

RAJASTHAN HIGH COURT

Sorawar Singh

Vs.

Kan Mal

Civil Writ Petition No. 3770 of 1989

(Rajesh Balia, J.)

26.07.2002

ORDER

Rajesh Balia, J.

1. Heard learned Counsel for the parties.
2. This case has a chequered course of claim to rights to the land in question.
3. The land in question as appears from the chronology of events recorded by the Board of Revenue in its judgment dated April 24, 1985, while deciding the review application, arising out of its judgment dated 5.6.1978, that the land in question was a Khudkasht land of Samandar Singh, who died on Miti Kartik Sudi 15 Samvat 1975 corresponding to Gregorian Calendar 1913. He left behind him no male issue, but was survived by a widowed mother and two widows Ugma Bai and Bhanwar Bai. By Order No. 21773 the then Ruler of Mewar ordered to take the said Khudkasht land under the management of the State on finding that the three female heirs of the two widows and widowed mother are not able to look after the land. The yearly yield from the Hawala land was Rs. 125/- per annum and same was ordered to be paid to two widows and the widowed, mother of Samandar Singh. Thereafter, on Miti Posh Budhi 10 Samvat 1976, the then Ruler of Mewar passed another Order No. 23756 to the effect that the income from the land in village Parlia should be appropriated to the Government of Mewar and the three widows may be paid subsistence allowance of Rs. 125 per year during their lifetimes by the Mewar Government, which amount was enhanced from time to time. The Hawala land was for sometime continued to remain in the name of widowed mother of Samandar Singh, but later on it was entered in the name of Government. In Samvat year 1996 (1940) Kanmal s/o Bheron Lal and Bansilal s/o Kali Charan, were entered as Shikmi (sub-tenant) in respect of land in dispute.

Meanwhile, widowed mother and one widow of Samandar Singh namely Ugam Bai had expired and only Bhanwar Bai survived.

4. After death of widowed mother of Samandar Singh, escheat proceedings were started. However, that was objected to by Bhanwar Bai, the surviving widow of Samandar Singh and she made a representation that the land should be restored in her name and she may be put in possession of agricultural land left by her landlord and the possession from Shikmi be restored to her.

5. On this representation, an order was made on 15.12.1951 to cancel escheat proceedings, thus accepting the representation of Bhanwar Bai. However, it was directed that plots of land given on Bapi shall not be disturbed and that the other plots of land shall also remain in possession of the existing tenants until they are held liable to ejection under the existing laws.

6. However, the said Bhanwar Bai persisted with her right to reclaim the lands left by her husband. On the report of Commissioner dated 7.8.1953 the State Government passed an order on 28.12.1953 with the following directions :-

"It is clear from the report of Mst. Bhanwar Bai widow of Samandar Singh of village Parlia was deprived of her khudkasht land measuring 91.5 bighas wrongfully and cannot now be put in possession of her whole land, 11.11 biswas have already been given to Bapi and Bapidars cannot be ejected. The remaining land is also in possession of the Shikmi cultivation with a view to afford relief to the widow I am directed to convey sanction of H.H. and Rajpramukh to the following as recommended :

(a) The name of Mst. Bhanwar Bai widow of Samandar Singh, Parlia be entered instead of Sarkar in the revenue records for Hawala lands, which are under the Shikim cultivators and have not been given in Bapi.

(b) The widow may be allotted 91.5 bighas parat land for purpose of cultivation."

7. Still dissatisfied with this order that notwithstanding the restoration of her name in the land records in place of her husband the same lands were not being restored to her, she persisted with her claim to possession of her husband's land with the State. This led to making of further orders. In continuation of order dated 28.12.1953, on 19th

July, 1955 following order was passed by the Government of Rajasthan:

"I am directed to request you kindly to dispossess the Ghair Mustakil Shikmis & hand over the possession to Smt. Bhanwar Bai."

8. After receipt of this order, when Bhanwar Bai sought ejection of the occupants the Shikidars in possession, who are respondent Nos. 1 and 2 in this writ petition, filed a civil suit for permanent injunction against Bhanwar Bai for restraining her from dispossessing them. This suit was returned by the Civil Court to the said plaintiffs for being presented before the proper Revenue Court, as the Civil Court held that it had no jurisdiction to try the suit in respect of agricultural holdings. The revenue suit was ultimately decreed in favor of respondent Nos. 1 and 2 to the extent it was ordered that the plaintiffs shall not be evicted from the land in question except in accordance with law.

