

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

S.A. No. 173 of 1997

SHRI MURARI MOHAN MISRA
VS.
SHRI SHYAMA CHARAN MISRA & ORS.

For the appellant:	Mr. Kanailal Mondal, Ms. Susmita Pal.
For the respondent no. 3:	Mr. Asit Kumar Rout, Mr. Sibasis Ghosh.
For the respondent no. 2:	Mr. Rajat Kumar Dhar.
For the respondent no. 1:	Mr. Falguni Bandopadhyay

Heard on : 28.03.2022

Judgment on : 20.04.2022

Biswajit Basu, J. :

1. The present second appeal is at the instance of the plaintiff in a suit for eviction of licensees and is directed against the judgment and decree dated March 21, 1996 passed by the Assistant District Judge, District 24-Parganas (Undivided) in Title Appeal No. 53 of 1995 thereby reversing the judgment and decree dated February 28, 1995 passed by the 3rd Court, Learned Munsif, Sealdah, District- 24 Parganas(Undivided) in Title Suit no. 477 of 1986.

2. One Surendra Nath Mishra was the admitted owner of the premises No. 15 Pravuram Sarkar Lane, Kolkata-700015. The plaintiff claiming to be the adopted son of the said admitted owner filed the said suit for eviction of the defendants from the entire ground floor and one room with one R.T. shed kitchen on the second floor of the said premises, describing them as licensees under him. The defendants are full blood brothers of the plaintiff. The plaintiff in the suit also claimed title over the suit premises on the basis of a deed of gift allegedly executed by the said Surendra Nath Mishra.

3. The defendants contested the said suit on a defence that the plaintiff is not the adopted son of the said Surendra Nath Misra, and the deed of adoption on the basis of which the plaintiff is claiming title over the suit premises was never acted upon, further defence of the defendants in the said suit was that on the death of the admitted owner of the suit premises, their great-grandfather, they have acquired right, title and interest over the suit property as co-sharers thereof.

4. The learned Trial Judge, on the basis of the pleadings of the parties framed the following issues:

"1. Is the suit maintainable in its present form?"

2. Are the defendants licensees over the suit property or are living there on their own right?"

3. Is the plaintiff, the adoptive son of Suren? If so, is the exclusive owner of suit property?"

4. Is the plaintiff entitled to get the decree as prayed for?"

5. To what other reliefs, if any is the plaintiff entitled?"

5. The plaintiff in the suit deposed as P.W.₁ and cited another witness to prove the ceremonies performed at the time of adoption of the plaintiff. The plaintiff proved the deed of adoption dated June 18, 1948 as Exhibit. 1, the tax receipt of the said premises issued by the Kolkata Municipal Corporation as Exhibit. 2, the certificate issued by the Head Master of Buthnath Mahamaya Institution, the school of which the plaintiff was a student as Exhibit. 3, the affidavit affirmed by the biological father of the plaintiff on June 18, 1960 as Exhibit.4, the record of rights of some lands as Exhibit. 5, a sale deed executed by the plaintiff on December 12, 1961 as Exhibit. 6 and the certificates issued by the Chief Operating Manager of the Calcutta Tramways Company Ltd., the erstwhile employer of the plaintiff as Exhibit. 7(series).

6. The defendants on the other hand cited four witnesses including the biological mother of the parties. The defendants proved the death certificate of Surendra Nath Misra as Exhibit. A, two trade licenses, one in the name of the Karunamoy Misra and other in the name of the plaintiff as Exhibits.B and B1 respectively, one letter issued by the Head Master of the aforesaid School authorising one Maniklal Pal to depose in the suit to prove the fees register of the said school for the years 1955, 1956 and 1957 as Exhibit. C and the appointment agreement of the plaintiff in the Calcutta Tramways Company Ltd. as Exhibit. D.

7. The said deed of adoption since was executed in the year 1948, i.e. prior to the commencement of the Hindu Adoptions and Maintenance Act, 1956,

both the Courts below, in deciding the issue involved in the suit placed reliance on different sections under Chapter XXIII of Mulla on principles of Hindu Law.

8. The biological mother of the plaintiff deposed in the suit as D.W.₁. She in her evidence stated that she never gave the plaintiff in adoption as he was her eldest son. The learned Trial Judge held that since under the old Hindu Law, the primary right to give his son in adoption was with the father and the mother had no right to give her son in adoption without the permission of the father, while the father is alive and capable of consenting, the consent of the mother in giving the plaintiff in adoption was not necessary and discarded the evidence of the said witness. The defendants' challenge to the validity of the said adoption for want of the ceremony of Datta Homa was overruled by the learned Trial Judge holding that in case of "twice-born classes" particularly when the gotra of the adoptive father and the adopted son is same, non-performance of the said ceremony would not affect the validity of the said adoption.

