

(2008) 06 BOM CK 0137

In the Bombay High Court

Case No : Second Appeal No. 267 of 1996

Gangadhar alias Dewaji Paraye and Others

APPELLANT

Vs

Vasant Patil

RESPONDENT

Date of Decision : 17-06-2008

Acts Referred:

Citation : (2008) 5 ALLMR 619 : (2008) 6 BomCR 429 : (2008) 5 MhLj 744

Hon'ble Judges : Vasanti A. Naik, J

Bench : Single Bench

Advocate : Anil S. Kilor, for the Appellant; Chorghade, holding for R.L. Khapre, for the Respondent

Final Decision : Dismissed

Judgement

Vasanti A. Naik, J.—By this Second Appeal, the appellants challenge the judgment passed by the Joint Civil Judge, Junior Division, Buldana on 31st January, 1994 in Regular Civil Suit No. 58/1991 as also that of the Additional District Judge, Buldana dated 20th June, 1996 in Regular Civil Appeal No. 41 of 1994.

2. This Court had admitted the Second Appeal by an order dated 7-8-1996 but had not framed any Substantial Question of Law. This Court, however, observed in the order dated 7-8-1996 that the trial Court did not consider that the plaintiff had not legally and properly proved the essential requirement of "giving and taking" for proving the factum of adoption.

3. Few facts giving rise to this Second Appeal are stated thus:

The appellants are the original defendants. A suit was filed by the plaintiff for recovery of possession with future mesne profits. The plaintiff claimed to be the owner of the suit property. According to the plaintiff, the suit property was originally owned by one Mahipati Patil, who was the plaintiff's grandfather. Mahipati died, leaving behind him, his widow Dhrupadabai and his two daughters. Since Dhrupadabai had no male issue, she had taken the plaintiff in

adoption. After the death of Dhrupadabai, the plaintiff became the owner of the suit property. It was pleaded by the plaintiff that in the year 1982-83, the defendants had made encroachment over the suit property and hence the plaintiff was constrained to file the suit for recovery of possession with mesne profits.

4. The defendants denied the claim of the plaintiff and pleaded that they were the owners of the suit property and were residing in the suit property since 1945 as owners thereof. According to the defendants, neither Mahipati nor his widow Dhrupadabai was the owner of the suit property. The factum of adoption was disputed by the defendants. The defendants sought for the dismissal of the suit.

5. The trial Court framed the necessary issues and held that the plaintiff had succeeded in proving that he was the exclusive owner of the suit property and that the defendants had committed encroachment over the suit property. The Court held that the defendants had failed to prove that they had become the owners of the suit property by adverse possession. The trial Court while decreeing the suit, directed the defendant Nos. 1 to 3 to deliver the vacant possession of the suit property to the plaintiff. The defendants challenged the judgment passed by the trial Court in an appeal. The first appellate Court framed the necessary points for determination and on an appreciation of the evidence on record came to the conclusion that the plaintiff had succeeded in proving his title over the suit property. Since the first appellate Court held that the defendants were in unlawful possession of the property, the decree passed by the trial Court was maintained. Both the judgments are challenged in the instant Second Appeal.

6. It is submitted on behalf of the appellants by the learned Counsel that the Courts were not justified in answering the issue of ownership in favour of the plaintiff when the plaintiff had utterly failed in proving the essential ceremonies of "giving and taking" of plaintiff in adoption. According to the learned Counsel, there was no evidence tendered by the plaintiff to prove that his natural parents had given him in adoption to his adoptive mother Dhrupadabai. It was then submitted that both the Courts committed a serious error in holding that the plaintiff was the adopted son of Dhrupadabai merely because the plaintiff was recognized as the adopted son of Dhrupadabai. It is submitted on behalf of the appellants that this evidence was not enough and it was necessary for the plaintiff to prove that there was an adoption ceremony which included the ceremony of "giving and taking" of the plaintiff in adoption. The Counsel for the appellant relied on the decisions in the cases of *L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others*, and *Maroti Bansi Teli v. Radhabai Tukaram Kunbi and Ors.* reported in AIR (32) 1945 Nagpur 60 to substantiate his submissions.

