

(1987) 01 OHC CK 0020
In the Orissa High Court
Case No : Second Appeal No. 120 of 1979

Bhima Kotha Dalai and Others	Vs	APPELLANT
Sarat Chandra Kotha Dalai and Others		RESPONDENT

Date of Decision : 27-01-1987

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 7

Citation : AIR 1988 Ori 14 : (1987) 63 CLT 649

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : K.C.J. Ray, for the Appellant; Manoj Mishra, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The short but interesting question that arises for consideration in this second appeal is whether a male Hindu having a widowed daughter-in-law capable of adopting a child could validly adopt a child to himself. It will be convenient to quote ground No. 4 of the memorandum of appeal which was accepted at the time of admission of the appeal as raising a substantial question of law to be decided in the appeal :

"For that admittedly according to plaintiff the adoption alleged having been made at a time when the adopter had already two daughters-in-law alive who could be the potential adopters of sons to their deceased husbands the adoption if at all be made by Butulu is accordingly invalid."

2. The facts relevant for the purpose of the appeal may be shortly stated thus : --

Sarat Chandra Kotha Dalai, respondent No. 1, filed the suit, Title Suit No. 99 of 1971 in the Court of the Subordinate Judge, Aska against the appellants, respondent No. 1 and predecessor in interest of respondents 3(a) and 3(b) for declaration of his title to the suit properties, for possession of the same after evicting the defendants and if the court finds that the suit properties are the joint family properties of late Butulu Kotha Dalai and his sons, for partition and

separate possession of the share of the plaintiff. The case stated in the plaint was that the parties are Khandayats settled in Balliguda Taluk in the district of Phulbani. Succession to their properties is guided by the law of Mitakshara as prevalent in the ex Madras State of which Balliguda division formed a part. The properties described in the schedules to the plaint comprised of agricultural land and house situated at Dudugumma, a hamlet of Mohasingi village. The extent of the properties was about 12 acres as described in schedule "B" to the plaint. According to the plaintiff, the suit properties were self-acquired properties of late Butulu Kotha Dalai. Butulu had two sons, Krushna Khota Dalai and Ramchandra Kotha Dalai, and two daughters, Janiphula and Badu alias Bimala Stree. Both Krushna and Ramchandra predeceased their father, the former having died in 1937 and the latter in 1946. Pirabati, the wife of Krushna Kotha Dalai, died during 1956 or 1957 leaving no issues. Kointara, defendant No. 3 (appellant No. 3), is the widow of Ramchandra Kotha Dalai. She has no issues. It was the further case of the plaintiff that with a view to perpetuate their line, Butulu and his wife decided to take a boy in adoption. They approached Pindika Patra, the natural father of the plaintiff, who was none else than the son-in-law of Butulu having married his daughter Janiphula to give the plaintiff to them in adoption. The natural parents of the plaintiff agreed to the proposal. Accordingly adoption ceremony was held on 18-6-1951 in presence of near relations. The giving and taking ceremony was performed and followed by a feast. From that day the plaintiff took the name of Sarat Chandra Kotha Dalai. Butulu also executed a deed of adoption evidencing the adoption of the plaintiff and recognising him as his sole heir on 18-6-1951. Butulu died during October, 1954 and his wife Tulasa died a year after, in October, 1955. After the death of Tulasa the suit properties were being managed by Pirabati and after her death by Kointara on behalf of the plaintiff who was then a minor. At this stage the father of the first defendant (appellant No. 1) and the mother of the second defendant (appellant No. 2) who were in no way related to the plaintiff or his family surreptitiously managed to get a deed of gift executed by Kointara on 25-6-71 conveying all the suit properties in their favour. Despite the said document the donees could not get possession of the suit properties and the plaintiff continued to possess the same. The plaintiff challenged the deed of gift as invalid and void on several grounds. It is not necessary to describe them in detail. The defendants 1 and 2 being armed with the invalid deed of gift trespassed upon the suit land on 29-8-71 during absence of the plaintiff from the village. On these averments the plaintiff sought the reliefs noticed earlier.

