

A.F.R.

Court No. - 18

Case :- WRIT - B No. - 3587 of 1985

Petitioner :- Triloki Nath

Respondent :- J.D.C.And Others

Counsel for Petitioner :- S.P.Shukla,Arvind Kr. Shukla,B.B. Singh,S.N.Goswami,S.P. Shukla,Shitla Prasad Tripathi

Counsel for Respondent :- C.S.C.,Ashok Kr. Baladiha,D.C. Mukherjee,Raj Mani Dubey

Hon'ble Manish Kumar,J.

1. Heard Shri Shitla Prasad Tripathi, learned counsel for petitioner, learned counsel for respondent as well as Shri Hemant Kumar Pandey, learned State Counsel.

2. During the pendency of the present writ petition, the petitioner has expired and in his place his legal heirs have been substituted and they will be referred to as petitioner. Similarly, during the pendency of the present writ petition, respondent nos. 3, 4 and 5 have also expired and their legal heirs have been substituted and they will be referred to as respondent.

3. The present writ petition has been preferred for quashing of the impugned revisional order dated 25.05.1985 and the appellate order dated 07.01.1985.

4. Learned counsel for petitioner has submitted that the uncle of the petitioner Naval Kishore was the original tenure holder of the Chak no. 32 situated at village Gumwa, District Sultanpur and he died issueless, hence after his demise, the petitioner being the nephew, would succeed the rights over Chak No. 32 as successors of late Naval Kishore.

5. During the consolidation proceedings, respondent no. 3 Ram Ujagir (now deceased) had filed a case under Section 12 of the Consolidation of Holdings Act, 1953 for claiming his co-tenancy rights on Chak No. 32 being an adopted son of late Naval Kishore, on the basis of the registered adoption deed dated 30.09.1972. The said case preferred by respondent no. 3 was dismissed by judgment and order dated 26.10.1983. Against which the respondent no. 3 had preferred an appeal under Section 11(1) of the Act, 1953 which was decided in his favour by judgment and order dated 07.01.1985. Against which, the petitioner preferred a revision under Section 48(1) of the Act, 1953 which was dismissed by judgment and order dated 25.05.1985 and feeling aggrieved by the appellate order and the revisional

order, the present writ petition has been preferred.

6. It is further submitted that the issue which was to be decided by the appellate court as well as the revisional court was whether the adoption was in accordance with proviso to Section 7 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the Act, 1956') which provides that the consent of the wife of the person adopting the child shall be necessary and the same was not there at the time of adoption and the registration of the adoption deed. So, the adoption of the respondent no. 3 is invalid and no right could be given to the respondent no. 3 in pursuance of the adoption deed which is invalid. In support of his submission, learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court in the case of ***Ghisalal and Ors. vs. Dhapubai (Dead) by LRs. and Ors. [AIR (2011) SC 644]***.

7. It is further submitted that the respondent no. 3 had not adduced either any documentary evidence or oral evidence to establish that there was a consent of the wife of Late Naval Kishore at the time of adoption of respondent no. 3 and in absence of the same, the adoption of the respondent no. 3 is not valid in the eyes of law.

8. On the other hand, learned Standing Counsel and the counsel for the respondents have submitted that it is not necessary that the consent should be in writing.

9. It is further submitted that the statement of the marginal witness (Indrajeet Tiwari) was recorded before the Consolidation Officer wherein he had stated that the adoption was with the consent of the wife of Late Naval Kishore and she was present at the time of adoption.

10. It is further submitted that even respondent no. 3 had also given his statement that he was adopted with the consent of wife of Late Naval Kishore. It is further submitted that the petitioner has not challenged the adoption deed till date and as per Section 16 of the Act, 1956, it would be presumed that the adoption deed is valid being a registered document.

11. It is further submitted that the wife of Late Naval Kishore pre-deceased her husband i.e. Late Naval Kishore, so this issue is of no relevance now at all in the present case.

12. After hearing the learned counsel for the parties, going through the record of the case, in the present case, the issue which is to be adjudicated that whether there was any consent in writing or tacit consent of the wife of Late Naval Kishore was there at the time of adoption or not in the light of proviso to Section 7 of the Act, 1956 and the judgment of the Hon'ble Supreme Court relied by learned

counsel for the petitioner in the case of **Ghisalal and Ors. (supra)**. For convenience, the proviso to Section 7 of the Act, 1956 is quoted hereinbelow:-

"7. Capacity of a male Hindu to take in adoption.- Any male Hindu who is 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 the them is unnecessary for any of the reasons specified in the preceding proviso."

13. From perusal of the proviso to Section 7 of the Act, 1956, wherein it is provided that a Hindu male can adopt a child but if he has a wife living then her consent is necessary unless the wife has completely and finally renounced the world or is ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

14. In the present case, the adoption deed which was read by learned counsel for respondent no. 3 to establish that there was consent of wife of late Naval Kishore for adoption, but he has failed to show even a single line that his wife consented for adoption, rather he has addressed himself only everywhere i.e. 'I' in place of 'We'. The adoption deed was signed bearing thumb impression of late Naval Kishore, the biological parents of respondent no. 3, the adopted child i.e. Ram Dev Pandey and his wife. If these persons could sign or put their thumb impression on the adoption deed at the time of its registration then the wife of late Naval Kishore could have signed or given her thumb impression on the same. There seems to be no reasons as to why the wife of late Naval Kishore could not have signed or put her thumb impression on the adoption deed while others had done so.

