

Mahadev Vs. Bainabai

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Court : Karnataka

Decided On : Mar-15-1974

Reported in : AIR1975Kant79; ILR1974KAR787; 1974(2)KarLJ184

Judge : V.S. Malimath, J.

Acts : [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 16; [Code of Civil Procedure \(CPC\), 1908](#) - Order 14, Rule 1;

Appeal No. : Second Appeal No. 695 of 1971

Appellant : Mahadev

Respondent : Bainabai

Advocate for Def. : B.V. Deshpande, Adv.

Advocate for Pet/Ap. : S.L. Benadikar, Adv.

Judgement :

1. This second appeal is by the second defendant against the decree passed by the 1st Additional Civil Judge, Belgaum, in Regular Appeal No. 141 of 1968, affirming the decree passed by the Additional Munsiff at Chikodi in O. S. No. 100 of 1966.

2. The respondent-plaintiff instituted the suit for declaration that the adoption of defendant No. 2 by defendant No. 1 being against the condition of a valid

adoption, should be declared that the same is invalid. The plaintiff's husband Krishna was the brother of Gundu. Gundu's son is Mahadev defendant No. 2. Krishna was impleaded as defendant No. 1 in the suit. Defendant No. 1 was ex parte in the Court of first instance and died some time later. Krishna had executed a deed of adoption dated 16-8-1965 as per Exhibit 42, which was registered on the 17th of August, 1965 on the said document being presented for registration by the natural father of defendant No. 2 Gundu. It is the execution of the said adoption deed that gave cause of action to the plaintiff to institute the suit. The case of the plaintiff is that no adoption ceremony as such took place on the 16th of August, 1965, there being no giving and taking. Her further case is that her consent for adoption of the second defendant by her husband was not taken. The suit was resisted by the second defendant, who took the stand that the giving and taking did take place and that he has been validly adopted by Krishna. He also pleaded that the plaintiff herself joined in the adoption ceremony and that the adoption did take place with her consent. The second defendant also relied upon the presumption arising under Section 16 of the [Hindu Adoptions and Maintenance Act, 1956](#) (hereafter referred to as the Act).

3. The Court of first instance decreed the suit of the plaintiff, which decree has been affirmed on appeal by the learned Civil Judge. Hence, this second appeal by the second defendant.

4. Sri S. L. Benadikar, learned counsel appearing for the appellant, contended that the learned Civil Judge committed an error of law in not raising a presumption under Section 16 of the Act Section 16 of the Act reads as follows:--

'16. 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 disapproved.'

The Court below has held that the presumption under Section 16 of the Act does not arise in respect of the adoption deed Exhibit 42, inasmuch as the said deed has not been signed by Gundu the person giving defendant No. 2 in adoption to

Krishna. The document is executed by Krishna. The argument of Sri Benadikar is that the registered document Exhibit 42 does bear the signature of Gundu and that therefore all the conditions prescribed by Section 16 of the Act are satisfied. As already mentioned, the document is not executed by Gundu. It is executed only by Krishna, the person taking the second defendant in adoption. A perusal of the document Exhibit 42, however, reveals that the document was presented, after its execution, for registration by Gundu as the guardian of the minor Mahadev defendant No. 2, In order to raise the presumption under Section 16 of the Act that the adoption has been made in compliance with the provisions of the Act, which presumption is a rebuttable one, the following conditions have to be satisfied, namely:-- (1) that the document produced before the Court purports to record the adoption made; (2) that the said document is signed by the person taking the child as well as by the person giving the child in adoption; and (3) that the document is duly registered under any law for the time being in force. It is not disputed by both the sides that the first and the third conditions are satisfied. The only controversy is regarding the second condition which requires the document to be signed by the person giving as well as the person taking the child in adoption. It is also not disputed that the document is duly signed by the person taking Mahadev in adoption. The question for consideration is, as to whether the signature affixed by Gundu as a person presenting the deed for registration can be regarded as signature of the person giving the boy in adoption contemplated by Section 16 of the Act, The answer to this question depends upon the sequence of time in which the three conditions have to take place. The first condition is that the adoption should have taken place before the same is recorded in the deed of adoption. After the record of the adoption is made in the document, the same is required to be signed by the person giving, as well as by the person taking the child in adoption. It is after the document is so signed by the giver and by the person taking the boy in adoption, that the document has to be presented for registration. It is, therefore, clear that the signature of the person giving and the signature of the person taking the child in adoption must have been affixed before the deed is presented for registration. Hence, the signature of the person presenting the document for registration cannot be regarded as satisfying the requirement of Section 16 of the Act I have, therefore, to affirm the finding recorded by the Court