9. It is alleged by the petitioner that he was adopted by Bhanwar Bai vide registered adoption deed dated 26.9.1960. After death of Bhanwar Bai in 1962 the present petitioner alleging himself to be adopted son of Samandar Singh and Bhanwar Bai filed a suit in the Court of Assistant Collector, *Chittorgarh*, against one Lal Singh, who was defendant No. 3 and Kanmal and Bansilal defendant Nos. 1 and 2. The plaintiff has alleged that in view of Section 46 of Rajasthan Tenancy Act sub-tenant of widow does not acquire the khatadari rights and continue to remain in possession as sub-tenant and, therefore, he is entitled to recover possession from them as an heir of widow Bhanwar Bai, who has now become owner of the property. He also alleged that after adoption, Bhanwar Bai had transferred the land in question by gift in favour of Lal Singh, but the same is inoperative against the plaintiff because Bhanwar Bai did not have the capacity to transfer the property of Samandar Singh after his adoption and also because gift has been made during the pendency of suit for cancellation of adoption and, therefore, it was hit by doctrine of *lis pendens*.

10. Respondent Nos. 1 and 2 filed written statement denying the claim of the plaintiff to Khatadari rights in the land in question and his claim to recover possession from them. Instead of respondent Nos. 1 and 2 claimed themselves to be khatedar tenants as they were inducted as shikmi or sub-tenancies during the escheat proceedings and continued as such until commencement of Rajasthan Tenancy Act, 1955. They also pleaded that the property in question was forfeited to the Mewar State. Subsequent proceedings, which were taken out by Bhanwar Bai widow of Samandar Singh were not a valid proceeding as the State Government had no authority to decide in respect

of the said lands. They denied that Section 46 in any sense applied to them. It was admitted that Bhanwar Bai has adopted plaintiff through registered deed, but alleged, that Bhanwar Bai had gifted the very same land in favour of Lal Singh and Lal Singh has consented before the Revenue Authorities that he has no objection to record the defendant Nos. 1 and 2 as khatedar tenants. They denied their status as either tenant or sub-tenant of the plaintiff. The said defendants also took the plea of adverse possession.

11. On the pleadings of the parties as many as 18 issues were framed by the trial Court of which issue Nos. 9 and 12 relevant for the present purposes read as under :-
(Vernacular matter omitted..... Ed)

12. The aforesaid two issues reproduced are relevant for the present purposes inasmuch as the Board of Revenue has decided the appeal before it only on the basis of its finding on these issues and has not gone into other aspects of the matter about the rival contentions between the plaintiff and respondent Nos. 1 and 2.

13. The factum of execution of registered adoption deed in favor of plaintiff had not been denied by any of the defendants. The plaintiff has produced before the trial Court in support of his claim as adopted son of Samandar Singh, registered adoption deed dated 26.9.1960 and Ex.A1 judgment of the Civil Court in which Bhanwar Bai's suit for cancellation of adoption was dismissed. The counsel for the defendants conceded the issue in favor of plaintiff. The finding of the trial Court on issue No. 9 was recorded as under :-
(Vernacular matter omitted..... Ed)

14. The gift deed was alleged by the plaintiff to have been executed in favour of Lal Singh and about execution of which there was no dispute either. The challenge to validity of gift was founded on the alleged incompetency of Bhanwar Bai to deal with the property of Samandar Singh after she had adopted Srovar Singh, the present petitioner. Burden to prove that the gift was invalid was on the plaintiff. Plaintiff did not produce the deed of gift obviously because the same was in possession of the donee. He has also not required the defendants to produce the said document. The trial Court held that in absence of gift deed it cannot be assumed that the gift was invalid and inoperative against the plaintiff.

15. On the finding on the above issues and on the finding of other issues, which were primarily between the plaintiff and defendant Nos. 1 and 2, The suit of the plaintiff was dismissed on 13.9.1971 by the SDO.

16. On appeal, the Revenue Appellate Authority held the adoption of plaintiff to be invalid on the ground that on the date of adoption the plaintiff was above 15 years of age and had no eligibility to be given in order taken in adoption under Section 10 of the Hindu Adoptions and Maintenance Act, 1956. Finding on issue No. 12 was confirmed and, therefore, the decree was also maintained.

