**RAJASTHAN HIGH COURT**

Nandkishore

Vs.

Brijbehari

Second Appeal No. 21 of 1950
(Ranawat and Sharma, JJ.)

24.03.1954

**JUDGMENT**

**Ranawat, J.**

1. This is a second appeal by Nandkishore and Mt. Birji against the judgment of the District Judge, Kotah, of 31-10-1949, by which the judgment and decree passed by the Court of the Civil Judge, Kotah, on 30-9-1947 were set aside and the suit of the plaintiffs was decreed for possession of the disputed property with costs.

2. A suit was filed by Mt. Ramnathi as next friend of her two minor sons Brijbehari, and Bhawani Shanker against Nandkishore and his wife Mt. Birji in the court of the Sub-Judge, Kotah, for recovery of possession of a house of which the details were given in the plaint and which belonged to one Sheonarain who was an uncle in relationship to the plaintiffs. After the death of Sheonarain in January 1944 his widow Mt. Surja Bai inherited his property as a limited owner. She died on 11-3-1945 and after her death Mt. Birji and her husband- Nandkishore took possession of the properties left by her in pursuance of a will executed by her during her life time in favor of Mt. Birji. It was claimed by the plaintiffs that as they are the heirs of Sheonarain they are entitled to inherit the property left by Sheonarain on the death of his widow. The plaintiffs therefore prayed for a decree for possession of the house left by Sheonarain at Kotah. It was also alleged that Srikishan, father of Birji, was also related to the deceased Sheonarain by blood but he had gone in adoption to another family at Jhalawar and his relations with the deceased had therefore been severed. The genealogical table of Sheonarain's family was stated to be as follows:

Mt. Birji has been married to Nandkishore defendant No.1.

3. The defendants admitted that the plaintiffs were the sons of Badri and grand-sons of Gordhan. It was also admitted by them that Srikishan became an heir of Mannalal at Jhalawar but it was denied that any ceremonies of Srikishan's adoption were performed. It was also denied that Gordhan and Onkar, the father of Sheo Narain, were brothers. It was alleged by them that Mt. Surja Bai, the widow of Sheonarain, made a will before her death in favor of the defendant No.2 Mt. Birji on 7-3-1945 in respect of the properties of Sheonarain as well as her own.

4. The first court held that Shrikishan's adoption to Mannalal had not been proved by the plaintiffs and that the defendants had also failed to prove the execution of a will by Surja Bai. It was further held that Onkar and Gordhan were real brothers. The suit of the plaintiffs was dismissed on the ground that Srikishan was nearer in degree to the deceased than the plaintiffs and he excluded the plaintiffs from inheriting the property left by Sheonarain. On appeal, the learned District Judge of Kotah held that the adoption of Srikishan to Mannalal at Jhalawar had been sufficiently proved and the suit of the plaintiff was therefore decreed. The defendants have come in second appeal to this Court. They have not taken their stand on the will of Surja Bai set up by them in the trial court and it is not necessary to deal with that aspect of the case. They have challenged the finding of the lower court about the adoption of Srikishan.
The decision of this case hinges on the fact of adoption of Srikishan to Mannalal. If his adoption to Mannalal is held proved the claim of the plaintiffs to the property left by Sheonarain would succeed. In case, the finding on the issue of adoption is otherwise, Srikishan being nearer to Sheonarain would exclude the plaintiffs from succeeding Sheonarain as his heir under the Hindu Law.

5. In this appeal, it has been urged as follows:

> 1. that the lower appellate court failed to appreciate the evidence of Srikishan on the point of his adoption to Mannalal. According to Srikishan Mannalal died before he was taken to Jhalawar by Kanwara Bai and his widow had been eloped by a Muslim before that time. Srikishan when he was produced by the plaintiffs themselves should be regarded as a witness of truth and the circumstances described by him would make his adoption to Mannalal impossible. The fact that Srikishan gave out his parentage of Mannalal at Jhalawar could not have been considered sufficient to prove his adoption.
> 2. That the decisions in the cases of - *'Neelawa Dundappa v. Gurshiddappa*

*Madiwalappa'*[1] - *'Kailash Chandra v. Bejoy Chandra',* [2] - *'Ramakrishna Pillai v. Tirunarayana Pillai*[3] and - *'Biradhmal v. Prabhabhati Kunwar',*[4] which have been relied on by the lower appellate Court do not help the case of the plaintiffs when the fact of adoption is rendered impossible on account of the death of Mannalal and the elopement of his widow before Srikishan was taken to Jhalawar for adoption.

