

Smt. Vidya Devi and ors. Vs. Nand Kumar

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Court : Allahabad

Decided On : Feb-12-1981

Reported in : AIR1981All274

Judge : N.N. Mithal, J.

Acts : [Evidence Act, 1872](#) - Sections 3, 32, 90 and 90A; Uttar Pradesh Evidence (Amendment) Act; Hindu Law; [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 16

Appeal No. : Second Appeal No. 2177 of 1974

Appellant : Smt. Vidya Devi and ors.

Respondent : Nand Kumar

Advocate for Def. : B.L. Katiyar, Adv.

Advocate for Pet/Ap. : S.N. Agarwal, Adv.

Disposition : Appeal dismissed

Judgement :

N.N. Mithal, J.

1. In this appeal only a short point about the validity of the adoption of Indra Jit Singh by Smt. Saras-wati Kunwar is involved. The suit was filed by the plaintiff

respondent in January, 1965 as a nearest reversioner of Smt. Saraswati Kunwar, who allegedly died in the later part of 1964. The suit was dismissed by the trial court but on appeal, the lower appellate court has allowed the same. Aggrieved, the defendants have come up in second Appeal.

2. In order to properly understand the case taken up by the plaintiff, it will be necessary to keep in mind the relations between the parties as per pedigree given below :--

GANGA DIN

_____ | _____

|||

Vishnu Tulsi Ram Kalloo

_____ | _____
_____ | _____

|||||

Thakurdin Govind Behari Tara Chand Harilal Devdin

|| (issueless) | died |

Sitaram Prag | _____

||||

Kamta Parashram (issueless) | Mannu Chandi

| _____ | (issueless) (issueless)

|||

Lalman Puttulal _____ | _____

||||

| Sheokumar Manilal Chandilal (issueless)

| (issueless) |

| _____ Smt. Saraswatu Kunwar

||

Shyam Lal Nand Kumar (Plaintiff)

_____ | _____

|||

Sundari Premchand Reechilal

3. From a look at the pedigree, it will be clear that the branch of Kalloo had come to an end and in the branch of Tulsi, the last male member was Manni Lal, whose widow was Smt. Saraswati Kunwar. The third branch of Vishnu had Nandkumar, the plaintiff, as the last and nearest reversionary male member on the date of the suit. The plaintiff alleged that Manni Lal died in 1930 and Smt. Saraswati Kunwar also died some time in the latter part of 1964. After the death of Manni Lal, Smt. Saraswati Kunwar had become the limited owner of the property and that after her death, the plaintiff as her nearest reversioner, was entitled to the property once belonging to Manni Lal. The defendants had no concern with the property in suit and they were only grand-children of Smt. Saraswati Kun-war's brother. On this basis, the suit (Contd. on Col. 2) for possession was filed, by the plaintiff.

4. The defendants put in contest and alleged that the pedigree set up by the plaintiff was incorrect and that Tulsi Ram had no brother by the name of Vishnu and that Kamta died during the lifetime of Manni Lal and also that one Indra Jit Singh had been adopted by Smt. Saraswati Kunwar according to the direction given by her husband and a registered deed of adoption was also executed by her on 19-5-1952. Indra Jit Singh, therefore, claims to be adopted son and on his death the defendants were owners of the property in question. Ajit Singh, defendant No. 1, also died and he is now represented by his legal representatives.

A replica was filed by the plaintiff on 12-9-1970, in which the adoption was denied and it was also alleged that Manni Lal had never given any authority to his wife to adopt a SOB. It was further alleged that even if the adoption may have been taken place, the same was illegal and that Indra Jit Singh was already married in 1942.

5. On these pleas of the parties, the trial court framed as many as 7 issues. On issue No. 2 as to whether Vishnu and Tulsi Ram were real brothers, the court came to the conclusion that Vishnu was not the brother of Tulsi Ram. On issue No. 3 as to whether Manni Lal had died in 1930. the court came to the conclusion that Manni Lal had died in 1930. On the crucial issue No. 4 as to whether Smt. Saraswati Kunwar had adopted Indra Jit Singh, the court held that Smt. Saraswati Kunwar had been given authority to adopt by her husband and that, in fact, Indra Jit Singh had been adopted as a son of her deceased husband Manni Lal. On these findings, the suit of the plaintiff was dismissed.

