

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 190 OF 2019**

Santosh Gahininath Patil alias
Santosh Ramchandra Patil

} ***..Appellant***

: Versus :

1. Shashikala Kondiba Zalake
2. Mangal Navnath Ghalake
3. Ramchandra Manohar Patil

} ***..Respondents***

**WITH
CIVIL APPLICATION NO. 352 OF 2019 (For Stay)
IN
SECOND APPEAL NO. 190 OF 2019**

Santosh Gahininath Patil alias
Santosh Ramchandra Patil

} ***..Applicant/
Appellant***

: Versus :

1. Shashikala Kondiba Zalake
2. Mangal Navnath Ghalake
3. Ramchandra Manohar Patil

} ***..Respondents***

Mr. R. M. Hardas a/w. Mr. Prasad Kulkarni, for the Appellant.

Mr. Umesh Kurund, for the Respondent Nos. 1 and 2.

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved On : 2 May 2024.

Judgment Pronounced On : 8 May 2024.

JUDGMENT :

1) By this Appeal, the Appellant challenges decree dated 16 April 2018 passed by the Ad-hoc District Judge-1, Barshi in Regular Civil Appeal No. 229/2014 (Old R.C.S. No. 405/2012) by which the first Appellate Court has proceeded to dismiss Appellant's Appeal and has confirmed the Decree dated 25 July 2012 passed by the Civil Judge Senior Division, Barshi in Regular Civil Suit No. 47/2012. The Trial Court has decreed the suit filed by Plaintiff/Respondents and has directed Defendant/Appellant to handover possession of the suit property to Plaintiffs.

2) Plaintiffs are daughters of Ramchandra Manohar Patil (Defendant No.1), who owned the suit properties bearing Gat Nos.977, 680, 962 and 984 at Village-Bavi, Taluka-Barshi, District-Solapur. Appellant/Defendant No.2-Santosh Gahirinath Patil is Plaintiffs' cousin. Plaintiffs' mother, Ranjana passed away in the year 1983, by which time, both Plaintiffs were married. It is Plaintiffs' case that after the death of their mother, Defendant No.1-Father started residing with Plaintiffs and used to attend the suit properties. Plaintiffs pleaded that after they obtained the 7/12 extracts of the suit properties, they discovered that the second Defendant had mutated his name to the suit properties. Such mutation was made by representing that Defendant No.2 was adopted by Defendant No.1. Plaintiffs claimed that no such adoption had taken place and the second Defendant did not have any right, title or interest in the suit properties. Defendant No.1-father appeared in the suit and filed Written Statement admitting contents of the plaint and denied that he had executed any Adoption Deed or any Will in favour of Second Defendant. Defendant No. 2 also resisted the suit by filing Written Statement and relied upon Adoption Deed dated 6 December 1990. He claimed that an adoption ceremony was held at Ram Mandir, Barshi and the Adoption Deed

was registered in the presence of several witnesses. That Defendant No.2 accordingly changed his name as '*Santosh Ramchandra Patil*'. He claimed title and possession over the suit property. During the course of trial, Mangal Navnath Ghalke, Plaintiff No.2 examined herself in addition to Plaintiffs' maternal uncle, Magan Ramling Argade. Defendant No.2 examined himself as a witness in addition to various other persons.

3) After considering the evidence on record, the Trial Court proceeded to decree the suit by Judgment and Order dated 25 July 2012. The Trial Court held that Defendant No.2 practiced fraud upon Defendant No.1 by mispresenting him and got forged and fabricated Adoption Deed executed on 6 December 1990. The Trial Court further held that execution of the Adoption Deed was not proved and that therefore Defendant No.2 is not the adopted son of Defendant No.1. The execution of Will dated 30 October 2007 by Defendant No. 1 was also held to be not proved. By recording above findings, the Trial Court decreed the suit and held that Plaintiffs are entitled to recover possession of the suit property from Defendant No.2. Defendant No.2 filed Regular Civil Appeal No.405/2012, which was later numbered as Regular Civil Appeal No. 229/2014. It appears that Defendant No.1-father died during pendency of the suit and was accordingly deleted from array of parties by the first Appellate Court. The first Appellate Court has confirmed the decree by dismissing the Appeal filed by Defendant No.2 by its judgment and order dated 16 April 2018.

