

(2006) 09 CAL CK 0060
In the Calcutta High Court
Case No : F.A. No. 169 of 2001

Smt. Malati Roy Chowdhury

APPELLANT

Vs

Sudhindranath Majumdar and Others

RESPONDENT

Date of Decision : 04-09-2006

Acts Referred:

Constitution of India, 1950 — Article 14
Hindu Adoptions and Maintenance Act, 1956 — Section 4, 5, 6, 7, 8
Hindu Succession Act, 1956 — Section 15(1), 16
Succession Act, 1925 — Section 218, 278

Citation : AIR 2007 Cal 4 : (2007) 1 CALLT 323 : (2006) 2 ILR (Cal) 441

Hon'ble Judges : Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Animesh Ghosal, G. Mukherjee and Debasish Roy, for the Appellant;

Judgement

K.J. Sengupta, J.—By this appeal the appellant Malati has assailed the judgment and order of the learned trial Judge whereby and whereunder appellant's application for grant of letters of administration as well as that of one Basanti Bagchi since deceased, u/s 278 of the Indian Succession Act, 1925 have been dismissed. During pendency of the application of Basanti she died and in her place and stead one Jayanti Sanyal was substituted. The said Jayanti Sanyal's heirs and legal representatives, did not prefer any appeal against this judgment. As such, the question in this appeal is as to whether the learned trial Judge has dismissed the application of the appellant rightly or wrongly.

2. The case before the learned trial Judge made out by the appellant in her separate application was that she was an adopted daughter of one Tripti Roy Chowdhury, since deceased. On the death of Tripti, as her adopted daughter, Malati had become the sole heiress and legal representative of all her estate and effects. The said Basanti was the sister of Tripti Roy Chowdhury's husband, Bimalakanta Roy Chowdhury who predeceased her. The said Roy Chowdhury couple was issueless and at the time of death of Tripti there has been no heir and heiress under Sub-section 1(a) of Section 15 read with Section 16 of Hindu

Succession Act, 1956. The contesting defendants viz. Sudhirindranath Majumdar and others who appeared before the Learned Court below were claiming to be the heirs and legal representatives under Clause (b) of Section 15(1) of the said Act.

3. The learned trial Judge after having appreciated and considered the oral and documentary evidence held that as far as the appellant is concerned she is not the adopted daughter of Tripti. The substituted plaintiff Jayanti Sanyal was held not to have any locus standi to make that application.

4. Since no appeal has been preferred by any person other than Malati we need not go into the aspect of locus standi point as far as Jayanti is concerned. The admitted fact is that Tripti died intestate.

5. As such, two rival persons applied for grant of Letters of Administration to the Learned Trial Judge who held that the appellant failed to prove the factum of adoption.

6. None appears for the respondent in spite of service of notice. Mr. Animesh Kanti Ghosal, Learned Senior Advocate, appearing in support of the appeal, contends that the findings of the Learned Trial Judge on the question of adoption are patently erroneous as the adoption ceremony has been proved by the priest who conducted the ritual. It is proved without any shadow of doubt as there has been no cross-examination on this point that the natural parents of Malati handed over their daughter physically to Tripti in the presence of the priest and in presence of her husband. That apart, other persons were also present there. It has been proved that at the time of adoption, Malati was about 2 years old. An independent person has also come forward to prove the factum of the adoption ceremony. After such adoption, Malati was brought up by Tripti and everywhere the said deceased lady accepted and acknowledged Malati being her daughter. In the school records also she had declared herself to be the mother of Malati. After her death, Malati lit the funeral pyre and subsequently performed Shradh ceremony. Now she has been looking after the estates and properties left behind by the deceased lady. He submits that on the face of the overwhelming evidence the learned trial Judge ought not to have held that there has been no adoption. According to him, the aforesaid facts and circumstances can be said to be in complete and absolute compliance of the provision of Hindu Adoption and Maintenance Act, 1956 (hereinafter "56 Act" in short).

