

## RAJASTHAN HIGH COURT

Deen Dayal

Vs.

Sanjeev Kumar

Civil First Appeal No. 110 of 1994

(Jitendra Ray Goyal, J.)

29.04.2009

### ORDER

**Jitendra Ray Goyal, J.**

1. This is a defendant's first appeal under Section 96 of the Civil Procedure Code directed against the judgment and decree dated 7-7-1994 passed by Additional District Judge No. 1, Ajmer in Civil Suit No. 252/1993 by which the suit of the plaintiff has been decreed.

2. The plaintiff Sanjeev Kumar had filed a suit for possession, declaration, injunction, recovery of mesne profits and other items with the averments that property bearing AMC No. 28/805 situated at *Adarsh Nagar, Ajmer* was owned and possessed by Shri Dayaram who died issueless in the year 1957 and after the death of Dayaram his wife Jai Devi inherited his property who also expired issueless in the month of May, 1970, therefore Chameli Devi, sister-in-law (Bhabhi) inherited the said property in accordance to Hindu Succession Act being the nearest surviving member after the death of Smt. Jai Devi. It was further the case of the plaintiff that Smt. Chameli Devi took in adoption to the plaintiff Sanjeev Kumar on 2-5-1974 and a registered adoption deed was also got executed by her; that Smt. Chameli Devi died on 23-4-1975, thereafter Sanjeev Kumar (plaintiff) became the sole owner of the property left by Chameli Devi. It was also stated that Deen Dayal was the step brother of late Smt. Jai Devi and after her death he continued collecting rent on behalf of Chameli Devi and also used to reside with her but the defendant Deen Dayal was in no way heir of Jai Devi or Chameli Devi. It was further averred that Chameli Devi served a notice on 20-5-1974 to the defendant Deen Dayal to stop collecting the rent, thereafter Deen Dayal with *mala fide* intentions lodged a First Information Report against Jai Prakash and

Chameli Devi and in that criminal case Jai Prakash and Chameli Devi were arrested but after release on bail Chameli Devi was kept in wrongful confinement by the defendant Deen Dayal and she was not permitted to meet even to her adopted son. It has further been averred that after the death of Chameli Devi, the plaintiff being adopted son has become the sole owner of her property, therefore he is entitled for possession of immovable property as well as cash money and ornaments.

3. The defendant Deen Dayal in his written statement denied the factum of plaintiff's adoption and averred that plaintiff was never adopted by Smt. Chameli Devi and forged adoption deed was prepared by Jai Prakash, father of the plaintiff. It was further the case of the defendant that he was adopted son of late Shri Dayaram, that Smt. Chameli Devi was not having any relation with the property of late Shri Dayaram and the defendant Deen Dayal is the sole owner of the disputed property after the death of Dayaram and his wife Jai Devi and this fact has been admitted also by Chameli Devi in writing and she also relinquished her right and title, if any, in the said property. It was also averred that Smt. Chameli Devi had adopted Snehlata and therefore, Snehlata is also a necessary party to the present suit.

4. The trial Court on the basis of the pleadings, framed following issues :-

(Vernacular matter omitted....Ed.)

5. The plaintiff Sanjeev Kumar apart from himself as P.W. 2 examined Jai Prakash as P.W. 1 and got exhibited three documents Exhibit-1 to Exhibit-3. The defendant Deen Dayal apart from himself produced A. R. Kulkarni, Vidhyanath and Mukandram in his evidence and got exhibited as many as 29 documents.

6. The learned trial Court decreed the plaintiff's suit for declaration that the plaintiff is adopted son of Smt. Chameli Devi and also for possession of the house but dismissed the suit in regard to the claim of cash money and jewellery. Feeling aggrieved against the judgment and decree dated 7-7-1994, the defendant-appellant has preferred this appeal.

