

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 262 OF 2019
WITH
CIVIL APPLICATION NO. 5458 OF 2019**

Changdeo Thama Kadam,
Age 64 years, Occu. Agril.,
R/o. Pimpri Lauki, Azampur,
Tq. Sangamner, Dist. Ahmednagar.

.. Appellant
(Defendant No.1)

Versus

1. Taibai Yashwant Nikale,
Deceased through L.Rs.

1A] Baburao Yashwant Nikale,
Age 57 years, Occu. Agril.,
R/o. Ambedkarnagar, Rahata,
Tq. Rahata, Dist. Ahmednagar.

1B] Shalini Balkrishna Pardhe,
Age 55 years, Occu. Household,
R/o. Ground Floor, Chandani Building,
Amrutnagar, Mumbra, Dist. Thane

Respondents
(Plaintiff's LR's)

1C] Malan Prakash Pagare,
Age 52 years, Occu. Household,

1D] Kalawati Babasaheb Shelke,
Age 50 years, Occu. Household,

Both R/o. Ambedkarnagar, Rahata,
Tq. Rahata, Dist. Ahmednagar.

1E] Sushila Pratap @ Pratic Londhe,
Age 47 years, Occu. Household,
R/o. Songaon, Tq. Rahuri,
District Ahmednagar.

2. Raju Thama Kadam @ Raju Revaba Kadam,
Deceased through L.Rs.

2A] Kavita d/o. Rajendra Kadam,
Age 17 years, Occu. Education,

Respondents
(LRs of Defendant no. 2)

- 2B] Babalu Rajendra Kadam,
Age 16 years, Occu. Education,
- 2C] Shubhangi Rajendra Kadam,
Age 15 years, Occu. Education,
- 2D] Alka Rajendra Kadam,
Age 40 years, Occu. Household,
Respondent Nos. 2A to 2C
are through their minor i.e. mother
of respondent No. 2-D.

The respondent No.2-D is deaf and dumb
Through her next friend i.e. father
Radhakisan Kushaba Jadhav,
Age 70 years, Occu. : Agril.,
R/o. Velhale, Tq. Sangamner,
Dist. Ahmednagar.

...
Mr. V. S. Bedre, Advocate for the appellant
Mr. A. N. Nagargoje, Advocate for the respondent nos. 1A to 1E
Respondent nos. 2A to 2D served - absent
...

CORAM : MANGESH S. PATIL, J.

DATE : 04 APRIL 2022

ORDER :

This is a second appeal by the original defendant no. 1.

2. The original plaintiff – Taibai who was the predecessor of the respondent nos. 1A to 1E filed a suit for declaration against the appellant who was arrayed as defendant no. 1 and his step brother Raju who was arrayed as defendant no. 2 seeking a declaration that she was the exclusive owner of the suit property which was inherited by her from her father – Dulba and mother Harnabai who died in the year 1953 and 1959 respectively. She also averred that after going through the revenue record she came to know that the appellant and

respondent – Raju who was the predecessor of respondent nos. 2A to 2D got the suit property mutated on the basis of an adoption stated to have been effected by Harnabai. Having found that the appellant and respondent – Raju were seeking right to the suit property on the basis of adoption of their father Thama whose real name was Revaba, she filed the suit and claimed declaration of being the exclusive owner of the suit property. In the alternative, she prayed for partition and separate possession of her 1/2 share.

3. The appellant and Raju contested the suit by their separate written statements. Appellant contented that Dulba had adopted his father Revaba whereas Raju contended that Harnabai had adopted Revaba. It was further contended that Taibai had relinquished her share in writing.

4. With such pleadings, the trial court conducted the suit and dismissed it.

5. Taibai preferred an appeal before the district court. By the judgment and order under challenge in this second appeal, the appeal was allowed and the suit was decreed. Hence this second appeal.

6. Learned advocate Mr. Bedre for the appellant – Changdeo would submit that a well reasoned judgment of the trial court has been unnecessarily reversed by the district court. The *factum* of adoption was duly established by all the attending circumstances. Even the

relinquishment was duly proved. There was no reason for the district court to take a different view. Substantial question of law arises for determination by this court. Though strictly speaking the original deed of adoption was not produced and proved, the matter can be remanded to enable the appellant – Changdeo to produce and prove the same.

7. As against this, the learned advocate Mr. Nagargoje for the respondent no. 1 – Taibai would submit that no substantial question of law arises for determination by this court. Though Changdeo and Raju were propounding a deed of adoption, they were coming with inconsistent stands and inconsistent evidence. While former was saying that Dulba had adopted his father, Raju contended that Harnabai had adopted him. In any case, the original deed was not produced on the record and none was proved. Even the secondary evidence could have been led by producing a certified copy but it was not done. When Taibai was in the witness box, she could have been confronted with such a certified photocopy. The opportunity was lost. Now since she is no more and in the absence of any attempt at proving the deed of adoption, there was no alternative for the district court to discard the plea of Revaba having been adopted by Harnabai.

