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

+ **Date of Decision: 09.12.2015**

% **RSA 351/2015 and C.M. Nos.21007-21008/2015**

BHUPINDER KUMAR Appellant

Through: Mr. Manoranjan, Advocate.

versus

RADHA RANI & ORS Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment & decree dated 27.02.2015 passed by the learned First Appellate Court in MCA 66/2006, whereby the said regular first appeal has been dismissed, and the judgment and decree passed by the Trial Court, namely the learned Civil Judge, Karkardooma Courts, Shahdara in Suit No.175/2006 dated 03.11.2006 has been affirmed.

2. The appellant/ plaintiff filed the suit for partition and permanent injunction against the defendants by claiming himself to be the adopted son of late Sh. Murari Lal vide adoption deed dated 15.06.1975 - stated to have been executed by Sh. Murari Lal and his wife Smt. Shanti Devi before the village Panchayat. He claimed that since 15.06.1975, he was residing with Sh. Murari Lal at property No.B-1/4, Krishna Nagar, Delhi – the suit

property. He claimed that Sh. Murari Lal was first married to the mother of Sh.Virender Kumar, and after her death, he married Smt. Shanti Devi, who had no issues. He claimed to be a relative of Smt. Shanti Devi. He claimed that Smt. Shanti Devi was the owner of the suit property. After the death of Sh. Murari Lal and Smt. Shanti Devi, he claimed that he along with Sh.Virender Kumar became co-owners/ joint owners of the suit property under the Hindu Succession Act, 1956. Defendant No.1 is the wife of Sh. Virender Kumar and the defendants No.2 & 3 are the daughters of Sh. Virender Kumar. The plaintiff claimed that whereabouts of Sh.Virender Kumar were not known for the last 40 years. He claimed that in January 1990, the defendants quarreled with him and he started living in a rented premises. Despite his asking, the defendants refused to partition the suit property. He claimed that on 15.03.2005, he again asked the defendants to partition the suit property but they flatly refused. Consequently, he filed the suit claiming half share in the suit property. He sought partition and injunctive reliefs.

3. The defendants contested the suit. They denied the alleged adoption of the plaintiff by late Sh. Murari Lal. The defendants stated that the adoption deed was false and manufactured by the plaintiff after he had graduated in Law. The signatures of Sh. Murari Lal and Smt. Shanti Devi on the adoption deed were denied. The defendants claimed that Sh. Murari Lal had executed a registered Will in favour of defendant No.1. She also claimed that after the death of Smt. Shanti Devi, Succession Certificate was obtained in case No.945/1987 by defendant No.1 from the Court of Sh.L.D. Malik, Sub-Judge in respect of the movable estate left by Smt. Shanti Devi

to the knowledge of the plaintiff. The defendants stated that the plaintiff's biological parents had eight children and they were living in very poor conditions. Looking to the same, Sh. Murari Lal and Smt. Shanti Devi had brought the plaintiff to Delhi with a view to give him good food and education. The defendants also denied that the suit property was owned by Smt. Shanti Devi. They stated that the same was purchased by Sh. Murari Lal in his father's name, and after the demise of his father, Sh. Murari Lal became the owner of the same. It was further stated that the plaintiff developed the habit of drinking and started creating nuisance in the family. Late Sh. Murari Lal warned the plaintiff several times and also reported the matter to his father Sh. Ram Narayan Dixit and handed over the custody of the plaintiff to his natural father. Since then the plaintiff had no concern with the defendants or the suit property.

4. On the basis of the pleadings, the Trial Court framed the issues. Issue No.3 pertained to the locus standi of the plaintiff to file the suit, which, in turn, depended on the issue whether the plaintiff had been adopted by late Sh. Murari Lal and Smt. Shanti Devi by the adoption deed set up by the plaintiff. Other issues were also framed.

5. The plaintiff examined himself as PW-1. He also produced Smt. Sumati Sethia as PW-2 and one Anil Kapoor as PW-3. He also examined one Sh. Ram Ratan as PW-4. The Adoption Deed was marked as Ex PW-1/2. The defendant examined herself as DW-1, apart from examining 3 other witnesses. The defendants exhibited as Ex.DW-1/1 the application to the police dated 20.07.1969, as Ex.DW-1/2 the publication notice put in Nav Bharat Times, as Ex.DW-1/3 the publication dated 16.07.1970, as Ex.DW-

1/4 the FIR and as Ex.DW-1/5 the Fatwa. The defendants also led in evidence, *inter alia*, documents to show that the name of the father of the plaintiff in Government records was recorded as that of his natural father Sh. Ram Narayan Dixit, and not of Sh. Murari Lal.

