

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.158 of 2011

Ashok Gupta, S/o Late Mangli Prasad Gupta, aged about 49 years, Occupation Business, R/o Mahalpara Road, Baikunthpur, Tah.Baikunthpur, Distt. Korea (CG)

----- Appellant/  
(Plaintiff)

Versus

1. Vinod Gupta S/o Late Shivratan Gupta, aged about 57 years, Occupation Business, R/o Mahalpara Road, Baikunthpur, Tah. Baikunthpur, Distt.Korea (CG)
2. Smt.Krishna Gupta W/o Late Prabhat Gupta, aged about 48 years,
3. Smt.Jyoti Gupta D/o Late Prabhat Gupta, aged about 25 years,
4. Suraj @ Bunti Gupta S/o Late Prabhat Gupta, aged about 20 years,
5. Neha Gupta D/o Late Prabhat Gupta, aged about 17 years, minor through her natural Guardian, mother, respondent No.2

All are R/o Mahalpara Road, Baikunthpur, Tah. Baikunthpur, Distt. Korea (CG)

----- Respondents/  
(Defendants)

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For Appellant/Plaintiff: Mr.Shakti Raj Sinha, Advocate  
For Respondents/Defendants:Mr.Sanjay Patel, Advocate

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Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

24/02/2021

1. The substantial question of law involved, formulated and to be answered in the plaintiff's second appeal is as under: -

"Whether both the Courts below are justified in holding that the plaintiff is not the adopted son of Mangli Prasad by recording a finding perverse to the record ?"

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court.)

2. The suit property was originally held by Mangli Prasad Gupta. Defendant No.1 is his brother's son i.e. Shivratan Gupta, defendant No.2 is daughter-in-law of Shivratan and defendants No.3 to 6 are granddaughters and grandsons of Shivratan. Plaintiff-Ashok Gupta filed a suit that he is adopted son of Late Shri Mangli Prasad Gupta as he was taken in adoption on 30.7.79 vide Ex.P-1 and Mangali Prasad Gupta had also executed the Will in favour of the plaintiff on 29.3.1982 vide Ex.P-2 and as such, he is entitled for decree of declaration of title, partition and permanent injunction.

3. Resisting the suit, the defendants filed their written statement and denied the averments made in the plaint stating inter-alia that the plaintiff is not adopted son of Late Shri Mangli Prasad Gupta and as such, the suit be dismissed.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its

judgment and decree dated 31.10.2009, dismissed the suit holding that the plaintiff has failed to prove that he is adopted son of Mangali Prasad Gupta and further held that no such Will (Ex.P-2) was executed by Mangli Prasad Gupta in favour of the plaintiff as attesting wittiness have not proved the execution and attestation of said Will. On appeal being preferred, the first appellate Court dismissed the appeal and affirmed the judgment and decree of the trial Court, against which, this second appeal under Section 100 of the CPC has been filed before this Court in which one substantial question of law have been formulated which has been set out in the opening paragraph of this judgment.

5. Mr.Shakti Raj Sinha, learned counsel for the appellant/plaintiff, would submit that both the Courts below have concurrently erred in holding that the plaintiff is not adopted son of Mangli Prasad Gupta. Therefore, finding recorded by both the Courts below is perverse and contrary to the record and deserve to be set-aside.

6. On the other hand, Mr.Sanjay Patel, learned counsel for the respondents/defendants, would submit that both the Courts below have rightly held that the plaintiff is not adopted son of Mangli Prasad Gupta and as such, the second appeal deserves to be

dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions and went through the records with utmost circumspection.
8. The short question for consideration would be, whether the fact of adoption of the plaintiff by Mangali Prasad Gupta is established and he is the adopted son of Mangali Prasad Gupta?
9. In order to consider the said plea, it would be appropriate to notice the necessary provisions in this regard contained in the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the Act of 1956'). Section 10 of the Act of 1956 provides as under: -

**"10. Persons who may be adopted.**—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely—

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

10. Section 10 of the Act of 1956 states about the persons who may be adopted. Section 11 speaks about the other conditions for a valid adoption. Clauses (4) and (6) of Section 11 are relevant which are extracted herein-below: -

**"11. Other conditions for a valid adoption.**

—In every adoption, the following conditions must be complied with:

(i) to (iii) xxx xxx xxx

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) xxx xxx xxx

(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 homan*, shall not be essential to the validity of an adoption."