9. The learned Trial Judge discarded the Exhibit. D, the employment agreement of the plaintiff wherein he was described as the son of Karunamoy Misra, his biological father on the ground that the plaintiff only signed the said document, somebody else had filled up the other portion of the said agreement, therefore, the said entry in the said agreement is of no consequence. The learned Trial Judge placed heavy reliance on Exhibit. 4, the affidavit of the biological father of the plaintiff, the record of rights standing in the name of Surendra Nath Misra, the adoptive father of the plaintiff, in respect of some lands being Exhibit. 5 and the sale deed executed by the plaintiff being Exhibit.

6 in holding that the plaintiff is the adopted son of his great-grandfather Surendra Nath Misra.

The learned Trial Judge accordingly decreed the suit by declaring the title of the plaintiff over the suit property and holding that the defendants are nothing but licensees under the plaintiff.

10. The defendants aggrieved by the aforesaid judgment and decree preferred an appeal before the Court of learned Assistant District Judge at Sealdah, District- 24 Parganas (Undivided) out of which the present second Appeal arises. The appeal Court below by the impugned judgment and decree has set aside the judgment and decree of the learned Trial Judge holding that by the deed of adoption i.e. Exhibit 1, adoption of the plaintiff was only proposed, without any physical act of giving and taking the plaintiff in adoption which is a necessary requirement to constitute a valid adoption as mandated under the old Hindu Law, as such the said deed of adoption cannot said to be acted upon. The appeal Court below further held that from the Exhibit. 6 it cannot be inferred that the properties sold under the said deed belonged to Surendra Nath Misra, the adoptive father of the plaintiff.

11. The appeal Court did not approve altogether rejection of the evidence of the biological mother of the plaintiff by the learned Trial Judge on the ground that in the absence of the biological father of the plaintiff, a party to the said deed of adoption, the biological mother of the plaintiff is the best available witness who can throw light on the disputed issue of the factum of adoption of the plaintiff and held that when the biological mother of the plaintiff is denying

the said factum, burden heavily lies upon the plaintiff to prove the validity of his adoption, which the plaintiff has failed.

12. The appeal Court below held that the evidence of the plaintiff as P.W.₁ and the evidence of one Sukumar Ghosh cited by the plaintiff as P.W.₂ to prove the ceremonies held on the occasion of adoption are contradictory and from the evidence of the P.W.₂, it cannot be ascertained whether physical act of giving and taking of the plaintiff in adoption did take place, although to validate an adoption it is necessary that there should be some overt act to signify the delivery of the boy from one family to another i.e. from the natural family of the boy to the family adopting the boy. The appeal Court on the analysis of the Exhibit. 1 held that by the said deed, the adoption was only proposed but it was not acted upon as it was written in future tense.

13. The appeal Court below further held that the mentioning of the name of the biological father of the plaintiff in the Exhibit. D, i.e. the employment agreement of the plaintiff and his admission in evidence that his biological father gave his marriage as Karta of the family also signify that the said deed was not acted upon. The admissions of the plaintiff in his evidence that his biological mother had no desire to give him in adoption and he was never treated as the adopted son of Surendra Nath Misra, were treated by the appeal Court as the final blow to the case of the plaintiff and accordingly allowed the said appeal.

14. The present second appeal was admitted without framing any substantial question of law, as such, this Court after hearing Mr. Kanai Lal Mandal, learned advocate for the appellant on March 11, 2022 was prima facie satisfied

that the following substantial question of law needs to be answered in the present second appeal: –

"Whether the appeal court below has committed substantial error of law in discarding the deed of adoption (Exhibit -1) on the ground that the same has not been acted upon?"

15. Mr. Mondal submits that the validity of the deed of adoption can only be challenged within the period of limitation prescribed under Article 57 of The Limitation Act, 1963 as such the defendants cannot challenge the validity of it, long after expiry of the said prescribed period of limitation. Mr. Mondal in support of his such contention refers to an unreported judgment dated May 08, 2020 passed by the Division Bench of the Karnataka High Court in the case of **Smt. Rudramma D/o Late Basappa vs. Shri Shivamurtheppa (R.F.A No. 100102 of 2015)** and also decision of the learned Single Judge of this Court in the case of **SOMA CHATTERJEE VS. CHAPALA CHATTERJEE** reported in **(1990) II DMC 312**. He also refers to the decision of the Single Bench of the Karnataka High Court in the case of **VEERABHADRAYYA R. HIEMATH VS. INAYYA A.F. BASAYYA HIEMATH** reported in **ILR 2006 Kar 1740** to contend that the defendants not being a party to the said deed of adoption has no *locus standi* to challenge the validity of the said deed.