4) Aggrieved by the Decree of the First Appellate Court confirming the Decree of the Trial Court, Appellant/Defendant No.2 has filed the present Appeal. This Court has admitted the Appeal by Order dated 2 May 2023 by framing following substantial questions of law :

- (i) Whether in view of the provisions of Section 16 of the Hindu Adoption and Maintenance Act, 1956 the trial and the first Appellate Court could have gone into the issue of validity of adoption ceremony performed at the time of adoption of the Appellant when the adoption deed is registered?
- (ii) Whether it was necessary for the Appellant to prove before the Trial Court that there is a custom in their community under which boy over 15 years of age can be taken in adoption in the light of the judgment of this Court in **Hanmant Laxman Salunkhe V/s. Shrirang Narayan Kanse AIR 2006 Bom.123 ?**

5) Mr. Hardas, the learned counsel appearing for the Appellant would submit that the Trial and the First Appellate Court have erred in doubting the authenticity of adoption of Defendant No.2 in the light of presentation of registered Deed of Adoption dated 6 December 1990. Relying on the provisions of Section 16 of the Hindu Adoptions and Maintenance Act, 1956 (**the Act**), Mr. Hardas would submit that when registered document relating to adoption was produced before the Court, the Court has to presume that the adoption was made in compliance with the provisions of the Act, unless and until it is disproved. That by production of valid registered Adoption Deed, it was impermissible for the Trial and the first Appellate Court to institute fresh enquiry into conduct of adoption ceremony or going into the issue of validity of adoption. Mr. Hardas would further submit that the first Appellate Court has erred in holding that the adoption was invalid on account of the provisions of Section 10(iv) of the Act. That in Maratha community, there is a custom which permits person who has completed the age of 15 years being taken in adoption. He would submit that once the Courts have recognised the custom in a particular matter for long time, the same has to be considered as long and continuous practice and that it is not necessary to prove the same. That the Trial and the first Appellate Court ought to have taken judicial notice of such custom as held by the Full Bench of this Court in *Anirudh*

Jagdeorao V/s. Babarao Irbaji¹. He would also reply upon judgment of this Court in ***Hanmant Laxman Salunke (D) by LRs. V/s. Shrirang Narayan Kanse²*** in which again this Court has recognised the custom in Maratha community where boy over the age of 15 years can be adopted. He would submit that the parties in the present case belong to Maratha community and that therefore it was not necessary to prove prevalence of such custom in the community.

6) Mr. Hardas would therefore submit that the Adoption Deed has to be treated as valid and that the Trial and the first Appellate Court have erred in ignoring such validly executed Adoption Deed. He would further submit that in addition to Adoption Deed, Defendant No.1-father also executed a Will bequeathing his estate in Appellant's favour and that therefore Appellant is the sole owner in respect of the suit properties. Alternatively, and without prejudice, Mr. Hardas would submit that atleast one-third share of Defendant No.2/Appellant must be protected on the basis of Adoption Deed, even if the Will is held to be not proved. He takes instructions from the Appellant who is personally present in the Court during the course of arguments who is ready to settle for one-third share in the suit property by ignoring the sale.

7) *Per-contra*, Mr. Kurund the learned counsel appearing for the Respondent/Plaintiff would oppose the Appeal and support the Decrees passed by the Trial and the first Appellate Court. He would submit that it was impossible that the Plaintiffs, who are daughters of Defendant No.1, would not be invited for the alleged adoption ceremony by the father. That the Second Defendant took disadvantage of illiteracy of the First Defendant and brought into existence fraudulent Deed of Adoption as well as Will with a view to grab his property. That Plaintiffs, being real daughters of Defendant No.1 are best persons to lead evidence

¹ AIR 1983 Bom 391.

² AIR 2006 Bom 123

in support of the absence of any adoption. That even father filed Written Statement denying any such adoption. Mr. Kurund would submit that therefore no interference is warranted in the well-reasoned judgments of the Trial and the First Appellate Court.

8) Mr. Kurund would further submit that the age of the Second Defendant was well above 15 years and the date of the alleged adoption and that therefore such adoption is invalid under the provisions of Section 10 of the Act. That there is no custom in the community of parties under which, boy above the age of 15 years can be given or taken in adoption. That in case, prevalence of such custom was required to be proved by leading evidence. That the adoption is thus clearly invalid and has been rightly ignored by the Trial and the first Appellate Court. In support of his contention, he would rely upon judgment of the Apex Court in *Bhimashya and others V/s. Janabi (Smt) alias Janawwa*³. Relying on the judgment of *Rajgopal (Dead) by LRs. V/s. Kishan Gopal and another*⁴, Mr. Kurund would submit that no interference is warranted in the concurrent findings of facts recorded by the Trial and the first Appellate Court. He would pray for dismissal of the Appeal.

9) Rival contentions of the parties now fall for my consideration.