3. The suit was contested by defendants 1 to 3. In the joint written statement filed by the said defendants they denied the claim of the plaintiff that he was the adopted son of Butulu Kotha Dalai. According to them the suit properties were ancestral properties of Butulu to which he and his sons had right, title and interest. According to the defendants, Krushna and Ramachandra died in the year 1935 and 1949 respectively, leaving behind their widows Pirabati and Kointara, Janiphula and Bimala having been married away the entire suit properties were

exclusively possessed by Kointara, widow of Ramachandra. According to these defendants, the plaintiff was never taken in adoption by Butulu and his widow. There was never any giving and taking accompanied by other religious ceremonies as alleged in the plaint. The adoption was also challenged to be illegal and contrary to law. Kointara being the sole surviving heir of the family possessed and enjoyed the entire properties till the date of alienation of the same by way of gift to defendants 1 and 2. Defendant No. 3 claimed to have acquired absolute right in the properties of Butulu Kotha Dalai u/s 14 of the Hindu Succession Act, 1956.

4. The trial court framed several issues including the issues, whether the suit properties were the self-acquisitions of late Butulu Kotha Dalai and whether the alleged adoption of the plaintiff by late Butulu Kotha Dalai was true and valid in law. The court on consideration of materials on record held that (i) the suit properties were the joint family properties of Butulu and his sons, (ii) the parties being from the agency area of ex Madras Province, adoption of daughter's son was permissible and adoption of the plaintiff by Butulu was genuine and valid, and (iii) defendant No. 3 had acquired the interest of her husband. Therefore the plaintiff and defendant No. 3 are entitled to half share each. Accordingly the trial court decreed the suit for partition and separate possession of half share of the plaintiff.

5. On appeal by defendants 1 to 3 (appellants in the second appeal) the first appellate court on reassessment of evidence on record came to hold that the plaintiff was validly given in adoption by his natural parents to Butulu and his wife and the latter accepted him as their adopted son. The grounds challenging the validity of adoption, that is, the plaintiff being the daughter's son of Butulu and the boy and the adoptive father belonging to different castes, were negated by the first appellate court. Ultimately the court confirmed the decision of the trial court and dismissed the appeal.

6. At the hearing of the second appeal, the learned counsel for the appellate challenged adoption of the plaintiff by Butulu on the ground stated in paragraph 4 of the memorandum of appeal quoted earlier. The learned counsel for the respondents on the other hand supported the concurrent decisions of the courts below. He also raised the question that the appellants cannot be permitted to challenge adoption of the plaintiff on this ground which was not urged at the earlier stages in the suit.

7. In the plaint the plaintiff based his case on his adoption by Butulu and made necessary averments in this regard. In the written statement the defendants 1 to 3 in paragraph 11 generally denied the claim of adoption by the plaintiff. It was averred in the written statement that there was no physical act of giving and taking accompanied by other religious ceremonies for the adoption of plaintiff and the said adoption was not done with the consent and knowledge of Kointara Kotha Dalai. The position is fairly well settled that a party who alleges adoption need only state his claim in the pleading. It is for the other party who challenges

the validity of adoption to plead the same by stating specifically the ground on which the validity of the adoption is questioned. If there is a general denial of the claim of adoption it means only denial of the factum of adoption and not its validity. Applying this principle to the pleadings in the present case, it has to be said that validity of the adoption of the plaintiff was not questioned by the defendants on any specific ground, particularly the ground on which it is sought to be challenged in second appeal. Further, no specific issue was framed by the trial court regarding validity of adoption of the plaintiff. Therefore, there is force in the contention of the learned counsel for the respondents that the appellants cannot be permitted to question the validity of adoption, the factum of adoption having been found concurrently by both the courts below in this case.