7. I have heard the learned counsel for the parties and perused the relevant material available on the record.

8. Learned counsel for the appellant firstly submitted that the suit filed by the respondent-plaintiff is not maintainable because earlier suit filed by him and his father Jai Prakash on the same cause of action was dismissed as withdrawn and no permission to file fresh suit was sought from the concerned Court and this fact has

been admitted by Jai Prakash (P.W. 1) in his cross-examination. It was then submitted that though this plea has not been raised by the appellant-defendant in his written statement but being a pure question of law the same may be raised at any stage. Reliance has been placed upon the judgment delivered in the case of *M. K. Ranganathan v. Govt. of Madras, reported* <sup>1</sup> in wherein it was held that a pure question of law may be raised even at the appellate stage.

9. Per contra, learned counsel for the respondent submitted that plea of bar being a subsequent suit on the same cause of action has neither been pleaded by the defendant in his written statement nor he incorporated this objection as a ground of appeal, therefore, it being a mixed question of fact and law cannot be permitted to be raised for the first time at the appellate stage. Reliance has been placed upon the judgment in *Rikabdas A. Oswal v. Deepak Jewellers, reported in* <sup>2</sup>

10. I have given my thoughtful consideration on the rival submissions made at the bar. It is not in dispute that appellant-defendant has neither taken this plea in his written statement that plaintiff-respondent had earlier also filed a suit on the same cause of action which was dismissed as withdrawn without leave of the Court nor such objection was raised by taking ground in his memo of appeal and for the first time during the course of arguments this plea has been raised by the counsel of the appellant-defendant deferring the statement of Jai Prakash (P.W. 1). In my considered view, this being a mixed question of fact and law, such plea cannot be permitted to be raised for first time at the appellate stage, since in this situation the plaintiff shall be remediless in rebutting the fact so asserted. Hon'ble the Apex Court in *Rikabdas A. Oswal's case (1999 AIR SCW 4731) (supra)* had occasioned to consider similar situation and held that plea of bar of subsequent suit must be expressly made in the written statement. It was further observed that where the defendant had neither taken the plea of bar of subsequent suit in the written statement nor in the grounds of appeal nor in the ground of review, the District Judge could not have entertained the said plea. As has been discussed here-in-before and also keeping in view the ratio laid down by Hon'ble the Apex Court in *Rikabdas A. Oswal's case (supra)*, I do not find any force in this contention of the appellant raised at this stage in regard to the bar of subsequent suit.

11. Learned counsel for the appellant next contended that learned Additional District Judge has not considered the oral as well as documentary evidence in a proper manner and only raised the presumption of Section 16 of the Hindu Adoptions and Maintenance Act, 1956 in regard to the valid adoption on the basis of registered

adoption deed Ex. 1 and has not considered the other evidence and circumstances at all. While placing reliance upon the judgment in *Jai Singh v. Shakuntala*, reported <sup>3</sup> in it was submitted that presumption is rebuttable one and it has been amply established that no ceremony of giving and taking has taken place which is a mandatory requirement of a valid adoption. To support this contention reliance has also been placed upon the judgment in *Kartar Singh (Minor) through Gaurdian Bachan Singh v. Surjan Singh (dead)*, reported <sup>5</sup> in It was then submitted that performance of ceremony of "giving and taking" neither noted in the deed nor described in the plaint and even according to the adoption deed Ex. 1 Sanjeev Kumar was given in adoption by only his natural father Jai Prakash and no consent of her mother was obtained nor averred in the adoption deed, therefore, from the adoption deed Ex. 1 itself, it is clear that this adoption is not lawful. It was further submitted that plaintiff continuously describing himself as a son of his natural father in the official record and no witness of such ceremony including the mother of the plaintiff was produced in the evidence. It was also submitted that adoption deed has been prepared by Shri Arjun Das, Advocate which was registered on 2-5-1974 and said deed is said to have been signed by Dal Chand Rathore (a client of Advocate Sh. Arjun Das) and Sitaram Munshi (Munishi of Arjun Das, Advocate) but for providing the adoption deed neither Arjun Das, Advocate nor any attesting witness was produced in the witness box. It was then submitted that Smt. Chameli Devi refuted such adoption soon after she came in knowledge about this fact and in this regard notice Ex. 20 dated 13-8-1974 has been proved by Advocate Shri Mukundram Garg (D.W. 4). It was also submitted that Smt. Chameli Devi also submitted affidavit on 3-8-1974 Ex. 17 and 18 in the Court in which she refuted the factum of this adoption. It was further submitted that plaintiff Sanjeev Kumar is the only son of his natural father Jai Prakash, the caste and Gautra of plaintiff Sanjeev Kumar and Smt. Chameli Devi are different and they were not, related and even known to each other prior to induction of Jai Prakash (father of the plaintiff) as a tenant in the disputed house, therefore, there was no occasion and reason for Smt. Chameli Devi to adopt plaintiff Sanjeev Kumar, specially in the circumstances where ordinarily an only son is neither given nor taken in adoption in Hindus. Reliance has been placed upon the judgment in a *A. Raghavamma v. A. Chenchamma*, reported <sup>5</sup> in