6. In appeal before the lower appellate court, mainly two points came up for consideration as to whether the plaintiff was the nearest male reversioner of Manni Lal and whether Smt. Saraswati Kunwar had, an authority to adopt Indrajit Singh and he had, in fact, been adopted. On a consideration of the evidence on the record, the lower appellate court came to the conclusion that Vishnu and Tulsi Ram were real brothers and as such the plaintiff was the nearest male reversioner of Smt. Saraswati Kunwar. This finding of the lower appellate court has not been seriously challenged before me. On the other Question about the adoption of Indrajit Singh, the lower appellate court came to the conclusion that he had, in fact, been adopted by Smt. Saraswati Kunwar, but, on the question whether she had an authority from her husband, Manni Lal to adopt Indra Jit Singh, the lower appellate court came to the conclusion that she, in fact, had no authority to do so and as such Indra Jit Singh had not been validly adopted as a son. It also came to the conclusion that Indra Jit Singh had not been married before the adoption and on that ground, his adoption could not be assailed.

7. The sole question for determination in this appeal is as to whether or not there was evidence on the record to show that Smt. Saraswati Kunwar had any valid authority to adopt.

8. Sri Sudhir Narain Agarwal, learned counsel for the appellants, has strenuously argued that the approach of the lower appellate court was absolutely erroneous in this respect and it has not properly appreciated the evidence on the record. He has also submitted that the authority in favour of the widow ought to have been presumed in the circumstances of the case and also the recital in the deed of adoption made by Smt. Saraswati Kunwar, who is now dead, should be properly considered. He has further argued that the burden of proof was on the respondents to prove that there was no authority and in this view of the matter, the entire approach of the trial court was legally erroneous.

9. I will take up the submissions made by the learned counsel for the appellant in seriatum.

10. According to the appellant, the authority which is alleged to have been given so long back in 1930 and the adoption having taken place as far back as 1942, must be presumed to have been given by Manni Lal to his wife as it remained unchallenged for such a long period. Admittedly, the adoption deed had been registered in May, 1942 and must have been within the knowledge of the plaintiff since that time. No efforts were made to question the same from 1942 till 1965 when the suit was filed. It is, therefore, argued that in such circumstances, it must be presumed that the widow had, in fact, an authority from her husband and it is not possible to adduce direct evidence of grant of authority after such a lapse of time. He has in this connection relied upon the case of Venkata Seetha-rama Chandra Rao v. Kanchumarthi Raju , where it was held :

'The burden resting, altogether apart from the law of limitation upon any litigant who challenges the authority of an adoption that has been recognised as valid during long course of years is of the heaviest order.

The same witness who proved the adoption also proved the authority to adopt, the adoption was challenged as having been made without the husband's authority, about 42 years after it had taken place; the conduct of the adopting widow had no element of usurpation in it but simply the element of carrying out her husband's dying wish. The adopted son was transferred from his natural home to his adopted home and he had lived there all his life as a member of the house hold. The

plaintiff did not question authority to adopt during the adopting widow's life which extended for 30 years beyond that of her husband the local authorities had recognised the adoption as valid and treated the adopted son as such. In various litigations, the plaintiff had acted along with the adopted son acknowledging in the course of proceedings his right and all other parties concerned had all along recognised the validity of the adoption.'

In these circumstances the Privy Council held that authority to adopt had been fully proved.

11. In this case, two circumstances which weighed with their Lordships of the Privy Council are of importance (i) there was proof on the record that the adopted son had been living with the adopting mother as a member of the household and the local authorities had also recognised the adoption as valid and he was treated as an adopted son by them, and (ii) the person who questioned the adoption himself had been acting along with the adopted son in various litigations and in doing so, he had acknowledged the validity of the adoption. In the instant case, however, the second aspect of the matter is absolutely absent. The case is, therefore, clearly distinguishable on facts.

12. The next case, on which reliance has been placed by the appellant is of *Biradh Mal v. Prabhabhati Kunwar*. In that case, it had come in evidence that the son who had been adopted, was present at the time when the deed of adoption was put up for registration and in his presence the Sub-Registrar had inquired from his natural father as also from the widow adoptive mother as to whether, they had executed the deed. In view of this evidence, it was held that actual giving and taking in adoption must be held proved. However, in the present case we are not concerned with the actual giving and taking of the son in adoption. But we are concerned here with the authority which is alleged to have been given by Manni Lal to his wife Smt. Saraswati Kunwar prior to his death to adopt a son to him. In this case, the very presence of the boy taken in adoption was in dispute. The facts of that case are, therefore, clearly different from the facts of this case, and cannot help the plaintiff in any way.