7. Mr. Ghosal submits that Tripti adopted Malati in the presence of her husband. Therefore, it can be said that this adoption took place actually for and on behalf of her husband as he did not raise any objection and his consent was implicit. Equally, this adoption has taken place under the provision of Section 7 of "56" Act.

8. According to him, if the text of the Section is read and construed in objective manner it will appear that adoption can be taken both by husband and wife though the language mentioned therein is "Hindu male" as being the eligible

person. He urges as a legal proposition that the natural agency between husband and wife is always presumed. When adoption takes place in the presence of the husband and taken by the wife it shall be construed that the adoption is deemed to have been taken by the husband viz. the male. The whole purpose of adoption u/s 7 is for the benefit of the family consisting of husband and wife not for the benefit of the husband alone.

9. According to him, he is supported in such interpretation by the judgment of the Karnataka High Court reported in AIR 1991 Karnataka 186.

10. Under those circumstances the judgment and order of the Learned Trial Judge is not sustainable and is patently erroneous in law, he concludes.

11. We have gone through the records and evidence to find out whether factually there has been any adoption as required under the provisions of Section 6 of 56 Act or not. It appears from the evidence of the priest that Malati's biological parents handed over her in the presence of the priest and her husband to Tripti. It further appears from the evidence of this priest that at the request of Tripti he procured Malati for the purpose of adoption. He has also said that the desire of Tripti was to procure any Brahmin girl as Tripti belonged to the Brahmin community. He testified that he made best effort to get a Brahmin girl but he failed. He, thereafter, procured Malati and brought her before Tripti. Of course, the evidence of other persons tell a different story. It is said by other witnesses in the proceedings that Malati was brought by some other person, not by the priest.

12. However, all other persons have also negated the story of adoption. Since other persons were opposing Malati we have not given any importance to their testimony.

13. Malati certainly believes that she was adopted at that point of time when she was two years of age. The documentary evidence produced before us and also before the Learned Trial Judge only shows that Malati started using the surname Roy Chowdhury and that apart no other convincing document is found to hold that Malati was accepted as the adopted daughter.

14. The evidence of the lady before the Learned Trial Judge is neither very convincing nor inspires any confidence to hold that there was any adoption but if the evidence adduced is considered in totality it will be established that Malati had been staying with and also being looked after by Tripti and there could be no doubt about it. In fact, she was admitted to school by Tripti. But this act of Tripti cannot be suggestive of the fact that there had been a valid adoption. So we do not find any infirmity and illegality in the findings of the Learned Trial Judge that adoption has not been proved.

15. Going by the provisions of the law, we are of the view that on the facts and in the circumstances stated by Malati there could not have been any lawful or valid adoption. It is an admitted position that at the time of the alleged adoption,

Bimalakanta Roy Chowdhury, the husband of Tripti, was alive. It is an admitted position that Malati was adopted by Tripti, but not by Bimalakanta Roy Chowdhury.

16. Under provision of Section 8 of "56 Act" a Hindu female can adopt while Section 7 enables a Hindu male to adopt. Therefore, in order to understand the right of Hindu male and female about adoption the said Sections are set out hereunder:

7. Capacity of a male Hindu to take in adoption.-Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife 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.

Explanation.? If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

8. Capacity of a female Hindu to take in adoption.? Any female Hindu?

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or 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, has the capacity to take a son or daughter in adoption.

17. The admitted fact is that Tripti was married. We also find through oral evidence that there has been a judicial separation and so also noted by the Learned Trial Judge. It was said orally but no documentary evidence was produced. Factum of passing a judgment of judicial separation can only be proved by the production of certified copy of decree itself. Therefore, oral evidence in this regard is inadmissible. We, therefore, do not accept the story of judicial separation.

18. In these circumstances, we hold that Tripti had no right to take adoption. Section 8 came to be challenged before a learned single Judge of Karnataka High Court in the case reported in AIR 1991 Karnataka 186 cited by Mr. Ghosal. It has been held that such Section was not violative of Article 14 of the Constitution of India.