12. Per contra, learned counsel for the respondent contended that learned Additional District Judge having considered the entire evidence arrived at correct conclusion about the fact of adoption in question and there is no reason to set aside the said finding. While placing reliance upon the judgment in *Dheer Singh v. Amar Singh*,

*reported in* <sup>6</sup> page 704, it was contended that strong presumption of a valid adoption is attached with the registered adoption deed, which is in no way rebutted by the appellant- defendant but in the instant case plaintiff however succeeded to prove his adoption and its ceremonies including "giving and taking ceremony" by the oral testimony of P.W. 1 Jai Prakash and P.W. 2 plaintiff Sanjeev Kumar and further proved that natural mother of Sanjeev Kumar also gave her consent for this adoption and the statements of P.W. 1 Jai Prakash and P.W. 2 Sanjeev Kumar further find corroboration from the registered adoption deed Ex. 1. According to the learned counsel for the respondent, minor contradictions in the statements of the witnesses after a lapse of many years of such ceremony are obvious, therefore, on the basis of minor contradictions, evidence of such witnesses cannot be discarded. Reliance has been placed upon the judgment in *Nandkishore v. Brijbehari*, *reported in* <sup>7</sup> wherein it was held that though onus of proving adoption is on the party who alleges it, but after a lapse of along time, it is natural that the evidence of adoption may disappear.

13. It was then submitted that though plaintiff Sanjeev Kumar and her adoptive mother were not of the same caste but they were known to each other and were residing in the same house and having a bond of love and affection, therefore, plaintiff Sanjeev Kumar was taken in adoption by Smt. Chameli.

14. I have considered the above submissions made at the bar in the light of the evidence and the material available on the record.

15. Plaintiff Sanjeev Kumar claims his right over the property in dispute on the basis of adoption and approached to the Court with a specific plea that he was taken in adoption by Smt. Chameli Devi on 2-5-1974 and an adoption deed was also executed and registered by her on the same day, therefore, he being an adopted son of Smt. Chameli Devi became the sole owner of the disputed house originally owned by Shri Dayaram which in turn was inherited by Smt. Chameli Devi, wife of Gopiram, who was the sister-in-law (Bhabhi) of deceased Dayaram, therefore the core question between the parties in this appeal is that of adoption of plaintiff Sanjeev Kumar.

16. The plaintiff apart from adoption deed which has been marked as Exhibit-1, has also relied upon his oral testimony as well as the testimony of his natural father Jai Prakash who was examined as P.W. 1 to prove this adoption.

