

(2005) 01 P&H CK 0125

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 1491 of 1999

Subedar Adopted son of Smt. Kapoori	APPELLANT
Vs	
Usman and Others	RESPONDENT

Date of Decision : 10-01-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 100, 107, 107(1), 107(2)

Citation : (2005) 139 PLR 864 : (2005) 3 RCR(Civil) 120

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : Sudhir Aggarwal, for the Appellant; V.K. Jain and Anil Bansal, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This is plaintiffs second appeal filed u/s 100 of the Code of Civil Procedure, 1908 (for brevity, "the Code") challenging findings of facts recorded by both the Courts below. The plaintiff-appellant filed a civil suit challenging mutation No. 3348 dated 11.9.1984 sanctioned in favour of the defendant-respondents. He further sought a declaration to the effect that he being the adopted son of one Smt. Kapoori has become owner in possession of the suit land detailed in the heading of the suit.

2. The trial Court recorded the findings that the plaintiff-appellant was adopted by Smt. Kapoori in accordance with the customary law applicable to the parties. It was further found that the adoption deed Ex. PW-1/A dated 17.7.1984 which is a registered document was validly executed by the parties and Subedar plaintiff-appellant was taken in her lap by Smt. Kapoori. However, the trial Court came to the further conclusion that adoption deed Ex. PW-1/A was cancelled by another document Ex. 01 which has also been proved on record. The adoption deed Ex. PW-1/A was executed on 17.7.1984 and it was cancelled by Smt. Kapoori on 1.8.1984 by Ex. DI and Smt. Kapoori in fact died on 22.8.1984.

3. On appeal, the learned Additional District Judge on the basis of arguments raised before him posed the question for determination as to whether a daughter's son could be adopted or not. He referred to paragraph 39 of Sir W. H. Rattigan's Digest of Customary Law which reads as under:-

"Para 39: A widow cannot appoint or adopt an heir to her husband unless:-

- (a) She has been expressly authorised by her husband to do so;
- (b) has obtained the consent of her husband's kindred.

Thereafter, the learned Additional District Judge referred to the oral evidence with regard to the ceremonies of adoption and the right of a widow in the absence of her husband to adopt her heir. After placing reliance on the judgment of the Division Bench of Lahore High Court in the case of Chanan Singh v. Buta Singh and Ors. AIR 1935 Lah 83 and two judgments of the Supreme Court in the cases of Hoshiar Singh and Ors. v. Mst. Bhura Singh and Anr. (1966) 68 P.L.R. 750 and Inder Singh Vs. Gurdial Singh, , the learned Additional District Judge culled out the requirement of a valid adoption which reads as Under. -

"i) Unequivocal intention to adopt before brotherhood"

ii) Adoption as a fact; and

iii) Subsequent conduct of the parties."

4. Being conscientious of the fact that the plaintiff-appellant who had claimed estate of Smt. Kapoori after her death being her adopted son and the fact that the evidence was produced in her absence, the learned Additional District Judge proceeded to scrutinize the evidence very closely. He recorded his, dissatisfaction on the entire oral evidence which he discusses as Under:-

"20. Rehman (PW-1) is father of the appellant-adoptee. He has stated that among a large congregation, the appellant was given in adoption by him and his wife to Smt. Kapoori, in compliance with the wishes of her deceased husband namely Birbal. He has also deposed that Gur was distributed.

He is sweepingly supported in his statement by Mamraj (PW-4). Smt. Bassi (PW-5) mother of the appellant, and Subhan Khan (PW-6).

21. Rehman (PW-1) and Smt. Bassi (PW-5) are the husband and wife and are parents of the adoptee. They are highly interested in the success of the case being closely related to the appellant-adoptee. Probing the statement of Rehman (PW-1) there are certain admission made by him which need to be distinctly noted:

- i) There were many persons but no one was associating with them;
- ii) Though presence of defendants is sweepingly stated but name of not even one could be disclosed which shows that this statement was clearly a lie;

iii) x x x x x x

iv) Witnesses of adoption have no connection with the family of the adopter;
and.

v) The appellant-adoptee continues to be included in the ration-card of his parent.

