

(2005) 04 SHI CK 0020
In the High Court Of Himachal Pradesh

Zatiun Begum

APPELLANT

Vs

Secretary Forests and Others

RESPONDENT

Date of Decision : 27-04-2005

Acts Referred:

Workmens Compensation Act, 1923 — Section 30

Citation : (2005) 3 ACC 877

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Judgement

Deepak Gupta, J.—This appeal u/s 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act) has been filed against the order of the Commissioner, Workmen's Compensation, Chamba in Case No. 12/VIII/92 decided on 20.3.1996 dismissing the application for grant of compensation filed by the present appellant.

2. When the appeal was admitted on 15.11.1996 no substantial question of law was framed. Even with the grounds of appeal no substantial questions of law have been mentioned. Therefore, the following substantial questions of law are framed at the time of hearing of the appeal:

(1) Whether there is a custom of adoption prevalent amongst the Muslims of the area to which the claimant belongs?

(2) Whether the claimant is adopted daughter of deceased Ghulam Mohammad and entitled to compensation?

(3) The facts necessary for decision of this case are that one Ghulam Mohammad ? Ghulama was employed with the Forest Department as daily-rated worker. On 16.8.1991, while he was on duty, he received a blast injury and died on the same day. The present appellant claiming herself to be the adopted daughter of Ghulama filed an application for grant of compensation under the Act. The respondents resisted the claim petition and one of the pleas taken was that the claimant was not dependent on the deceased. The Tribunal after

recording the statements of the witnesses came to the conclusion that the parties were Muslims and also held that the claimant had failed to prove that she was the adopted daughter of Ghulama and, therefore, the petition was dismissed. Hence, the present appeal.

3. Mr. Ashok Sharma, learned Counsel for the appellant has submitted that there is sufficient evidence on record to show that the deceased and the appellant were governed by customary law and such custom recognizes adoption. He, therefore, submitted that the order of the Commissioner should be set aside.

4. On the other hand Mr. J.S. Guleria, learned Law Officer has submitted that adoption is not recognized in Islam, therefore, not permissible amongst Mohammedans. He also submitted that the appellant has failed to plead or prove the custom permitting adoption amongst Muslims of the area.

5. It would be profitable to reproduce the relevant allegations made in the claim petition which are as follows:

5. That the adoption was done according to Islamic Suni Laws and according to rites and customs prevailing among the Muslims and others within the area.

6. The claimant in support of her petition first examined her real mother Chand Bibi. She has stated that the claimant Zaitun Begum is her daughter. This witness has stated that her paternal uncle Gulamdin ? Ghulama had adopted her daughter. She states that according to Mohammedan Law by which they are governed adoption of young children is recognized. Thereafter, the adopted parents are responsible for the maintenance and upkeep of the child. The child is entitled to inherit the property and other assets of the adopted parents. She also states that ever since her uncle Ghulama had adopted Zaitun Begum he alone was looking after her day to day expenses and was maintaining the child. She states that at the time of the adoption her father and other persons of the village were present. In cross-examination she has stated that she has no written document to prove the adoption. According to her no written document was prepared. She states that as per their religion the movable and immovable property can be willed orally. She also states that adoption can be done orally.

7. The next witness examined on behalf of the claimant is one Partap Masih who is a priest in the Church at Chamba. According to him in the year 1989 Ghulama had called him and had informed him that he wants to adopt his niece Zaitun Begum. Next day he went to the house of Ghulama. 40-50 persons were present there. There one "Maulvi", one Pandit and the witness were amongst those present. This witness states that Maulvi had asked Ghulama three times whether he wanted to take the child in adoption. Thrice Ghulama had accepted to do so. At the time the girl was aged about 7 years. He states that thereafter Ghulama had stated that he will look after the child and the child would be entitled to inherit his property. In cross-examination he has stated that the name of the Maulvi was Ibrahim. He could not give name of the Pandit. He also could not remember the date or the time of the adoption.

8. P.W. 3 is Bhagat Ram. He states that he knew Ghulama. He also states that Ghulama had adopted Zaitun Begum in the presence of 40-50 persons, one Padri, one Maulvi and one Pandit. On the asking of the Maulvi, Ghulama had thrice accepted the girl as his daughter.