13. He has then relied on *Neelawa Dandappa Kohalli v. Gurshiddappa Madiwalappa Pattanshetti* (AIR 1937 Bom 169) where a Division Bench of that court had considered the question of adoption and had held that the recital in the deed of adoption that a person had been adopted could be taken into consideration along with other evidence and subsequent conduct of the party. There cannot be any disagreement with the above proposition of law but it is difficult to understand how the same is being applied in the present case. It is one thing to say that the statement made by a dead person in a document when issue had not been raised is a relevant and admissible fact to be taken into consideration by the court and it is quite different to say that such a statement must be deemed to be proof of the fact stated in the document. In fact, like any other evidence, the recital in the document made by a deceased person, if the same is admissible under Section 32 of the Evidence Act, can be taken as another piece of evidence to be assessed by the court about its worth as credible evidence.

14. The learned counsel then argued that Ex. A. was relevant and admissible piece of evidence which has not been considered by the court below and it had wrongly rejected the deed of adoption as inadmissible and not proved. It is true that the deed of adoption Ex. A-1 is a registered deed and it cannot be said that it had come before the court from the source which can be said to be improper. Therefore, the provisions of Section 90 of the Evidence Act must apply. Section 90 of the Evidence Act as amended in U. P. reads as under :--

90. (1) 'Where any document, purporting or proved to be twenty years old, is produced from any custody which the court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

(2) Where any such document as is referred to in Sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified

copy thereof is produced, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested.

Explanation-- Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.'

15. There is another amendment in the Evidence Act as applicable in the State of Uttar Pradesh introducing a new Section 90-A, which reads as under :--

90-A 'Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.'

16. A comparison of the sections will go to show that while Section 90 applies to all documents which are more than 20 years old and have been produced from proper custody, about which a presumption may be raised by the court that the signature and other parts of the document were in the handwriting of the particular person and may presume due execution thereof, Section 90-A on the other hand operates in respect of only registered documents and the qualification of the document being more than 20 years old is not applicable thereto. Section 90-A raises a presumption in respect of a registered instrument or its certified copy in a similar manner but it does not raise any presumption of its due attestation but a presumption is raised only as regards the due execution thereof. There is, however, an exception to this also which says that the presumption will not be made in cases in which the document in question was the basis of the suit or defence or was relied upon either in the plaint or in the written statement.

17. A deed of adoption, however, does not, require attestation and if the document is registered and is produced from proper custody, the provisions of Section 90-A could have applied thereto, In this case, however, the deed of adoption is a document which was referred to and has been relied upon in the written statement. Even though the original document has been filed, yet on account of the proviso to Section 90-A(1) the presumption which could have been raised under Section 90-A(1) of the Evidence Act will not apply in such a case. In my opinion there is no conflict between the provisions of Section 90 as amended in U. P. and Section 90-A as added in U. P. though they are designed to operate in different fields, yet they can operate simultaneously over a limited common area also. They do not mutually exclude the applicability of one by the other. A document which is registered and is also more than 20 years old cannot be admitted in evidence under Section 90-A if it is the basis of the suit or of defence, yet it can still be held proved in view of the provisions of Section 90 and a presumption referred to therein can be raised in respect of such a document. In my opinion, therefore, the lower appellate court was absolutely incorrect in discarding this document as inadmissible as the same was, in fact, admissible under Section 90 as amended in U. P. being the original document which was more than 20 years old and had been produced from a proper custody.

18. The question, however, still remains whether the recital made by Smt. Saraswati Kunwar in the deed of adoption that she had an authority from her husband to adopt, though otherwise admissible in evidence would be deemed sufficient proof of the fact of giving the authority merely by the production of this document alone irrespective of the other circumstances which may go to negative her assertion in the deed As is evident from the record, Manni Lal had died in 1930. The adoption is alleged to have taken place on 23rd April, 1942, and the deed of adoption Ex. A-1 was executed on 18-5-1942. There is no direct evidence about the persons, in whose presence the alleged authority had been given. In the document itself, there is a mention that this authority had been given to the executant in the presence of some relations and respectable persons whose particulars were not disclosed. She was the person to whom the authority is alleged to have been given and, therefore, she must be deemed to be in a position to know their names and other particulars even at the time when Ex. A-1 was