22. The witnesses of alleged adoption are also on no better footings. Mamraj (PW-4) is a resident of far off place and having no connection with the family of the adopter has not been able to explain his presence in the alleged gathering where alleged adoption was made. He has not been able to tell the date, time and place of such adoption. Details given by him are also not coinciding with the details mentioned by Rehman (PW-1).

Cross-examination effected on this witness rather shows that he is totally a stranger. What kind of proximity he could claim with the adopter's family when he even did not know as to how Birbal died. He had met Birbal husband of the Smt. Kapoori (adopter) only 2-3 times and that too earlier to his death. Cat is out of the bag when he admits his relationship with natural father of the adoptee. Samandhi of Rehman (father of the adoptee) is brother-in-law of this witness. Thus, his interest in the success of the case of the appellant is also apparent.

Subhan Khan (PW-6) is resident of a distant village. He is also having no association with the family of the adopter. He is also totally silent about the date, time or place of alleged adoption and has not been able to specify the details or about the persons present, though he states that even 30-40 persons from his own village were present but has not been able to tell name of even one.

23. In addition to this highly interested, every general, fluid and non-clinching oral evidence, the appellant has produced adoption deed Ex. PW-1/A alleged to have been executed on 17.7.1984 by the adopter Smt, Kapoori and parents of the adoptee in presence of witnesses."

5. The adoption deed Ex. PW-1/A dated 17.7.1984 is also at the centre of the controversy. The learned Additional District Judge did not feel satisfy with the execution of the adoption deed dated 17.7.1984. He has listed various suspicious circumstances in paragraph 23 of the judgment and has thereafter declared the adoption deed Ex. PW-1/A dated 17.7.1984 as a waste paper. The eleven suspicious circumstances found by the learned Additional Sessions Judge read as Under-

"i) Adoption deed was got registered not at the relevant Sub Tehsil i.e, Punhana but far away in Tehsil Ferozepur Jhirka. Not even one person from village of the adopter was present much less as scribe or a witness;

ii) Two witnesses of this document are of village Baded and one is of Neemkhera;

iii) Witnesses of the deed are neither related nor associated with the adopter much less being from their brother-hood"

iv) The adoption deed was never acted upon. The adoptee continue to be recorded as member of the family of his natural parents and his name still appears in the ration card of his parents;

v) There is no evidence that Smt. Kapoori accepted him as son and he continued living with her in such capacity after execution of adoption deed Ex. PW-1/A.

vi) It is admitted by Rehman (PW-1) that due to fear of the defendants they had been very cautious;

vii) Petition Writer Nanwa Ram (PW-3) though states that he had scribed Ex. PW-1/A but has not been able to tell the date of Smt. Kapoori even by approximation. He knows no details;

viii) Neither any member panchayat nor Sarpanch of the village was associated much less informed about this development;

ix) Shahbuddin (PW-7), an attesting witnesses to this document tries to be more loyal than his master Rehman (PW-1) father of the adoptee, in stating that after execution of the document Ladoos were distributed in Tehsil premises as ceremonies of adoption were held in the said premises itself. This nowhere is the case of the appellant;

x) Shahbuddin (PW-7) has further mentioned that about 5-6 days earlier Smt. Kapoori had informed him about such function to be organised. This again is nowhere the case of the appellant. Rather stand of the appellant is that about 3-4 days earlier, the ceremonies of adoption were held and the document was executed later;

xi) Umar Mohammad (PW-2) another attesting witness is also known to Rehman (PW-1) and not Smt. Kapoori. When cross-examination became close and grilling, he was flat. He could neither tell the persons, who had seen the adoption as a fact nor could give other necessary details. He has stated that on the day of execution of the deed, he was taken by- Smt. Kapoori from his village. However, in earlier part of his statement he mentioned that he had gone himself."

6. It has further been found that the adoption deed Ex. PW-1/A was executed on 17.7.1984 which was allegedly cancelled on 1.8.1984 and Smt. Kapoori who is alleged to have adopted the plaintiff-appellant had died on 22.8.1984. Finding that there is no evidence showing the expression of adoption in unequivocal terms as no time had elapsed between the execution of adoption deed on 17.7.1984 and the death of Smt. Kapoori who died on 22.8.1984, from the totality of circumstances and proximity to the date of death of Smt. Kapoori, the learned Additional District Judge disbelieved the adoption deed itself.

