

Ashok Kumar Vs. Basantilal and ors.

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Court : Madhya Pradesh

Decided On : Oct-15-1984

Reported in : AIR1985MP179

Judge : G.G. Sohani, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 96 and 100

Appeal No. : Second Appeal No. 147 of 1974

Appellant : Ashok Kumar

Respondent : Basantilal and ors.

Advocate for Def. : P.K. Saxena, Adv.

Advocate for Pet/Ap. : S.D. Sanghi, Adv.

Disposition : Appeal allowed

Judgement :

G.G. Sohani, J.

1. This is defendant's second appeal arising out of a suit instituted by plaintiffs-respondents 1 to 4 for partition. Briefly, the plaintiffs' case was that the plaintiffs and defendant 1 Sobhagmal were brothers and were entitled to succeed to the property of their brother Chandmal, who died on 17-9-1960. It was averred that

defendant 1, however, denied the right of the plaintiffs to succeed to the estate of deceased Chandmal on the ground that his son defendant 2 Ashok Kumar was adopted by deceased Chandmal. Hence the plaintiffs filed the suit for partition. The suit was resisted by the defendants mainly on the ground that deceased Chandmal had adopted defendant 2 Ashok Kumar, son of defendant 1, two years prior to the death of Chandmal and, therefore, defendant 2 Ashok Kumar alone was entitled to succeed to the property of deceased Chandmal. The trial court, after appreciating the evidence on record, found that defendant 2 Ashok Kumar was validly adopted by deceased Chandmal and hence, he alone was entitled to succeed to the property of deceased Chandmal. In this view of the matter, the trial Court dismissed the plaintiffs' suit. On appeal, the lower appellate court held that defendant 2 Ashok Kumar was not proved to be the adopted son of deceased Chandmal. The lower appellate court, therefore, allowed the appeal and setting aside the judgment and decree passed by the trial court, decreed the plaintiffs' suit for partition. Hence, defendant 2 Ashok Kumar has preferred this second appeal.

2. Shri Sanghi, learned counsel for the appellant, contended that the lower appellate court had ignored the material evidence on record and without giving any cogent reason for interfering with the finding of fact arrived at by the trial court, set it aside. It was urged that the entire approach of the lower appellate court was perverse and findings were, therefore, vitiated. In reply, it was contended by Shri Saxena, learned counsel for the respondents, that the evidence led by the defendant-appellant to prove adoption was not reliable and the lower appellate court was, therefore, justified in holding that the adoption was not proved.

3. Before I proceed to appreciate the contentions urged on behalf of the parties, it is necessary to bear in mind that in a second appeal, interference with finding of fact, however erroneous, is not permissible unless the finding arrived at by the lower appellate court is based on misreading of evidence on record or has been arrived at by ignoring material evidence on record or is vitiated by any error of law. It has also to be seen whether the lower appellate court, in reversing the finding of fact reached by the trial court, has adhered to the well settled principle that where there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses the appellate court should permit the findings

of fact recorded by the trial court to prevail unless it clearly appears, as observed by the Supreme Court in *Madhusudan Das v. Smt. Narayani Bai*, AIR 1983 SC 114, that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. It is, therefore, necessary to turn to the judgment of the trial court to find out as to how it has proceeded to appreciate the evidence on record and has evaluated it and then to find out whether, in the circumstances of the case, the lower appellate court was justified in reversing the finding of the trial court regarding adoption.

4. Now, the trial court has first referred to the settled principle of law that a person, who seeks to displace the natural succession to property by alleging an adoption, must discharge the burden that lies upon him by proof of the factum of adoption and its validity and that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. The trial court has then proceeded to analyse the testimony of each and every witness adduced by the defendants to prove the adoption. The trial court has referred to the testimony of DW 1 Sajanbai, mother of defendant 2 Ashok Kumar, who had deposed that two years before the death of Chandmal, her son was taken in adoption on Baisakh Sudi 3, by deceased Chandmal; that the adoption took place in village Adhari at about 8 or 8.30 P.M.; that she had given her consent for giving her son in adoption and that the physical act of giving and taking defendant 2 in adoption took place. The trial court found that though there were minor contradictions in the testimony of DW 1 Sajanbai, the mother, D. W. 3 Sobhagmal, the father of the adopted boy, these variations were not such as would render their testimony untrustworthy. The trial court referred to the testimony of D. W. 2 Narayansingh, who deposed that he was present when the adoption took place. He had further deposed that he was a resident of the village, where the adoption took place. The trial court noted that it had come in the testimony of that witness that some cases were pending between him and plaintiff Basantlal and that though on that ground alone, the testimony of D. W. 2 Narayansingh could not be rejected, the trial court proceeded to find out whether the testimony of the parents of defendant Ashok Kumar that they had given their son in adoption to deceased Chandmal was corroborated by the testimony of other

witnesses. It was noted that D. W. 6 Jankidas and D. W. 8 Karu, who were admittedly neighbours of Chandmal, had deposed that they were present at the time of adoption and that there was no valid reason for rejecting the testimony of D. W. 6 Jankidas and D. W. 8 Karu.

