

(2009) 12 CAL CK 0021
In the Calcutta High Court
Case No : F.A. No. 198 of 1991

Binapani Samanta

APPELLANT

Vs

Sambhu Mondal and Others

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Citation : (2010) 1 CALLT 598

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.;Prasenjit Mandal, J

Bench : Division Bench

Advocate : Partha Chakraborty and Sarbani Chakraborty, for the Appellant;S.P. Roychowdhury and Bhabani Prasad Mondal, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—This first appeal is at the instance of an applicant for revocation of Probate and is directed against the judgment dated September 4, 1990 passed by the learned Additional District Judge, Ninth Court, Alipore, District - South 24 Parganas, in Original Suit No. 5 of 1983 thereby dismissing the proceedings on contest.

2. The short fact of the case made out by the appellant is that one Lalit Mohan Das and his wife, Dalimmoyee, had no issue of their own and they adopted the appellant as their own daughter after observing ceremonies in presence of the local people and near relations. The adoptive parents arranged for education and marriage of the adopted daughter. The respondents are the near relations of Dalimmoyee but they did not attend any ceremony of Dalimmoyee being envious of them. Even on the death of Dalimmoyee in 1974, the respondents did not perform any funeral rites and Sradh ceremony. Dalimmoyee was suffering from various ailments at her old age and the appellant and her two sisters looked after her. The husband of the appellant performed Sradh ceremony with the consent of the cognates of Dalimmoyee in presence of tenants of Dalimmoyee. In 1982, the appellant came to know that the respondents obtained a probate in respect of the premises at 154, S.N. Roy Road, Calcutta - 38 under P.S. Behala belonging to

Dalimmoyee. The Will purported to have been executed by Dalimmoyee was a forged one. Dalimmoyee died intestate. She did not execute any Will at all. Even no notice was ever served upon the appellant in respect of the probate case, though she was the only of Dalimmoyee legal heir by adoption. So the appellant filed the proceedings for revocation of the probate granted in favour of the respondents in the Probate Case No. 7 of 1976.

3. The respondents contested the proceedings by filing a joint written statement contending, inter alia, that they are respondents are not at all distant relations of Dalimmoyee and that the appellant was not adopted by Dalimmoyee as her own daughter. No adoption ceremony was held at all according to Hindu law and custom. In fact, the father of the appellant, Kanailal Das, was a tenant under Lalit Mohan and he was an employee of the Tram Company, but he lost his service after he became a paralytic patient. He was completely invalid. He had six daughters and one son. In order to save Kanailal Das and other members of his family from starvation, they were allowed to stay at the house of Lalit Mohan afterwards out of charity. The husband of the appellant did not arrange for Sradh ceremony of Dalimmoyee at all. But one Banshi Das, a cousin of late Lalit Mohan, performed the Sradh ceremony of Dalimmoyee. It was not true that Dalimmoyee had been suffering from various ailments or that she had no good relation with the respondents. The Will was duly executed by Dalimmoyee in presence of the witnesses. Since the death of Dalimmoyee, the respondents have been collecting rents from the tenants of the premises of Dalimmoyee and in fact, they are making necessary repairs of her premises. It is not true at all that the appellant and her two sisters looked after Dalimmoyee. As the appellant was not a near relation of Dalimmoyee, question of serving notice upon her did not arise. So the proceedings should be dismissed.

4. After analysing the evidence on record, the learned Trial Judge dismissed the proceedings. Being aggrieved by the said judgment, the appellant has preferred this appeal.

5. Mr. Chakraborty, learned Advocate for the appellant, submitted that Lalit Mohan, the husband of Dalimmoyee, acted as guardian of the appellant all along and that he signed on the progress reports of the appellant while the latter was a student in the school. In fact, the appellant resided in the house of Dalimmoyee at 154, S. N. Roy Road, Calcutta - 38. Her marriage was arranged by Dalimmoyee after selling one of her immovable properties to meet the expenses for her marriage. He also contended that the adoption was held by observing the customs followed by ceremonies prevailing at that time and that the provisions of the Hindu Adoptions and Maintenance Act, 1956 would not be applicable because adoption was held prior to the enforcement of the said Act. At that time, the appellant was six months old. She was adopted on the date of her Annaprasan. Villagers, near relations and the priest attended the said ceremony of adoption. He also contended that the appellant was taken by the P.W.1 from the lap of her natural mother and then she was placed in the lap of her adoptive mother,

