

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 22.02.2011*
Judgment Delivered on: 25.02.2011

+ **RSA No.236/2004**

MISS KAMLA KUMARI Appellant
Through: Mr. S.P. Jha, Advocates

Versus

SHRI VED PRAKASH GUPTA Respondent
Through: None

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1 This appeal has impugned the judgment and decree dated 08.04.2004 which had endorsed the findings of the trial Judge dated 27.01.2003 whereby the suit filed by the plaintiff Kamla Kumari Gupta seeking a declaration to the effect that she is the legally adopted daughter of late Sh. Joginder Nath Gupta had been dismissed.

2 The plaintiff had averred that she is the adopted daughter of Sh. Joginder Nath Gupta. She was residing with him till the time of his death. They were residing in property bearing No. R-705 B, New Rajinder Nagar, New Delhi. The defendant Ved Prakash Gupta was the son of late Sh. Joginder Nath Gupta. The plaintiff was adopted by the deceased and all necessary ceremonies required for adoption had been performed on 10.06.1976. The Pandit performing the ceremonies of adoption was Pandit Durga

Das. A document to the said effect had also been prepared. The plaintiff was recognized as the daughter of late Sh. Joginder Nath Gupta. He was a store keeper in 'COD', Delhi Cantt. He had written a letter to his Department recommending the name of the plaintiff for a job. The defendant had applied for succession certificate qua the properties of his deceased father; plaintiff had filed objections.

3 In the written statement it was denied that the plaintiff was the adopted daughter of deceased Joginder Nath Gupta. It was stated that the deceased was neither competent to take the plaintiff in adoption nor was she adopted.

4 On the pleadings of the parties, the following six issues were framed:-

- "1. Whether the plaintiff has no locus standi or cause of action and therefore suit is not maintainable? OPD.*
- 2. Whether there is bar under Sections 10 and 11 of the Hindu Adoption and Maintenance Act in adopting the plaintiff as daughter? OPD.*
- 3 Whether the present suit for declaration is barred under Section 34 of the Specific Relief Act? OPD*
- 4 Whether the plaintiff is the legally adopted daughter of late Sh Joginder Nath Gupta and had been living with deceased till his death as pleaded in para 1 of the plaint? OPP*
- 5 Whether the plaintiff is entitled to the relief of declaration as prayed for? OPP.*
- 6 Relief. "*

5 Oral and documentary evidence had been led before the trial court. Four witnesses were examined on behalf of the plaintiff which included the plaintiff herself who was examined as PW-1. The Pandit who performed the adoption ceremonies was examined as PW-4. Three witnesses had been examined on behalf of the defendant which included the defendant himself who was examined as DW-1. Sections 10 & 11 of the Hindu Adoptions and

Maintenance Act, 1956 (hereinafter referred to as the 'said Act') had been adhered to; being mandatory a person more than 15 years of age could not be taken in adoption unless there was custom to the contrary which custom was neither pleaded nor proved. Suit was accordingly dismissed.

6 The first appellate court had reaffirmed this finding.

7 This is a second appeal. After its admission on 21.02.2011, the following substantial question of law was formulated:-

"Whether the finding in the impugned judgment dated 08.04.2004 dismissing the suit of the plaintiff qua his pleading that the plaintiff is not the legally adopted daughter of late Sh. Joginder Nath Gupta is a perverse finding? If so, its effect?"

8 On behalf of the appellant, it has been urged that the findings of the two courts below are perverse; plaintiff was admittedly 30-31 years of age at the time of her adoption on 10.06.1976 yet the custom prevailing in their community permitted such an adoption; the parties were of the 'Vaish' community and there was no bar of age. The adoption ceremony had been proved through the version of Pandit PW-4. Under Section 57 of the Indian Evidence Act, 1872, judicial notice can be taken of admitted facts; a custom prevailing in the community of the plaintiff permitting adoption of person of more than 15 years of age did not necessarily have to be either pleaded or proved. For these propositions, reliance has been placed on AIR 1991 SC 1180 Kondiba Rama Papal Vs. Narayan Kondiba Papal to substantiate this submission that once a custom is judicially recognized, it is not required to be independently proved. Reliance has been placed upon AIR 1959 SC 1041 Ujagar Singh Vs. Mst. Jee; it is submitted that under Section 57 of the Evidence Act nothing need be proved of which judicial notice can be taken by the Court. In the instant case, the custom

prevailing in the 'Vaish' community permitted the plaintiff to be taken in adoption. Reliance has also been placed on JT 2010 (12) SC 441 Atluru Brahmanandam Vs. Anne Sai Bapuji to support the same submission. Reliance has also been placed upon a judgment of the Andhra Pradesh High Court reported in AIR 1994 AP 134 Jupudi Venkata Vijaya Bhaskar Vs. Jupudi Kesava Rao & Others which had been upheld in appeal by the Supreme Court in AIR 2003 SC 3314.