16. Mr. Mondal, supporting the judgment of the learned Trial Judge, submits that the learned Trial Judge on assessment of the entire evidence-on-record has held that the adoption of the plaintiff is valid and was acted upon, the appeal Court below cannot reverse the said findings unless the same are perverse. He by placing reliance on the decision of the Hon'ble Supreme Court

in the case of **SANTHOSH HAZARI vs. PURUSHOTTAM TIWARI (DECEASED) BY L.R.S.** reported in **(2001) 3 Supreme Court Cases 179** argues that in an appeal under Section 96 of the Code, the Appellate Court must be conscious that findings of fact based on conflicting evidence arrived at by the Trial Court must weigh with the appeal Court, more so when the findings are based on oral evidence but in the preent case, according to him, the appeal Court below in reversing the judgment and decree of the learned Trial Judge did not follow the said principle, as such, has committed substantial error of law in holding that the deed of adoption i.e. Exhibit. 1 was not acted upon.

17. Mr. Asit Kumar Rout, learned advocate for the respondents refuting the said contentions of Mr. Mondal submits that the deed of adoption was never acted upon, mere existence of the said deed is not sufficient to prove the adoption unless it is accompanied by actual giving of the minor and taking of him in adoption, in support of his such contention he cites the decision of the Judicial Committee in the case of **MAHASHOYA SHOSINATH GHOSE VS. KRISHNA SOONDARI DAS** reported in **(1879-80) 7 Indian Appeals 250** and the decisions of the Hon'ble Supreme Court in the case of **LAKSHMAN SINGH KOTHARI VS. RUP KANWAR (SMT) ALIAS RUP KANWAR BAI** reported in **AIR 1961 SUPREME COURT 1378** and in the case of **M. GURUDAS AND OTHERS VS. RASARANJAN AND OTHERS** reported in **(2006) 8 Supreme Court Cases 367**.

18. He further argues that the deed of adoption was written in future tense, which the learned Trial Judge failed to consider but the Appeal Court has

rightly interpreted the said deed in holding that by the said deed, the adoption of the plaintiff was only proposed but was not given effect to as the plaintiff, even after execution of the said deed of adoption, claimed his share in the money left by his biological father in his Bank account and also appeared in a suit as his heir and the said conduct of the plaintiff leaves no room for any doubt that the said deed of adoption was never acted upon.

19. He relying on the decision of the Hon'ble Supreme Court in the case of ***NASIB KAR AND OTHERS VS. COL. SURAT SINGH (DECEASED) THROUGH L.R.S AND OTHERS*** reported in **2013 (2) ICC (SC) 337** finally submits that the appeal Court below on the basis of the clinching evidence produced on behalf of the respondents, has reversed the judgment and decree of the learned Trial Judge which cannot be interfered with in a Second appeal.

Heard learned advocate for the parties, perused the materials-on-record.

20. The Hon'ble Supreme Court in the case reported in **(2001) 3 Supreme Court Cases 179 (supra)** relied on by Mr. Mondal has held that in an appeal under Section 96 of the Code, the Appeal Court ought not to interfere with the finding of the learned Trial Judge on the question of fact unless the latter has overlooked some peculiar feature connected with the evidence of the witness or such evidence on balance is sufficiently improbable so as to invite displacement by Appeal Court. Let me now consider whether the appeal Court below has followed the said principle laid down by the Hon'ble Supreme Court

in the said decision in reversing the judgment and decree of the learned Trial Judge and holding that the said deed of adoption was never acted upon.

21. No doubt under the Old Hindu Law, the father had the primary right to give his son in adoption but when the dispute is whether the deed of adoption on the basis of which the plaintiff is claiming to be the adopted son of his great-grandfather was at all acted upon or not, the evidence of the biological mother in the absence of the father cannot be brushed aside altogether on the sole ground that her consent for giving the plaintiff in adoption under the Old Hindu Law was not necessary, particularly when she has denied the factum of said adoption, the appeal Court below, under such circumstances has not committed any error in giving credence to the evidence of the biological mother of the plaintiff.