17. On further appeal before the Board of Revenue dismissed the appeal vide its order dated 5th June, 1978. However, thereafter on application for review of that judgment as the said review application was allowed on 24th April, 1985 and the appeal was required to be reheard. Subsequent thereto, it appears that the alleged gift deed dated 19.4.1962, which was registered on 25.4.1962 was produced before the Board.

18. The Board was of the opinion that this document is not the gift deed, but a Will and by order dated 29.8.1986 the Board ordered the pleadings to be amended. By another order dated 19.12.1986 the case was remitted to the trial Court for recording evidence to prove the Will. After recording the evidence about the due execution of Will, the Board of Revenue on the basis of said evidence recorded by the trial Court held that execution of Will has been duly proved.

19. On return of the evidence, the Board of Revenue vide its order dated 22.12.1988 in the first instance held the adoption to be invalid by affirming the finding that under Hindu Adoptions and Maintenance Act, 1956 a person above the age of 15 years cannot be adopted unless it is proved that there is some custom to the contrary in the family and, therefore, the finding arrived at by the Revenue Appellate Authority was confirmed. Thereafter, assuming that adoption to be valid, the Board of Revenue finding that the execution of Will after adoption has been proved and as per Will the property on the death of Bhanwar Bai devolved on Lal Singh and not on the plaintiff.

20. The plaintiff's plea that the document of adoption stipulates agreement to contrary, was not accepted by the Board *inter alia* on the ground that stipulation is only for vesting of the property in future on demise of Bhanwar Bai. No property was transferred to Samandar Singh as adopted son. In the absence of any such agreement to the contrary, the plaintiff did not divest the adoptive widow of any property, which

has already vested in her prior to the date of adoption. Therefore, the disposition made by Bhanwar Bai, whether it is by way of gift or Will, will not be affected by adoption. With these findings the appeal was dismissed.

21. The Board of Revenue has not adverted to any other issue as to the *inter se* rights between the plaintiff, adopted son of Bhanwar Bai and respondent Nos. 1 and 2, who are admittedly in possession of the land in question as Shikmidars since 1939-40.

22. The review petition against the order dated 12.12.1988 was filed, which also was dismissed on 8.9.1989 by holding that even if, the adoption is held to be valid and the respondents are held to be bound by decree between the deceased-Bhanwar Bai and the plaintiff about the validity of adoption in view of subsequent disposition of the property by Bhanwar Bai it does not affect the result of the case.

23. From the aforesaid narration of facts it is apparent that the Board of Revenue has non-suited the petitioner on two grounds. Firstly, the adoption was invalid because at the time of adoption, the petitioner was above 15 years of age and incapable of being given in adoption and secondly that even if the adoption is held to be valid, because of the subsequent disposition by the adoptive mother of the property in question of which she was not divested, and there was no agreement to the contrary in terms of Section 13 of the Hindu Adoption and Maintenance Act to the property in question.

24. My attention was invited by the learned Counsel for the petitioner to the finding recorded by the S.D.M. on issue No. 9 which has been quoted above which clearly goes to show that the respondents have abandoned contest to the question of invalidity of adoption and accepted claim by the petitioner as Bhanwar Bai's son and heir.

25. Whether the adoption has taken place in accordance with law of adoption is a question of fact. The provision of Hindu Adoptions and Maintenance Act merely provides necessary qualification and the mode of adoption subject to other conditions. The existence or non-existence of such conditions and of the eligibility criterion are all question of facts. Existence or non-existence of conditions affecting validity of adoption cannot be assumed in favour of either parties. If the factum of adoption is contested, the same has to be proved like any other fact, by providing all necessary ingredients of a valid adoption. But, where parties do not join issue or abandon it after joining the issue, by accepting the fact of adoption, the proceedings must constitute on

assumption that adoption is an admitted fact.

26. Once contest to the issue of validity of adoption was abandoned explicitly by the respondents-defendants in this case before the trial Court it was not open for the appellate authorities to hold the adoption to be invalid by assuming that certain state of affairs to exist from some material nor record and hold that contra requirement has not been proved. Facts in dispute only are required to be proved and not the admitted facts.