17. Jai Prakash (P.W. 1) in his deposition stated that Chameli Devi adopted his son Sanjeev Kumar on 2-5-1974 where in the morning rituals were performed and his son was given in lap of adoptive mother Chameli Devi by Pandit and thereafter sweet

(prashad) was distributed. He further stated that his wife also consented for this adoption and at that time along with his wife Vimla Devi and children, the persons of community were also present. He also stated that adoption deed was also executed and registered by Smt. Chameli Devi which was drafted by scrub Advocate Shri Arjun Das whereas Dal Chand Rathore and Sita Ram signed the deed as a witness. He further stated that two years prior to this adoption he came in the disputed house as a tenant of Chameli Devi and before that he was not acquainted with her. He further admitted in this cross-examination that he and Chameli Devi were of different caste and Gautra. He also denied having any knowledge about the relatives of Chameli Devi on her maternal side. He further admitted that Sanjeev Kumar is his only son to whom he had given in adoption to Chameli Devi. He further admitted in his cross-examination that at the time of adoption no relative of Chameli Devi and Jai Devi was present. He further stated that at the time of adoption ceremony, Jagdish Prasad Bansai, Shri P. N. Mehra and Shri Narayan were present who are still alive. In the cross-examination, P.W. 1 Jai Prakash further stated that Advocate Arjun Das who drafted the adoption deed had been his counsel in so many cases against the defendant. In his deposition at one place he stated that he along with Chameli Devi, went to Arjun Das for drafting of adoption deed whereas in his next breath he stated that draft was prepared in his house by Advocate Arjun Das. In regard to attesting witnesses of the adoption deed P.W. 1 Jai Prakash stated that Sitaram is a Munshi of Arjun Das and another witness Dal Chand is also alive. P.W. 1 Jai Prakash further admitted in his cross-examination that he was a tenant of defendant Deen Dayal to whom he used to pay the rent. He also stated that Chameli Devi died at Delhi but he was not present at the time of her funeral, therefore, he was not aware as to who performed the rituals at that time.

18. Another witness plaintiff Sanjeev Kumar (P.W. 2) himself stated that at the time of his adoption he was only 12 years of age, he was taken in adoption by Smt. Chameli Devi and after Pooja and rituals he was given in the lap of Chameli Devi by his natural father Jai Prakash. He also stated that he was not in the relations of Smt. Chameli Devi nor he knows about her Gautra. He further stated that at the time of his adoption, his father, mother and two sisters along with other familiar persons were present, out of them one Dal Chand, O.P. Mehra and Jagdish Prasad Bansai are still alive. He further showed his ignorance whether at the time of his adoption any relative of Chameli Devi was present or not?

19. This is the entire oral evidence which has been produced by the plaintiff in support

of his plaint and from the above oral testimony, it is difficult to hold that Sanjeev Kumar was taken in adoption by Smt. Chameli Devi by performing ceremony of "giving and taking" for the following reasons which have been emerged from the plaintiff's evidence :-

(a) That the adoption is said to have taken place in the morning on 2-5-1974 at the residence of Smt. Chameli Devi but none of her relative was called and present at this very important occasion;

(b) That the plaintiff Sanjeev Kumar and his father Jai Prakash were not acquainted with Chameli Devi prior to their induction as a tenant in the disputed house in the year 1972 :

(c) That the plaintiff Sanjeev Kumar and his father Jai Prakash were not aware about the Guatra and caste of Chameli Devi to whom Jai Prakash opted to give his only son Sanjeev Kumar in adoption, even after this adoption;

(d) That the natural mother of the plaintiff Sanjeev Kumar, though alive, has not been produced in the witness box for the reasons best known to the plaintiff Sanjeev Kumar;

(e) That it is not disputed that Sanjeev Kumar is the only son of his natural father Jai Prakash even then he opted to give his only son in adoption. It is also significant to note here that in Hindus one of the important purpose of adoption is to ensure spiritual services for a man after his death by the offering of obligations and rice libations of water to the manes periodically. Therefore, ordinarily an only son is neither given nor taken in adoption. Mitakshara has dealt with this point and lays down as follows :-

The Hon'ble Apex Court in A. Raghavamma's case ( AIR 1964 Supreme Court 136) (supra) has observed that though it is well known that ordinarily an only son is neither given nor taken in adoption unless there are special circumstances for such adoption of only son.

