

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No. 515 of 2013
With
Civil Application No.11865 of 2014**

Dnyanoba s/o Vishwanath Kute
(died) through his legal
representatives.

.. Appellants.

Versus

Kondabai w/o Vishwanath Kute
And Others.

.. Respondents.

Shri. V.D. Salunke, Advocate, holding for Shri. S.B. Ghatol
(Patil), Advocate, for appellants.

Shri. P.R. Katneshwarkar, Advocate, for respondent Nos. 1
to 3.

CORAM: T.V. NALAWADE, J.

DATE : 12th OCTOBER 2015

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.304/1992 which was pending in the Court of the Joint Civil Judge, Junior Division, Parbhani and also against the judgment and decree of Regular Civil appeal No.55/2004 which was pending in the Court of the District Judge-1 Basmathnagar, District Parbhani. The suit filed by the

present respondents for relief of declaration and possession is decided in their favour. Both the sides are heard.

2) Plaintiff Nos.2 and 3 are daughters of plaintiff No.1 and deceased Vishwanath Kute was the husband of plaintiff No.1 and father of plaintiff No.2 and 3. Vishwanath was owner of agricultural lands situated at two places and also house properties. Property bearing Gat Nos.144 and 154 were situated at Pimpalgaon (Tong) and properties bearing Gat No.31 (share of Vishwanath), Gat No.355 (share of Vishwanath), Gat No.348 and Gat No.397 situated at Pimpalgaon (Hazam). The suit was also filed for possession of house properties bearing House No.105 situated at Pimpalgaon (Hajam) and other house property bearing House No.265 situated in the same village.

3) It is the case of the plaintiffs that after the death of Vishwanath they became the owners of the suit properties. It is contended that after the death of Vishwanath they came in possession of the properties but

they took help of the defendant, who is son of real brother of Vishwanath for cultivation. It is contended that in the year 1990 the defendant forcibly dispossessed the plaintiff from land Gat No.355, 352, 31 and 348 situated at Pimpalgaon Hazam and he also forcibly took possession of House No.105 situated at Pimpalgaon Hazam. It is contended that though they are in possession of Gat Nos.144 and 154, the defendant was trying to obstruct the possession of the plaintiffs over these lands also.

4) It is the case of the plaintiffs that when they questioned the defendant about his acts, the defendant said that he was adopted by Vishwanath in the year 1982 and there was such adoption deed with him. It is contended that Vishwanath had never taken defendant in adoption and to the knowledge of plaintiff No.1 there was no ceremony at all in respect of the adoption. It is contended that if at all there is such adoption document, such adoption needs to be declared as null and void. Alternatively it was claimed that if the adoption is proved then share of the plaintiffs in the properties left behind by Vishwanath be given to the plaintiffs.

5) The defendant admitted the relationship and he also admitted that the suit properties were originally owned by Vishwanath. He contended that on 10-5-1982 Vishwanath adopted the defendant and accordingly document was prepared and it was registered. It was contended that after the death of Vishwanath, plaintiff No.1 shifted to Parbhani and so plaintiffs were never in possession of the suit properties. It was also contended that the suit was not within limitation.

6) Issues were framed in the trial Court. The main issue was about the contentions made by the defendant about his adoption by Vishwanath. The Courts below have held that the defendant has failed to prove that there was legal adoption. It appears that during pendency of the proceeding some properties, which were in possession of the plaintiffs, were sold by them and to that extent the decree is modified by the First Appellate Court. The trial Court has not given decree in respect of one house property like House No.265 but this decision was not challenged though the plaintiff ought to have challenged and so to that extent no relief is given to the plaintiffs.

Only the defendant challenged the decision. It appears that when defendant failed in First Appellate Court he filed second appeal in this Court and this Court remanded the matter by setting aside the decision of the Courts below (in Second Appeal No.561/2011). The matter was remanded to give an opportunity to the defendant to lead evidence on so called adoption as he had not given any evidence on adoption. After remand of the matter the evidence of the father of the defendant came to be recorded. After considering this evidence it is held that the adoption is not proved and so the decision given after remand is challenged in the present appeal.