3. That the lower appellate court should not have placed reliance on the statement of Ramchandra regarding performance of the ceremonies of adoption when he was not believed by the trial court.

4. That even though the finding of the lower court about adoption relates to a question of fact it can be challenged in second appeal as ignoring of evidence by the lower appellate court is a question of law.

6. It may be noted that the trial court was influenced by the statement of Srikishan in coming to the conclusion that Srikishan could not have gone in adoption to Mannalal at Jhalawar because according to this witness he did not see after he was taken to Jhalawar both Mannalal and his widow. The statement of Ramchandra was disbelieved for certain reasons which will be dealt with hereafter and the evidence of Jhunthilal, Gopaldutt, Ramnathi and Gangabai was considered to be not of much assistance as it was all hearsay so far as the point of adoption was concerned. The learned trial Judge under the circumstances held that the adoption of Srikishan to Mannalal was not proved. On appeal the learned District Judge disagreed with the trial court as regards the value of the statement of Ramchandra. The reasons given by the trial Judge for discarding Ramchandra's evidence were discussed in detail and the learned Judge came to the conclusion that those reasons were not sufficient to condemn his statement as untrue. On the other hand, the learned Judge thought that Srikishan was an interested witness and his statement was biased on this account. On the evidence of Ramchandra the adoption of Srikishan to Mannalal was held proved, specially because this was the case of old adoption which had been acted upon for a number of years. The cases in *'Neelawa Dundappa v. Gurshiddappa Madiwalappa'*; *'Kailash Chandra v. Bejoy Chandra'*; *'Ramkrishna Pillai v. Tirunarayana Pillai'* and *'Biradhmal v. Prabhabhati Kunwar,* were referred to in support of the view taken by the learned District Judge.

7. It has been urged on behalf of the appellants that because Srikishan was produced as a witness on the side of the plaintiffs he should be regarded as a witness of truth

and the circumstances described by him about the death of Mannalal and the elopement of his widow should therefore be taken to be true and on that basis the adoption of Srikishan should be held impossible. Reliance was placed on the authority in the case of - *'Shatrugan Das v. Sham Das',6* in which their Lordships of the Privy Council observed as follows:

> "He adopted instead the tactics of calling Shamdas, defendant 1, as a witness for the plaintiff, with the usual result that important features of his case are denied by his own witness. Their Lordships have on previous occasions condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put defendant 1 forward as a witness of truth."

8. On this point the respondents have urged that Srikishan was not a party to this case and the decision in *'Biradhmal v. Prabhabhati Kunwar,* is therefore not directly applicable to his case. He was a witness no doubt of the plaintiffs but the defendant No.2 Mt. Birji is one of his daughters and it was quite natural for him to feel interested in her. Under these circumstances, the plaintiffs should not be regarded as being bound by certain averments made by this witness in his cross-examination.

9. It is true that Srikishan was not a party to this case and the observations of their Lordships in Biradhmal's case, do not apply to his case. The value of his evidence is to be judged on its merits and the plaintiffs cannot be pinned down to the case put by him in his cross-examination, merely because they chose to produce him as their witness.

10. In 'In re Rangaswamy Iyengar', 21 Ind Gas 781 (Mad), it was held that a party calling his opponent as a witness is not bound by all the statements made by him, as such a witness is clearly hostile to the person calling him. In the present case, though Srikishan was not a party to the case, he was certainly interested in his daughter who was a defendant and as such he was clearly hostile to the plaintiffs who called him as their witness.

11. The decision of the Privy Council in - *'Kishorilal v. Chunnilal',*[7] was also referred to on this point by the learned counsel of the appellants but the observations of their Lordships in that case relate to the practice of calling opposite party as a witness and those observations therefore do not apply to the case of Srikishan who was not a party

to the proceedings.

12. A reference may be made to a decision of the Allahabad High Court in - *'Baburam v. Emperor',* [8] where it has been observed that a party is not bound by the evidence of a witness whom he produces, and no part of the statement of such a witness amounts to an admission on behalf of the party producing him, nor is there any rule of law that a party is not able to say that a witness produced by him is not speaking the truth upon some particular point unless he makes a written application to say that the witness is hostile. These observations were made in a criminal case but as they relate to the principles of the Law of Evidence, they are equally applicable to civil cases.

