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

**SECOND APPEAL NO.522 OF 1991**

Uttam Rajaram Salunke  
(Died) Through Legal Heir

APPELLANT

Kishor Uttam Salunke  
Age – 31 years, Occ – Agriculture  
R/o Shirodi (Bk), Taluka – Phulambri,  
District - Aurangabad

VERSUS

Tulsabai wd/o Vinayak Salunke  
Age – 25 years, Occ – Household,  
R/o Sherudi Bk, Taluka – Khultabad,  
District – Aurangabad  
At present residing at Adgaon,  
Taluka – Sillod, District – Aurangabad

RESPONDENT

.....  
Mr. N. K. Kakade h/f Mr. A. N. Kakade, Advocate for appellant  
Mr. R. D. Mane, Advocate for respondent  
.....

**[CORAM : SUNIL P. DESHMUKH, J.]**

**DATE : 4<sup>th</sup> JANUARY, 2016**

**ORAL JUDGMENT :**

1. This is a second appeal by the unsuccessful defendant against judgment and decree dated 22<sup>nd</sup> August, 1991 passed in Regular Civil Appeal No. 45 of 1986 by Additional District Judge,

Aurangabad reversing judgment and order of Civil Judge, Junior Division, Aurangabad dated 20<sup>th</sup> December, 1985 in Regular Civil Suit No. 305 of 1983.

2. Regular Civil Suit No.305 of 1983 had been instituted by plaintiff – present respondent seeking declaration that adoption deed dated 15<sup>th</sup> June, 1982 is void and does not affect her rights to the properties left behind by her husband Vinayak and for possession of the agricultural land and house property referred to in the plaint.

3. Undisputed facts in the matter are – the plaintiff is the widow of deceased Vinayak. Vinayak and Rajaram were real brothers. Rajaram had three sons. Uttam – the defendant in aforesaid suit was middle son of Rajaram. The plaintiff and deceased Vinayak had no issue from the marital relationship. Vinayak died on 16<sup>th</sup> November, 1982 at Sherodi, Taluka-Khultabad.

4. Parties hereto are being referred to by their status in the suit, for convenience.

5. The plaintiff instituted aforesaid suit contending that after mourning period after death of Vinayak, she had been to her

parents house at Adgaon in Sillod Taluka. While she returned from her parents' house, she found that her house was occupied by defendant – Uttam. The defendant claimed ownership over the properties referring to his adoption by her deceased husband Vinayak. Upon learning about the same, she enquired into the matter and found that the adoption is not legally tenable and it was not legal and valid and the deed had been executed without taking her consent and further that the defendant was not capable of being adopted, him having been married and over the age of 15 years. Since the plaintiff had been dispossessed of the properties legitimately belonging and coming to her, she had instituted the suit seeking declaration and possession.

6. Upon appearance, defendant – Uttam submitted his written statement at Exhibit-11. The defendant admitted ownership of deceased Vinayak over the properties. He claimed that he is in possession of the properties, being adopted son of deceased Vinayak. It is further averred that while Vinayak had decided to adopt the defendant, the plaintiff had given consent to the same. It is averred by him that after death of Vinayak, the plaintiff continued to reside with the defendant. After some time she went away to her parents' house at Adgaon in Sillod Taluka. According to him, the plaintiff had changed her mind in respect

of the adoption at the instigation of her brother and parents, in order to grab the suit properties. He claimed that he was 23 year old when he was adopted. It had further been asserted that the parties belong to '*Maratha-Kunbi*' community wherein there is a custom to adopt person of any age, including a married one. It is, therefore, claimed that the adoption is legal and valid.

7. The defendant in his additional written statement has referred to that initially, his mother was not inclined to give him in adoption, however, since Vinayak suffered from *tuberculosis* and *asthma* and upon his renewed request through a mediator, she acceded to the request and accordingly he was given in adoption. The ceremony of adoption had taken place according to the customs on 13<sup>th</sup> June, 1982 and deed in respect of the same came to be registered on 15<sup>th</sup> June, 1982 and mutation accordingly had been effected in respect of the suit properties.