27. In this connection, It may be further noticed that only ground on the basis of which the Revenue Appellate Authority or Board of Revenue has held that the registered adoption deed dated 26.9.1960 shows that on the date of adoption the petitioner was above 15 years of age and, therefore, the adoption is invalid in view of the provisions of Section 10 of Hindu Adoptions and Maintenance Act, 1956.

28. A perusal of Section 10 clearly goes to show that so far as criterion of age is concerned that adopted child should not have completed the age of 15 years, is not absolute in its term, but admits of exception on the basis of custom or usage applicable to the parties. Existence or non-existence of customs to the contrary is a question of fact. The parties having abandoned the issue of validity of adoption and accepted it as an admitted fact, it was not open for the appellate Court to have relied on absence of proof of custom to the contrary to invalidate the said adoption. In the facts and circumstances parties are deemed to have not joined issue about the validity of adoption to be contrary to Section 10 so as to assume certain facts to invalidate the adoption. Once defendants abandoned contest on any issue and accepted existence of fact in issue, they are bound throughout the proceedings and cannot be permitted to resile from in the court in appeal. Nor is the appellate Court entitled to reach its own conclusion of facts about existence of which parties do not join or after joining the issue deliberately concedes in favor of other party. The Court must proceed further on the premise of existence of such facts viz. the existence of valid adoption of petitioner in present case. Finding as to invalidity of adoption in my opinion suffers from an error apparent from record.

29. Learned Counsel for the respondents sought to urge at this stage that adoption may not be invalid for want of breach of conditions mentioned in Section 10, but it is invalid because the plaintiff has not proved that difference of age between the plaintiff

and adoptive mother was of 21 years or more as required under Section 11(3).

30. This contention is noticed to be rejected. Whether at the time of adoption the adoptive mother was older by 21 years than the adopted male child is a question of fact. There is no foundation to such facts in pleadings nor any evidence has been led consciously by the parties on this issue. Merely by raising a question on assuming certain facts to exist contrary to the requirement of law and relying on abstract doctrine of burden of proof that had such a dispute been raised, burden would be on the plaintiff to prove his case. A plea of fact cannot be allowed to be raised for the first time at this belated stage.

31. Moreover, the plaintiff has pleaded in his pleadings that the alleged gift deed in favor of Lal Singh was made during the pendency of suit for cancellation of said adoption. He has also produced certified copy of the judgment in the suit filed by adoptive mother for securing a decree for cancellation of adoption, which was dismissed on 16th April, 1952. In these circumstances, so far as Lal Singh is concerned, he is bound by that judgment in which the challenge to adoption made by Bhanwar Bai the transferor, has been replied and the suit has been dismissed. Lal Singh, who is claiming through Bhanwar Bai only, and claiming under her, is as much bound by said decree as Bhanwar Bai. But the Board of Revenue and Appellate Authority have consistently ignored this aspect of the matter and committed an error apparent on the face of it.

32. So far as the question of validity of adoption is concerned, it is vitiated by an error apparent on the face of record and cannot be accepted as binding. It must be held that so far as the present litigation is concerned between the parties adoption by Bhanwar Bai to the petitioner is to be assumed to be valid and in accordance with law as held by the trial Court.

33. However, this finding is not by itself sufficient to grant relief to the petitioner for declaration of title to the land and claim its possession from the respondents.

34. On the question of second finding the learned Counsel for the appellant has raised two fold contentions, firstly, that Bhanwar Bai had no power to dispose of the property after she adopted petitioner as her son and as a son to her deceased husband under the term of adoption deed itself he has been recognized as owner of the property in question. Therefore, any transfer *inter vivos* or by testamentary disposition by

Bhanwar Bai is invalid. The terms of adoption deed binds and under it she was denuded of any authority to hold and transfer the lands in question by recognizing him as owner of the property in question.

35. The Board of Revenue has reasoned that the agreement in question only envisages vesting of the proper in the petitioner in future by inheritance and does not result in immediate divesting of the adoptive mother of her property and, therefore, there is no agreement to the contrary envisaging vesting of property in present.

36. It appears that while referring to the provisions of divesting the Board of Revenue has not properly understood the difference between the theory of relation back in the case of adoption by a widow to her husband the time immediately before the death of adoptive father and the right of the adoptive parents to dispose of the property, which is vesting in them at the time of adoption.