7. Shri Chorghade, the learned Counsel for the respondent, submitted that both the Courts had concurrently held that the plaintiff was the adoptive son of Dhrupadabai and was the owner of the suit property and since the findings recorded by the two Courts are pure findings of facts, the findings are not liable to be interfered with. It is submitted on behalf of the respondent that there is

ample evidence on record to show that the plaintiff was given in adoption by his natural parents, to Dhrupadabai. According to the learned Counsel for the respondent, the use of the words "giving and taking" may not have found place in the oral evidence of the plaintiff but a reading of the evidence of the plaintiff's witnesses in the right perspective clearly showed that "giving and taking" did take place. It is also submitted on behalf of the respondent that the Courts below had rightly considered the voluminous evidence on record in the form of Sanad, bills and tax receipts at Exhs.44 to 50. Lastly, it was submitted on behalf of the respondent that the plaintiff was not only the adopted son of Dhrupadabai but was also recognized as such.

8. On considering the submissions made on behalf of the parties and on perusing the judgments, it appears that the following substantial question of law arises for consideration in this Second Appeal.

Whether as a universal rule oral evidence of "giving and taking" in adoption is necessary to prove the factum of adoption ?

9. To consider the substantial question of law involved in the Second Appeal, it is necessary to consider the pleadings as also evidence tendered by the parties on record. It is pleaded by the plaintiff that he was adopted by Dhrupadabai on 1-3-1948. The defendants have denied the factum of adoption as pleaded by the plaintiff. Though the trial Court had not specifically framed an issue in regard to the validity of adoption of the plaintiff, the Court had framed an issue of ownership of the plaintiff over the suit property. While considering the question of ownership of the plaintiff over the suit property, the trial and the appellate Court considered the evidence on the factum of his adoption by Dhrupadabai. It is observed by both the Courts that the registered adoption deed, at Exh. 43 clearly shows that all the requirements of a valid adoption under the Hindu Law, were fulfilled. The Courts held that though oral evidence on the factum of adoption was lacking in the instant case, there was ample evidence on record to show that the plaintiff was treated as an adopted son of Mahipati in the society.

10. It is now necessary to consider whether the plaintiff had produced cogent and reliable evidence on record to prove that he was the son of Mahipati and Dhrupadabai. The plaintiff had produced the registered adoption deed, at Exh. 43. It is clearly stated in Exh. 43, on which Dhrupadabai has endorsed her thumb impression, that she asked the natural parents of plaintiff to give the plaintiff to her in adoption. It is further stated in Exh. 43 that the natural parents of the plaintiff gave the plaintiff to Dhrupadabai in adoption. It is also recorded in the adoption deed that the adoption ceremony was performed in the morning hours according to Hindu Rites and Custom. After the execution of the adoption deed and the death of Dhrupadabai, the name of the plaintiff was recorded as the owner of suit properties. The assessment list shows the name of the plaintiff as a owner thereof. The plaintiff produced voluminous documentary evidence on record to show that he was paying the taxes and the assessment dues to the concerned authorities since the year 1970-71.

11. The plaintiff had clearly stated in his evidence that after Dhrupadabai took him in adoption, the adoption deed was executed and got registered. It is further stated by the plaintiff in his examination-in-chief that the panchas and pandits were called at the time of actually taking the plaintiff in adoption. It is also stated by the plaintiff that the adoption ceremony was performed in accordance with Hindu rites and Custom. The plaintiff examined one Kaduba, who deposed that Dhrupadabai took the plaintiff in adoption and he was present at the adoption ceremony. He also deposed that the plaintiff was considered as the adopted son of Mahipati and Dhrupadabai since his adoption. He further deposed that he was a witness to the adoption ceremony and the adoption deed also. In his cross examination, he stated that the adoption ceremony was performed prior to the execution of the adoption deed.

12. It appears from the evidence that not only was the plaintiff given in adoption to Dhrupadabai in the year 1948 but the society also recognised the plaintiff as the adopted son of Mahipati and Dhrupadabai. The documentary evidence tendered by the plaintiff at Exhs.44 to 50 further showed that after the adoption deed was executed, necessary entries were effected in the relevant records. The plaintiff was the recorded owner of the property and he had also paid the taxes and other dues on the properties owned by Mahipati. It is not in dispute that deceased Mahipati was the grandfather of the plaintiff. Merely because the words "giving and taking" were not uttered by the plaintiff or his witness it cannot be said that the plaintiff failed to prove his adoption. The words "giving and taking" need not be specifically uttered while tendering the oral evidence on the factum of adoption, in a given case. It is enough for the parties to prove that there was in fact, a giving of the child in adoption by the natural parents and the adoptive parents had taken the child in adoption.

