from the transferee on the death of the female Hindu or on extinction of the woman's estate otherwise, has been adversely affected and taken away by Section 14 of Act 30 of 1956 ?"

The learned Chief Justice in delivering the Judgment on this question on behalf of the Court proceeded to examine the meaning of the oppression "any property possessed by a female Hindu" in Section 14. His Lordship observed :

> "In my opinion, this expression does not necessarily refer to physical possession of a female Hindu. The possession contemplated in Section 14 is not necessarily physical possession; it may be possession in law. For example, possession of a mortgagee or lessee from a female Hindu of the property, or the possession of a guardian or trustee of a female Hindu, would be possession of the property of the female Hindu for the purpose of Section 14 of the Act. I am further of opinion that a person attempting to acquire title against a Hindu woman by adverse possession would not deprive her of possession for the purpose of Section 14 of the Act. (It is this sentence on which learned counsel very much stressed). In this connection I should like to refer the definition of 'possession' in Stroud's Judicial Dictionary, 3rd Edition, at page 2239 to the following effect :
> 'Possession', (1)(a) Possession is said two waies, either actual possession or possession in

law.

(b) Actual possession, is when a man entereth in deed into lands or tenements to him descended, or otherwise.

(c) Possession in law is when lands or tenements are descended to a man, and he hath not as yet really, actually, and in deed, entered into them. And it is called possession in law because that in the eye and consideration of the law, he is deemed to be in possession, for as much as he is tenant to every man's action that will sue concerning the same lands or tenements, (Termes de la ley possession).

I am definitely of the view that the expression 'any property possessed by a female Hindu' occurring in Section 14 must he broadly interpreted in the context of the language of the Sub-Section and must be taken simply to mean 'any property owned by a female Hindu' at the date of the commencement of Act. But in the case of property which has been absolutely alienated by the widow before the commencement of the Act she retains no right or interest in the properly on the date of the coming into force of the Act. If the widow had sold away the property of which she had only a limited interest, or if she had made an absolute gift of the property and put the grantee into possession, it is difficult to hold that the widow was 'possessed' of the property when the Act came into force." The case before the Full Bench was of a female Hindu who had made an alienation in favor of another person of a property before the commencement of the Hindu Succession Act. It was not a case where the person attempted to acquire title against a Hindu woman by adverse possession. The observation of the learned Chief Justice : "I am further of opinion that a person attempting to acquire title against a Hindu woman by adverse possession would not deprive her of possession for the purpose of Section 14 of the Act" was really not in relation to the facts of the case or the question of law under reference before the Court. It was undoubtedly an expression of an opinion perhaps to accentuate the emphasis upon what was stated earlier about possession in law or constructive possession. Stroud's Judicial Dictionary does not also refer to adverse possession by a trespasser. With great respect to the learned Chief Justice, I should say that his opinion in regard to a trespasser's possession with reference to Section 14 of the Act was an obiter and not the essential part of the decision. The case did not involve the question of a trespasser's possession or the possession of a person as adverse to the widow. Secondly, in view of what was decided in regard to the import and meaning of the word "possessed" in that section by the Supreme Court in the case of AIR 1959 SC 577 that opinion of the learned Chief Justice does not receive confirmation. After quoting a passage from the Judgment in the case of *Gostha Behari v. Haridas Samanta*[8], where only three kinds of possession actual, constructive and possession in law were held to be the extent of meaning of "possessed by a female Hindu" the learned Judges of the Supreme Court observed :

> "In our opinion, the view expressed above is the correct view as to how the words 'any property possessed by a female Hindu' should be interpreted".

In none of those three kinds a trespasser's possession can come. This, I think, is sufficient to hold that a trespasser's possession at the time of the commencement of the Act cannot be taken to be the possession of a female Hindu for purposes of Section 14 of the Hindu Succession Act.

