

(1981) 01 PAT CK 0002
In the Patna High Court
Case No : A.F.O.D. No. 443 of 1973

Most. Ram Sakhi Kuer and Another

APPELLANT

Vs

Daroga Prasad Singh and Others

RESPONDENT

Date of Decision : 28-01-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1
Evidence Act, 1872 — Section 101

Citation : AIR 1981 Patna 204 : (1981) 29 BLJR 501

Hon'ble Judges : Chaudhary Sia Saran Sinha, J; B.P. Jha, J

Bench : Division Bench

Advocate : Thakur Prasad, Chandramauli Kumar Prasad and Ravi Shankar Prasad, for the Appellant; Prabha Shankar Mishra, Ramesh Chandra and Binod Shankar Tiwary, for the Respondent

Final Decision : Allowed

Judgement

B.P. Jha, J.—The plaintiffs preferred an appeal before this Court against the judgment of the trial Judge.

2. The point of law for consideration in this appeal is:

Whether a Hindu widow has been empowered after her remarriage to give in adoption a son by her first husband?

This decision will not affect the cases under the Hindu Adoptions and Maintenance Act, 1956. In the present case, the alleged adoption took place sometime in the year 1949.

3. The present appeal arises out of a partition suit. Plaintiff No. 1 is the widow of Harihar Mahto, and plaintiff No. 2 is the daughter of Harihar Mahto. Admittedly, Harihar Mahto died in the year 1957 after the Hindu Succession Act, 1956 came into force. Plaintiff No. 1 Ramasakhi Kuer was the first wife of Harihar Mahto. He also married Most. Chhathia as his second wife. After the marriage, Most, Chhathia gave her son Surya Mahto, who was the son of her previous husband,

in adoption. It is the consistent evidence of D. Ws. 1, 2, 4, 6 and 8 that after Most. Chhathia was remarried with Harihar Mahto, she gave her son, who was the son by her previous husband, in adoption to Harihar Mahto. The question for consideration is: Whether such an adoption is a valid adoption or not?

4. The P. Ws. have denied the factum of adoption. It is pleaded in the written statement of Most. Chhathia that the adoption was in accordance with the Shastras as well as on the basis of the custom. It is an admitted position that there is no evidence adduced on behalf of the defendants to show that there was any custom amongst the Sudras that a remarried widow can give in adoption her son by her previous husband.

5. It has been held by certain decisions that a mother can give her son in adoption. After remarriage, the widow ceases to be the mother of the son and, as such, she cannot give in adoption a child who was by her first husband according to the Hindu law as it was prevalent before the Hindu Adoptions and Maintenance Act, 1956 came into force. A father had the authority to adopt a son and he could give his son in adoption to another person. When a widow remarries, she loses her status as a mother and, as such, after remarriage she cannot give her son in adoption who was by her first husband. According to Section 2 of the Hindu Widows' Re-marriage Act (Act XV of 1856), after remarriage, a widow dies a civil death so far as the rights and interests in the family of the previous husband are concerned. By giving in adoption such a son from her previous husband, she deprives her previous husband of the spiritual benefits to which her previous husband was entitled from a son. In this circumstance, I hold that Most. Chhathia loses her right of a mother of Surya Mahto (who was born by her previous husband). No doubt, as a mother she was entitled to give in adoption Surya Mahto according to some authorities; but as soon as she ceases to be the mother, Surya ceased to be her son. If Surya ceased to be her son, Chhathia had no authority in law to give Surya, who was a stranger to her, in adoption to Harihar. D. Ws. 1, 2, 4, 6 and 8 have stated that after remarriage. Most. Chhathia had given in adoption her son by her first husband to Harihar. Even if the evidence of these D. Ws. be accepted, in law Most. Chhathia had no authority to give Surya in adoption on the grounds stated above,

6. The factum of adoption has been denied by the evidence of P. Ws. 1, 2, 3, 4, 5, 6 and 7.

7. It was contended by the learned counsel for the respondents that the defendants did not prove the factum of custom as no issue was framed to this effect. On a perusal of issue No. 4, it is clear that an issue was framed about the adoption. It is relevant to quote issue No. 4 which runs as follows:--

"Is Suraj Singh the adopted son of Harihar Singh?"

