

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

**SECOND APPEAL NO. 528 OF 2012
WITH
CIVIL APPLICATION NO. 8854 OF 2012**

Ashok s/o. Vishwambhar Mule alias
Alleged s/o. Narayan Mule
Age. 44 years, Occ. Agri.,
R/o. Sindagi Bk., Tq. Ahamedpur,
Dist. Latur.

.. Appellant
[original
defendant No.1]

Versus

1. Indubai alias Narsabai w/o. Baliram Gadkar
Age. 37 years, Occ. Household,
R/o. Ghoaj, Tq. Kandhar,
Dist. Nanded.

.. Respondents
[R.No.1 to 5 are
legal heirs of ori.
Plntf.Nos.1&2 & 6
&7are ori.def.2&3]

2. Balaji s/o. Maruti Wakale
Age. 21 years, Minor U/g.
Of his father respondent No.3 below.

3. Maruti s/o. Parbatrao Wakale,
Age. 50 years, Occ. Agri.,
R/o. Yevari, Tq. Udgir,
Dist. Nanded.
[deleted as per order dated 08.12.2017
in C.A. No.14645/2017]

4. Mahadevi w/o. Dnyanoba Bhusare
Age. 34 years, Occ. Household,
R/o. Mortalwadi, Tq. Udgir,
Dist. Latur.

5. Shahubai alias Laxmibai w/o. Ankush
Wakale, Age. 40 years, Occ. Agri.,
R/o. Yevari, Tq. Udgir, Dist. Latur.
LRs. Of original plaintiff Nos. 1 and 2.
6. Kamlakar s/o. Vishwambhar Mule,
Age. 57 years, Occ. Agri.,
R/o. Sindagi Bk. Tq. Ahmedpur,
Dist. Latur.
7. Ashok s/o. Dattaji Pawar
Age. 35 years, Occ. Agri.,
R/o. Kotkyl, Tq. Kandhar,
Dist. Nanded.

Mr. Kuldeep S. Patil h/f. Mr. S.S. Choudhari, Advocate for the appellant.
Mr. Girish Wani h/f. Mr. B.S. Bhale, Advocate for respondent No.1.

CORAM : KISHORE C. SANT, J.
DATED : 04.09.2023

PC :-

01. Heard learned Advocates for the parties. The parties are referred to as per their original status in the suit. The Second Appeal is filed by original defendant No.1, who claims to be adopted son of original plaintiff No.1 and 2. The suit was filed seeking declaration that the defendant is not adopted son of the plaintiffs; secondly the adoption deed registered on 03.04.1992 be declared as null and void and for injunction restraining the defendant from interfering with peaceful possession of plaintiffs over the suit

land. Further declaration was sought that mutation entries taken in the name of defendant No.1 be declared as illegal. The cause of action arose on 01.09.1992 when the defendant obstructed and interfered with the possession of the plaintiffs and he even denied ownership of the plaintiffs over the suit land. It is, thereafter, the plaintiffs came to know that defendant has prepared a bogus and false adoption deed. It is, therefore alleged in the plaint that that the said adoption deed is forged and fraudulent.

02. It is case of the defendant that he came to be adopted on Gudi Padwa of 1991 in the presence of witnesses. One of the witnesses is also examined by the defendant. It is case of the defendant that there is custom in the society of adoption of a person even above age of 15 years. It is admitted that on the date of alleged adoption, defendant No.1 was of 24 years of age and was also a married person having one son. It is further case of the defendant that plaintiff No.1 Narayan was of unsound mind and had four daughters and therefore the plaintiffs decided to adopt defendant No.1.

03. The Trial Court dismissed the suit holding that adoption is properly proved and defendant No.1 is having every right in the property.

04. In the appeal, the Appellate Court held that defendants could not prove the adoption. It is also held that he failed to prove custom or usage in the society to adopt even a married person and who is above 15 years of age.

05. The appellant is thus before this Court in this appeal. In support of case of the appellant/defendant evidence of one Mohan Bhangé came to be recorded, who claims to be present at the time of so called adoption. He happens to be a cousin of Narayan – plaintiff No.1. He deposed that Narayan was a smart and normal person and was not gullible or idiotic. He was having four daughters and he had no son and therefore he adopted son of his brother, namely, Vishwambhar. He further deposed that on the day of Gudi Padwa of 1991 the adoption ceremony took place at the house of Narayan. Plaintiff No.2 was also present. Defendant No.1 was given in adoption by making him to sit in the lap of plaintiff No.1. He further stated that in the community of the plaintiffs and defendants, there is custom of taking even a married person in adoption. He also deposed that the adoption deed was later on registered.