below that as Exhibit 42 has not been signed by the person giving Mahadev in adoption, the presumption under Section 16 of the Act does not arise.

5. It was next contended by Shri Benadikar that the Court of first instance framed an issue only with regard to the validity and legality of the adoption of defendant No. 2 by defendant No. 1 and that therefore the courts below were not justified in going into the question of factum of adoption of defendant No. 2 and recording a finding against the defendants in that behalf. He submitted that the premises for the issue framed by the Court of first instance is that there is no dispute in regard to the factum of adoption and that the controversy was only in regard to the validity of the adoption, depending upon the question as to whether prior consent of the plaintiff was taken by Krishna. It was also contended that the finding on the question of factum of adoption has necessary bearing on the question of consent by the plaintiff. If the factum of adoption is proved, it would undoubtedly go a long way to support the case of the defendants that she was a consenting party to the adoption having regard to her conduct. Shri Benadikar, in my opinion, is right when he maintains that the issue framed by the Court of first instance is not right. The plaintiff has, no doubt, sought for a declaration that the adoption of the second defendant by defendant No. 1 is not legal and valid. But, the averments in the plaint make it clear that the plaintiff has not conceded or admitted the factum of adoption. She has, in express terms, stated that the giving and taking did not take place and that therefore there was no factum of adoption as such. Having regard to the averments in the plaint and the prayer, one has to understand the relief claimed by the plaintiff as seeking a declaration that defendant No. 2 is not the adopted son of defendant No. 1. This prayer would include not only the investigation of the factum of adoption but also the question of validity of the adoption. Shri B. V. Deshpande, learned counsel appearing for the respondent, is right in maintaining that that is how both the sides understood their respective cases and led evidence in the Court of first instance. If the wrong framing of the issue has not caused prejudice to the parties, it will not be proper to set aside the decree only on the ground that appropriate issues have not been framed by the Court of first instance. The second defendant has led oral evidence to prove his case that the adoption ceremony did take place. Such evidence would not have been led by the second defendant if he was misled by the issues framed by the

Court of first instance. As I am satisfied that the second defendant did lead evidence on the assumption that he has to prove giving and taking in the event of the Court coming to the conclusion that the presumption under Section 16 is not available to him, the failure to frame an appropriate issue does not call for interference with the judgments and decrees passed by the Courts below.