5. The learned trial Judge then observed that the solitary witness examined by the plaintiffs P. W. 2 Gulabasingh had deposed that defendant Ashok Kumar was taken in adoption by deceased Chandmal and that the adoption ceremony had taken place in his presence. The trial court noted that plaintiffs' own witness P. W. 2 Gulabsingh supported the case of the defendants regarding adoption that no reason was brought on record to disbelieve that witness and that though the plaintiffs had summoned a number of witnesses, no witness other than P. W. 2 Gulabsingh, who had admitted adoption, was examined by the plaintiffs. The trial court noted the inconsistencies in the testimony of defence witnesses regarding the age of defendant Ashok Kumar when he was adopted. The trial court noted that there was variation of two to three years in estimating the age of the adopted boy but it held that that was natural and would not justify rejection of the defence evidence. The trial court further noted that there was variation in the testimony of defence witnesses regarding the time of adoption and that while some witnesses had deposed that the adoption had taken place at about 8 or 8.30 P.M., others had deposed that it had taken place at about 7.00 or 7.30 P.M. After taking into consideration all these facts, which the trial court held were not sufficient for discarding the testimony of the defence witnesses, the trial court found that there was reliable evidence to prove the adoption of Ashok Kumar by deceased Chandmal. The trial court further found that it was proved by the testimony of D. W. 4 Chandmal brother-in-law of the plaintiffs, and D. W. 5 Sajanlal, Panch of the community of the plaintiffs and the defendants, that on the occasion of 'Mosar' of Chandmal performed after his death, defendant 2 Ashok Kumar was recognised as the heir of Chandmal because Pagdi was tied around his head by the members of the community. The trial court observed that DW 4 Chandmal had deposed that the list Ex. D. 1, was prepared by him at the time of 'Mosar' giving details of the amount and 'sarpao' (clothes) given by the members of the community, to defendant Ashok Kumar and that the heading of the list D. 1 was in the handwriting of plaintiff Basantilal. The trial court found that plaintiff Basantilal had

falsely denied that fact In view of all this material on record, the trial court held that there was ample evidence for holding that adoption of Ashok Kumar had taken place. As regards its validity, it was not disputed before the trial court that parties being Jains, all that was required for a valid adoption was the giving and receiving of the boy in adoption. The trial court thus reached the conclusion that a valid adoption of defendant 2 had taken place.

6. The lower appellate court, instead of first proceeding to appreciate the evidence of witnesses produced by the defendants to prove adoption and the reasons given by the trial court for relying on their testimony, observed that the documentary evidence to prove adoption was meagre. It was not the case of the defendants that any deed of adoption was executed Though DW 1 Sajanbai had admitted that a deed of adoption was executed, she immediately corrected her statement and stated that no deed was executed The lower appellate court noted that the list Ex. D. 1 prepared by D. W. 4 Chandmal at the time of 'Mosar' ceremony on the death of Chandmal disclosed details of the amounts and clothes given by members of the community to defendant Ashok Kumar, who was recognised as heir to deceased Chandmal. The lower appellate court failed to appreciate that D. W. 4 Chandmal was a close relative of both the plaintiffs and the defendants and that there was no material in the cross-examination of that witness to indicate that his relations with the plaintiffs were strained. Yet the lower appellate court proceeded to disbelieve DW 4 Chandmal because he was unable to recall from memory the names of the persons mentioned in the list Ex. D. 1, who were present at the time of 'Mosar'. The lower appellate court failed to note that 'Mosar' took place in the year 1960 on the thirteenth day after the death of Chandmal and that DW 4 Chandmal was being examined about 10 years thereafter. The fact that DW 4 Chandmal was unable to recall from memory the names of persons mentioned in the list Ex. D. 1, could not have been a ground for discarding his testimony. The lower appellate court then held that the list of persons, who were invited for dinner at the 'Mosar' ceremony of deceased Chandmal, was not produced and hence, adverse inference should be drawn against the defendants for non-production of that document. The lower appellate court also held that Rodmal, who, according to DW 3 Sobhagmal had issued invitations at the time of 'Mosar', was not examined and hence, adverse inference should be drawn against the defendant. The lower

appellate court failed to note that Rodmal was cited by the plaintiffs as their witness but was given up by the plaintiffs. The lower appellate court then observed that if adoption had really taken place, then the plaintiffs would not have filed the suit and raised a dispute against the defendants. The logic is curious, to say the least. By this logic, every suit will have to be decreed, irrespective of any other consideration. It is regretted that the lower appellate court should have adopted this mistaken approach while appreciating the evidence on record.