7) The learned counsel for the appellant, original defendant, submitted that the Appellate Court has not framed proper points for consideration and on that point substantial question of law needs to be formulated. He also submitted that the Courts below have ignored some material and also the provision of Section 16 of the Hindu Adoptions and Maintenance Act 1956 and due to that there is perversity and on this point, substantial question of law needs to be formulated.

8) The learned counsel for the appellant placed reliance on a case reported as **AIR 1985 Bombay 98 (Anita v. Abdul Wahid)**. In this case, this Court has discussed the importance of provision of Order 41 Rule 31 of the Civil Procedure Code and it is observed in paragraph 16 thus :--

"**16.** . . . At this stage I am constrained in invite the attention of the courts below to the provisions of O.41, R.31 of the Civil P.C. This provision deals with the judgment of the Appeal Court and it says amongst other things that the judgment shall state the points for determination. When a requirement such as this is insisted upon by the procedural law of the land, one must try to understand the object and scope of this provision. Merely asking the question as to whether the judgment of the Court below is correct, legal or valid is hopelessly an inadequate method of meeting the requirement of this legal provision. I have with dismay noted several times in the judgments of the Appeal Courts below the points for determination being formulated in the following manner :

(1) Is the judgment of the Court below liable to be set aside ?

(2) Is the decree of the Court below liable to be interfered with ?

(3) Is the decree of the Court below valid ?

(4) is the decree of the Court below proper and legal ?

These are some of the ways in which the courts of first appeal have tended to formulate the points for determination."

On the same point one more case reported as **(2010) 7 SCC 179 (Santosh Hazari v. Purushottam Tiwari)** is referred to by the learned counsel for the appellant. In this case similar observations are made by the Apex Court. However, the Apex Court has also laid down that whether a question is or not a substantial question of law depends on the facts and circumstances of each case. It is laid down that essential overall consideration is the need to strike a judicious balance between the duty to do justice at every stage and the pressing necessity of preventing delay in the final disposal of a case.

9) This Court has carefully gone through the decision delivered by the First Appellate Court. Specific point was formulated regarding the case of adoption put up in defence in Written Statement. This point is specifically addressed by the First Appellate Court like it was done by the trial Court. The evidence given after the remand is considered by the First Appellate Court. In view of all these circumstances it cannot be said that the First Appellate Court has committed error of aforesaid nature. Thus there is no material to formulate substantial

question of law on the basis of the first contention made by the learned counsel for the appellant.

10) Much was argued by the learned counsel for the appellant on the basis of provision of section 16 of the Hindu Adoptions and Maintenance Act, 1956. He submitted that this section raises a presumption in favour of the party in whose favour the adoption document is there, which is registered. Learned counsel submitted that in view of the presumption which is available under this section the Courts below ought to have held that there was legal adoption. This Court has carefully gone through the evidence given in the present matter and also the law developed on section 16 of the Hindu Adoptions and Maintenance Act, 1956. This Court had occasion to consider the law developed on this point in the case reported as **2014 (3) ABR 788 (Pandurang Shankar Shivankar v. Muktabai Govindrao Mate)**. The discussion about the law is at paragraphs 15 to 19 and it is as under :-

"15. Hindu law, customs and usages are considered in codified law viz. Hindu Adoptions and Maintenance Act 1956 (hereinafter referred to as "the Act"). The procedure of adoption is given in Section 11 of the Act and it runs as under :

"11. Other conditions for a valid adoption.-- In every adoption, the following conditions must be complied with :-

(i) to (v)

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption:

Provided that the performance of datta homam shall not be essential to the validity of an adoption".

Thus the fact of giving and taking needs to be proved.