9. Another witness Chhatar Singh was produced. He stated that according to revenue papers Zaitun Begum was not the adopted daughter of the deceased. He in cross-examination had admitted that in village Barot, the Muslims can take children in adoption. However, he could not give any example of the same.

10. Gian Chand is the President of the Gram Panchayat, Barot. According to him there is no record in the Pariwar register to show that Zaitun Begum is the adopted daughter of Ghulama.

11. Adoption is unknown in Mohammedan Law. Tayabji in his book on "the Personal Law and Muslims in India & Pakistan" has observed that the adoption is not known to Muslim law. Sahed Khalid Rashid in his book "Muslim Law" has observed that Muslim Law does not recognize adoption. B.R. Verma, in his book "the Mohammedan Law in India & Pakistan" has stated that adoption shall not confer upon any person the status of a child except in the cases where subject to the provisions of the Shariat Act (XXVI) of 1937, there is valid custom of adoption and where it is permitted by the provisions of any law for the time being in force.

12. Mulla in his book "Principles of Mohammedan Law" has observed that Mohammedan Law does not recognize adoption as a mode of filiation. He however states that where a special family or tribal custom of adoption is proved the adoption can be done. The burden of proving custom is on the person who asserts custom.

13. However, in India the custom of adoption prevalent amongst certain classes of Mohammedans has been saved by virtue of the Muslims Personal Law (Shariat) Application Act, 1937. Section 2 of the Muslims Personal Law (Shariat) Application Act, 1937 provides as under:

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq ila zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and Wakfs (other than charities and charitable institutions and charitable and religious endowments the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (shariat).

14. A perusal of the above section shows the subjects which are to be governed by the Muslim Personal Law notwithstanding customs or usages to the contrary. Adoption is not included in these. Therefore, the custom of adoption if proved

would prevail over the General Muslim Law.

The following position thus clearly emerges:

- (1) Adoption is normally not recognized under Muslim Law;
- (2) By virtue of custom Mohammedans may also have system of adoption;
- (3) A Muslim who alleges that by custom he is subject to adoption must plead and prove the custom.

15. The mode of proving a custom is well known. The person relying upon the custom must prove that such a custom has been in existence from time immemorial and must give specific instances of such custom. In the present case neither there is any pleadings nor proof of the custom.

16. A perusal of para 5 of the pleadings quoted above shows that no mention is made that the adoption was done as per the rights and customs prevailing amongst Muslims and others in the area. P.W. 1 has not made any mention of this custom. Similarly, P.W. 2 has also not made any mention of any such custom. The only witness who has made about custom is Patwari Chhattar Singh but he was unable to give any instances of the custom.

17. Mr. Ashok Sharma has relied upon the statement of Chhattar Singh, Patwari in cross-examination that there is a custom of adoption. This statement by itself is not sufficient since the claimant has failed to prove the custom in accordance with law. The person who alleges custom contrary to some precept of his personal law is bound to prove the custom. In the present case no evidence worth the name has been led to prove the custom. In fact even in the claim petition nothing has been said with regard to the existence of the custom. No other instance of the custom has been given. The claimant has miserably failed to prove the custom.

18. Mr. Ashok Sharma, learned Counsel, submitted that since there is no cross-examination to the witnesses with regard to the adoption, therefore, their bare statements should be accepted. I am unable to agree with this contention. It was for the claimant to plead and prove the custom. The absence of any cross-examination will not prove the custom. The reliance placed by him on the judgment of Patna High Court in case of Karnidan Sarda and Another Vs. Sailaja Kanta Mitra and Another, and Baldev Singh Vs. The State of Himachal Pradesh, is totally misplaced.

19. In view of the above discussion the two substantial questions of Law raised can be answered together. Since the claimant has failed to prove that there was any custom of adoption prevalent amongst Muslims of the area, Zaitun Begum cannot be held to be the daughter of the deceased Ghulama. She is, therefore, not entitled to compensation. The claim has rightly been dismissed.

20. The appeal being without merit is dismissed with no order as to costs.