12. There are two other cases to which I should also refer where a contrary view about the

meaning of the word "possessed" in Section 14 was taken. In the case of *Yamunabai v. Ram Maharaj*[9], a widow Y succeeded to the estate left by her co-widow A in 1949. A had adopted the defendant before her death in 1949 but the necessary sanction for that adoption as required under the law prevailing in Kolhapur State was not accorded till 1958. It was only after that sanction that the adoption could be valid. The question that arose in that case was whether Y had acquired absolute ownership over that estate and if she was liable to be divested thereof on the ground of sanction for the adoption of the defendant in 1958. It was held that the estate possessed by Y became her absolute properly since the Hindu Succession Act came into force and, therefore, she was not liable to be divested later when the adoption became valid by sanction ex post facto. One of the arguments was that the widow Y was not in possession of that estate at the commencement of the Act as the defendant (who had been adopted though invalidly) was in possession of the property, and so she could not have absolute ownership of that. The learned judge in refuting that argument very briefly observed that for Section 14, possession is to be taken as legal possession and property wrongfully in possession of a trespasser ran be taken to be in the possession of a female Hindu owner. Except a bare observation like that nothing else has been stated in support of such conclusion. There is also no discussion or finding if in fact
the defendant in that case was in physical possession of the property in question. I have already shown that in the case of AIR 1959 SC 577 possession of an invalidly adopted son living with the adoptive mother was held to be of a permissive character and in that sense the female Hindu (adoptive mother) was held to be "possessed" of that property within the meaning of Section 14 of the Act. The case before the Bombay High Court was one of that nature at the most and by use of the words "in wrongful occupation of a trespasser" the learned Judge had in view the invalidly adopted son's occupation. He was not a trespasser in the sense the word is used as it appears from the judgment of the Supreme Court in the above mentioned case.

13. In the case of *Ramsewak Ojha v. Sheopujan Pandey*[10], Misra, J. explained what he meant by "actual possession" which he had used in the case of *Ramsaroop Singh v. Hira Lall Singh*[11], while dealing with the meaning of the word "possessed" in Section 14. By elucidation and reference to the cases of *Secy, of State for India v. Krishnamoni Gupta*[12], and *Umatul Mehdi v. Kulsum*[13], the learned Judge brought out that "actual possession" may be by receipt of rent or by the implied possession when the land is merged under water or possession through a mortgages, lessee or licensee. The learned Judge also referred to the Judgment in the case of *Brijnandan Singh v. Jamuna Prasad*[14], to recall the broader sense in which possession was considered by him as synonymous with ownership but he added that he had not thought it necessary to elaborate that point in that judgment since he was content with agreeing with the view propounded by Vishwanath Sastri, J. in the case of AIR 1957 Andhra Pradesh 280. By alt those observations the learned Judge does not appear to mean to include a trespasser's possession within the ambit of "actual possession" of the rightful owner (before the trespasser's possession matures to a title by prescription). But, at two places in that judgment the learned Judge has given indication of holding that such an adverse possession by a trespasser will not prevent the female Hindu owner from having her absolute ownership within the meaning of Section

14. At one place he referred to Vishwanath Sastri, J's judgment where such a view was supposed to have been expressed and at another place he differed from the view taken by the Orissa High Court in the case of *Sansir Patelin v. Satyabati Naikani*[15], where it was held that the trespasser's possession could not come within the meaning "possessed" under Section 14 as such pos session was adverse to the rightful female Hindu owner. I have already shown by a quotation from the

judgment of the Andhra Pradesh High Court that Vishwanath Sastri, J. chose not to express his view on the question if a trespasser's possession could really be brought within the scope of "possessed" as mentioned in Section 14. I have also shown the same attitude taken by the learned Judges of the Supreme Court on that question. Therefore the basis of the observation of Misra, J. does not appear to exist. I am not able to find any justification or warrant for adopting the view that physical possession of a property by a trespasser which is adverse to a female Hindu owner at the time of commencement of the Hindu Succession Act, 1956, could attract the benefits of absolute ownership of the female Hindu over that property.

14. In the present case the property that had been alienated by defendant No. 1 by way of dedication to a deity through defendant No. 3 is in the same position as in the case of AIR 1958 Patna 581 (FB) where the widow, defendant No. 2, in that case had executed a deed of gift in favour of defendant No. 1. In respect of that property, therefore, the present defendant No. 1 having parted with her title cannot claim absolute ownership on the coming into effect of the Hindu Succession Act since that alienation was on the 12th February 1956.