11. For a valid adoption, the physical act of giving and taking is an essential requisite. The give and take in adoption is a requirement under Section 11(vi) of the Act of 1956 and stands as a *sine qua non* for a valid adoption (see Jai Singh v. Shakuntala<sup>1</sup>).

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1 (2002) 3 SCC 634

12. In the matter of Kishori Lal v. Chaltibai<sup>2</sup>, the Supreme Court has held that as an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth.

13. The said judgment has further been followed in the matter of Madhusudan Das v. Smt. Narayanibai (Deceased) by L.Rs. and others<sup>3</sup> in which it has been held that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. It has been further held as under: -

“For a valid adoption, the ceremony of giving and taking is an essential requisite in all adoptions, whatever the caste. This requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption. In some cases, to complete the adoption a “datta homam” has been considered necessary, but in the case of the twice-born classes, no such ceremony is needed if the adopted boy belongs to the same gotra as the adoptive father.”

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2 AIR 1959 SC 504

3 (1983) 1 SCC 35

14. Section 10(iv) of the Act of 1956 clearly provides that in order to be taken in adoption, the person to be adopted, he or she, must not have completed the age of 15 years, unless there is a custom or usage applicable to the parties which permits adoption of a person of more than 15 years of age.

15. Reverting to the facts of the present case, in the instant case, it is the case of the plaintiff that Mangli Prasad Gupta had no issue, therefore, he has adopted the plaintiff as adopted son on 30.7.79 (Ex.P-1). The trial Court held that the plaintiff is not adopted son of Mangali Prasad Gupta vide Ex.P-1 and Ex.P-1 is not proved, whereas the first appellate Court held that the date of Ex.P-1 is 30.7.79 and the suit was filed on 1.3.2006 in which he (plaintiff) has stated his age to be 49 years. Accordingly, the plaintiff could have born in the year 1957 and his age would be appropriately 22 years on the date of execution of adoption deed dated 30.7.89 (Ex.P-1) and by virtue of Section 10(iv) of the Act of 1956 the plaintiff could not have taken in addition. In order to be taken in adoption after completion of 15 years, there must be a custom or usage applicable to the parties which permits adoption of a person of more than 15 years of age and the plaintiff has not

pleaded and proved any such custom permitting his adoption after the age of 15 years. The said finding is correct finding based on evidence available on record as the plaintiff has failed to plead and establish any custom in which the person, who has completed the age of 15 years, can be taken in adoption, as such, finding recorded by the first appellate Court in this regard is correct finding based on evidence available on record. Similarly, the first appellate Court has also recorded a finding that the plaintiff has taken in adaption only by Sitaram Gupta, whereas according to Section 11(vi) of the Act of 1956, it must have been pleaded and proved that the plaintiff was actually given in adoption by their parents i.e. natural father and mother, whereas Ex.P-1 only states that he was given in adoption only by natural father Sitaram, as such, adaption deed (Ex.P-1) is also contrary to the provisions contained in Section 11(vi) of the Act of 1956. Both the Courts below have also recorded a finding that the plaintiff has not examined four witnesses of adoption deed namely Matadin, Ambalal, Kanhaiyalal and Fulchand and scribe Jag Mohan Lal (PW-2) has not supported the fact of adoption and made contradictory statement, as such, finding recorded by two Courts below that

the fact of adoption has not been proved in accordance with law and alleged adoption (Ex.P-1) is hit by the provisions contained in Sections 10(iv) and 11(vi) of the Act of 1956 is a finding of fact based on evidence available on record, as such, the first appellate Court is absolutely justified in affirming the judgment and decree of the trial Court. I do not find any illegality or perversity in the said finding. The substantial question of law is answered in favour of the defendants and against the plaintiff.

16. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

17. A appellate decree be drawn-up accordingly.

**Sd/-**  
(Sanjay K. Agrawal)  
Judge

B/-