executed. The absence of their names from this document is also a circumstance which has to be taken into account by the court in considering whether any such authority was really given to her. The recitals in the deed of adoption are also relevant. It says that Manni Lal could not beget a son in spite of his three marriages and he had been considering the matter of adopting a child but he was not able to lay his eyes upon any suitable boy for this purpose. The adoption deed further mentions that in the family of Manni Lal, no such person was alive. This recital is absolutely incorrect as Vinshu's family did have a male boy. It is true Kallu's branch had become extinct but Vishnu's branch had been continuing and this wrong recital in the deed, therefore, makes it suspicious. May be it was so mentioned because she did not want to adopt a child from family of his brother and for that reason the deed proceeds to mention that Manni Lal had wished that Smt. Saras-wati should take a healthy child from her side in adoption. Further with a view to explain the long delay between the death of Manni Lal and the time of adoption, that is, a gap of 12 years, the document recites that Indra Jit Singh who was ultimately adopted was too young to be taken in adoption at the time when Manni Lal had died and there was no surety about his further life. Nobody can be sure about the future prospects of anybody and generally children of tender age who are quite innocent are usually taken in adoption, so that they can easily be assimilated and adjusted in the adopted family. Indra Jit Singh. according to the evidence on record, was about 4 years old in 1930. That perhaps was the right age when he would have been taken in adoption instead of waiting for 12 long years during which he may have become more attached in his natural family and may have also become firm and rigid in his opinions and views about life. That was hardly a proper time to adopt Indra Jit Singh, This is another circumstance which goes against the theory of authority having been given to her to adopt a son as set up by the defendants.

19. One more circumstance in this connection must be considered. When the deed of adoption was executed, admittedly two of the witnesses were still alive. None of them has been examined as a witness on the ground that they were too old and infirm to give their statement in court. The Code of Civil Procedure does make a provision where infirm and old persons can be examined as a witness on commission. Resort to this procedure was not taken. It is true that persons signing

a document as witnesses normally are supposed to depose only about the execution of the deed but then the plaintiff could have cross-examined them about the authority which the executant of the document claimed to have obtained from her husband. It was possible that some light may have been thrown by them regarding the facts mentioned in the deed of adoption. As the evidence stands today, the only evidence of authority to adopt is her own statement contained in the deed Ex. A, 1 which though admissible in evidence cannot be taken on its face value. Since the executant was dead when the question of adoption was challenged, the courts did not also have the advantage of her cross-examination on that point. The circumstances already referred to above also do not go to support the theory of adoption. The statement of D. W. 3 on the point is also not accurate. According to him, the adoption took place 3 or 4 years after Manni Lal's death although, in fact, it took place 12 years after death. He has also stated that authority to adoption had been given about 1 1/2 to 2 years before the death while in the deed of adoption Ex. A-1 we find a mention that such an authority was given only a few days before the death of Manni Lal. These discrepancies though not very material in themselves but are sufficient to shake the confidence in the already shaky evidence in favour of the authority to adopt. The lower appellate court has also referred to Ex. 4, a copy of death register in respect of Indrajit Singh, in which his parentage is shown as son of Ram Lal, his natural father. Similarly, in the voter's list of 1942, Ex. 17, he is again shown as son of Ram Lal. In Ex. 12, which is regarding consolidation proceedings, it appears there some objection had been filed by Smt. Saraswati Kunwar while she was alive in which she had impleaded Indra Jit Singh, the alleged adopted son, as an opposite party and therein he had been mentioned by her as the son of Ram Lal. If really he had been adopted as a son by Smt. Saraswati Kunwar and had been treated as such there was no reason why Smt. Saraswati Kunwar herself of all persons would have shown Indra Jit Singh as the son of Ram Lal and that too as an opposite party in a proceeding launched by her. In the written statement also, we do not find any mention of the period when the authority is alleged to have been given. Taking a cumulative view of all the above mentioned circumstances and the entire evidence on the record, it is not possible to hold that the view taken by the lower appellate court was wrong, ignoring of the adoption deed by it notwithstanding.

20. In view of the above discussion. I do not find any merit in the appeal, which is, accordingly, dismissed. However, in the circumstances of the case. I would direct the parties to bear their own costs here.

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