7. The lower appellate court failed to appreciate that the evidence regarding recognition of defendant Ashok Kumar as heir of deceased Chandmal by the members of his community, was not evidence of the ceremony of adoption but merely lent assurance to the evidence regarding factum of adoption adduced by the defendants. The lower appellate court has not given any cogent reason for disbelieving the testimony of DW 4 Chandmal and DW 5 Sajanlal who were independent witnesses and were relied upon by the trial court.

8. The lower appellate court then proceeded to appreciate the oral evidence regarding adoption. The evidence of defence witnesses, who had deposed that they were present at the time adoption took place, was not referred to at all. The evidence of PW 2 Gulabsingh, who had also admitted that he was present at the time of adoption, was not referred to. Thus, the lower appellate court ignored the material evidence on record. The lower appellate court should have referred to that evidence and given reasons for disbelieving it. But the lower appellate court, however, chose to treat all that evidence as non-existent, a course which was not justified at all.

9. The lower appellate court then dealt with the testimony of DW 3 Sobhagmal and DW 1 Sajanbai, parents of the adopted boy. The discussion was prefaced by the following observations :

'Before advertng to the said evidence, it must be remembered that in his written statement, the Samvat year or year of alleged adoption has not been specifically mentioned by respondent 2. The averments in para 14 of the W. S. are that the adoption ceremony was performed on Miti Baisakh Sudi 3 by Chandmal two years before his death. There is no dispute , that aforesaid Chandmal expired in the

month of September, 1960.'

Now, if the allegation in the plaint that Chandmal died in the year 1960 is admitted in the written statement and the defendants have averred that adoption took place two years prior to the death of Chandmal on 'Baisakh Sudi 3', i.e. 'Akshaya Tritiya', which is a well known auspicious day, the failure to mention the year, in which adoption took place was not significant, because in the context the date and the year when adoption took place was specifically averred in the written statement. The lower appellate court has thus erroneously drawn an inference against the defendants for not having disclosed the year of adoption in the pleadings, when, in fact, there was such a disclosure.

10. D. W. 3 Sobhagmal, father of the adopted boy Ashok Kumar, had in answer to a question put to him in the cross-examination, deposed that in the school register, the father of defendant Ashok Kumar was stated to be Chandmal, who had adopted him. An application was made before the lower appellate court under Order 41, Rule 27, Civil P. C to adduce in evidence the school leaving certificate and the High School certificate of Ashok Kumar to substantiate the testimony of DW 3 Sobhagmal that defendant Ashok Kumar was shown in the school record to be son of Chandmal, who had taken him in adoption. The lower appellate court rejected that application and yet observed as follows : --

'Sobhagmal DW 3 in para 19 of his cross-examination, claims to have recorded father's name of Ashok Kumar as Chandmal on getting him admitted in the school but the respondents' conduct in not producing and proving the relevant records raises the presumption that had the said documentary evidence been produced, the same would have gone against the respondents.'

Having refused permission to the defendants to adduce in evidence the relevant record, the lower appellate court should not have drawn adverse inference against the defendants for not producing the relevant record.

11. The lower appellate court referred to the testimony of DW 1 Sajanbai and DW 3 Sobhagmal, the parents of the adopted boy and held that due to certain inconsistencies in their testimony, it was not reliable. The lower appellate court,

however, did not give any cogent reason for differing from the finding of the trial court in that behalf. Moreover, as already observed, the entire approach of the lower appellate court in appreciating the evidence on record was erroneous. It completely ignored material evidence and chose to draw adverse inference against the defendants for reasons which were not valid. The judgment of the lower appellate court, therefore, is vitiated and cannot be sustained in law. Having gone through the entire evidence on record. I see no valid reason to differ from the finding arrived at by the trial court that defendant 2 Ashok Kumar was proved to have been validly adopted by deceased Chandmal.

12. For all these reasons, this appeal is allowed with costs. The judgment and decree passed by the lower appellate court are set aside and those passed by the trial court are restored. Counsel's fees according to scale, if certified.

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