15. It is not necessary that the consent should be in writing. This can be done either by producing documentary evidence showing her consent in writing or by leading evidence to show that wife had actively participating in the ceremonies of adoption with an affirmative mindset to support the action of her husband. For that learned counsel for the respondent no. 3 has submitted that the statements of Ram Ujagir i.e. the person who had been adopted and one Shri Indrajeet, the marginal witness of adoption deed were recorded and both of them in their statement had submitted that the adoption was made with the consent of the wife of late Naval Kishore. But both these persons whose statements have been relied by learned counsel for the respondent no. 3 are interested witness to support and protect the validity of the adoption deed, for the reason

one is the person himself who was adopted and second is the marginal witness of the adoption deed. They did not state as to in what manner the wife of late Nawal Kishore expressed her consent for adoption except that she had participated. Except them no other person was adduced/produced to state that wife of late Naval Kishore had consented for the adoption though it was the case of the respondents throughout that after the ceremonies and following rituals in presence of the villagers, Pandit, Nau (barber) the adoption was made. But none of these persons were produced in support of their submissions by respondent no. 3. Even those witnesses namely Indrajeet Tiwari and Ram Ujagir have not stated that wife of late Naval Kishore had actively or otherwise participated in any of the rituals or in the proceedings of adoption, much less with mindset of having given the consent for adoption. As discussed earlier also mere her presence at the time of adoption of little consequence.

16. The Hon'ble Supreme Court in the case of **Ghisa Lal (supra)** has interpreted the term "consent" used in proviso to Section 7 of the Act, 1956. The relevant paragraph are quoted hereinbelow:-

"20. The term 'consent' used in the proviso to Section 7 and the explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

21. At this stage, we may notice some precedents which have bearing on the interpretation of proviso to Section 7 of the 1956 Act. In Kashibai v. Parwatibai (supra), this Court was called upon to consider whether in the absence of the consent of one of the two wives, the adoption by the husband could be treated valid. The facts of the case show that Plaintiff No. 1 and Defendant No. 1 were two widows of deceased Lachiram. Plaintiff No. 2 was daughter of Lachiram from his first wife Kashibai and Defendant No. 2 was the daughter from his second wife Parwati. Defendant No. 3, Purshottam son of Meena Bai and grandson of Lachiram. The Plaintiffs filed suit for separate possession by partition of a double storey house, open plot and some agricultural lands. The Defendants contested the suit. One of the pleas taken by them was that Purshottam son of Meena Bai had been adopted by deceased Lachiram vide registered deed of adoption dated 29.4.1970, who had also executed deed of Will in favour of the

adopted son bequeathing the suit properties to him and thereby denying any right to the Plaintiffs to claim partition. The trial Court decreed the suit for separate possession by partition by observing that the Defendants have failed to prove the adoption of Purshottam by Lachiram and the execution of Will in his favour. The High Court reversed the judgment of the trial Court and held that the Defendants had succeeded in proving execution of the deed of adoption and the deed of Will in accordance of law and as such the Plaintiffs were not entitled to any share in the suit properties. On appeal, this Court reversed the judgment of the High Court and restored the decree passed by the trial Court. On the issue of adoption of Purshottam, this Court observed:

It is no doubt true that after analysing the parties' evidence minutely the trial court took a definite view that the Defendants had failed to establish that Plaintiff 1, Defendant 1 and deceased Lachiram had taken Defendant 3, Purshottam in adoption. The trial court also recorded the finding that Plaintiff 1 was not a party to the Deed of Adoption as Plaintiff 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial court took the view that the alleged adoption being against the consent of Kashi Bai, Plaintiff 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act provides that 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. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present case as seen from the evidence discussed by the trial court it is abundantly clear that Plaintiff 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the Defendants was clearly hit by the provisions of Section 7 and the adoption cannot be said to be a valid adoption."

17. The said judgment has been followed by this Court very recently in the case of **Uttam Chandra and two others versus State of U.P and ten others** in Writ B No. 3822 of 2023, judgment dated 30.11.2023.

18. The other submission of learned counsel for the respondent no. 3 is that the petitioner had not adduced any evidence to disprove that the adoption was without the consent of the wife of late Naval Kishore, the onus was upon them. The said submission of learned counsel for the respondent no. 3 is not acceptable as the Hon'ble Supreme Court in the case of Ghisa Lal (supra) has held, that if the adoption deed by a hindu male becomes subject matter before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. Here it is the respondent no. 3 who had failed to adduce any independent evidence to show that the adoption of respondent no. 3 was with the consent of the wife of late Naval Kishore. Even the participation if any, of the wife of late Naval Kishore in the rituals of adoption, even that cannot be said that it was a consent by the wife of late Nawal Kishore as per the law settled in the case of the Ghisa Lal (supra).

19. The appellate and revisional Court for treating the

adoption deed proved had relied upon section 6, 11 and 16 and other sections of the Act, 1956 but no plausible and reasonable finding has been given as far as the objection raised by the petitioners in pursuance to proviso to Section 7 of the Act, 1956 i.e. the consent of the wife of the late Naval Kishore. But merely on the basis of statement of Indrajeet Tiwari, the marginal witness treating the adoption deed valid despite the finding that there was no consent of the wife of late Nawal Kishore in writing.

20. In view of the facts, circumstances and discussion made hereinabove, it is clear that the adoption was not in accordance with the proviso to Section 7 Act, 1956, since there was not consent of the wife of late Nawal Kishore for the adoption in writing nor it could so inferred by merely her presence during the adoption ceremonies, more particularly, there is affirmative mindset of her consent, as held by the Hon'ble Supreme Court in the case of Ghisa Lal (supra) that such a presence would be as an spectator in the assembly of people.

21. In the result, the writ petition is ***allowed***.

22. The impugned revisional order dated 25.05.1987 and appellate order dated 07.01.1985 are hereby quashed.

Order Date :- 30.5.2024
DiVYa