Dalimmoyee. Thus, the ceremony of adoption was performed. He also contended that the appellant being a member of Shudra community need not perform all the ceremonies to be performed in the case of an adoption under the Hindu Law and the Hon"ble Apex Court supported such custom. He also contended that the husband of the appellant took steps for Sradh ceremony of Dalimmoyee and that the respondents did not attend the said Sradh ceremony because of strained relation with Dalimmoyee. He contended that when the appellant came to know about the grant of probate, she immediately filed the proceedings for revocation of the probate on the ground that Dalimmoyee did not execute at all any Will in the last part of her life and that the appellant looked after Dalimmoyee all along and not the respondents. He also contended that even the invitation card for the marriage of the appellant describes that Lalit Mohan was the father of the appellant. Thus, he submitted that the appellant had been able to prove that she was the adopted daughter of Dalimmoyee and so she being the only heir of Dalimmoyee was entitled to be cited in the proceedings for grant of Probate and in the absence of such citation the Probate granted by the Court should be revoked. Thus, he prayed for setting aside the judgment passed by the learned Trial Judge.

6. On the other hand, Mr. Roychowdhury, learned Senior Advocate for the respondents, supported the judgment passed by the learned Trial Judge.

7. Upon due consideration of the submission of the learned Advocate of both the sides and on perusal of the materials on record, we find that admittedly, the appellant was born on August 26, 1947. Admittedly, she was the daughter of one, Kanailal Das who was an employee of the Tram Company and he had six daughters and one son. Admittedly, he suffered from paralysis and leprosy. He became invalid. For that reason, he was discharged from service. Admittedly, at first Kanailal stayed in the house of Lalit Mohan as a tenant and in the last part of his life when he was discharged from service, he was allowed to stay in the house of Dalimmoyee out of charity and they helped the members of his family to prevent them from starvation. Admittedly, the appellant passed the School Final Examination in 1965 and she became a graduate in 1971 from Deshbandhu College. Admittedly, the appellant is a distant relation of Dalimmoyee and the three respondents are the sons of the sister of Dalimmoyee. Admittedly, Lalit Mohan, husband of Dalimmoyee, died in 1965 and Dalimmoyee died in 1974. Admittedly, the respondents, filed the probate case without impleading the appellant as a party to that proceeding and obtained a probate in 1976. Admittedly, the father of the appellant left the premises of Dalimmoyee on one day in 1973 and since then he is not traceable and it is not known whether he is alive or not. Admittedly, Dalimmoyee inherited many properties from her husband, Lalit Mohan and she resided at 154, S. N. Roy Road, Calcutta - 38 till her death. Admittedly, there are some tenants in the house of Dalimmoyee and the respondents were collecting rents from such tenants after the death of Dalimmoyee. In the circumstances, the following two points are to be decided in this appeal:

1. Whether the learned Trial Judge was justified in holding that no adoption was held by the adoptive parents in respect of the appellant and

2. Whether the learned Trial Judge was justified in rejecting the prayer of the appellant for revocation of the probate granted in favour of the respondents.

8. The appellant having been born on August 26, 1947 and as per the case made out by the appellant she was adopted when she was six months old only, she was adopted sometime in or about the month of February, 1948. At that time, Hindu Adoptions and Maintenance Act, 1956, was not in force and so the customs prevailing amongst the Hindus at that time should be considered in order to come to a conclusion whether adoption of the appellant was held in accordance with the old Hindu Law.

9. The Apex Court in the case of Lakshman Singh Kothari Vs. Smt. Rup Kanwar, observed the adoption under the ancient Hindu law as follows:

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. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party.

10. This view was also followed in the case of Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, , L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others, and Ranjit Kumar Jain Vs. Kamal Kumar Chowdhury and Another, .

11. Apart from that, under the old Hindu Law, the adoption of a daughter was not permissible at all. It is now settled that the adoption of a daughter was invalid under the old Hindu Law except dancing girls as customary in Madras, Pondicherry and Western India. Our such view gets support from the decision in the case of M. Gurudas and Others Vs. Rasaranjan and Others, The Hon'ble Apex Court has come to such a finding on the basis of a well-recognised book of Treatise on Hindu Law and Usage by Mayne and the Principles of Hindu Law by Mulla. For convenience, we are quoting the paragraph Nos. 23 & 28 of the said decision.