16. As per the contents of Hindu Text also there should be giving and acceptance of the boy taken in adoption. Thus the condition which was there in the text of Hindu law is incorporated in the aforesaid provision. Even when adult is adopted, giving and taking as mentioned in the aforesaid provision is required to be proved. (reliance is placed on a case reported as AIR 1970 SC 1286 (Debi Prasad v. Tribeni Devi) and AIR 1975 SC 1103 - (Dhanraj v. Suraj Bai]).

17. When adoption would displace the natural succession of property, the evidence on adoption should be free from all suspicion of fraud and it should be so consistent and probable that it leaves no occasion for doubting the adoption. (reliance is placed on AIR 1959 SC 504 (Kishori Lal v. Mt. Chaltibai).

18. Provisions of Section 5(1) of Chapter II of the Act runs as under :-

"5. Adoptions to be regulated by this Chapter.--
(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void."

19. Section 11 is part of Chapter II. So, if factum of giving and taking is not proved, the so called adoption needs to be treated as void."

When factum of giving and taking is not proved, the adoption becomes void and other things need not be considered. In the case of Pandurang (cited supra) some more observations are made at paragraph 28 and they are as under :-

"28. Learned counsel for the appellant has stressed much on the provisions of Section 16 of the Act Section 16 runs as under :--

"16. Presumption as to registered documents relating to adoption.-- Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the persons taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

The provision shows that it becomes applicable only if giving and taking is proved and the document needs to be signed by the parties to show that there was giving and taking. So, it was necessary for the defendant No.3 to prove the factum of giving and taking. Even if there is writing, de-hors the document factum of giving and taking needs to be proved i.e. the base for using the document needs to be created and only after that the provision of Section 16 can be used."

11) The father of the defendant has given evidence that he had given the defendant in adoption to Vishwanath. In the examination-in-chief he has stated that one priest was present at the time of performance of adoption ceremony and in the presence of the priest he had handed over the defendant to Vishwanath and the defendant was made to sit on their lap. He has given evidence that after this ceremony they had gone to the office of the Sub Registrar and the document, which was prepared about the adoption, was registered. The document of adoption does not bear signature or thumb impression of plaintiff No.1, the wife of Vishwanath. The father of the defendant has avoided to admit that there is no thumb impression or signature of plaintiff No.1 on this document. In any case even in the substantive evidence the father has not stated that there was consent of the

plaintiff No.1 to this adoption. There are many suspicious circumstances about this document. It appears that attempt was made to show one more document of adoption when the first document of adoption was written on stamp paper and this document was shown to be registered. The first document which is registered is dated 10-5-1982 and the other document which is not proved is dated 7-11-1982. It can be said that attempt was made to deprive the widow of Vishwanath and his daughters of everything from the property by creation of these documents. In the second document it is mentioned that for the time being two lands were to remain with the daughters and after their marriage they were not to have any kind of right or interests in those properties also.

12) Though the document was shown to be created in 1982, after the death of Vishwanath, the name of Kondabai, widow of Vishwanath, was entered as the heir of Vishwanath at least in the record of rights of three lands from Pimpalgaon (Tong) and mutation was sanctioned in the year 1988. Even names of the two daughters were entered in the record of Gat No.144.

These mutations were never challenged by the defendant. Thus in respect of some lands, the name of the defendant was entered in the revenue record after the death of Vishwanath.

13) The aforesaid discussion shows that the things were concealed from the widow and the daughters of Vishwanath and the contention of the defendant that plaintiff No.1 has shifted to Parbhani shows as to how the defendant and his father could manipulate the things. In any case title could not have passed in favour of the defendant if the adoption was void.