8. In paragraph No. 4 of the written statement of Most. Chhathia (defendant No. 1) and Surya Mahto (defendant No. 8), it is specifically pleaded that the adoption

was done in accordance with the Shastras as well as in accordance with the custom. I, therefore, hold that the learned counsel for the respondents erred in arguing that no evidence was led in respect of the factum of custom, for no issue was framed to this effect. The issue is quite clear. Under issue No. 4, the defendants ought to have led evidence that the adoption was a valid adoption in accordance with the Shastras as well as on the basis of the custom which has not been done in the present case. It is conceded by the learned counsel for the respondents that the D. Ws. have not proved that there was a custom to the effect that a remarried widow can give in adoption a son born by her previous husband. In view of the fact that there is no evidence adduced on behalf of the defendants to prove such a custom, I hold that the defendants failed to prove the adoption in accordance with the Shastras as well as in accordance with the custom. Hence Suraj Mahto will not be entitled to any share.

9. According to Section 10 of the Hindu Succession Act, 1956, all the widows shall take one share, and the surviving sons and daughters shall each take one share. Harihar Mahto died leaving behind two widows, namely Ramsakhi Kuer (Plaintiff No. 1) and Most. Chhathia (defendant No. 1). Harihar had five daughters, namely, Taramati (Plaintiff No. 2), Ramrati Kuer (defendant No. 3) Dimagia Devi (defendant No. 4) Rakmin Devi (defendant No. 5) and Rajpati Devi (defendant No. 6). Each daughter including plaintiff No. 2 shall take 1/6th share, and 1/6th share shall be taken by plaintiff No. 1 (widow) and defendant No. 1 (Most. Chhathia). I, therefore, pass a preliminary decree for partition in favour of the plaintiffs granting 1/12th share to plaintiff No. 1 and 1/6th share to plaintiff No. 2. The decree of the court below is modified to the extent mentioned above. The transferees will get their share after allotment of the shares to the parties concerned out of their respective shares.

10. In the result, the appeal is allowed with the modification, indicated above, and the judgment and decree of the court below are accordingly modified to the extent indicated above. The parties shall bear their own costs throughout.

Choudhary Sia Saban Sinha, J.

11. In this first appeal by the plaintiffs, the main submissions of Mr. Thakur Prasad, learned counsel for the appellants, were twofold, namely that the story of adoption of Surya Mahto (defendant No. 3), as alleged in the written statement filed by defendants 1 and 8, which has been accepted by the trial Court, is incorrect, and, that even if that be so, Most. Chhathia (defendant No. 1) having remarried with Harihar Mahto, she ceased to have any legal and valid right to give Surya Mahto (defendant No. 8), her son from her previous husband Ramadhin, in adoption to Harihar Mahto. Mr. Prabhashanker Mishra, learned counsel for the respondents, refuted these contentions.

12. The plaintiffs came with a cut and dried case of partition treating Surya Mahto only as a Dagarua son of Harihar Mahto suggesting that Surya Mahto was born of Most. Chhathia from her previous husband and when Most. Chhathia

remarried with Harihar Mahto, obviously in sagai form, she came to Harihar with Saryu Mahton.

13. The claim of the plaintiffs for partition was contested. In view of the certain contentions advanced before this Court, which I shall deal shortly herein-after, I consider it appropriate to give an extract of paragraph No. 4 of the written statement filed on behalf of defendants 1 and 8 which is as follows:--

"Yah ke kursinama munasawak aarji "nalish galat hai mudalah No. 8 Harihar Mahto ka mutmana larka (adopted son) wo bachapan se Harihar Mahto ne mudalah number 8 wo aape larka sa tasaur karke apna samil rakhkar parwarish mudalah number 8 ka kiya wo mutawik shashtra wo riwaj ke adoption hua wo mudalah number 8 ko barabar se bataur putra ke Harihar Mahto saluk karte the."