6. The Trial Court returned the finding that plaintiff had not been able to establish his alleged adoption by Sh. Murari Lal Chobey and Smt. Shanti Devi. The Trial Court examined the provisions contained in Sections 6, 8 & 11 of the Hindu Adoptions and Maintenance Act, 1956 (HAMA) and held that the adoption was, in any event, would not be valid. The plaintiff had produced only one witness, namely Sh. Ram Ratan as PW-4, who deposed that he was present at the time of adoption and his signatures appear on the adoption deed. However, when the said document was produced before him, he could not identify the signatures of late Sh. Murari Lal Chobey. He identified signatures of Sh. Ram Narayan Dixit as that of late Murari Lal Chobey. The Trial Court held that even though the natural parents of the plaintiff were alive, they were not produced as witnesses by the plaintiff in support of his plea that his natural parents had given him in adoption to late Sh. Murari Lal Chobey and Smt. Shanti Devi.

7. By placing reliance on Section 8 of the HAMA, the Trial Court held that Smt. Shanti Devi was not competent to adopt, which was purported to be done by the alleged adoption deed relied upon by the plaintiff. The school record and other documents produced by the defendants, i.e. Ex.CW-1/8 and DW-1/18 indicate the name of the father of the plaintiff was recorded as Sh. Ram Narayan Dixit, and not Sh. Murari Lal Chobey. Consequently, the Trial Court dismissed the suit, as the basic issue of

adoption was not proved by the plaintiff.

8. The First Appellate Court concurred with the said finding. The First Appellate Court in the impugned judgment took note of the fact that the parentage of the plaintiff in his electoral list and the ration card was that of his natural father, i.e. Sh. Ram Narayan Dixit. The First Appellate Court also took note of the fact that on the date of the alleged adoption, i.e. 15.06.1975 the period for which Sh. Virender Kumar had been missing (since 20.07.1969) was 5 years and 10 months. Thus, in law, Sh. Virender Kumar could not be presumed to be dead, and there was every reason to presume that he was alive. Reliance was placed on Sections 107 and 108 of the Evidence Act. Consequently, it was held that the plaintiff, in any event, could not have been validly adopted by virtue of Section 5(2) of the HAMA.

9. The First Appellate Court, even otherwise, on a reading of the adoption deed held that the same does not suggest that Sh. Murari Lal Chobey and his wife Smt. Shanti Devi had adopted the plaintiff. The language used in Ex.PW-1/2, i.e. the adoption deed, was suggestive that the adoption had taken place only by Smt. Shanti Devi and not by her husband Sh. Murari Lal Chobey. The First Appellate Court held on a reading of Section 7 of the HAMA, that a Male Hindu could have adopted a son in 1975 and a married female Hindu - whose husband was alive, could not have adopted a son in her individual capacity.

10. The First Appellate Court also disbelieved the testimony of PW-4 as he identified the signatures of Sh. Ram Narayan Dixit as that of Sh. Murari Lal Chobey. He also stated that the village Panchayat maintained a register

recording marriage, death and adoption, but no such register was produced by the plaintiff. The adoption deed did not bear any serial number to show that it had been entered into the register of the village Panchayat. Despite the natural parents of the appellant being alive during the pendency of the suit - as his natural father died in the year 2010 and his mother died in 2013, they were not examined by the appellant.

11. Reliance was placed on *Rahasa Pandiani Vs. Gokulananda Panda*, AIR 1987 SC 962, wherein the Supreme Court had observed that in case of an adoption, which is claimed on the basis of oral evidence and is not supported by a registered document or any other evidence of clinching nature, if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the Court by the party setting up a plea of adoption.

12. Reliance was also placed on *Kishori Lal Vs. Mt. Chaltibai*, AIR 1959 SC 504, wherein the Supreme Court had observed that since adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers, it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud, and so consistent and probable as to leave no occasion for doubting its truth. Consequently, the first appeal of the appellant was dismissed.

13. Before this Court, the submission of learned counsel for the appellant is that the First Appellate Court was not right in invoking Section 5(2) of the HAMA, on the reasoning that Sh. Virender Kumar could not have been presumed to be dead on the date of the adoption - as the period of 7 years

had not expired since he went missing since 20.07.1969.

14. He seeks to place reliance on the judgment of the Allahabad High Court in *Zishan Khan Vs. District Inspector of Schools, Varanasi & Others*, 2012 LawSuit(All)1265, to submit that there are exceptions to the rule that a person who is missing shall be presumed to be dead on the expiry of seven years from the date he was missing. He submits that the presumption attached to Sections 107 and 108 is only with regard to the death of the person on the expiry of the period of seven years. When the said period of seven years expires, the date of death relates back to the date since when the person was missing. The presumption does not attach to the date of death of person who has gone missing.

15. He submits that in the present case, even as per the police complaint (Ex.DW-1/1) produced by the respondent/ defendant, Sh. Virender Kumar had gone to river Yamuna for a bath and he never returned. Thus, it could be accepted that he drawn in the river and died and there is no reason not to accept the date of his death as the date when he went missing.

16. Learned counsel submits that even though the respondents/ defendants disputed the signatures of late Sh. Murari Lal Chobey and Smt. Shanti Devi on the adoption deed, they had not produced any evidence to establish that the said signatures were not theirs. He submits that PW-4 was a witness to the adoption and his testimony could not have been rejected by the Courts below.