06. To consider this second appeal, the basic factor needs to be

considered is the adoption in the light of evidence of Bhange is concerned. The defendant submits that when all the ingredients were proved and even custom was proved, it was not proper on the part of the learned Appellate Court to dismiss the evidence and hold that adoption is not properly proved. The learned Advocate for the defendants relies upon judgment in the case of Kondiba Rama Papal alias Shirke (dead) by his LRs and Anr. Vs. Narayan Kondiba Papal reported in AIR 1991 SC 1180.

07. As against this the learned Advocate for the plaintiffs submits that in this case the suit is filed by both the father and mother who unfortunately died during pendency of the proceeding. The suit is thereafter prosecuted by daughters. He submits that in this case customary adoption is not at all proved. To prove the custom, it was necessary to prove the custom in strict manner. No prior instances are quoted by the deponent in this case. Nothing is shown even to infer consent of plaintiff No.2. The evidence of priest is also silent about consent from the wife. In this case, admittedly, there is no express consent. He further submits that mere presence of wife cannot be said to be a consent. He submits that admittedly when the age of the defendant is more than 15 years and it is also established that he was married on the date

of adoption and having a son, a strict proof was required to prove custom and usage. His submission is that when the fact of adoption itself is not proved, there is no need to go into other aspects of the matter. The learned Advocate for the respondents placed reliance on the judgment in the case of **Ratanlal alias Babulal Chunilal Samsuka Vs. Sundarabai Govadrdhandas Samsuka (D) LRs. & Ors., reported in AIR 2017 S.C. 5797.**

08. In the case of **Kondiba (Supra)** the Hon'ble Apex Court has held that if any custom is judicially recognized, proof of custom is not necessary in subsequent cases of adoption. It is further held that child of any age can be adopted. It is thus seen that to prove the custom, it is not necessary in the cases to prove that custom, if the custom is judicially recognized. It is held in that case that child of any age can be adopted. This Court finds that, therefore, in that case it was proved before the Court that the custom was judicially recognized and in that view of the matter the Hon'ble Apex Court held that it was not necessary in that case to prove the custom.

09. In the case of **Lakshman Singh Kothari Vs. Smt. Rup Kanwar reported in AIR 1961 SC 1378,** the Hon'ble Apex Court has considered the

essential condition of a valid adoption. It was held that transfer of adoptive boy by ceremony of giving and taking is essential. No particular form is prescribed. The challenge appears to be that there was no giving and taking of child in a particular manner. The Apex Court considered that what is material is only giving and taking of the child in adoption. The manner in which giving and taking has taken place is not material. With due respect, this case is not applicable to the present case.

10. In the case of Ratanlal (Supra) the Hon'ble Apex Court has laid down settled position of law under section 2 (a) of the Hindu Adoption and Maintenance Act and the ingredients for establishing a valid custom are (a) Continuity (b) Certainty (c) Long usage and (d) Reasonability. In this case it is seen that only one witness said that there is custom in the society to adopt child even after the age of 15 years. No other instances are given. No continuity of usage is shown. Thus, in the case in hand, the learned Appellate Court has rightly held that the custom is not proved.

11. In the case of Ghisalal Vs. Dhapubai (dead) By LRs and Ors. reported in (2011) 2 SCC 298, the Hon'ble Apex Court has specifically

considered the question of consent of wife as required under section 7 of the Hindu Adoption and Maintenance Act. Section 7 of the said Act clearly stipulates that any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption, provided that if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Thus, it is clear that consent of wife itself is requirement of wife, it needs to be specifically proved and the consent cannot be inferred merely because the wife was present at the time of adoption.

12. This Court finds that it is rightly pointed by the learned Advocate for the respondent that the fact of consent of the wife is not proved. There is no evidence that her consent was specifically obtained. The second material aspect needs to be seen is that in this case even wife is a plaintiff, who specifically states that there was no adoption of defendant No.1. In such case, it was all the more required to prove is consent of wife in specific terms. On all these counts, when the fact of adoption itself is not proved, this Court finds that no other aspects are required to be considered as the entire case is based

upon adoption of defendant No.1. Considering all above aspects, this Court finds that no substantial question of law is made out. No case is made out to admit the appeal. The Second Appeal stands dismissed.

13. In view of dismissal of the Second Appeal, connected Civil Application for stay does not survive and disposed off accordingly.

[KISHORE C. SANT, J.]