22. The plaintiff in his evidence has admitted that his biological father being the Karta of the family gave his marriage and in his ration card he has been described as the son of his biological father. The plaintiff has also admitted in his evidence that in his Life Insurance policy he mentioned the name of Karunamoy Misra as his father. He also admitted in his evidence that after the death of his biological father, he appeared in a suit before the Sealdah Court as one of the heirs of his deceased biological father and to get his shares in the savings of his deceased biological father in the bank, he signed papers as one of his heirs. The deed of sale or the entry of the name of the adoptive father of the plaintiff in the R.S.R.O.R have no relevance in deciding the issue of adoption of the plaintiff, the learned Trial Judge, therefore, has erroneously

placed reliance on the said documents in coming to a conclusion that the plaintiff is the adopted son of his great-grandfather.

23. The biological father of the plaintiff in his affidavit of declaration affirmed on June 18, 1960 being Exhibit. 4 has stated on oath that till the plaintiff attained majority, he acted as his natural guardian, such statement of the biological father of the plaintiff is a serious jolt to the case of the plaintiff, which the learned Trial Judge failed to appreciate, the assessment of the said document by the appeal Court in coming to the conclusion that the deed of adoption was never acted upon is well within the scope of an appeal under Section 96 of the Code.

24. The plaintiff in his appointment agreement with the Calcutta Tram Company, was described as the son of his biological father, the finding of the learned Trial Judge that the plaintiff has only signed the said documents, somebody else filled up the said form and on the said ground discarded the said document being Exhibit. D is based wholly on surmises and conjectures inasmuch as neither the plaintiff has made out such a case nor there is any evidence on record supporting the said finding of the learned Trial Judge.

25. The learned Trial Judge held that for “twice born classes” neither the Datta Homa nor giving and taking ceremony is necessary. The Judicial Committee in the decision reported in **(1879-80) 7 IA 250 (supra)** and the Hon’ble Supreme Court in the decisions reported in **AIR 1961 SC 1378 (supra)** and **(2006) 8 Supreme Court Cases 367 (supra)** cited by Mr.

Rout has held that giving and taking of the minor in adoption is a necessary requirement for a valid adoption. Therefore, even if the requirement of holding the ceremony of Datta Homa for “twice born classes” can be dispensed with, the requirement of giving and taking the minor in adoption cannot. The appeal Court below, therefore, has rightly held that the plaintiff having failed to prove that there was overt act on the part of the two families in giving and taking the plaintiff in adoption, an essential requirement for a valid adoption, the deed of adoption cannot said to be acted upon.

26. In an action for eviction, the plaintiff can succeed only on the strength of his own title, not by the weakness of the case of the defendant (See: **LALA HEM CHAND vs. LALA PEARY LAL AND OTHERS** reported in **76 CLJ 451**). In the present case, the plaintiff is seeking a decree of eviction of the defendants from the suit property on the strength of his title, therefore, irrespective of the weakness of the defence of the defendants in the suit, the burden is upon the plaintiff to prove his title over the suit property, as such any kind of incapacity of the defendants to challenge the validity of the deed of adoption through which the plaintiff is claiming such title would not enure to the benefit of the plaintiff, consequently the decisions relied on by Mr. Mondal on these two points i.e. **Smt. Rudramma D/o Late Basappa vs. Shri Shivamurtheppa (supra), (1990) II DMC 312 (supra)** and **ILR 2006 Kar 1740 (supra)** are misplaced.

27. The plaintiff in the plaint, although claimed that his adoptive father executed a deed of gift in respect of the said premises but, neither the said

deed was produced nor the plaintiff advanced his such claim in the suit. The plaintiff in the suit traced his title through the said deed of adoption, as such, to get the relief as prayed for in the suit he is required to prove that after his adoption, he was treated as the adopted son of the owner of the suit premises but not only the plaintiff has failed to prove his said case, but also, in his cross-examination recorded on March 10, 1993, he has admitted that he was never treated as the adopted of S.N.Misra that is why his biological father's name was recorded in his agreement for employment, the said admission of the plaintiff gives the final and fatal blow to the case of the plaintiff of acquisition of title over the suit property through his said adoption.

In view of the discussion made above, this Court is of the opinion that no substantial question of law as formulated is involved in the present second appeal warranting interference with the appellate decree. S.A.173 of 1997 is dismissed without any order as to costs.

The department is directed to send down the Lower Court Court records immediately to the Court below.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)