8. Upon aforesaid pleadings, the trial court framed issues with respect to proof by the defendant about consent to the adoption of defendant by the plaintiff, about custom in '*Maratha-Kunbi*' community of adoption of person of any age including married one, about entitlement of the plaintiff to possession of the suit properties, *mesne* profits and about execution of the

adoption deed.

9. The trial court considered that the defendant has been able to prove consent by the plaintiff to the adoption, execution of adoption deed as also the custom in '*Maratha-Kunbi*' community about adoption of a person of any age including a married person and found that the plaintiff is not entitled to possession of the suit properties and consequently *mesne* profits.

10. The trial court has referred to the depositions by the defendant's witnesses about holding of ceremony of adoption and presence of the plaintiff in the same and considered that evidence of witnesses Digamber Joshi, Vasant Jayant Lahane, Gulab Rajaram Salunke, Laxman Barku, Sakharam Jadhav and attesting witnesses of adoption deed at Exhibit-42 Fakirao Bhaurao Salunke and Deorao Parbat, shows that the plaintiff had been present in the adoption ceremony. Digambar Joshi – DW-2, was the priest who had caused performance of necessary rites for adoption of the defendant and that the other witnesses have corroborated his evidence.

11. The trial court had repelled submissions on behalf of the plaintiff about the witnesses being stereotype, considering that the number of persons had witnessed the adoption ceremony

and discrepancies occurring in their evidence would not materially affect credibility of their evidence.

12. The trial court has further considered that having regard to section 16 of the Hindu Adoptions and Maintenance Act, 1956, the adoption as reflected in the registered deed dated 15<sup>th</sup> June, 1982 would have presumptive value. The adoption deed is registered and that attesting witnesses have been examined. The defendant has proved that the adoption deed has been duly executed. As such, the adoption deed was held to be valid. The trial court had also observed that there is sufficient evidence on record to show that there subsists a custom in 'Maratha-Kunbi' community about adoption of a person of any age including married person. The suit, as such, came to be dismissed.

13. The matter was taken in appeal by the plaintiff. The appellate court framed points for consideration about validity and legality of adoption of defendant – Uttam and found that having regard to mandate about consent of wife having not been satisfied, the adoption not to be legal and valid.

14. Substantial question of law that arises is -

*“ Whether the deed of adoption of defendant Uttam can be said to be valid in absence of consent by the plaintiff ?”*

15. Mr. N. K. Kakade, learned advocate appearing for the appellant – defendant submits that the trial court had first hand experience of appreciation of evidence by the witnesses on behalf of the defendant and it had come to the conclusion that the plaintiff - wife of deceased Vinayak had been present during the adoption ceremony on 13<sup>th</sup> June, 1982. He further submits that not only that during the ceremony plaintiff had been present, but even thereafter, while the adopted son and his wife started residing with Vinayak and plaintiff during lifetime of Vinayak, the plaintiff not even by semblance suggested that there was absence of consent to said adoption. It was only after death of Vinayak relations became sour and the plaintiff has turned around. According to learned senior counsel this is sufficient indication of the fact that adoption of the defendant had been with the consent of the plaintiff. He submits that the law does not require any overt action on the part of the wife to show consent to adoption of a person. The conduct of the plaintiff in present case is sufficiently eloquent to establish her consent to the adoption of the defendant and as such, requirement of law about consent stands satisfied and upon that ground judgment and finding of the trial court could not have been reversed by the appellate court.

16. Mr. Kakade, learned advocate, further submits that almost all the witnesses on behalf of the defendant have testified presence of the plaintiff in the adoption ceremony and that their evidence cannot be said to have been rebutted by the plaintiff. According to him, while evidence shows presence of plaintiff during the adoption ceremony, the appellate court has absolutely misdirected itself considering that quality of evidence may not help the defendants.

17. According to Mr. Kakade, in the present case, evidence favours the defendant more quantity and quality-wise. He further submits that the appellate court has considered that there is custom of adoption of person of any age and even married person in the '*Maratha Kunbi*' community and in such a case, the appellate court ought not to have suspected validity of adoption deed on the consideration of difference in age between the plaintiff and the defendant, once having considered that there is custom in said community. Yet, according to him, this consideration to a large extent appears to have influenced the decision of the appellate court. Mr. Kakade, refers to a decision in the case of "*Hanmant Laxman Salunke V. Shrirang Narayan Kanse*" reported in *AIR 2006 123* to support his submission that there is

custom and usage of adoption of a person more than 12 years of age and a married person.

