

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Uday Kumar

FA 394 of 2009

Soham Achayra Chowdhury & Ors.
(Kalyan Kumar Acharya Chowdhury, since deceased)
Versus
Upa Karan Acharya Chowdhury & Ors.

With

FA 395 of 2009

Upa Karan Acharya Chowdhury
Vs.
Soham Achayra Chowdhury & Ors.
(Kalyan Kumar Acharya Chowdhury, since deceased)

Appearance:

Mr. Probal Kumar Mukherjee, Sr. Adv.,

Ms. Sujata Mukherjee, Adv.

..... for the appellants in FA 394 of 2009

and

..... for the respondents in FA 395 of 2009

Mr. Sourav Sen, Adv.,

Ms. Adrisnata Chakraborty, Adv.

..... for the appellant in FA 395 of 2009

and

..... for the respondent no.1 in FA 394 of 2009

Order dated

: 11th April, 2023

Soumen Sen, J.:-

The appeal is arising out of a judgement and decree passed by learned Judge, 10th Bench, City Civil Court at Calcutta in a suit for declaration and permanent injunction. The

learned Trial Judge dismissed the suit against which the aforesaid appeal being FA No.395 of 2009 has been filed.

The appellant is the adopted son of Sabitri. Sabitri is the wife of Krishna Gobinda Acharya Chowdhury. Krishna was one of the sebaitis. Krishna died in the year 1970. Sabitri adopted the son of one of her relatives in the year 2000. Sabitri died in the year 2004. The plaintiff alleged that, by virtue of such adoption, the plaintiff is entitled to exercise all rights that were available to Krishna including the right to function as sebait of the deity. On the allegation that the plaintiff was not allowed to exercise his right as a sebait and there was a threat of dispossession of the plaintiff from the suit property, the plaintiff filed the suit through his natural guardian as he was minor at the relevant point of time.

The respondent nos. 1 and 4 contested the said suit and filed the written statement with a counter claim. The respondents prayed for a decree of declaration that the defendant nos. 1 and 4 are the only sebaitis of the deity and a decree for eviction and mesne profit. The learned Trial Judge, on the basis of the pleadings, framed five issues and dismissed the suit filed by the plaintiff on contest. The learned Trial Judge disbelieved the adoption and held that the adoption was not accompanied by actual delivery of the plaintiff. However, the Trial court had remained silent with regard to the counter claim.

The said judgement has resulted in two appeals. Upa Karan Acharya Chowdhury the plaintiff is aggrieved by the dismissal of the suit and the defendant nos. 1 and 4 are aggrieved by reason of non-consideration of the counter claim.

Mr. Sourav Sen, learned Counsel representing the appellant has submitted that the deed of adoption has meticulously recorded the rituals performed during adoption and in the recital, it has been clearly stated that the natural parents of the child have given the child to Sabitri with the clear intention to give up any claim towards this son and Sabitri accepted the

giving away and taking over of the child in her favour. In the adoption deed there is a clear statement that there has been physical handing over of the child inasmuch as the deed of adoption is not under challenge. The trial court has failed to appreciate the fact that the very ceremony of giving and taking in itself is symbolic of transplanting the adopted son from the family of his birth to the adoptive family. It is submitted that the natural father and mother of the child are the executants and the deed of adoption was subsequently registered. Mr. Sen has relied upon Section 16 of the Hindu Adoption and Maintenance Act, 1956 to contend that there is a strong presumption of adoption when the factum of adoption is reduced in writing and duly registered. It is submitted that by reason of such registration, the Court is required to presume that the adoption has been made in compliance with the provisions of the Hindu Adoption and Maintenance act, 1956 unless and until it is disproved. Mr. Sen, has also referred to the deposition of the natural father and draws our attention to the evidence where the natural father has stated that “Home Jug Joggya were (sic) celebrated at premises no. 64, Bhupen Bose Avenue in the room of Sabitri Devi”. Mr. Sen submits that this has been clearly stated by the natural father of the child during his cross-examination held that on 24th July 2008. It is submitted that the said evidence along with the recitals in the deed of adoption are required to be read together in deciding the right of the plaintiff in the suit property. Mr. Sen further submitted that there is no rebuttal evidence in this regard and accordingly, there was no reason for the learned Trial Judge to dismiss the suit and disbelieve the deed of adoption. It is submitted that the learned Trial Judge has ignored Section 16 of the said act and has arrived at an erroneous finding. Mr. Sen, in this regard, has relied upon a decision of the Allahabad High Court in *Baru & Ors. v. Tej Pal & Ors.*, reported in **AIR 1998 Allahabad 230** for the proposition that even if the priest performing a ceremony was not called upon to prove the adoption presumption flowing from recital of adoption deed cannot be ignored and/or discarded.