9 None has appeared for the respondent.

10 Perusal of the record shows that the testimony of witnesses of the plaintiff and the defendant had been scrutinized in detail as also the mandate of the provisions of the Act of 1956. The Court had returned a finding that there was no evidence on record either oral or documentary to substantiate the averment that there was any custom in the family of the plaintiff which permitted adoption of a person more than 15 years of age. PW-4 Pandit had come into witness box but had nowhere deposed that there was any custom in the family of the parties which permitted such an adoption; adoption deed (Ex. PW-4/1) which has been specifically averred to by the plaintiff had also not been proved; only a photocopy of the said document had been placed on record; the Court had disregarded this document for another reason also that neither was it registered & nor attested by any independent witness. In para 15 of the judgment of the trial court, it had been noted that the daughter of the deceased Joginder Nath Gupta was admittedly alive when the adoption took place on 10.06.1976 which was also a bar for a legal valid adoption under provisions of the said Act of 1956. Suit of the plaintiff had been dismissed.

11 The first appellate court had re-appreciated the evidence both oral and documentary and arrived at the same finding. In the impugned judgment, it had been noted that the appellant/ plaintiff had failed to prove the existence of any custom in his family or in the family of the deceased Joginder Nath Gupta whereby a person over and above age of 15 years could be adopted.

The Act of 1956 had been promulgated to amend and codify the law relating to adoptions and maintenance among Hindus. Admittedly the parties are Hindus in this case.

Chapter II deals with adoption.

Under Section 5 no adoption shall be made except in accordance with the provisions of this Chapter; adoption contrary to the said Chapter would be void.

The requisites of a valid adoption are contained in Section 6. The person adopting must necessarily have the capacity to adopt; further the person adopted must be capable of being taken in adoption.

Under Section 10 no person shall be capable of being taken in adoption when the 4 conditions contained therein are fulfilled. Clause (iv) reads as under:-

"he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption"

Section 11 stipulates the other conditions for a valid adoption. Clause (ii) reads as under:-

"if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption."

12 Admittedly on 10.07.1976 i.e. on the date of the alleged adoption, the deceased Joginder Nath Gupta had a daughter living. This has been recorded in para 15 of the judgment of the trial court. Section 11 (vi) thus stood violated.

13 The plaintiff was aged 30-31 years on the date of her alleged adoption. She had neither pleaded nor proved that there was any custom which permitted her adoption i.e. adoption of a person of more than 15 years. Categorically findings were returned by the two courts below that these provisions being mandatory and not having been adhered to, such an alleged adoption in view of these mandatory provisions was void. The onus was upon the plaintiff to establish a local or family custom validating such an adoption. She had come into the witness box as PW-3; Pandit who had performed the ceremonies had been examined as PW-4. Neither of them had whispered a word on this count.

14 The judgments relied upon by the learned counsel for the appellant do not come to her aid. In Kondiba Rama Papal (Supra), the Supreme Court had recognized the fact that once a custom permitting adoption of a child as prevailing in the Bombay State, it was not required to be proved in a subsequent case. In the present case, there was no such recognized custom; as already noted this submission was also not pleaded. The ratio of Ujagar Singh (Supra) is that judicial notice can be taken of such a custom which is recognized. The judgment of Atluri Brahmanandam (Supra) is also on the same ratio. The judgment of Jupudi Venkata Vijaya Bhaskar (Supra) had relied upon an adoption agreement which was held to be valid and binding inter-se between the parties; further in the 'Vaish' community custom permitted adoption of a boy of above

age of 15 years. It was never the plea of the plaintiff that she is of the Vaish Community which argument has now been urged. Before the Supreme Court, this judgment was assailed but in para 3, the Supreme Court had noted that the invalidity of adoption under Clause IV of Section 10 of the said Act of 1956 had not been challenged.

15 The findings in the impugned judgment call for no interference. The plaintiff being more than 15 years of age had to cross the hurdle of Section 10 of the said Act of 1956 before she could claim a valid adoption. There was no averment in the plaint that there was any custom prevailing amongst the family of the plaintiff or in the family of deceased Joginder Nath Gupta which enabled him to adopt a person more than 15 years of age. Neither had this been pleaded nor proved. The capacity of deceased Joginder Nath Gupta to adopt was also vitiated in view of the fact that he had a living daughter at the time of alleged adoption. There was a bar under Section 11 (ii) of the said Act. The photocopy of the adoption deed Ex. PW-4/1 had not been proved; it was neither attested nor registered; the original of the same had not been produced. There is no merit in the appeal.

16 Dismissed.

INDERMEET KAUR, J.

25 FEBRUARY, 2011

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