18. Mr. Kakade further refers to another judgment in case of *“Golak Chandra Rath V. Krutibas Rath”* reported in *AIR 1979 ORISSA 205* in order to support his submission, having regard to provisions of section 16 of the Hindu Adoptions and Maintenance Act, that when there is duly registered document in support of the adoption, the court shall presume that the adoption was in compliance with the provisions of the Act, unless and until it is disproved. He, therefore, urges to set aside the judgment and decree of appellate court and restore the judgment and decree of trial court.

19. Mr. R. D. Mane, learned advocate appearing for the plaintiff – respondent submits that the appellate court had considered the evidence on record and found that there was no consent by the plaintiff to adoption of the defendant. He submits that the persons who have deposed to alleged fact about her presence during adoption ceremony are interested witnesses and have deposed in stereotype manner about her presence. According to him, however, mere presence in adoption ceremony would not tantamount to consent as required under section 7 of the Hindu

Adoptions and Maintenance Act, 1956. He submits that the defendant, according to his own say, was 23 year old and married when the adoption had taken place, while the plaintiff had been merely 25 years of age when the suit was instituted. As such, she was of almost the same age as that of the purportedly adopted son. The age difference cannot be said to be as required under the provisions of section 11 (iv) of the Hindu Adoptions and Maintenance Act, 1956. He submits that the appellate court has also referred to that the priest Digambar Joshi had no knowledge about proper ceremony and/or rites for adoption and his such lack of knowledge has been exposed in the evidence. It further has been considered by the appellate court that although it is the case of the defendant that invitation cards with respect to adoption ceremony had been printed, yet not a single person from parental side of the plaintiff had been invited to the adoption ceremony and there was no reason coming forward from the witnesses as to why no invitation had ever been given to the relatives of the plaintiff on her parental side. It has further come on record, according to him, that there was no such invitation card printed and no such invitation card has been placed on record. He thus submits that it is not the quantity of evidence, but quality of evidence has been rightly

judged and appreciated by the appellate court refusing to consider that the evidence would lend credibility to case of the defendant. He submits that the appellate court is the last fact finding court and its appreciation not being perverse, is not liable to be interfered with by the second appellate court.

20. Perusal of the judgment of the trial court depicts that it has been impressed by the number of witnesses deposing to holding of adoption ceremony on 13<sup>th</sup> June, 1982.

21. The trial court has vaguely observed that in Maharashtra Law Journal at page 729, the court had observed at page 738 that witnesses could not be said to be liars in cases where there are more than 4 to 5 witnesses who come forward to depose probability of truth. This observation appears to have been taken randomly without reference to its context. What appears to have weighed with the trial court is that seven witnesses have been examined by the defendant on the factum of adoption.

22. While the evidence was being considered by the appellate court, it has found that the evidence does not refer to material ceremonial rites and rituals about giving and taking on lap of the adopted person. None of the witnesses has given any evidence in respect of the same.

23. Except oral evidence, with regard to ceremony, which the appellate court has found not to be reliable, no other material has been placed on record regarding the factum of the ceremony.

24. Although case is sought to be made out by defendant Uttam that invitation cards with respect to organization of ceremony had been printed, however, no credible material in respect of the same had ever been produced. It is intriguing as to how not a single person from the parental relations of the plaintiff had been present in the stated adopted ceremony. The appellate court has observed that the person / priest of the ceremony did not have proper knowledge of the ceremonial rituals for adoption. The evidence with respect to the same, as appreciated by the appellate court cannot be said to be a strayed appreciation.

25. The position, even according to the defendant also shows that deceased Vyankat had been suffering ailment. As such, it emerges that Vyankat had not been keeping good health and was not to live long. It is in the scenario, the deed of adoption having been executed, without the consent of plaintiff assuming that such an adoption may vest the property absolutely in Uttam

and able to keep away the plaintiff from the property.