13. Similarly, in the case of - *'Jalal Din v. Nawab',* [13] Beckett, J., has remarked that there is no rule of law that a party must be bound by the statement of his witnesses, though the belief in such a rule is not uncommon and does great harm in judicial trials in some of the subordinate courts. Simply because, the plaintiffs produced Srikishan as a witness on their behalf they should not be considered to be bound by his statement. Defendant No.2 Mt. Birji is Srikishan's daughter and if the suit is dismissed the property left by Sheonarain would go to her. It was therefore natural for Srikishan to feel interested in the case of the defendants. Srikishan stated that he was taken to Jhalawar by Kunwara Bai when he was a boy of 7 or 8 years of age for adoption to Mannalal. He mentioned his parentage of Mannalal and at the same time also stated the name of his natural father. According to him Mannalal had died before he was taken to Jhalawar and the widow of Mannalal died two or three years after he had shifted to Jhalawar. He has further stated that he gave himself out as the son of Mannalal in Jhalawar State where he served throughout his life. In the records of Jhalawar State he had got the name of Mannalal entered as his father and in a suit filed against Sitaram he described himself as the son of Mannalal. In connection with the transfer of certain property which had been mortgaged to him he had got the name of Mannalal entered as his father, in revenue proceedings. In his cross-examination however he stated that the widow of Mannalal had eloped with a Muslim before he went to Jhalawar and that no ceremony whatsoever relating to his adoption to Mannalal was performed after he was taken to Jhalawar. Ramchandra P.W.2 has stated that he attended the adoption ceremony of Srikishan and that the widow of Mannalal took Srikishan in adoption and in connection with the ceremony of adoption she took Srikishan in her lap, and that the usual custom of distributing sweets was also followed. 50 or 60 men of the brotherhood assembled on that occasion. His evidence

was discarded by the trial court for the following reasons:

1. that it was contrary to the statement of Srikishan himself,
2. that Gopaldutt and Prabhudial P.Ws.6 and 3 who were also mentioned by him to have been present on the occasion of the adoption ceremony totally denied that they were present there,
3. that Prabhudayal who is of 70 years has stated that he did not attend the adoption ceremony as he was a child. If Prabhudayal was a child at that time how could Ramchandra who is younger to him remember the fact of adoption which must have taken place when he was only a child,
4. that Mt. Ganga who is related to Ramnathi, the mother of the plaintiffs lives in the same house in which Ramchandra lives and on this account she should not be treated as an independent witness.

14. All these points have been thoroughly dealt with by the learned lower appellate court in discussing the value of the statement of this witness. Srikishan is an interested witness and the evidence of Ramchandra cannot be discarded simply because it is contrary to the statement of Srikishan. It is true that the presence of Gopal Dutt and Prabhudayal has been mentioned by Ramchandra at the adoption ceremony and both these witnesses have not admitted their presence but have only stated that they heard that the ceremony took place.

After a lapse of 45 years it should not be considered unnatural that a witness may not remember certain details relating to the occasion. This circumstance is not such as would render the entire statement of Ramchandra false. Prabhudayal who lias given his age as 70 years stated that he could not attend the adoption ceremony because he was a child. This statement however does not appear to be correct. The adoption ceremony at the most had taken place about 45 years before he was examined as a witness and taking his age to be of 70 years as stated by him at the time of his examination he should have been of 25 years when the adoption ceremony took place. His statement that he was only a child at the time of SriKishan's adoption is therefore obviously false. The relationship of Ganga to the plaintiffs' mother cannot necessarily be taken to influence Ramchandra. These points were thoroughly considered by the lower appellate court in coming to the conclusion that the evidence of Ramchandra was reliable.

It is not disputed that Srikishan was taken to Jhalawar by Kunwara Bai for giving him in adoption to Mannalal and that throughout his life he was taken to be the son of

Mannalal at Jhalawar. In filing a suit in a civil court and in a case of mutation proceedings in a revenue court he had described himself as a son of Mannalal. He also got an employment in Jhalawar State for the reason that he was considered to be the adopted son of Mannalal. All these circumstances were considered in favor of the validity of his adoption which was now being disputed by one of his daughters after a lapse of about 45 years.