20. In the instant case, as has been discussed here-in-before, Jai Prakesh gave his only son in adoption whereas nothing has been shown as to what special reasons or circumstances persuaded to him to give his only son Sanjeev Kumar in adoption to the old widow lady Smt. Chameli Devi.

(f) That the witnesses of adoption ceremony as stated by Jai Prakash (P.W. 1) and Sanjeev Kumar (P.W. 2) have not been produced in the witness box to prove the ceremony of "given and taken", though it has been admitted that all these witnesses are alive. The neighbourers and an important community

persons were also not invited at this very important and auspicious occasion reasons best known to the plaintiff Sanjeev Kumar and natural father Jai Prakash;

(g) That the adoption deed is said to have been drafted by Sri Arjun Das, Advocate, who is admittedly the counsel of Jai Prakash in so many cases filed by him against the defendant Deen Dayal and one attesting witness Sitaram is the Munshi of Scrub Advocate Shri Arjun Das;

(h) That neither Arjun Das, Advocate nor two attesting witnesses Sarva Shri Sitaram and Dal Chand were examined for the reasons best known to the plaintiff;

(i) That there are major and noticeable contradiction in the statements of plaintiff Sanjeev Kumar (P.W. 2) and his father Jai Prakash (P.W. 1) in regard to the ceremony of "giving and taking". P.W. 1 Jai Prakash stated that his son was given in lap of adoptive mother by Pandit whereas Sanjeev Kumar says that he was given in the lap of Chameli Devi by his natural father Jai Prakash.

21. So far the oral testimony of defendant Deen Dayal is concerned, he categorically denied about adoption of Sanjeev Kumar and stated that Sanjeev Kumar was never taken in adoption on 2-5-1974 by Smt. Chameli Devi. He further stated that after the death of Jai Devi her plot No. 44, Adarsh Nagar was transferred in his, name and his name has been recorded as, owner of the house in the record of Nagar Parishad. He also stated that Jail Prakash was his tenant who executed rent note in his favor and used to pay him the rent. He further stated that a suit for eviction was filed against Jai Prakash which was decreed. D.W. 1 Deen Dayal further stated that Chameli Devi adopted his daughter Snehlata at Delhi in the presence of relatives and community persons and "given and taken" ceremony was also performed and registered adoption deed was also executed by Chameli Devi in favour of Snehlata. He further stated that Chameli Devi died at Delhi and at that time he and his relatives performed necessary rituals. Defendant's another important witness is Mukundram (D.W. 4), Advocate who proved the notice Ex. A20 dated 13-8-1974 which was served by him upon the plaintiff's Advocate Sri Arjun Das at the instructions of Chameli Devi. In the notice Ex. A20 dated 13-8-1974 it has been mentioned that Jai Prakash is tenant in the disputed property No. 804 belonging to Dayaram (since deceased) and finding her all alone got her signatures on blank papers. In the said notice, it has also been denied that Chameli Devi ever adopted Sanjeev Kumar, mentioning therein that Chameli Devi would not have adopted Sanjeev Kumar who is not of her community and Gautra, there was no "giving and taking ceremony" in the presence of community

people and there was no occasion for such an adoption. Therefore, from the evidence of the defendant, it also appears that soon after knowledge of this adoption Smt. Chameli Devi denied and refuted such adoption.

22. It is significant to mention here that for a valid adoption of a Hindu under the Hindu Adoptions and Maintenance Act, 1956 transfer of adoptive boy by ceremony of giving and taking is essential as has also been held in the case of *Lakshman Singh Kothari v. Smt. Rup Kanwar*, reported <sup>8</sup> in wherein it has been observed that under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking.

23. In the instant case, as has been discussed here-in-before, it has been found that plaintiff has not succeeded to prove his adoption and giving and taking ceremony by his oral evidence.

24. Next important piece of plaintiff's evidence is registered adoption deed Ex. 1 which was written and registered at Ajmer on 2-5-1974.