Among other issues, one of the issues framed was issue No. 4 which reads as under:--

"Is Suraj Singh, the adopted son of Harihar Singh? While the defendants led evidence to show that surya Mahto had been adopted by Harihar Mahto, the plaintiffs led evidence of the contrary. The learned subordintte Judge on a consideration of the evidence recorded a finding in paragraph No. 31 of the judgment that the contesting defendants had established that Surya Mahto was the adopted son of Harihar Mahto. The evidence adduced was scrutinised by the learned trial court in right perspective. Certain infirmities were pointed out by Mr. Thakur Prasad in their evidence, and it was submitted that the evidence of the witnesses for the defendants ought not to have been relied upon. I have given my anxious consideration to the evidence adduced on this point and I find it difficult to accept the contention of Mr. Thakur Prasad. The infirmities pointed out, in substance, related to the evidence as to the time of adoption, one of the witnesses being unsummoned and one being unable to say the year of adoption. We are well aware as to how an illiterate or a semi-literate witness behaves in a witness box when he is put in the whirlwind of cross-examination. We are also well aware about such witnesses being unable to give the exact year of a particular incident in regard to which they depose. The evidence of such witnesses cannot be scrutinised on mathematical calculation, although the entire evidence has to be considered whether it can be found to be reliable, satisfactory and trustworthy. D. Ws, 1, 2, 4, 6 and 8, as my learned brother has pointed out, have consistently stated about Surya Mahto having been given in adoption and about his being adopted by Harihar. The trial court which had the occasion to examine these witnesses and to mark their demeanour has accepted their evidence, overruling the negative evidence adduced on behalf of the plaintiffs and I see no reason to disagree with the finding of the trial court. I, therefore, hold and find in agreement with the trial court that it is established that Surya Mahto had been given in adoption to and adopted by Harihar Mahto.

14. We have, at present, on the statute book the Hindu Adoptions and Maintenance Act, 1956. The adoption in the instant case having been made prior

to this enactment of the year 1956, the general principles of the Hindu Law, then existing, shall govern the matter under consideration. Section 475 of the Mulla's Hindu Law (Thirteenth Edition) lays down that the primary right to give in adoption is that of the father. Section 476 thereof stated that the mother cannot give her son in adoption, while the father is alive and capable of consenting, without his permission. It would thus appear that the right to give a boy in adoption prior to the Hindu Adoptions and Maintenance Act, 1956, was primarily the right of the father of the boy, i.e. *patria potestas*. The right to give a boy in adoption is a right of disposition. A portion of *patria potestas* comes to the widow by reason of her connection, with her former husband's estate. If therefore, she meets her civil death on remarriage, she cannot exercise any such right. The theory of pious obligation of the son is also well-known. By giving a boy in adoption without the permission of the real father of the boy, the father will be deprived of the spiritual benefits expected from the son. Apart from these, the question as to who is the guardian of the person of the boy being given in adoption is also one of the relevant factors while considering who is competent to give in adoption. The Hindu Widow's Re-marriage Act, 1856 (Act XV of 1856) was undisputedly applicable to the parties at the relevant time when Surya Mahto was given in adoption. It is undisputed that Most. Chhathia was previously married to Ramadhin. Surya Mahto was also undisputedly born of the lawful wedlock of Most. Chhathia and Ramadhin. It is further undisputed that after the death of Ramadhin, Most. Chhathia was married in sagai form with Harihar Mahto and she brought Surya Mahto with herself. My learned Brother, while referring to Section 2 of the Hindu Widows' Remarriage Act, 1856, has observed that on remarriage the widow remarrying meets her civil death. I would also refer to Section 3 of the said Act which states, *inter alia*, that on the remarriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children. This implies that on remarriage, in the circumstances stated in Section 3 the widow ceases to be the guardian of the person of her minor son born of her previous husband. If the matter is considered in these perspectives, the irresistible conclusion would be that it would be against the principles of Hindu law to permit a widow remarrying to give her son from the previous husband in adoption to her second husband, without the permission of her previous husband. Mr. Thakur Prasad relied on certain decisions of the other High Courts which support this view. One of the decisions is in *Panchappa v. Sanganbasawa*, (1900) 24 Bom 89, wherein it was held that a Hindu widow had no power, after her remarriage to give in adoption her son by her first husband, unless he had expressly authorised her to do so, which is not the case of the defendants in the instant case. A somewhat contrary view was taken by the Bombay High Court in