15. Learned counsel drew our attention to some portion of the plaintiff's evidence (P.W. 9) to show that she stated that defendant No. 1, Mt. Kanchan Kuer, was still in possession of the property she inherited from her husband Trilok. Defendant No. 1 (D.W. 15) at one place in cross-examination said that she was managing the lands given to Thakurji. All the lands including those were jointly cultivated and managed and the produce thereof was jointly stocked. From these statements learned counsel argued that in spite of the deed of endowment, the possession of the properties covered by that was still with the widow, defendant No. 1, all through and in that view Section 14 will be attracted in her favor. Her definite case was that the endowment had been created which meant that the property had gone out of her ownership and possession to defendant No. 3 as Shebait of the Thakur in whose favor the endowment was created. That is also the, finding of the trial Court. What she stated in cross-examination can only amount to saying that the cultivation of her own lands and the lands given in endowment were jointly managed and cultivated. That is not the same as she, in her own rights, was in possession over those properties any longer after the endowment was made.

16. For all these reasons she did not acquire absolute ownership under Section 14 of those properties, and, therefore, the suit by the plaintiff-reversioners is maintainable for a declaration that that alienation by way of dedication was not valid and binding upon them.

17. Whether after the adoption of defendant No. 2 was made by defendant No. 1, the remaining part of the estate in the hands of defendant No. 1 went under possession of the adopted son is not clear from the evidence. There is no finding of the trial Court in that respect. Even if the adoption would have been valid, defendant No. 1 would have still continued her half share in the estate of her husband under the Women's Right to Property Act and in respect of that share, she would have been in joint possession with the adopted son. Her rights over that part of the property would change to absolute ownership under the provisions of Section 14. In regard to the other half, the title and possession of the adopted son will be of an adverse character if the adoption was invalid. But if the adopted son was not in exclusive possession of that share in the property, there would be actually no exercise of an adverse title by and on behalf of him. When his adoption is declared to be invalid the title of defendant No. 1 whether limited or absolute, would remain where it was before the adoption. Defendant No. 2 was a minor. The evidence of his

natural father Rajballabh Singh is to the effect that even during the lifetime of Trilok Prasad Singh he was brought to the village to look after and manage the properties and since then he had been doing that and that arrangement still continued after his death. In that case his management must be taken to be on behalf of the rightful owner and the rightful owner was in possession of the properties through him. In that view defendant No. 1 can legitimately claim absolute ownership under Section 14 in respect of the share in the property which purported to have vested in the invalidly adopted son. In other words, the whole of the estate of her husband except the portion she had alienated by endowment has become her absolute property. A similar view was taken in the case of AIR 1959 SC 577. Yet the plaintiffs' suit is maintainable as reversioners of the last male holder in respect of the other part of the property alienated and covered by the deed of endowment.

18. The result is that the plaintiffs' suit will have to be decreed, and they will be given the declaration that the adoption of defendant No. 2 was illegal and void, and the transfer made in the name of defendant No. 3 as Shebait under the registered Arpannama, dated the 12th February 1956 is illegal and not binding on the plaintiffs. The appeal is allowed and the decree of the Court below is set aside. In view of the circumstances of the case, parties will bear their own costs throughout.

A. B. N. Sinha, J.

19. I agree.

Appeal allowed.

Cases Referred.

[1] AIR 1959 Pat 153 (FB)
[2]49 Ind App 383
[3] AIR 1959 SC 577
[4] AIR 1957 And Pra 280
[5]64 NY 76 (80)
[6](1899) 1 Ch D 688
[7] AIR 1958 Pat 581 (FB)
[8] AIR 1957 Cal 557 at p. 559
[9] AIR 1960 Bom 463
[10] AIR 1959 Pat 75
[11] AIR 1958 Pat 319
[12] ILR 29 Cal 518 (PC)
[13] ILR 35 Cal 120
[14] AIR 1958 Pat 589
[15] AIR 1958 Ori 75