17. Having heard learned counsel for the appellant and perused the decisions of the Court below as well as the other records, I am of the view

that there is no merit in the present second appeal and it does not raise any substantial question of law requiring consideration by this Court. The findings returned by the two Courts below are concurrent with regard to the failure of the appellant to, as a matter of fact, prove his adoption by late Sh. Murari Lal Chobey and Smt. Shanti Devi. The appellant has not been able to point out any perversity in the said finding.

18. On facts, it is not in dispute that even though the appellant claimed that he had been given in adoption by his natural parents in adoption to Sh. Murari Lal Chobey and Smt. Shanti Devi, he had not produced either or both his natural parents as witnesses, even though both of them were alive when the matter went to trial. The natural father of the appellant/ plaintiff died in the year 2010, whereas his natural mother died in the year 2013 (as noticed by the First Appellate Court), even though the suit was decided way back on 03.11.2006. This means that the trial was conducted even prior to that date. There is absolutely no explanation as to why the plaintiff did not produce his natural parents as his witnesses, if he had indeed been given in adoption by them to Sh. Murari Lal Chobey and Smt. Shanti Devi. They were best witnesses for the plaintiff to produce, as the plaintiff/ appellant was their son and only they could give the plaintiff in adoption to any other person. Withholding of the said crucial evidence by the plaintiff/ appellant certainly raises a doubt about the plaintiff's claim that he was given in adoption by his natural parents to late Sh. Murari Lal Chobey and Smt. Shanti Devi and it raises an adverse inference against him.

19. The only witness to the adoption deed produced by the appellant was Sh. Ram Ratan, PW-4. However, even this witness failed in his testimony

inasmuch, as, he identified the signatures of Sh. Ram Narayan Dixit as that of Sh. Murari Lal Chobey. Though he claimed that the village Panchayat maintains the register recording, *inter alia*, the adoptions but no such register was produced either by him or the by the plaintiff. No witness from the village Panchayat was summoned by the plaintiff to produce the relevant register, which would have recorded the adoption of the plaintiff by late Sh. Murari Lal Chobey and Smt. Shanti Devi, had taken place in the year 1975.

20. There is another aspect that needs consideration. Sh. Virender Kumar, who had gone missing since 20.07.1969 had already been married and had two daughters. Thus, late Sh. Murari Lal Chobey and his wife had an unsupported/dependant daughter-in-law, i.e. defendant No.1 and 2, unsupported/dependant grand-daughters, i.e. defendants No.2 & 3 to look after and support. In these circumstances, it does not stand to reason why Sh. Murari Lal Chobey or Smt. Shanti Devi would adopt a son, when they had to support a daughter-in-law and two grand-daughters, knowing full well that a legal adoption would mar their rights of succession.

21. Though the adoption deed is stated to have been executed in 1975, the suit premised on the same was filed in 2005, i.e. after 30 years. Pertinently, the plaintiff claimed that he left the suit property in 1990 on account of disputes being raised by the defendants. He did not stake his claim to the suit property on the basis of the said adoption deed in the year 1990, and kept quiet about it till 2005, i.e. for about 15 years. The adoption deed surfaced only in the year 2005 when the suit was filed.

22. In the meantime, in several undisputed Government records and

school records the name of the plaintiff's father continued to be reflected as that of his natural father Sh. Ram Narayan. In this factual background, the adoption deed set up by the appellant/ plaintiff is fraught with contradictions and suspicion.

23. That apart, in my view, the First Appellate Court was right in observing that even legally, the adoption deed set up by the plaintiff/ appellant could not be said to be valid, inter alia, on account of the embargo contained in Section 5(2) of HAMA. The normal rule is that if a person goes missing, there is no reason to presume he is dead till expiry of 7 years. It is only thereafter that he would be presumed to be dead, and the date of his death would be on the expiry of the said period of 7 years and not earlier. This position is recognized in *Zishan Khan* (supra) itself. No doubt, there are exceptions to this rule, as for example, where a person undertakes a journey by sea and the ship he is sailing on, sinks. Similarly, if a person goes to war and does not return, it may be presumed that he died in action when he went missing. However, in the facts of the present case, there is no reason to raise any such presumption that Sh. Virender Kumar died on the date when he went missing, i.e. 20.07.1969. The police complaint Ex.DW-1/1 merely records that Sh. Virender Kumar had gone to the river Yamuna on the said day in the morning. Merely because a person goes to a river for a bath and does not return, it cannot be presumed that he has drowned in the river on the same day. It is not the appellant's case that either his body or any of his belongings or clothes were recovered from the river some time after Sh. Virender Kumar had gone missing.

24. In the factual background of the present case, in my view, the decision

in *Zishan Khan* (supra) relied upon by the appellant does not come to the aid of the appellant. The appellant has not advanced any other submission qua the findings returned by the courts below.

25. For all the aforesaid reasons, I find no merit in the present appeal and the same is, accordingly, dismissed.

VIPIN SANGHI, J.

DECEMBER 09, 2015

B.S. Rohella