It is submitted that when a widow adopts a child the child becomes the child of the family of the husband of the widow and entitled to get all the benefits as a Class I heir and is entitled to get all the benefits including the right of residence in the property in question.

Mr. Probal Kumar Mukherjee, learned Senior Counsel appearing on behalf of the respondent submitted that the learned Trial Judge ought to have decided the counter claim. The trust deed clearly stipulates that after the demise of settler, his son will be the sebait and after their demise their “adult male son” would be the sebait. However, in the instant case, the plaintiff claimed that Sabitri adopted the plaintiff by virtue of adoption deed of 2000 as she was issueless. It is submitted that for the purpose of deciding the right as to whether the plaintiff is a sebait, it is important to take note of the fact that the husband of Sabitri died in the year 1970 without any issue and accordingly, the alleged adoption of the plaintiff by Sabitri in 2000 cannot give a right to the plaintiff to claim the office of sebait. It is further submitted that the possession is inextricably connected with the office of sebait and unless the plaintiff is declared to be a sebait, he has no right of residence.

We have carefully gone through the registered deed of adoption and the evidence of the parties on the question of adoption. The deed of adoption has clearly stated that “Dattak Homam” was duly performed on 19th January, 2000 in the presence of several persons including those who were attesting witnesses. The executants are the natural guardian of the child. The said adoption was duly signed by the giver and the recipient. The said document is not under challenge. The recitals in the deed is corroborated by the evidence of the natural father of the child. Whenever any document is registered under the provision of any law for the time being in force is produced before any court, purporting to record an adoption made and is signed by the person giving and the person receiving the child in adoption, the court

shall presume that the adoption has been made in compliance of the provision of the said Act. The recitals unless is rebutted by cogent evidence shall be accepted.

The defendants have not seriously disputed the validity of the deed of adoption although in the written statement, they have stated that the said deed of adoption is not enforceable and invalid. If the adoption is disputed, it is for the defendants to prove that ceremony of giving and taking of the child had not taken place. There was no disability of the giver and the recipient in complying with the act of adoption. Section 16 of the said Act creates a statutory presumption with regard to adoption and the presumption is that the adoption is made in accordance with law unless and until it is disproved. It is open for the party to offer evidence in support of adoption irrespective of what may have stated in the recital. The rule is flexible and would depend upon the nature of the evidence adduced by the parties.

In the instant case, we have discussed the nature of the evidence available on record and considering the oral and documentary evidence with regard to the adoption of the child in the family of Sabitri, there cannot be any doubt that the factum of adoption was duly proved by the natural father of the child. The child was minor at the time when the suit was filed. It was filed by his natural mother and the evidence was given by the natural father of the child. The filing of the suit by the natural mother was never objected to by the defendants. However, insofar as the objection with regard to the right of the plaintiff to perform the seba puja and to act as sebaite we agree with the submission made by Mr. Mukherjee that on the date of adoption, Sabitri was issueless and when the right to the office of sebaite opened in 1970 consequent upon the death of the husband of Sabitri be followed the main line of succession from the other branches become entitled and they have already exercised their right and hence they would have the exclusive right to sebaite and the

plaintiff would have no right of sebaiship under the Debutter Trust. Since the sebaish would have the right to occupy the said premises, the plaintiff would also have the right of residence without any let or hindrance. The deity however, would remain the owner of the property.

The appeal succeeds in part.

In view of the aforesaid finding, the counter claim filed by the defendant nos. 1 and 4 in the suit stands dismissed.

The department is directed to draw up the decree both in respect of the suit and the counter claim as expeditiously as possible and after the decree is complete, shall send down the LCR to the learned Court.

I agree,

(Soumen Sen, J.)

(Uday Kumar, J.)