23. While arriving at the said finding, the court referred the following passage

from Mayne's Treatise on Hindu Law and Usage, 13th Edn., pp.429-30: "Adoption of daughters -Nandapandita in his Dattaka Mimamsa would construe "putra" (or son) as including a daughter and he draws the inference that on failure of a daughter, a daughter of another could be adopted. He supports his conclusion by referring to ancient precedents, such as the adoption of Shanta, the daughter of King Dasaratha by King Lomapada and the adoption of Pritha or Kunti, the daughter of Sura by Kunti Bhoja. This view is sharply criticised by Nilakantha in the Vyavahara Mayukha. It is now settled that the adoption of a daughter is invalid under the Hindu Law."

28. In Section 480 of the said treatise (i.e. Principles on Hindu Law & Usage by Mulla), it is categorically stated that the person to be adopted must be a male.

12. In view of such decisions of the Hon"ble Apex Court the adoption of a girl under the old Hindu Law, as in the instant case, was not valid at all. For that reason only, the application for revocation of Probate filed by the appellant before the learned Trial Court is liable to be dismissed.

13. In addition to the above ground, from the evidence on record, we find that the following facts and circumstances have emerged there from:

1. The evidence of the appellant, as regards adoption, is nothing but hearsay on the ground that she was six months old at the time of adoption.

2. At the time of so-called adoption, the natural father of the appellant and Lalit Mohan, so-called adoptive father were very much alive; but on scrutiny of the evidence on record we do not find that they took any part in the matter of adoption on the day of so-called adoption.

3. The appellant has claimed that the P.W.6, their priest and the P.W.1, a tenant, were present at the time of the ceremony of adoption. But, on scrutiny of their evidence, we find that the P.W.6 has stated that the adoption was performed when the P.W.1 formally placed the appellant in the lap of Dalimmoyee from the lap of her natural mother and declared that from that day the appellant became the daughter of Dalimmoyee. That was the ceremony performed in daylight. Had it been so, it would have been considered as a part of adoption. But, in fact, when the P.W.1 was examined at earlier point of time, she did not utter such words at all. Had it been the fact, the P.W.1 must have stated so in her deposition while she was examined first on behalf of the appellant. So it can well be concluded that finding no other evidence on the ceremony, this fact was incorporated subsequently by way of development during the course of examination of other P.Ws. So the statement of the P.W.6 cannot be accepted at all. The P.W.5 has stated that the appellant was adopted by Lalit Mohan and Dalimmoyee after observing a ceremony for the said adoption. But, on scrutiny of his evidence, we find that he was not at all present at the time of adoption and he has stated that his father was present at the time of adoption. So his statement cannot be accepted.

4. No religious ceremony including home, Jagya, etc. was at all held for effecting adoption.
5. No registered deed was executed in support of the claim of adoption.
6. Admittedly, the so-called adoption was held on the date of Annaprasan of the appellant and so it was natural that some persons, some neighbours including tenants of Lalit Mohan and relations might appear on the date of Annaprasan.
7. Signing of Lalit Mohan on the progress report of the appellant does not prove that the adoption was effected.
8. At the time of the marriage of the appellant the invitation card printed by the groom party described the appellant as a "Palita Kanya" of Lalit Mohan (vide exhibit - 1). This is not an admission at all on the part of the Lalit Mohan or his wife. As per evidence on record, marriage between the appellant and her husband, Kailash was held out of love affairs and not settled by Dalimmoyee.
9. The appellant along with other members of her natural guardian stayed in the house of Dalimmoyee at the time of her marriage and so it might be the situation that Dalimmoyee provided for marriage expenses of the appellant; but this fact did not confer the status of adopted daughter of Dalimmoyee on the appellant.
10. At the time of deposition, the appellant stated that no invitation card was printed at the time of her marriage; but we find that the respondents were able to prove that invitation card for marriage of the appellant was printed in the name of Dalimmoyee describing the appellant as niece of Dalimmoyee without mentioning the appellant as daughter of Dalimmoyee. Such facts and circumstances indicate that the appellant wanted to suppress the truth before the Court to achieve her goal.
11. Immediately after the death of Dalimmoyee, the appellant did not take any step for mutation of her name with the municipality or for realisation of rents from the tenants of Dalimmoyee. So she did not do any act of possession of the property left by Dalimmoyee.
12. On the other hand, it is the respondents who collected rents from the tenants of Dalimmoyee after her death and they mutated their names with the municipality. So the action of the respondents were such that they became the owners of the property left by Dalimmoyee after her death.
13. While the appellant applied for admission to the pre- University course in the Deshbandhu College, she mentioned the name of her father as Kanailal Das and not as Late Lalit Mohan Das. Such application for enrolment was filled up and submitted by the appellant before the Principal of the College on August 9, 1966, when there was no case/proceeding between the parties at all. So, this document (exhibit-D) should be treated as genuine and containing the true particulars of the appellant. Had she been adopted in the family of Lalit Mohan, the appellant would have mentioned her father's name as late Lalit Mohan in the column of

father's name in the application instead of Kanailal Das.