10) Before answering the first question of law framed, I would take up the second question for consideration first, in the light of findings recorded by the Trial and the first Appellate Courts. Perusal of the judgment passed by the Trial Court would indicate that the issue of age of Defendant No.2 being above 15 years for the purpose of considering validity of adoption under Section 10(iv) of the Act was raised and has been considered by it in para-15 of the judgment which reads thus:

³ (2006) 13 SCC 627.

⁴ (2003) 10 SCC 653.

15. The above ratio laid down by the Hon'ble Bombay High Court shows that the custom was prevailing in Bombay State that the boy of any age even if he is married can be adopted. This custom is well recognized by the Hon'ble Bombay High Court in several rulings. It is also observed by the Hon'ble Bombay High Court that as the custom is prevailing in the Bombay State, hence there is no need to plead or prove the said custom as there is no embargo in respect of age of adoptive child. Therefore, there can be no ground to reject this adoption on the ground to reject this adoption on the ground of age of adopted son.

11) Thus, so far as the Trial Court is concerned, it accepted the custom in Maratha community of adoption of boy above age of 15 years by relying on judgment of this Court in ***Hanmant Laxman Salunkhe*** (supra). The Trial Court thus held that it was not necessary for Defendant No.2 to lead evidence about existence of custom in Maratha community to prove validity of adoption when the age of Defendant No.2 was above 15 years on the date of adoption. This finding is not challenged by Plaintiffs by filing appeal/cross objection before the first Appellate Court. The first Appellate Court though has recorded factual position and submission in paragraph-16 and 17 of its judgment on this aspect, apparently there is no specific finding by the first Appellate Court on this issue. It is held by the first Appellate Court in paragraph-16 and 17 of the judgment as under :

16. Admittedly, at that time of adoption deed dated 06.12.1990 (Exh.86), the original defendant No. 2 was of 23 years old. The learned advocate for plaintiffs argued that the so called adoption is in contravention of law, therefore, not legal. As per section 10 (iv) of Hindu Adoption and Maintenance Act 1956, no person shall be capable of being taken in adoption unless he or she has not completed age of 15 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.

17. On the other hand, advocate for defendants argued that there is custom in Maratha Community in Bombay School, to take a person in adoption above the age of 15 years. He relied in ratio laid down in case of “ ***Hanmant Laxman Salunkhe Vs. Shrirang Narayan Kanse, reported in AIR 2006 Bom. 123*** ”, wherein His Lordships of Bombay High Court has

observed that, “if there is judicial recolonization, it is not necessary to prove it by leading evidence in trial court”.

12) In my view therefore there is no serious contest on the issue of validity of adoption of Defendant No.2 despite his age being above 15 years in the light of provisions of Section 10(iv) of the Act. In *Hanmant Laxman Salunkhe* (supra), Single Judge of this Court has relied upon Full Bench decision of this Court in *Anirudh Jagderao V/s. Babarao Irbaji* (supra) and decision of the Apex Court in *Kondiba Rama Papal V/s. Narayan Kondiba Papal*⁵ and held that it is not necessary for party to prove by evidence that there is custom or usage prevailing in Maratha community of adopting a boy who has crossed the age of 15 years and who was married at the time of his adoption. This Court held in paras-7 and 8 as under :

8. The learned counsel for the respondent was right in his submissions that the view taken by the Full Bench of this Court in Anirudh's case (AIR 1983 Bom 391) (supra) has been approved by the Apex Court in the case of Kondiba Rama Papal (AIR 1991 SC 1180) (supra) in the following words: "...The adoption is not invalid although it took place after the thread ceremony of the boy was performed. Thus the custom is judicially recognised in the Bombay State as regards adoption of a child at any age. Once the custom is judicially recognised, it is not required to be independently proved in subsequent cases..."

By following the law laid down by the Full Bench of this Court in the case of Anirudh (AIR 1983 Bom 391) (supra) and by the Apex Court in the case of Kondiba (AIR 1991 SC 1180) (supra) it will have to be held that in the instant case it was not necessary for the defendant to prove by evidence before the trial Court that there was a custom or usage prevailing in the Maratha community

in Satara District of adopting a boy who had crossed the age of 15 years and was also married at the time of adoption. The contentions of the appellant that the adoption of the respondent as had taken place on 22-11-1988 was illegal on account of non-compliance of Section 10(iii) and Section 10(iv) of the Act have to be rejected and thus the substantial questions of law at serial no.(ii) and (iii) are hereby answered against the appellant-plaintiff.