14) Learned counsel for the respondents placed reliance on a case reported as **AIR 2011 SC 644 (Ghisalal v. Dhapubai)**. The Apex Court has discussed the mandatory nature of provision of Sections 6 and 7 of the Hindu Adoptions and Maintenance Act, 1956 at paragraphs 17,19 & 20 which are as under :-

"17. Section 6 reproduced above enumerates the requisites of a valid adoption. It lays down that no adoption shall be valid unless the person adopting has the capacity as also the right to take in adoption; the person giving in adoption has the capacity to do

so; the person adopted is capable of being taken in adoption, and the adoption is made in compliance with the other conditions mentioned in Chapter II. Section 7 lays down that any male Hindu who is of sound mind and is not minor has the capacity to take a son or a daughter in adoption. This is subject to the rider enshrined in the proviso which lays down that if the male Hindu has a wife living then he shall not adopt except with the consent of his wife unless she is incapacitated to give the consent by reason of her having completely and finally renounced the world or her having ceased to be a Hindu or she has been declared by a court of competent jurisdiction to be of unsound mind. The explanation appended to Section 7 lays down that if a person has more than one wife living at the time of adoption, then the consent of all the wives is *sine qua non* for a valid adoption unless either of them suffers from any of the disabilities specified in the proviso to Section 7. Section 8 enumerates the conditions, which must be satisfied for adoption by a female Hindu. Section 12 deals with effects of adoption. It declares that from the date of the adoption, an adopted child is deemed to be a child of his/her adoptive father or mother for all purposes and his ties in the family of his or her birth shall stand severed and replaced by those created in the adoptive family. Proviso (a) to this section contains a restriction on the marriage of adopted child with a person to whom he or she could not have married if he or she had continued in the family of his or her birth. Clause (b) of the proviso saves the vested right of the adopted child in the property subject to the obligations, if any, attached to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth. Likewise, clause (c) to the proviso lays down that the adopted child shall not divest any person of any estate vested in him or her before the date of adoption. Section 16 which embodies a rule of presumption lays down that whenever any document registered under any law for the time being in force evidencing adoption and signed by the person giving and person taking the child in adoption is produced before any court, then it shall presume that the adoption has been made after complying with the provisions of the Act unless proved otherwise.

19. After India became a sovereign, democratic republic, this position has undergone a sea change. The old Hindu Law has been codified to a large extent on the basis of constitutional principles of equality. The Hindu Marriage Act, 1955 codifies the law on the subject of marriage and divorce. The Hindu Succession Act, 1956 codifies the law relating to intestate succession. The Hindu Minority and Guardianship Act, 1956 codifies the law relating to minority and guardianship among Hindus. The 1956 Act is also a part of the scheme of codification of laws. Once the Hindu Succession Act was passed giving equal treatment to the sons and daughters in the matter of succession, it was only logical that the fundamental guarantee of equality of a status and equality before law is recognized in the matter of adoption. The 1956 Act now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption [Sections 8, 11(1) and 11(2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

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."

15) In view of the evidence given in the present case by the defendant and the aforesaid position of law it can be said that even the remand of the matter itself was not necessary. This Court has no hesitation to observe that when the suit filed in the year 1992 was decreed in favour of the plaintiffs in 2003, the defendant misused the procedure of law, somehow managed to remain in

possession after the year 2003. In the case of Santosh Hazari (cited supra) the Apex Court has laid down that the Courts are expected to be cautious and they need to ascertain as to whether delaying tactics are being played by creating some grounds. It can be said that the defendant succeeded to much extent and he avoided to hand over the possession for about 12 years. There is no material whatsoever on the basis of which substantial question of law can be formulated. Another point is the appreciation of evidence by the Courts below on the case of adoption. Learned counsel for the appellants had made submission that the matter needs to be remanded back for re-trial and the aforesaid points need to be treated as the substantial question of law. There is no such possibility in the present matter and nothing can be achieved if the matter is remanded back in view of the aforesaid circumstances of the case.

16) In the result, the appeal stands dismissed. Civil Application No.11865 of 2014 stands disposed of.

Sd/-
(T.V. NALAWADE, J.)

rs1