

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

SECOND APPEAL NO.445 OF 2018

Shakuntalabai @ Sakhubai Sajan Bhoi

Age : 52 years, Occu : Labour,
R/o. Near Bus Stand, Musalman
Mohalla, Navapur, Tq. Navapur,
Dist. Nandurbar.

..APPELLANT
(Orig. Plaintiff)

VERSUS

Gokul S/o. Daga Bendare (Died)
Through Legal Heirs:

- A. Lilabai Gokul Bendare
Age : Major, Occu : Nil,
- B. Puja Gokul Bendare
Age : Minor, Occu : Education
- C. Guddi Gokul Bendare
Age : Minor, Occu : Education

Respondents No.B and C are minor
U/G of their Mother i.e. Respondent No.A

All R/o. Bhavsar Galli, Pimpalner,
Tq. Sakri, Dist. Dhule

.. RESPONDENTS
(Orig. Defendants)

....
Shri V.B. Patil, Advocate for the appellant.
....

CORAM : P. R. BORA, J.
DATE : 09/08/2018

ORAL JUDGMENT :

1. Heard Shri V.B. Patil, the learned Counsel appearing
for the appellant.

2. The present appellant had filed Regular Civil Suit No.2 of 2006 in the Court of Jt. Civil Judge, Junior Division, Sakri against one Gokul Daga Bendare for cancellation of the sale-deed dated 22.04.1999 executed by one Banubai Ekaram Bhoi in respect of the City Survey No.578 (Gram Panchayat House No.1703) in favour of said Gokul Daga Bendare and for possession of the said house. Said Gokul Daga Bendare died during pendency of the said civil suit and his legal heirs were taken on record, who are the respondents in the present appeal. The aforesaid civil suit was dismissed by the trial Court. Against the said Judgment, the appellant preferred Regular Civil Appeal No.28 of 2013 in the Court of District Judge at Dhule. The learned Ad-hoc District Judge-1, Dhule vide judgment delivered on 01.08.2017 dismissed the said appeal. Aggrieved by, the appellant has preferred the present Second Appeal. The appellant as well as the respondents are hereinafter referred to as their original status in the civil suit i.e. the plaintiff and the defendant.

3. It was the contention of the plaintiff in the civil suit

filed by her that, she was taken in adoption by Banubai and Ekaram Bhoi since they did not have any issue of their own. According to the plaintiff, she, until her marriage resided with Banubai and Ekaram. It was also her contention that, though Banubai and Ekaram performed her marriage, the marriage so performed could not subsist and she, therefore, returned to her parents i.e. Banubai and Ekaram.

4. It was the further contention of the plaintiff that, defendant Gokul, who was the son of the real sister of Banubai, was brought to Pimpalner by Banubai since he was jobless and by playing fraud on Banubai he got executed the sale-deed of the suit house in his favour. It was the contention of the plaintiff that, after the death of Banubai on 26.10.2005, she had become the sole successor of the estate left behind by Banubai being her adoptive daughter inclusive of the suit property i.e. City Survey No.578 (Gram panchayat House No.1703). According to the plaintiff, since sale-deed dated 22.04.1999 was got executed by defendant – Gokul in his favour by playing fraud on Banubai, the same was liable to be declared as null and void. The plaintiff had, therefore, sought the declaration that, the sale-deed dated

22.04.1999 is null and void and for recovery of the possession of the said house.

5. As I noted herein above, defendant Gokul died during pendency of the suit and his legal heirs were taken on record. The legal heirs of deceased Gokul i.e. present respondents, however, did not cause their appearance in the matter and the suit proceeded *ex-parte*. The learned trial Court after having considered the evidence placed on record before it by the plaintiff, dismissed the suit vide Judgment and order passed on 08.03.2010. The plaintiff thereafter filed the appeal and, as noted herein above, the appeal was also dismissed by the District Court.

6. Shri V.B. Patil, the learned Counsel appearing for the appellant assailed the Judgments passed by the Courts below on several grounds. The learned Counsel submitted that, the Courts below have grossly erred in recording a finding that, the plaintiff could not prove the fact of her adoption by Banubai and Ekaram. The learned Counsel further submitted that, in absence of any contrary evidence on record, there was no reason for the

Courts below to disbelieve and discard the statement on oath made by the plaintiff that, she was lawfully adopted by Banubai and Ekaram. The learned Counsel further submitted that, the Courts below have also failed in not considering the evidence placed on record in the form of ration card, evidencing that the plaintiff was residing with Banubai. The learned Counsel further submitted that, the Courts below have also gone wrong in recording a finding that, the plaintiff did not prove the allegation against the defendant that, by playing fraud on deceased Banubai, he got executed the sale deed of City Survey No.578 in his favour. The learned Counsel submitted that, when the fact of adoption itself was not in dispute, there was no reason for the Courts below to indulge in further inquiry, whether the plaintiff proves her adoption by deceased Banubai. According to the learned Counsel, on this ground alone, the appeal filed by the appellant – plaintiff deserves to be allowed and eventually the suit filed by her deserves to be decreed.