8. Mr. Nagargoje would further submit that the prayer to remand the matter to enable Changdeo to establish and prove the deed of adoption is nothing but an afterthought. No such request was made before the district court and even the present appeal memo is

silent. There is no prayer even to lead additional evidence as contemplated under Order XLI Rule 27 of the Code of Civil Procedure and it would not be appropriate now to remand the matter.

9. So far as the stand regarding Taibai having relinquished her share, the learned advocate Mr. Nagargoje would submit that admittedly the writing (Exhibit 37) is an unregistered document when the law requires that a deed of relinquishment is compulsorily registrable under section 17 of the Registration Act, 1908. By virtue of bar contained under section 49 of that Act, such relinquishment could not have been proved and none has been proved as has been rightly concluded by lower appellate court. He would therefore submit that the trial court had overlooked such glaring shortcomings in the stand of Changdeo and Raju and still had illegally dismissed the suit. The error was gross and has been corrected by the district court. No substantial question of law arises and the appeal be dismissed.

10. I have carefully considered the rival submissions and the judgments and orders of the courts below as well as the papers. Obviously, the entire fate of the matter hinges on the fact as to whether there is evidence regarding adoption of Revaba by Harnabai and relinquishment of share by Taibai.

11. Ignoring the inconsistencies in the stand being taken by Changdeo and Raju as to who actually had adopted Revaba and assuming that they wanted to prove that Harnabai had adopted their

father – Revaba, they were seeking to establish this fact on the basis of a deed of adoption, but the original deed was not produced on the record and even no secondary evidence was led. In-fact, though the court's below have over-looked the circumstances and the law, it was highly imperative for Changdeo and Raju to have produced the original, in view of the mandate contained in Sections 91 and 92 of the Indian Evidence Act which recognizes the concept of exclusion of oral evidence by documentary evidence. When according to them, as has been submitted by the learned Advocate Mr. Bedre, it was a registered deed of adoption, by virtue of section 91 original ought to have been produced on the record. Even if it was not available the secondary evidence could have been led but was not attempted to be led. In the absence of which, the trial court could not have legally upheld the contention regarding adoption. Merely by referring to the other attending circumstances when the law requires the fact of adoption to be proved strictly in accordance with section 91 and 92 of the Evidence Act.

12. For the same reason, apart from above reason assigned by the district court, even it could not have and has rightly refused to concur with the conclusion of the trial court and has rightly discarded the contentions in the written statement regarding Revaba being the adopted son of Dulba, adopted by his widow Harnabai.

13. As regards the request of learned Advocate Mr. Bedre to remand the matter to enable appellant – Changdeo to make an attempt at proving adoption, I am afraid, no such request was made before the lower appellate court. Though it was an appeal by Taibai, at least the submission reproduced in the judgment and order under challenge does not show that any request was made for remanding the matter. Even the memo of appeal in this Second Appeal does not contain any such prayer. In the case of **Syeda Rahimunnisa Vs. Malan Bi (dead) by Legal Representatives and another; (2016) 10 SCC 315**, it has been held that in absence of any pleadings of remand before the High Court or first appellate court matter cannot be remanded to trial court.

14. Now turning to the other aspect regarding relinquishment, though the document Exhibit-37 was produced and allowed to be produced and read in evidence, *ex facie*, it reads that Taibai had relinquished her share in the suit property by receiving consideration of Rs.500/-. Going by the contents, it was indeed a deed of relinquishment which was compulsorily registrable under Section 17 of the Registration Act. In view of the bar contained under section 49 of that Act, it could not have been read in evidence for want of registration. The purpose for which it was being sought to be produced and proved was nothing but to prove that Taibai intended to relinquish her share. It cannot be said to be a collateral purpose but was the main purpose for bringing the document into existence. In view of such state-of-affairs, the observations and the conclusion of the district court

in refusing to accept this writing as a piece of evidence cannot be legally questioned.

15. Resultantly, both the grounds on the basis of which appellant - Changdeo and respondent – Raju were putting up a claim to the suit property were not duly proved within the four corners of law. In these circumstances, the district court has allowed the appeal and reversed the judgment and order of the trial court and decreed the suit. There is no apparent perversity or arbitrariness much less any illegality giving rise to any substantial question of law.

16. The appeal is dismissed.

17. Pending civil application stands disposed of.

[MANGESH S. PATIL]
JUDGE

arp/