7. Mr. Sudhir Aggarwal, learned counsel for the plaintiff-appellant has vehemently argued that once the defendant-respondents have placed reliance on cancellation deed Ex. DI dated 1.8.1984, then validity of the adoption deed has to be automatically accepted and considered as proved. Learned counsel has

further submitted that after the suit of the plaintiff-appellant was dismissed by the trial Court, he alone had filed an appeal u/s 96 of the Code before the learned Appellate Court and no cross objections warranting reversal of findings in respect of validity of adoption deed Ex. PW-1/A was raised. The learned counsel has emphasized that once the adoption deed Ex. PW-1/A dated 17.7.1984 is deemed to be validly executed, then the duty of the learned Appellate Court was to determine the validity of the cancellation deed Ex. D1 which the learned Additional District Judge has failed to perform.

8. Mr. V. K. Jain, learned senior counsel appearing for the defendant-respondents has submitted that in the absence of any grievance, the plaintiff-appellant could not have filed an appeal as it was not aggrieved party by the judgment and decree passed by the learned trial Court. The learned counsel has also submitted that in any case both the Courts below have dismissed the suit of the plaintiff-appellant on the basis of findings that he cannot be treated to be adopted son of Smt. Kapoori. The learned counsel has also urged that in view of the concurrent findings of facts in respect of Ex. D1 providing cancellation of the adoption deed by the trial Court or the illegality in the adoption deed itself by the learned Appellate Court, no question of law warranting admission of the appeal would arise nor any such question has been raised by the learned counsel for the plaintiff-appellant.

9. After hearing the learned counsel at a considerable length, I am of the considered view that this appeal is liable to be dismissed. The trial Court has recorded categorical findings of facts that adoption deed Ex. PW-1/A although was validly executed on 17.7.1984 but the same was cancelled on 1.8.1984 by Ex. D-1. However, after close scrutiny of the oral evidence, the learned Additional District Judge found that the witnesses produced by the plaintiff-appellant did not inspire confidence. He has adopted strict approach in scanning the oral evidence because Smt. Kapoori the adopting mother of the plaintiff-appellant had expired and the beneficiary under the adoption deed, namely, the plaintiff-appellant has claimed her estate. He found that the statement made by Rehman Khan PW-1 who is the natural father of the plaintiff-appellant, was sweepingly supported by Mamrej PW-4, Smt. Bassi, PW-5 the natural mother and Subhan Khan PW-6, He recorded his dis-satisfaction and material contradictions with regard to the statement made by aforementioned witnesses as is evident from paragraphs 22 and 23 which have already been reproduced above. The approach of the learned Additional District Judge in examining the oral testimonies closely is understandable and deserves to be approved by this Court. Thereafter, he proceeded to examine the adoption deed Ex. PW-1/A and recorded eleven suspicious circumstances to which reference has already been made in the preceding paragraphs of this judgment. He also found that the execution of the adoption deed is shrouded in mystery as it was executed in proximity with the date of death of Smt. Kapoori. The adoption deed is dated 17.7.1984 and the cancellation deed Ex. D-1 is dated 1.8.1984 and Smt. Kapoori is proved to have died on 22.8. 1984.

10. The argument of learned counsel for the plaintiff-appellant is that in the absence of any cross objections or appeal, the Appellate Court u/s 96 of the Code could not have reversed the findings with regard to validity of the adoption deed Ex. PW-1/A as recorded by the learned trial Court. This argument is devoid of any merit in view of the provisions of Section 107 read with Order XLI Rule 33 of the Code. Section 107 and Order XXLI Rule 33 of the Code are reproduced hereunder for facility of reference:

General Provisions relating to appeals

107. Powers of appellate Court.- (1) Subject to such conditions as may be prescribed, an appellate Court shall have power-

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trials;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

ORDER XLI APPEALS FROM ORIGINAL DECREES

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33. Power of Court of Appeal.- The Appellate Court shall have powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or Order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where, there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