14. The School Final Examination Certificate of the appellant could have been another vital document in support of the contention of the appellant that she was adopted by Lalit Mohan and his wife, Dalimmoyee. In this regard, the appellant did not produce such School Final Examination Certificate on the pretext that she had lost the said certificate; but while filling up the column of the date of birth according to school final certificate, she mentioned the date of birth as on August 26, 1947 (vide exhibit No. D). This fact clearly suggests that the appellant was in possession of the School Final Examination Certificate at least on the date of filling up the application for enrolment in 1966. Another document which would have been a genuine one in respect of the proof of the date of birth and the father's name was the Admit Card for appearing in the School Final Examination; but the appellant withheld such document also without any reason. So the presumption is that the appellant had withheld such document in order to conceal the real fact of recording her natural father's name in those documents.

15. The appellant might have been brought up as "Palita Kanya" in the house of Lalit Mohan because of the fact that she and her sisters were the six daughters of Kanailal and that her father had no sufficient means to maintain such a big family. Moreover, the appellant might have been adopted in the family of Lalit Mohan to obviate hazards that might have been faced at the time of marriage of the appellant because her father was suffering from leprosy at that time.

16. No paper is forthcoming from the possession of the appellant to the effect that late Lalit Mohan and his wife ever recognised the appellant as their adopted daughter.

17. The deposition of the D.W. No. 7, Panchu Charan Das, is very much important in this respect. He is an aged person and is the younger brother of Dalimmoyee. He was a mechanic in the Calcutta Port Trust (Junior Supervisor) and he supported the contention of the respondents that Dalimmoyee executed the Will. He was brought up by Dalimmoyee since his age of 11/12 years. He was in the visiting terms with Dalimmoyee till her death. He stated that Lalit Mohan never adopted the appellant as their daughter. On scrutiny of his evidence, we find that his statement could not be shaken in spite of prolonged cross-examination in different ways. So he is trustworthy.

18. For the purpose of offering "pindas" to the departed soul a son was, generally, adopted before the Hindu Adoptions and Maintenance Act, 1956 came into operation.

14. Thus, we find that there is no written acknowledgement or recognition at all on the side of the so-called adoptive parents that they ever adopted the appellant as their own daughter in 1948. The oral evidence of the so-called eyewitnesses to the adoption is not also trustworthy. The case of adoption being not an ancient fact, burden of proof lies on the appellant. But, we find that she has failed to discharge her burden of proof.

15. In view of the above facts and circumstances and the decisions reported to above, we are of the view that the contention of the appellant that she was the adopted daughter of Lalit Mohan and Dalimmoyee cannot be believed. We, therefore, hold that the learned Trial Judge has rightly decided the issue that no valid adoption in respect of the appellant was ever held by the natural guardians and the adoptive parents in respect of the appellant.

16. The last Will purported to have been executed by Dalimmoyee had been duly proved by the respondents and a probate was obtained from a competent court. The question of issuing notice upon the appellant at the time of the grant of probate did not arise because she was not considered at all as an adopted daughter of Lalit Mohan and Dalimmoyee. After her marriage she resided in the house of her husband, Kailash. So, the prayer of the appellant for revocation of the probate cannot be entertained.

17. Therefore, the findings of the learned Trial Judge on those two points, we hold, are justified. We are of the view that this appeal is devoid of merits and that there is nothing to interfere with the judgment impugned. Accordingly, the appeal is dismissed.

18. The impugned judgment dated September 4, 1990 passed by the learned Additional District Judge, Ninth Court, Alipore, District - South 24 Parganas, is hereby affirmed.

19. Considering the circumstances, there will be no order as to costs.

20. Urgent xerox certified copy of this order, if applied for, be made available to the learned Advocate for the parties on their usual undertakings.

21. I agree.