7. After having considered the submissions advanced by the learned Counsel appearing for the appellant – plaintiff and on perusal of the Judgments passed by the Courts below, it does

not appear to me that, any case is made out by the appellant-plaintiff so as to cause interference in the Judgments rendered by the Courts below. It is true that, the defendants though were duly served, did not cause their appearance in the Court and the civil suit was, therefore, proceeded *ex-parte* against them. However, the contention of the appellant – plaintiff that, in such circumstances, whatever was stated by her in the suit plaint ought to have been as it is accepted by the Court, is difficult to be accepted. The plaintiff was under an obligation to prove the fact pleaded by her that, she was the adoptive daughter of deceased Banubai and deceased Ekaram.

8. From the evidence of the plaintiff adduced before the trial Court, it is quite evident that, the plaintiff did not bring on record any evidence to show that the mandatory requirements in the form of ceremonies were duly performed at the time of her adoption by deceased Banubai and deceased Ekaram. As has been observed by the trial Court, the adoption has to be proved as per the provisions of the Hindu Adoption and Maintenance Act, 1956 and more particularly, Section 6 thereof. The plaintiff did not bring on record any evidence to

show that, her biological mother namely Manibai and her biological father had consented for giving her in adoption to deceased Banubai. The learned trial Court has also observed that, neither the plaintiff has brought the iota of evidence to show that, at the relevant time there was no biological issue alive of deceased Banubai and deceased Ekaram, nor it was duly proved by the plaintiff that, at the relevant time, she was younger by 21 years to her adoptive father. The trial Court has further held that, the plaintiff also did not bring on record any evidence to show that, the ceremonial part for adoption which is mandatory was performed. Admittedly, the plaintiff did not examine any witness, to prove her adoption and the ceremonies performed at the time of adoption. The plaintiff, thus, failed in proving the fact pleaded by her that, she was adoptive daughter of deceased Banubai and deceased Ekaram. In the circumstances both the Courts below have recorded a concurrent finding that the plaintiff failed in proving her adoption. It does not appear to me that, the Courts below have committed any error in recording the finding that, the plaintiff failed in proving her adoption by deceased Banubai and deceased Ekaram.

9. Similarly, from the material on record, it is equally evident that, no evidence was brought on record by the plaintiff to prove that, in the transaction between deceased Banubai and defendant Gokul in respect of the sale of House Property any fraud was involved. It need not be stated that, the allegation of fraud has to be strictly proved by the party who makes such allegation by bringing on record cogent evidence in that regard. As has been observed by the Courts below, the plaintiff has miserably failed in bringing on record any such evidence. Thus, the two basic facts, which must have been proved by the plaintiff, have not been proved by the plaintiff. The suit filed by the plaintiff was, thus, liable to be dismissed and it appears to me that, the same was rightly dismissed by the trial Court. First Appellate Court has rightly concurred with the finding recorded by the trial Court.

10. The First Appellate Court has relied upon the Judgment of the Hon'ble Apex Court in the case of **Neelima Mukharji Vs Kanta Bhushan Ghosh, A.I.R. 2001, S.C. 2725**, wherein it is laid down that, the adoption cannot be believed if there is no iota of evidence to show that, any ceremony of the

adoption was performed and that the adopted son or daughter was actually handed over to the adoptive mother and father by the biological father and mother. The learned Counsel for the appellant made a feeble attempt by relying on the judgment of the Hon'ble Apex Court in the case of **L. Debi Prasad (Dead) By L.Rs. Vs. Tribeni Devi, AIR 1970 (SC) page no.1286** to submit that, in absence of any challenge to the contentions raised by the plaintiff that she is the adoptive daughter of deceased Banubai and further considering that, she was recognized by the society for a long time to be the adoptive daughter of deceased Banubai, merely on the ground that, she did not bring on record any evidence proving the ceremonies of adoption were not performed, I am, however, unable to agree with the submissions of the learned Counsel. The facts in the case (cited supra) before the Hon'ble Supreme Court were quite distinct than the facts involved in the present matter. In the present case, even the basic facts have not been proved by the plaintiff, as to when, she was taken in adoption by deceased Banubai. There is further no evidence that, her adoption was recognized by the society. Merely by filing ration card, the said fact could not have been proved.

11. After having considered the entire evidence on record, it does not appear to me that, any case is made out or any substantial question of law is raised by the appellant so as to cause interference in the Judgments rendered by the Courts below. The appeal being devoid of any substance deserves to be dismissed and is accordingly dismissed.

[PR. BORA]
JUDGE