Provided that the Appellate Court shall not make any Order u/s 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such Order.]" P

11. A perusal of Section 107 of the Code shows that it deals with general provisions relating to appeals. An Appellate Court has been clothed with wide power including the power to determine a case finally. Sub-section (2) further shows that the powers of the Appellate Court are the same which are conferred on the Courts of original jurisdiction in respect of the suits instituted before such

Courts. The Appellate Court is expected to perform the same duties. Similarly a perusal of Rule 33 of Order XLI of the Code deals with the powers of the Appellate Court and confer upon the Appellate Court powers to pass any decree and make any order which ought to have been passed or made as the case may require notwithstanding that no appeal or objection has been preferred by the respondents.

12. The aforementioned provisions have been subject matter of consideration of the Supreme Court in the case of *M/s. Bihar Supply Syndicate Vs. Asiatic Navigation and others*, . Dealing with Rule 33 of Order XLI of the Code, their Lordships opined that it runs into three parts and observed as Under:

Rule 33 of Order 41 C.P.C. is in three parts. The first part confers on the appellate Court very wide powers to pass such Orders in appeal as the case may require. The second part contemplates that this wide power will be exercised by the appellate Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents of parties may not have filed any appeal or objection. The third part is where there have been decrees in cross-suits or where two or more decrees are passed in one suit, this power is directed to be exercised in respect of all or any of the decrees, although as appeal may not have been filed against such decrees."

13. Holding that the provisions of Rule 33 of Order XLI of the Code, can be used for doing complete justice between the parties and that power u/s 107(1)(a) of the Code could be exercised, their Lordships in *The State of Punjab and Others Vs. Bakshish Singh*, observed as Under:-

Order 41, Rule 33 C.P.C. gives very wide power to the appellate Court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The Appellate Court cannot in the garb of exercising power under this Rule, enlarge the scope of the appeal. Whether this power should or should not be exercised depends upon nature and facts of each case.

If trial Court can dispose of a case finally, the appellate Court can also by virtue of Section 107(1)(a) CPC, determine a case finally."

14. Similar view has been taken in *Giasi Ram v. Ramjilal* (1969)71 P.L.R. 996 K. *Muthuswami Gounder Vs. N. Palaniappa Gounder*, and *Chaya and Others Vs. Bapusaheb and Others*, . The power of the Appellate Court in invoking Rule 33 of Order XLI of the Code has been considered so wide that even when the cross objections filed by a respondent are found to be time barred Under Order XLI

Rule 33 of the Code, the Appellate Court could fall back upon Order XLI Rule 33 of the Code for exercise of its powers for doing complete justice between the parties, the aforementioned principles have been laid down in the cases of Banarsi and Others Vs. Ram Phal, and Mahant Dhangir and Another Vs. Madan Mohan and Others, .

15. If the argument raised by learned counsel for the plaintiff-appellant is examined in the light of principles laid down in Order XLI Rule 33 and Section 107 of the Code and the principles enunciated by the Supreme Court while interpreting the aforementioned provisions, then it becomes evident that the course adopted by the learned Additional District Judge in reversing the findings with regard to adoption deed Ex. PW I/A does not suffer from any legal infirmity. The learned Additional District Judge found a number of holes in the oral testimony of the plaintiff-appellant and also discovered unexplained suspicion in the execution of the adoption deed Ex. PW-1/A. In any case there is no substitution or alteration in the decree which has eventually been passed and the suit has been dismissed. In other words, the suit was dismissed by the learned trial Court and the result remained the same before the learned Additional District Judge.

16. It is further pertinent to mention that no argument has been raised by learned counsel for the plaintiff-appellant with regard to eleven suspicious circumstances listed by the learned Additional District Judge. The fore-most important suspicious circumstances is the continuation of the name of the plaintiff-appellant is the ration card of his natural parents after the adoption and his continuous stay with his natural parents. As a matter of fact, the adoption has not found its expression in any evidence produced by the plaintiff-appellant. Moreover, no question of law much less substantive question of law has been raised which is a sine qua nor for admission of the appeal u/s 100 of the Code. Therefore, the appeal is liable to be dismissed.

For the reasons, recorded above, this appeal fails and the same is dismissed.