8. As noticed earlier, the learned counsel for appellants argued at some length regarding validity of adoption of the plaintiff by Butulu and therefore I deem it proper to deal with this point also. His contention was that in presence of the widowed daughters-in-law Pirabati and Kointara who could adopt sons to their husbands, Butulu was not competent to adopt a son to himself. The learned counsel placed reliance on the decisions reported in AIR 1945 Nag 60 (Maroti Bansi Teli v. Radhabai) AIR 1953 Nag 239 (Nago v. Sukya) AIR 1954 Ajmer 57 (Smt. Godawari Devi v. Subh Karan) and AIR 1957 MadhBha 179 (Madhavrao v. Netram). I have carefully perused the said decisions. I am afraid, none of the said decisions expressly supports the contention raised on behalf of the appellants. Most of those decisions deal with power of the widow to adopt to her husband. In none of the decisions any proposition is laid down that a male Hindu otherwise competent to adopt a son loses his competence to do so if he has a daughter-in-law of a predeceased son. The learned counsel for the appellants was also not able to produce any text on Hindu Law in support of his contention.

9. In the case of Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa, the Supreme Court observed that it is now well settled that the main object of adoption is to secure spiritual benefit to the adopter, though its secondary object is to secure an heir to perpetuate the adopter's name. Such being the significance of adoption, its validity shall not be made to depend upon the contingencies that may or may not happen. In that case the Court did not accept the contention that an adoption cannot be made unless there is certainty of not getting a son and that if the wife is pregnant, there is a likelihood of the adopter begetting a son and, therefore, the adoption made is void. The court further observed that there are no texts of Hindu Law imposing a condition of non-pregnancy of the wife or son's widow or a grandson's widow for the exercise of a person's power to adopt.

The Privy Council in the case of AIR 1933 155 (Privy Council) while accepting the position that the widow's power to adopt may come to an end if a son she originally continue the line either by the birth of a natural son or by the adoption to him of a son by his own widow clearly observed that the vesting of the property on the death of the last holder in some one other than the adopting

widow, be it either another coparcener of the joint family, or an outsider claiming by reversioner or, by inheritance cannot be in itself the test of the continuance or extinction of the power of adoption. Though the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end, the mere birth of a son does not do so. This is not based upon a question of vesting or divesting of property. The true reason is that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son dies himself sonless and unmarried the duty will still be upon the mother, and the power in her which was necessarily suspended during son's lifetime will revive.

The Madras High Court in the case of Venkalakshmi Ammal v. Jagannathan. AIR 1963 Mad 316 observed that under the Hindu Law of adoption in the Hindu family governed by the Mitakshara school as it was interpreted prior to the Hindu Adoptions and Maintenance Act, 1956, the validity of an adoption depended on the theory of spiritual benefit which was the guiding principle before the commencement of the said Act of 1956. According to this principle the widow of a predeceased son (the daughter-in-law) can validly adopt a son to her husband after the death of the father-in-law who had himself left a widow alive on the date of the adoption. The argument advanced on behalf of the widow of the father who had herself taken a son in adoption to her husband that although there was the interposition of son's widow, the father being alive, the duty to continue the line still with him, and never passed on to his son, and after his death, to his widow, was an deeper consideration rejected. In the said case, the learned Judge quoted a passage from the case of Collector of Madura v. Mootoo Ramalinga Sethupady 1867 12 Moo Ind App 397 (PC), wherein the right of the widowed daughter-in-law to take a son in adoption to her husband with the consent of her father-in-law as enunciated in "Dattaca Mimamsa" of the author "Vaidya Narainsamy" was accepted on the ground of spiritual benefit to her husband.

10. On the discussions in the foregoing paragraphs, the position is manifest that there is no support either from any text on Hindu Law or authoritative pronouncement of the courts in support of the contention raised on behalf of the learned counsel for the appellants that Butulu had no right to take the plaintiff in adoption since his widowed daughters-in-law were alive and they could adopt sons. Accepting the contention of the learned counsel would be against the settled principle that adoption is mainly for the spiritual benefit of the adopter. Butulu, a male Hindu, otherwise competent to take a son in adoption could not have lost that right merely because of the contingency of wives of his predeceased sons could adopt sons to their husbands. The contention raised by the learned counsel for the appellants questioning validity of plaintiff's adoption on this ground has therefore to be rejected.

11. Accordingly the second appeal is dismissed as devoid of merit. Both parties will bear their respective costs of this appeal.