15. According to the Hindu Law, the onus of proving adoption is on the party who alleges it. It was therefore in the present case for the plaintiffs to prove the fact of Srikishan's adoption to Mannalal, but after a lapse of long years, it is natural that the evidence of adoption may disappear and it may become very difficult to find any witnesses of the ceremony of actual giving and taking in adoption. In such cases some evidence of the fact of adoption may be regarded as sufficient to shift the burden on the other side to prove want of adoption.
In the case of - *'Rup Narain v. Mt. Gopal Devi',*[10] there was a dispute about adoption which was alleged to have taken place about 50 years ago so that direct evidence of much value could hardly be looked for. Their Lordships of the Privy Council in such a case observed as follows:

> "Their Lordships are of opinion that the adoption is established. Before the death of Sultan in 1861 Wazir is described as his adopted son. On the death of Sultan, Wazir succeeded to the estate without controversy, which he could only have done as adopted son, and enjoyed it and disposed of it as his own without controversy down to his death in about 1870. Almost every document, both during the life of Wazir and since his death, is framed entirely upon the basis of the adoption."

16. In *'Mt. Binda Kuer v. Lalita Prasad Chaudhary',*[11] on the basis of a statement in a will that an adoption took place on a particular date with the consent of his natural parents, it was held that the recital was equivalent to an express declaration that the adoption was in Dattaka form. This construction of the will was made 60 years after the execution and when full evidence of adoption could not have been available. This authority, even though it relates to a presumption about the form of adoption, does throw light on the point of the nature of proof that may be held sufficient for the purpose of proving an old adoption.

17. In the case of - *'Har Shankar Partab Singh v. Lal Raghuraj Singh',* [12] the observations of their Lordships are as follows:

> "To establish the fact of a valid adoption it was essential for the appellant to show that it was made by the direction of the deceased husband of the adoptive mother, and that the respondent's father had given him in adoption. In the absence of proof which the lapse of time made impossible, it was incumbent on the appellant before any presumption that those conditions were fulfilled was justified to establish an initial probability that the adoption was likely to have been validly made, and that the conduct of the parties cognizant of the facts had at least been consistent with such a hypothesis".

18. In that case the evidence which was led to prove the adoption was considered to fall short of establishing such an initial probability. This decision of the Privy Council lays it down that in cases of old adoption if initial probability for adoption is established a presumption in favour of adoption may be raised.

19. Similarly in - *'Rajendra Nath v. Jagendra Nath',*[13] it was held by the Judicial Committee of the Privy Council (reversing the decree of the High Court at Calcutta) that although the defendant was bound to prove his title as adopted son as a fact, yet from the long period during which he had been received as adopted son, every allowance for the absence of evidence to prove such fact was to be favorably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant in order to defend his status is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindoo, long recognized as an adopted son, raised even a stronger presumption in favor of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family.

20. Similarly, in *'Venkata Seetharama Chandra Rao v. Kanchumarthi Raju',* [14] it was held that the burden resting altogether apart from the law of Limitation upon any litigant who challenges the authority of an adoption that has been recognized as valid during a long course of years is of the heaviest order. The same witnesses who proved

the adoption also proved the authority to adopt. As such, this evidence was held sufficient to prove authority for the disputed adoption. This case relates to a question about the authority to adopt and is not on the point of adoption itself but the principle laid down is equally applicable to questions of old adoptions.

21. The learned counsel of the appellants referred to the case of *'Neelawa Dundappa v. Gurshiddappa Madiwalappa***,** but that is a case where the presumption was raised about the ceremony of adoption from statements contained in a registered deed executed immediately after the adoption and the decision of this case is not very helpful for the purposes of the present case.

22. In - *'Krishnaji Hanmant v. Raghavendra Keshav',* [15] it was held that the conduct of the members of the family in respect of the family property was a far more convincing indication of the real state of things that a member of the family had gone out of it by adoption and that his failure to establish his adoption in the courts may have been due to his negligence in not taking prompt steps to assert his rights.

23. In - *'Kailash Chandra v. Bejoy Chandra,* an adoption which took place nearly a century ago was challenged when the person whose adoption was challenged enjoyed the status as an adopted son all his life and when direct evidence to adoption could not be expected. It was observed that no doubt as stated by Lord Atkinson in 36 Ind App 9 (PC), the onus of proving an adoption is on the party setting it up; but very slight evidence may be sufficient for this purpose where the alleged adopted son has been treated as such for a long series of years. Reliance was placed in this case on the decision in 38 Ind App 103 (PC) (J).