37. Before commencement of Hindu Adoption and Maintenance Act, 1956 the effect of an adoption of a son by a widow was that it was deemed as if a son was born immediately before the death of adoptive father. This resulted in placing the adopted son to exist at the time succession of adoption opened. As a consequence an adoption by widow were to divest those who had succeeded to the property of his father by doctrine of relation back. This effect, was independent of the position that on adoption the adoptive son became member of coparcenary, if any, existing at the time of adoption and Will acquire right of coparcener in the joint estate of Hindu undivided family.

38. Section 12 of the Hindu Adoption and Maintenance Act which deals with consequence of adoption brought a radical change in the matter. Consequence of adoption envisaged in Section 12(c) is that the adopted child shall not divest any person of any estate which vested in him or here before the adoption. This section is absolute in its term and does not admit of an exception. Such consequence of divesting any person of his property cannot be avoided by agreement to the contrary. Such divesting in favor of an adopted son can only take place by way of transfer *inter vivos*, if property in the manner known to law, if such property were to vest in the adopted son during the life time of adoptive parents. This is not to say that it at the time of adoption, adoptive mother or adoptive father is a member of coparcenary, the adoptive son will not become member of such coparcenary so as to get right in it by birth which

may result in diminishing the shares of other coparceners. In such event no divesting and vesting of property takes place. Only by operation of rule of unobstructed heritage on the birth of a female child he gets an interest in joint Hindu Family property by birth. This effect is not affected by adoption. Necessary pre-condition is that coparcenery holding such property must be alive and property must not have gone out of coparcenery of which the adopted son is to become a member.

39. In the present case there is no dispute about the facts that the property in question was in the first instance was khudkasht land of Samandar Singh, who died in Samvat 1975 or Calender year 1978 before commencement of Hindu Succession Act. He left behind him three female successors as noticed above without any male issue. On his demise the property in question was first recorded in the name of his widowed mother and thereafter the property was sought to be forfeited to the State by escheat. However, on objection being raised by Bhanwar Bai the property was released from escheat and ordered to be entered in her name recognizing her as surviving heir of her deceased-husband. As per principles of Hindu law, then governing succession of property, a female heir would have succeeded only as a limited heir acquiring widow's estate, as was the expression well known under Hindu law. A widow's estate vests in the female during her life time and on her demise the property will revert to nearest male relative of her husband, known as reversionary interest vesting in the body of reversioners.

40. This limited estate of any female ripened to full ownership on commencement of Hindu Succession Act, 1955 as per Section 14 thereof. Thus, it must be held that ownership of rights in the property in question vested absolutely in Bhanwar Bai, admittedly only surviving heir of Samandar Singh then, as full owner with the commencement of Hindu Succession Act, 1955. There being no other male member of coparcenery, when the property vested in Bhanwar Bai absolutely as full owner it lost its character as a coparcenery property and could not be revived by subsequent adoption. At the time when present petitioner was adopted in 1960. Bhanwar Bai was full owner of property. By virtue. of such adoption, he did not divest Bhanwar Bai of her property in any manner.

41. As against this Section 13 envisages that subject to any agreement to the contrary an adoption does not deprive the adoptive father or mother of the power on dispose of his or her property by transfer *inter vivos* or by Will. Thus, ordinary rule is that on

adoption of a child the rights of adoptive parents to transfer any property vesting in them in any manner, whether by transfer *inter vivos* or by testamentary disposition, is not put under any clog. However, if there is agreement to the contrary putting restriction on right of adoptive parents to disposition of property vesting in them, such agreement takes precedence and can be enforced by avoiding any such transfer made by adoptive father or mother in breach of such agreement.

42. It may be clarified that this provision relates to disposing power of the holder of property which already vested in the adoptive father or mother. It does not confer any powers which otherwise does not vest in adoptive father or mother as the case may be. The existing fetters on disposition powers are not affected by existence or non-existence of agreement under which adoption has taken place. The said fetters continue to remain even if there is no agreement to contrary for example restrictions in respect of property held as coparcenary property. However, in this case we are not concerned with the property which at the time of adoption bore character of coparcenary. Sole surviving heir of Samandar Singh was a female, who was recorded as khatedar in the land records of the land in question. The limited estate of widow had ripened into full ownership on coming into force of Hindu Succession Act.