13. The judgment in the case reported in AIR (32) 1945 Nagpur, 60 and relied on by the learned Counsel for the appellants would hardly be of any assistance to the case of the appellants as it lays down that for proving "giving and taking" it is only necessary to prove that there was some overt act to signify the delivery of possession of the boy from one family to another. In the instant case the overt act signifying the delivery of possession of the plaintiff was proved on the basis of the contents of the adoption deed as also the other evidence and circumstances. Similarly, the judgment in the case of L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others, is also not of any help to the appellants. In fact, the observations made by the Supreme Court in the aforesaid judgment, help the case of the plaintiff/respondent. The Supreme Court has quoted the observations of Gopalchandra Sarkar in his book on Hindu Law, Eighth Edition, as also the views expressed in Mayne's Hindu Law. According to Mayne's Hindu Law, all that the law requires for a valid adoption is that the natural father shall be asked by the adoptive parent to give his son in adoption and that the boy shall be handed over and taken for this purpose. After quoting the aforesaid view, the Hon'ble Supreme Court observed that in Hindu Law, long recognition as an adopted son, raises a strong presumption in favour of the validity of an adoption, arising from

the possibility of the loss of the rights in his own family by being adopted in another family. The Supreme Court further observed that in the case of all ancient transactions, it is but natural that positive oral evidence will be lacking as passage of time gradually wipes out such evidence. The Hon^{ble} Supreme Court agreed with the views expressed by the various Courts that in cases of ancient adoption, evidence showing that the boy was treated for a long time as an adopted son, at a time when there was no controversy, is sufficient to prove the adoption although evidence of actual "giving and taking" is not forthcoming. Since in the reported Supreme Court decision, there was a recognition of the party as an adopted son for long, the Supreme Court held that the adoption pleaded was true.

14. In the instant case also, the adoption was questioned after a lapse of 42 years by a stranger. While claiming the title to the suit property by adverse possession, the defendants had disputed that the plaintiff was the adopted son of Mahipati and Dhrupadabai. As already discussed hereinabove, not only Dhrupadabai endorsed her thumb impression on a registered adoption deed executed in the year 1948, but the deed had mentioned that the natural parents of the plaintiff were requested to give their son in adoption and they had given him in adoption to Dhrupadabai. It is further mentioned in the deed that the adoption ceremony was performed in accordance with Hindu rites and Custom. It is conspicuous to note that the natural parents of the plaintiff, had never challenged the adoption of the plaintiff. Exh. P-3 is a certificate issued in the year 1948 by the Headmaster of the Government High School, Buldana which certifies that in view of the adoption of the plaintiff, his name has been changed from "Vasant Bhimrao Kakde" to "Vasant Mahipati Patil" as per the order of the Divisional Superintendent of Education, West Berar, Akola. Thus, it is apparent that in the school record also, the plaintiff was shown to be the son of Mahipati since the year 1948. The documents at Exhs. 44 to 50 further show that the plaintiff was consistently paying the taxes and other dues of the properties which he inherited on the death of Mahipati. The assessment lists at Exhs. 51 to 54 are in the name of the plaintiff and he is shown to be the son of Mahipati. Apart from these documents, there was sufficient oral evidence on record to show that the adoption ceremony was performed according to Hindu rites and Custom just before the execution of the registered adoption deed. The ratio laid down in the case of *L. Debi Prasad v. Smt. Tribeni Devi and Ors.* (cited supra) can be clearly applied to the facts of this case as in the instant case also there is long standing recognition of the plaintiff as the adopted son of Mahipati and Dhrupadabai. There is no reason to believe that the plaintiff was not the adopted son of Mahipati or that the adoption pleaded by the plaintiff was untrue. In the instant case, it cannot be said that there was no "giving and taking" of the plaintiff in adoption merely because the plaintiff and his witness did not utter the term "giving and taking" in their oral evidence. The "giving and taking" is proved by the adoption deed as also the fact that the adoption was not challenged by the natural parents of the plaintiff. It is also proved in view of the statements made

by the plaintiff and his witness in the evidence that the adoption ceremony was performed and it was performed according to the Hindu rites and Custom. It is also worthwhile to note that the adoption of the plaintiff is not challenged by any of the members of the family but is challenged by a stranger who has claimed the ownership of the property by adverse possession. Be that as it may, the evidence in this case was more than enough for proving the adoption of plaintiff in the year 1948. The substantial question of law framed by this Court is, therefore, answered in the negative and against the appellants.

For the aforesaid reasons, the Second Appeal is dismissed with no order as to costs. A prayer is made on behalf of the appellants to stay this judgment for a period of six weeks. I find no reason to grant the same.