24. In *'Ramakrishna Pillai v. Tirunarayana Pillai,* it was held that where an adoption was acquiesced by the members of the adopting family for over 50 years the burden of proving lay heavily on one of the members of the family challenging it to disprove it.

*25. In - 'Pannalal v. Chiman Parkas',* [16] Mahajan, J., as he then was, observed that in respect of an old adoption strict proof of the performance of the ceremonies cannot be demanded. An adoption acquiesced in and recognized for a number of years by the person making the adoption and a long course of recognition on the part of that person and by the brotherhood who were best acquainted with the circumstances gives rise to the inference that the conditions relating to the adoption were fulfilled.

26. The decisions referred to above go to make it clear that in cases of old adoption a presumption in favor of the validity of adoption may be gathered from the status of the adopted son in the adopting family and its recognition by the members of the family for a number of years. In the present case, Srikishan lived at Jhalawar from his childhood and onwards and was taken to be the son of Mannalal. In his suits and other proceedings he adopted the parentage of Mannalal and he was taken in the service of the Jhalawar State as being the son of Mannalal. Srikishan himself did not care to prefer a claim to the property left by Sheonarain but he kept silent and encouraged his daughter and son-in-law to fight out the case challenging his own adoption. Such a conduct of Srikishan goes to show that he could not himself dare to revoke his own adoption. In his statement also he stated the parentage of Munnalal but subsequently explained it by saying that he had been giving out the parentage of Munnalal because his father's sister had told him that he was Munnalal's son. This explanation is not convincing and it cannot be taken to account for his conduct. The widow of Munnalal died two or three years after Srikishan had gone to Jhalawar and the widow could certainly take him in adoption provided she had an authority to do so. In the case of an old adoption such an authority should be inferred from the circumstances of the case. The fact that throughout his life Srikishan was taken to be the son of Munnalal goes to point out in favor of the validity of the adoption. The statement of Ramchandra also proves that the widow of Munnalal took Srikishan in her lap at the time of the adoption ceremony. In view of the evidence on record, the lower appellate court was not wrong in holding that the adoption of Srikishan to Mannalal should be held valid.
The contention of the appellants that the lower court ignored the evidence of Srikishan is not correct. The lower court examined the evidence of Srikishan and after a full consideration of the circumstances of the case it came to the conclusion that certain particulars mentioned by him were not reliable regarding ceremony of adoption and also regarding elopement of the widow of Mannalal by a Muslim before his adoption. Gangabai had stated that the widow of Mannalal was eloped by a Muslim because she was not kept under good control by Srikishan who was adopted as her son. This shows that the widow of Mannalal was eloped after the adoption and not before it.

27. We would like to note here that there is no good reason before us for interference with the finding of fact arrived at by the lower appellate court regarding the fact of adoption of Srikishan to Mannalal. That finding of fact is final and cannot now be challenged in second appeal. The contention of the appellants that evidence was

ignored on this point by the lower appellate court does not appear to be correct.

28. As regards the presumption in favor of the validity of adoption, it is in favour of the plaintiffs when it is challenged after about 45 years and when consistently throughout Srikishan had given himself out as the son of Mannalal.

29. The defendants can have no claim to the property left by the widow of Sheo Narain as the plaintiffs are the nearest reversioners to the deceased after Srikishan who had gone in adoption to some other family. The widow of Sheonarain had no right to will away the property of her husband and the appellants have also not tried to take their stand on the will of Surja Bai.

30. In conclusion, this appeal fails and is dismissed with costs.

Appeal dismissed.

Cases Referred.


1. AIR 1937 Bom169
2. AIR 1923 Cal 18
3. AIR 1932 Mad 198
4. AIR 1939 PC 152
5. AIR 1938 PC 59
6. AIR 1938 PC 59
7. 31 All 116,
8. AIR 1937 All 754
9. AIR 1941 Lah 55
10. 36 Cal 780 (PC)
11. AIR 1936 PC 304
12. 29 All 519 (PC)
13. 14 Moo Ind App 67 (PC)
14. AIR 1925 PC 201
15. AIR 1942 Bom 178
16. AIR 1947 Lah 54