25. It is settled position of law that registered adoption deed raises a presumption that adoption has been made in accordance with law but such presumption is rebuttable. Hon'ble the Apex Court in the case of *Jai Singh v. Shakuntala*, reported in <sup>9</sup> observed as under :-

"Section 16 envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the Statute is rather definite since the Legislature has used 'shall' instead of any other word of lesser significance. Incidentally, however the inclusion of the words 'unless and until it is disproved' appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - Thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words 'unless and until it is disproved' shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption."

26. According to the document Ex. 1, Smt. Chameli Devi has been described as party

No. 1, had taken in adoption to Sanjeev Kumar from his natural father Jai Prakash who has been described as party No. 2. It has also been mentioned in this document that;

"as the party No. 1 is a childless widow, her husband having died about 25 years and party No. 1 or husband do not have any child or grand child and whereas Gopi Ram had only one brother by name Daya Shankar who has also died without any issue and his wife is also dead. Now with a view to keep the line of the family going the party No. 1 has of her free will and choice taken Sanjeev Kumar aged 12 years son of the party No. 2 in adoption as a son and the party No. 2 has of his free will given the boy Sanjeev Kumar in adoption to the party No. 1 and the adoption ceremony has been performed on the morning at 2nd May 1974."

27. From the above contents of the adoption deed Ex. 1, it transpires that Sanjeev Kumar has been given in adoption only by Jai Prakash party No. 2 and his wife was not party of this adoption. It is also significant to note here that neither her consent has been mentioned in the adoption deed nor she was present at the time of registration, therefore on the close scrutiny of this document, it can be safely inferred that adoption was not made in accordance to law since as per the provisions contained in Section 9 of the Hindu Adoptions and Maintenance Act, 1956 a Hindu child cannot be given in adoption without the consent of mother, if she is alive or unless she has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind.

28. In the instant case, it is admitted by the plaintiff Sanjeev Kumar and his father Jai Prakash that mother of Sanjeev Kumar is alive and plaintiff has not pleaded nor stated about any in capabilities envisaged in Section 9 of the Hindu Adoptions and Maintenance Act, 1956. Therefore, in this fact situation, when it has been found from the adoption deed Ex. 1 that mother of adopted son Sanjeev Kumar was not a party of this adoption nor she consented to give her son in adoption, therefore, in the eye of law such adoption cannot be said to be valid one and the adoption deed Ex. 1 is not capable of raising any presumption in favor of plaintiff for a valid adoption.

29. Learned counsel for the appellant submitted that Snehlata who had been taken in adoption by Smt. Chameli Devi has not been arrayed as a party despite of specific objection taken by the defendant in the written statement.

30. Suffice is to say here that no issue has been framed in this regard, otherwise also

this controversy has lost its relevance since the adoption of Sanjeev Kumar has not been found proved, therefore, the suit of the plaintiff fails on this count alone.

31. In view of the entire discussion made hereinabove, since the adoption of Sanjeev Kumar by Chameli Devi has not been found proved which is the very basis and foundation of the suit, therefore, the appeal filed by the appel -defendant Deen Dayal deserves to be accepted and the judgment and decree passed by the trial Court deserves to be set aside.

32. Consequently, this appeal is allowed and the judgment and decree dated 7-7-1994 passed by Additional District Judge No. 1, Ajmer in Civil Suit No. 252/1993 is set aside. Resultantly, the suit of the plaintiff is hereby dismissed. The appellant is entitled to costs throughout.

Appeal allowed.

Cases Referred.

1. AIR 1955 SC 604
2. (1999) 6 SCC 40: (1999 AIR SCW 4731)
3. AIR 2002 SC 1428
4. AIR 1974 SC 2161
5. AIR 1964 SC 136
6. 1998 (2) WLC (Raj)
7. AIR 1955 Raj 65
8. AIR 1961 SC 1378
9. AIR 2002 SC 1428