19. In this judgment it has been explained that the legislature by and u/s 7 has conferred the right of adoption upon males on fulfilling the conditions mentioned therein which right of adoption was given to females on the conditions as mentioned u/s 8 therein.

20. Of course this judgment has also observed that the purpose of taking provision of Section 7 for adoption is meant for the entire family. Consent of the wife is sine qua non for adoption u/s 7 of the said Act. This judgment has not held that u/s 7 adoption can be taken by married wife or the husband can authorize wife to adopt. The judgment does not support the contention of Mr. Ghosal.

21. The language of Section 7 is clear. A male is entitled to adopt, but if he is married the consent of the wife is a must. This Section clearly shows that unless the wife gives consent the husband cannot take adoption but that does not mean that the wife is authorized to take adoption by the husband. According to us, adoption has to be taken factually or legally by the male in case of marriage, and not by the wife. In other words, the wife has no capacity to adopt even with the consent of the husband u/s 7. We find a decision of the Bombay High Court in support of this proposition reported in 1977 (79) Bombay L.R. 426. The judgment rendered by a learned single Judge on interpretation of the provisions of Sections 4, 5 and 8 of the Act has held that a Hindu wife cannot validly adopt even with consent of her husband. Before enactment of the Act under Hindu custom and religion a Hindu female had no right to adopt any son or daughter. By this act, under the provisions of Section 7, a Hindu male has been given exclusive right to adopt under the circumstances and conditions mentioned therein. While u/s 8 a Hindu female has been given right under the conditions mentioned therein. The gender discrimination in the matter of adoption which prevailed prior to this Act has been eliminated by enactment giving both male and female right to adopt under Sections 7 and 8, respectively, under the Act. Thus it is clear that during subsistence of a marriage a wife has no right to adopt, only to give consent in adoption if taken by her husband, meaning thereby it is the husband who is to take decision and initiative and such right of adoption of husband is inchoate until consent is given by his wife. Therefore the right of Hindu male to adopt consent is not absolute u/s 7, while u/s 8 the female's right is absolute under the conditions mentioned therein.

22. We have already noted the facts herein that Tripti's husband never took any initiative for decision to adopt. He was only present. As such, the case of adoption sought to be made out by Malati is not proved. Therefore, we hold that learned trial Judge had rightly held that Malati was not the adopted daughter of Tripti so much so she cannot be said to be sole heiress and legal representative of Tripti or for that matter her husband.

23. We are of the view that the appellant/Malati has no claim as heiress. But Letters of Administration in case of death intestacy is granted ordinarily to an heir or heirless of the deceased, but it is not an inflexible rule for sometimes when heir intestacy is found incompetent, the Court may look for a competent person. In Section 218 read with 278 of Indian Succession Act, 1925 there is no prohibition against grant to outsider.

24. From the evidence of all persons, we find, all along the appellant had been

residing with the deceased and she was brought up by the deceased lady. She is well-acquainted with the estate and despite the fact that she may not have any heritable or other interest, but by virtue of her staying in the house with the deceased lady she can certainly administer the property left by her. She cannot be said to be a total stranger though she is legally a stranger but she is competent to apply for grant of letters of administration. Since this appeal is not contested by any one in spite of notice and further heir and heiress intestacy have not come forward to obtain the grant, we allow this appeal only for the purpose of granting letters of administration. Malati will collect all the debts receivable by the estate of the said deceased and shall pay off all the dues of the creditors and complete the administration within a period of six months and file accounts before the learned Court below. We make it clear, so long she will administer, she will look after the estates and properties left behind by the deceased. It will be open for the heirs and legal representatives of the said deceased lady to apply for removal of the appellant, if the situation arises.

25. We dispose of the appeal on the basis of the aforesaid. There will be no order as to costs.

Sanjib Banerjee, J.

26. I agree.