



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.8396 OF 2022

Kisanlal s.o Sadiram Agrawal .Vs. Niaz Ahmad s/o Hifzul Kabir and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Ms R.D. Raskar, Advocate for petitioner.

Shri Masood Shareef, Advocate for respondent Nos.1 and 2.

CORAM : ANIL S. KILOR, J.

DATED : 19/12/2023

1. The order below Exh.46 dated 28.11.2022 passed by the 14th Jt. Civil Judge (Sr. Dn.), Nagpur in Special Civil Suit No.425 of 2012 allowing the application filed by the defendant Nos.1 and 2 for holding inquiry under Order 22, Rule 5 of the Code of Civil Procedure (CPC) to determine the question as to legal representative of deceased plaintiff is under challenge in this writ petition.

2. The petitioner is claiming to be an adopted son of the original plaintiff who had filed a Special Civil Suit No.425 of 2012 for declaration, cancellation of partition deed and further cancellation of sale deed and further for cancellation of power of attorney and injunction alleging that the defendant due to unstable condition of the plaintiff as he was suffering from various ailment, got the document fraudulently, executed.

3. During the pendency of the said suit, the plaintiff died and the petitioner moved an application for bringing him as legal representative of original plaintiff, being his adopted son. The said application was opposed by the defendants on the ground that adoption ought to have been proved after recording evidence.

4. The learned trial Court allowed the application vide order dated 03.03.2022, which was the subject matter of challenged before this Court in Writ Petition No.4824 of 2022. The Writ Petition was partly allowed directing the trial Court to consider the effect of the registered adoption deed and the objection raised on behalf of the defendants that the presumption would not operate as the adoption was not made in compliance with the provisions of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as “the Act of 1956”) and then to decide the application afresh.

5. Thereafter, the defendants moved an application under Order 22, Rule 5 of the CPC seeking the trial Court to determine the question as to legal representative of deceased plaintiff. The said application came to be allowed vide impugned order dated 28.11.2022. Hence, this petition.

6. As this Court in earlier Writ Petition No.4824 of 2022 while remanding the matter back to the trial Court to decide the application for bringing the petitioner on record as legal representative of original plaintiff directed the trial Court to take into consideration the registered adoption deed and the objection raised by the defendants in respect of compliance with the provisions of the Act of 1956, it would be appropriate and relevant to refer to Section 10(iv) and Section 16 of the Act of 1956, which read thus:

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

(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.”

“16. Presumption as to registered documents relating to adoption.-

Whenever any document registered under 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 taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.”

7. The Hon’ble Supreme Court of India in the case of *Atluri Brahmanandam and Anr ..vs.. Anne Sai Bapuji*, reported in (2010) 14 SCC 446 has held thus:

“12.Madras High Court, however, took contra view holding that when the person adopted is over fifteen years, the same can come under exception in Section 16 of the Act only when the custom or usage applicable to parties permitting such adoption is proved. In Mahalingam (supra), Madras High Court held as under.

The simple reason is, with regard to an exception, there could not be a presumption, legal or otherwise. Exception is a departure from the normal and general requirements. An exception takes the case from the purview of general requirements. An exception must be proved and it cannot be presumed. When an exception is engrafted in the main part of the provision to the effect that on satisfaction of certain conditions, the general requirements need not be invoked, the onus in regard to such exceptional conditions is on the person who pleads them. An exception must be strictly construed. The presumption under Section 16 does not cover the case of an exception to the general requirements of the provisions of the Act. That is how, Section 16 must be construed. Otherwise, it will lead to anomalous results. Even if there is no satisfaction of the general requirement regarding age, Court will be called upon to presume the exception. This could not be the intendment of the legal presumption under Section 16. There must be plea and proof of the exception under custom or usage spoken to in clause (iv) of Section 10. Unless that is made out, the exception cannot rule. There could not be a presumption of such custom or usage. Even by a bare reading of Section 16, it is not possible to spell out a theory that it dispenses with pleading and proof in the case of an exception under Section 10(iv) of the Act.”

8. It is equally beneficial to refer to the judgment of the Hon’ble Supreme Court of India in the case of *Jai Singh ..vs.. Shakuntala*, reported in (2002) 3 SCC 634 wherein the Hon’ble Supreme Court of India had an occasion to interpret the words used under Section 16 of the Act of 1956, namely “unless and until it is disproved” and has held thus:

“2.The Section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the Statute is rather definite since the Legislature has used "shall" in stead of any other word of lesser significance. Incidentally, however the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption.

Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above. On the wake of the aforesaid the observations of the learned single Judge in Modan Singh vs. Mst.Sham Kaur & Ors. (AIR 1973 P&H 122) stands confirmed and we record our concurrence therewith.”

9. In the present matter at hand, admittedly, there is a registered adoption deed. Undisputedely on the date of adoption the petitioner was nineteen years old. The adoption is permissible if he or she is above 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. It is further not in dispute that, in the adoption deed there is no mention of any such custom or usage which is a prerequisite under Section 10(iv) of the Act of 1956, if age is more than fifteen years.

11. Thus, considering the observation made by the Hon'ble Supreme Court of India in the case of *Atluri Brahmanandam* (Supra), I do not find any error committed by the Court below in allowing the application. Moreover, no prejudice would be caused to the petitioner if he proves the fact of adoption for getting impleaded as legal representative of the original plaintiff.

12. In that view of the matter as there is no merit in the present writ petition, the writ petition is **dismissed**.

JUDGE