26. Over and above this, it would be worthwhile to refer to section 11 (vi) of the Hindu Adoptions and Maintenance Act, 1956 reading thus -

*“ 11 (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.”*

27. In the evidence as appearing, none of the parents of defendant Uttam appear to have been examined in the present matter. Looking at the proximity between the date of execution of adoption deed and the date of death of Vyankat and further the contention on behalf of the plaintiff that the deceased Vyankat used to consume liquor and it is in inebriated condition adoption deed has been got executed, gives an indication of reason as to why parents rather mother of defendant Uttam had been unwilling to give in adoption to Vyankat, her middle son Uttam. Provision refers to that the parents must have actually

given child in adoption. Parents comprise father and mother. Adoption deed does not bear Uttam's - the defendant's real mother's signature. Nor does the deed refer to her consent. As such, evidence is deficient of showing compliance of requirement under section 11 (vi) of the Hindu Adoptions and maintenance Act, 1956. Oral evidence on behalf of the defendant falls short of lending any assistance to the legality of the adoption. Even otherwise, it may be considered that the adoption may not keep absolutely away a widow from the property of her husband.

28. It is being contended on behalf of defendant that the adoption deed is not susceptible to any cracking / doubt, since it is accorded presumption in law. While such a submission is to be considered, one may also take into consideration that an adoption to be valid would require consent of wife. Oral evidence about wife's presence in the adoption ceremony would not be sufficient to deduce consent to adoption of the defendant. There is no credible material appearing on record to establish consent by wife to stated adoption of the defendant. The deed of adoption appears to have been executed not only in the absence of the wife, but also in absence of her consent.

29. In the circumstances, legal position being that in such

cases, consent of wife is mandatory, the appellate court has rightly considered that the deed of adoption cannot be said to be valid. Aforesaid is amply borne out from the judgment in case of “*Ghisalal V. Dhapubai*” reported in *AIR 2011 SC 644* relied on by learned advocate Mr. R. D. Mane. Relevant extract from the same is worthwhile to be reproduced herein below -

*“ Hindu Adoptions and Maintenance Act (78 of 1956), 2.7, Proviso – Adoption by male Hindu – Consent of wife – Proof – Presence of wife as mute spectator in ceremony of adoption of son by her husband – No active participation by wife – Her consent to adoption cannot be presumed – In absence of her consent, adoption by husband would be invalid.*

*Judgment of M. P. High Court, D/12-9-2000, Reversed.*

*The consent of wife envisaged in proviso to section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If adoption by a Hindu male becomes subject-matter of challenge before the Court, the party supporting 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 ceremonies of adoption with an affirmative mindset to support the action of husband to take a son or daughter in adoption. The presence of wife as a spectator in assembly of people who gathered at 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 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.*

*Neither adopted son nor any of the witnessed examined by him stated that before taking in adoption, husband had consulted wife or taken her in confidence and the latter had given her consent or agreed to adoption of son or that she had taken prominent part in adoption ceremonies. All of them made a parrot like statement that wife was sitting with other women below the platform (chabutra). By no stretch of imagination this could be equated with her active participation in adoption ceremonies so as to enable the courts to draw an inference that she had given consent for adoption.*

*Further consent cannot be presumed by relying upon contents of deed of adoption in which husband is said to have recorded that it was his and his wife's esteemed desire to take son in adoption. It was neither the pleaded case of husband nor any evidence was produced by him to prove that wife was a signatory to said deed or that she was present at time of execution and / or registration of deed. Therefore, the contents of deed could not be made basis for assuming that wife was a party to adoption.”*

Aforesaid extract from the judgment of the Supreme Court applies on all fours to the case in hand.

30. The appreciation by the appellate court that evidence falls short of establishing consent and that no credibility can be given to the adoption ceremony, being suspicious, would not be amenable to be dubbed as perverse or inappropriate. Adoption deed appears to have been executed keeping the plaintiff in dark and away.

31. Substantial question of law, as such, is answered in negative. The adoption and the deed of adoption cannot be said to be legally valid and as such is inoperative.

32. Second appeal, in the circumstances, fails and stands dismissed. Pending civil application, if any, stands disposed of.

**[SUNIL P. DESHMUKH, J.]**

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