6. It was next urged by Shri Benadikar that even if the second defendant is not entitled to the benefit of the presumption under Section 16 of the Act, the recitals in Exhibit 42 executed by Krishna wherein there are averments regarding giving and taking, should have been taken into consideration by the Court below while recording a finding on the question of factum of adoption. This contention of Shri Benadikar is well founded and must be sustained. The Court below has not at all taken into consideration the recitals in Exhibit 42. The recitals in Exhibit 42 are in Marathi. It is stated therein that with the consent of Gundu and his wife, Mahadev was taken in adoption by Krishna in accordance with the custom of the community. The recitals in Exhibit 42 therefore prima facie support the case of the second defendant. The recitals in the document have to be taken into consideration along with the oral evidence produced by the second defendant to prove the factum of adoption. The only witnesses who have been examined to prove the factum of adoption are D.Ws. 1 to 3. D.W. 1 is Gundu the natural father of defendant No. 2. The Courts below have characterised his evidence rightly as that of a highly interested person. He states that the adoption took place at about 10 A.M. and that his brother asked him to give his son in adoption and that he told him to take the boy in the presence of the people. He has further stated that the neighbouring people were collected and he was once again asked to give the boy in the presence of those people. He agreed and handed over the boy to Krishna and made him sit between Krishna and his wife the plaintiff. They put Kunkuma to the boy and plaintiff put sugar in the mouth of the boy. Thereafter betel leaves were distributed and the relatives were fed. He has also stated that one Ayya was present at the time of adoption. The said Ayya has not been examined. This witness has stated that talks of adoption were going on for 1 1/2 years prior to the adoption ceremony. If the talks were going on for such a long time, one would expect him to have led evidence of independent witnesses who were present at the time of such talks. Besides, it is necessary to point out that on the 5th of

March, 1965, the plaintiff's husband gave a wardi to the village officers transferring all his property in favour of his wife the plaintiff. The adoption is stated to have been taken place on the 16th of August, 1965. If the talks of adoption were going on for about 1 1/2 years which culminated in the adoption on the 16th of August, 1965, the conduct of the plaintiff's husband in transferring the lands in favour of the plaintiff by giving a wardi on the 5th of March, 1965 becomes inexplicable. D.W. 1 is naturally interested in supporting the case of the second defendant, inasmuch as the adoption will bring valuable properties for his son. D.W. 2 is Ramgouda Patil, He is a resident of another village Birdi and not the resident of Jalalpur the place of residence of the plaintiff and her husband at the time of adoption. The Court below has rightly characterised the evidence of this witness as that of a chance witness. This witness has, no doubt, supported the second defendant's case regarding the factum of adoption. But, from what has been elicited in the cross-examination it appears that he was not really a witness to the factum of adoption. He has admitted that he did not notice as to who put the sugar in the mouth of the boy. The putting of the sugar in the mouth of Mahadev took place immediately after the alleged giving and taking. If this witness has not seen the putting of the sugar in the mouth of the boy, it is obvious that he could not have seen the actual giving and taking. He is also not aware as to who performed the Puja of dattak ceremony. He has stated that he was sitting outside the apartment, whereas the adoption ceremony took place inside the apartment. This clearly shows that he was not at all a witness to the factum of adoption. D.W. 3 Mallappa Jadhav is the other witness examined by the second defendant. He has supported the case of the second defendant so far as the factum of adoption is concerned. But, it is in evidence that Gundu and Krishna have purchased the land belonging to D.W. 3 Jadhav on the condition to recovery the same. This circumstance clearly establishes that D.W. 3 is an interested witness, inasmuch as he has to secure reconveyance of the property which he has transferred by means of a sale-deed in favour of Gundu and his brother Krishna. He is, therefore not an independent witness. If the oral evidence regarding the factum of adoption is rejected, what remains is only the recitals in Exhibit 42. In this behalf two circumstances have to be noticed. The first is that the fact that the plaintiff's husband Krishna gave a wardi about 5 months before the date of the alleged adoption transferring all his

property in favour of his wife. The second circumstance is that Krishna though he is impleaded as a party, remained ex parte and did not choose to controvert the express assertions made by the plaintiff that the adoption ceremony in fact did not take place and that the plaintiff's consent was not taken to the alleged adoption. If these circumstances are taken into consideration, the only inference possible is that the deed of adoption was got executed from Krishna without any adoption having taken place and without the consent of the plaintiff. Hence, I affirm the finding of the Court below that the factum of adoption has not been proved. As the factum of adoption itself has not been proved, the question of consent of the plaintiff, either express or implied, does not arise for consideration in this case.

7. For the reasons stated above, this appeal fails and is dismissed. No costs.

8. Appeal dismissed.

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