the case of Putlabai v. Mahadu ILR(1909) 33 Bom 197. This led to a consideration of the matter by a Full Bench of the Bombay High Court in Fakirappa Veerbhadrappa v. Savitrewa Sangappa (AIR 1921 Bom 1) where it was laid down that a Hindu widow after her remarriage could not claim to have any right to give a son by her first husband in adoption. The decision of the Allahabad High Court relied upon by Mr. Thakur Prasad is reported in the case of Kishni and Others Vs. Ratna and Others, and of the Nagpur High Court is reported in the case of AIR 1925 1 (Nagpur) .

15. Thus, on a consideration of the principles of Hindu law then applicable, the conclusion would be that Most. Chhathia had no right to give Surya Mahto in adoption to her subsequent husband, Harihar Mahto: and, this being so, the adoption of Surya Mahto must be held to be illegal and invalid in law.

16. Mr. Prabha Shankar Mishra relying on a decision of this Court in Rup Raut and Another Vs. Basudeo Raut and Another, submitted that if, as held therein, by establishing a special custom, the widow remarrying retained her interest in her first husband's property, by invoking such a special custom she can also claim to have a right to give her son from her previous husband in adoption to her subsequent husband. I must say at once that no such special custom has been pleaded by the defendants in their written statement and, it may be too late for the defendants to raise any such plea. The words "Shashtra who riwaj ke adoption hua", stated in paragraph No. 4 of the written statement filed on behalf of defendants 1 and 8" refer to the formalities of adoption, both acceding to the Shastras and the custom, and nothing beyond that. This being the position, the contention of Mr. Prabha Shankar Mishra that the suit should go back on remand for a consideration of the question of validity or otherwise of the adoption is unfit to be accepted. The plaintiffs came out with a case in the plaint that Surya Mahto was a dagarua son of Harihar Mahto. The defendants had another story to tell, namely, that Surya Mahto was the adopted son of Harihar Mahto. Section 101 of the Evidence Act lays down, inter alia that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. The story of adoption was repudiated by the plaintiffs. If, therefore, the defendants claim any legal right on the basis of adoption based on any special custom, it was their duty to set up such a case and lead evidence which they have failed to do. Mr. Mishra contended that the defendants did not adduce evidence of any special custom for want of an issue to that effect. Issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. No such plea of special custom, as stated above, having been specifically set up in the written statement, the issue framed by the Court which is generally based on the issues proposed by the parties was correctly framed and the question of any remand of this long drawn suit on this score cannot arise. This contention of Mr. Mishra, has, therefore, no legs to stand and it is negatived.

17. At one stage of the argument. Mr. Mishra also contended that there was no

evidence to show that Most. Chhathia gave Surya Mahto in adoption after her remarriage with Harihar. This contention is devoid of any merit as there is sufficient material to show that this adoption took place after Chhathia's remarriage with Harihar. The term "Sagai", as is commonly known and understood, means remarriage and there can be no dispute about it. This apart, as submitted by Mr. Thakur Prasad, there is an admission of D. W. 4 himself in paragraph No. 5 of his statement. This contention also, therefore, fails.

18. No other contentions having been raised it has to be found that though Surya Mahto was adopted by Harihar Mahto, on his being given in adoption by Most. Chhathia, the said adoption cannot be treated as legal and valid in law. Consequently, any such adoption cannot entitle Surya Mahto to any share in the properties of Harihar Mahto. This being so, the plaintiffs will get shares in the properties of Harihar to the extent indicated by my learned Brother and will be well entitled in law to a preliminary decree for partition. In these circumstances, amongst others, referred to by my learned Brother, I agree to the order proposed by learned Brother.