9. Now coming to the next issue of non-compliance of the requirements of Section 11(iv) of the Act, as noted earlier, the lower Appellate Court has

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1991 (2) SCC 218

recorded a finding of fact that the age difference between the adopting mother and the defendant was less than 21 years on 22-11-1988 and thus there was a contravention of the requirements of Section 11(iv) of the Act. The Full Bench of this Court in Anirudh's case (AIR 1983 Bom 391) (supra) was not called upon to consider the issue as to whether the requirements set out under Section 11 were mandatory or directory. The Apex Court in the case of Kondiba (supra) also did not deal with the said issue and, therefore, the Courts below committed a gross error in holding that once the fact of adoption was proved, the non-compliance of the requirements or of any of them under Section 11 of the Act would not affect the adoption in any way and lead to a conclusion that the adoption was illegal or invalid. Section 5 of the Act states that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in Chapter II and any adoption made in contravention of the said provisions shall be void. As per sub-section (2) of the said Section an adoption which is void shall neither create any rights in the adoptive family in favour of any persons which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

Section 6 states that no adoption shall be valid unless

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

(Emphasis supplied)

Section 11 of the Act sets out other conditions for a valid adoption and it states that these conditions must be complied with. The conditions which must be complied with are as under:

- "(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
- (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted." (Emphasis supplied)

Section 16 creates certain presumptions as to the registered documents relating to adoption. It states that 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.

13) In my view therefore the Adoption Deed dated 6 December 1990 cannot be treated as invalid only on the ground of age of Defendant No.2 being 23 years as on 6 December 1990, as it was not necessary for the Appellant to prove that there is custom in their community permitting adoption of a boy over the age of 15 years. The second question of law is answered accordingly.

14) Coming to the first question of law, it is seen that both Trial and the first Appellate Court have gone into the issue of validity of the adoption ceremony as well as the Adoption Deed dated 6 December 1990. The Trial and the first Appellate Court have doubted genuineness of such adoption ceremony. The main reason for raising such doubts by both the Courts below is failure to invite Plaintiffs, who are natural daughters of Defendant No.1, for such ceremony. In my view, the Trial and the first Appellate Court have completely erred in not appreciating the provisions of Section 16 of the Act which provides thus:

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.

15) In the present case, the Adoption Deed dated 6 December 1990 is registered. Once registered deed of adoption was presented, the Court has to presume that the adoption was made in compliance with provisions of the Act. In

the present case, Defendant No.1 father did not file any proceedings to challenge the Adoption Deed. In a suit filed by her daughters essentially to claim rights in property, he filed a Written statement disowning the Adoption Deed. Both the Trial and the first Appellate Court have not recorded any finding of fact that Defendant No.1 has not signed the Adoption Deed. Thus, execution of Adoption Deed is proved. Once execution and registration of the Adoption Deed is proved, Section 16 of the Act relieves party of any burden to prove valid adoption and casts a duty on the Court to presume valid adoption recorded in the document. Thus, upon production of a registered Deed of Adoption, the Court is not supposed to institute an enquiry as to whether adoption ceremony was validly performed or not. In my view both, Trial and the first Appellate Court have erred in going into the aspect of genuineness or validity of performance of adoption ceremony, which is clearly impermissible considering the provisions of Section 16 of the Act. The first question of law is answered accordingly.

16) Thus valid adoption of Defendant No.2 is proved. Though Defendant No.2 relied upon Will of Defendant No.1 dated 30 October 2007 in his Written Statement, Mr. Hardas has not pressed the point of validity of Will and accordingly no question of law is framed in that regard while admitting the appeal. Therefore, upon proof of valid adoption of Defendant No.2, he becomes entitled to share in the suit properties alongwith the two Plaintiffs. In my view, therefore the two Plaintiffs and Defendant No.2 shall each have one-third share in the suit properties.

17) Second Appeal accordingly partly succeeds and I proceed to pass the following order:

- (I) Decree dated 25 July 2012 passed by Civil Judge Senior Division, Barshi in Regular Civil Suit No. 47/2012 as affirmed by decree dated

16 April 2018 passed by Ad-hoc District Judge-1, Barshi in Regular Civil Appeal No. 229/2014 are set aside.

(II) The decree of the Trial Court is modified to the extent that Plaintiffs and Defendant No.2 shall each have one-third share in the suit properties and each shall have right of partition and separate possession in respect of their shares.

(III) Preliminary decree for partition for carving of one third share each of Plaintiffs and Defendant No.2 be accordingly drawn up and sent to the Collector for effecting partition.

18) With the above directions, the Second Appeal is **partly allowed**. There shall be no order as to costs.

19) With the disposal of the Appeal, nothing survives in the Civil Application and the same also accordingly stands disposed of.

SANDEEP V. MARNE, J.

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