43. In this connection Mr. Mehta learned Counsel for the petitioner urged that perusal of the adoption deed goes to show that mother has not only recognized the fact that adopted son shall become owner of the property in future in recognition of her claim as heir of the present owner of the property, but specifically, by detailing the property in question, in respect of which the adopted son was proclaimed to, be owner of the property in present.

44. Having given our thoughtful consideration on contentions raised before me and closely reading the deed of adoption. I find that the adoption deed does not anywhere deals with disposing power of the adoptive mother. It does not restrict in any manner the disposing power of the adoptive mother. Mere recognition of a adopter; son as owner of the property, does not lead to any inference that this was agreement to the contrary so as to denude the holder from her disposing power of the property of which she is not lawfully divested. It was at best recognition of Sarovar Singh as son of her late husband Samandar Singh and perhaps ventilating the conventional belief entertained by many a Hindus particularly in rural areas even now that an adoption results in divesting the female holder of land from adoptive father on such adoption on

doctrine that adoption relates back to the point of time immediately before the death of adoptive father, whereas under law, though the deceased husband of the female adopting, a child may be recognized as adoptive father of such adopted child, he does not divest the adoptive mother of her property which vest in her absolutely, whether as her stridhan or acquired as an heir of her husband or from any other relative.

45. Such a declaration cannot in any sense be considered as a clog on disposing power of adoptive father or mother which he or she possesses at the time of adoption.

46. In this connection I notice the opinion expressed by N.R. Raghavachariar in Hindu law on the effect of Section 13 of the Hindu Adoption and Maintenance Act "sometimes the adoption deed merely recites the factum of adoption and that the son adopted will have all the rights of a son. In this latter case, the deed does not amount to an agreement not to alienate the property, and if the property is the self-acquisition of the adopter's powers by reason of such declaration cannot be questioned by the adoptee as being beyond the adopters powers by reasons of the adoption."

47. The aforesaid opinion is correct expression of effect of Sections 12 and 13 read together. Mere recitals of recognizing the accepted son as owner of the property as heir of Samandar Singh, the petitioner, cannot be read as an agreement of putting any restrictions on the disposing of power of the adoptive mother Bhanwar Bai in respect of the property which was vesting in her and of which she is not divested by such declaration.

48. Once this conclusion is reached, I am of the opinion that the petitioner on his admission contained in the plaint itself must be non-suited.

49. The factum of transfer of her interest in the property by Bhanwar Bai whether by way of gift or by way of Will, is admitted by the petitioner. Such transfer is not challenged on any defect in the manner of execution of the deed of transfer, which is a registered deed. On admitting the factum of transfer it has been sought to be avoided only on the ground of lack of competence of Bhanwar Bai to transfer said property solely because of adoption of the petitioner by her. The plaintiff has clearly averred in the plaint that Bhanwar Bai had after adopting the petitioner gifted the property in favor of Lal Singh, which she was not entitled to for the reason that after adoption she lost her right to transfer the property. The execution of gift deed which was otherwise

valid, but for pleading of incompetence of Bhanwar Bai to dispose of that property, was a fact admitted in the plaint itself. The question of transfer made by Bhanwar Bai in favour of Lal Singh was never denied and disputed. In addition thereto as noticed by the Board of Revenue the petitioner in his statement dated 22nd February, 1977 has admitted the factum that Bhanwar Bai has transferred the property to Lal Singh by way of gift or by way of Will. The execution of document by Smt. Bhanwar Bai, by which the property has been disposed of was never in dispute.

50. Therefore, I do not find any error in the conclusion of Board of Revenue about the valid execution of document of disposition by Bhanwar Bai. The question, whether it was a gift or Will, once its execution is not disputed, loses its significance so far as present *lis* is concerned. The only objection as to effectiveness of said document was founded on the contention about lack of competency of Bhanwar Bai to transfer the property. On this aspect as per above discussion the answer is clearly against the petitioner that Bhanwar Bai was neither divested of her interest in property nor of her disposition power due to adoption. As a result of the fact that after adoption Bhanwar Bai had disposed the land in question in favor of Lal Singh, the petitioner cannot get any relief.

51. As a result, this petition is dismissed with no order as to costs.
Petition dismissed.