(1978) 12 MP CK 0003

Madhya Pradesh High Court

Case No: F.A. No. 14 of 1978

Naresh		APPELLANT
	Vs	
Ichraj Bai		RESPONDENT

Date of Decision: Dec. 16, 1978

Acts Referred:

- Contract Act, 1872 - Section 16
- Evidence Act, 1872 - Section 111, 41
- General Clauses Act, 1897 - Section 5(1)(b)
- Hindu Adoptions and Maintenance Act, 1956 - Section 10, 10, 11, 11, 12, 12

Citation: (1979) JLJ 314

Hon'ble Judges: K.K. Dube, J; H.G. Mishra, J

Bench: Division Bench

Advocate: B.L. Agrawal, for the Appellant; B.D. Gupta, for the Respondent

Final Decision: Allowed

Judgement

H.G. Mishra, J.
This is an appeal against judgment and decree dated 8-12-1977, passed by Second Additional Judge to the Court of District Judge Gwalior in Civil suit No. 14-A of 1977.

2. Facts essential for decision of this appeal are as under :

(i) The plaintiff-appellant filed the present suit for declaration of his status being adopted son of Balkisandas, a lunatic, on the allegations that :

(a) Balkisandas, the lunatic and his wife Radhabai had no issue. Balkisandas was himself brought to his family by Ramratan. Ramratan had been taken in adoption by Madanlal As Balkisandas was lunatic and was not competent to give his consent, Radhabai, his wife, adopted the plaintiff on 1-3-1971. A deed of adoption (Ex P-7) was executed and registered on 15-3-1971 by Radhabai, adoptive mother, and Rambabu, natural father of the plaintiff.

(b) As Balkisandas was lunatic, the Court of Additional District Judge, Gwalior on an application registered as Miscellaneous Judicial Case No- 12 of 1952, jointly made by Radhabai and Ichrajbai u/s 67 and 75 of the Indian Luncy Act, 1912, had appointed (l) Bhajanlal (brother of Radhabai (2) Banshidhar (brother of Ichrajbai respondent) and (3) Jagannath Prasad, as managers of his Property. The managers were directed by the aforesaid order to make payment of maintenance allowance to Balkisandas Radhabai and Ichrajbai (defendant respondent) out of the property of Balkisandas the lunatic. The property of the fluoric: was ordered to be put by the Court under management of the managers. Accordingly, maintenance used to be paid to Radbabai for herself, as well as for Balkisandas upto 15-5-1971 i.e., till her death. Thereafter, the managers, submitted an application to the Court for soliciting orders regarding the person to whom payment of maintenance for Balkisandas should be made. Necessity for moving the application had arisen since the plaintiff claimed himself to be the adopted son of Balkisandas and Mst. ichrajbai was denying the status so asserted by him. The Additional District Judge by order dated 15-5-1972, directed the parties to get the dispute decided by a regular suit.

(b) Accordingly, the plaintiff applicant originally instituted the suit on 22-1-19(sic)4, in the court of IV Civil Judge Class II, Gwalior, for declaration of his status being an adopted son Balkisandas. The number of that Civil Suit was C.S. No, 53 A of 1974. The defendant, inter alia, raised the objection about the jurisdiction of the Court on proper valuation of the suit. Ultimately, the plain; was ordered to be returned for presentation to Court competent to entertain the same. On return, the plaint was represented on 24-12-1976 to the Court of District Judge, Gwalior.

2. The defendant-respondent denied the claim of the plaintiff-appellant and inter alia took the following pleas:

(1) The factum as well as legality of adoption were denied. The deed of adoption is also legally invalid and insufficient to clothe the plaintiff with the status of an adopted son,

(2) Mst. Radhabai had no right to take the appellant in adoption because her husband was declared by any competent Court, to be a man of unsound mind.

(3) Bhajanlal, brother of Mst. Radhabai, was one of the managers appointed by the Court of Additional District Judge to manage the estate of her husband Balkisandas. As such, his position was anologus to that of a trustee. He was acting with consent of other managers. It is likely influence exercised by Bhajanlal In the matter of adoption, Radhabai was not acting as a free agent. She had no independent advice The principles underlying in section 111 of the Indian Evidence Act. 1872 and section 16 of the Indian Contract Act, 1882 vitiate the adoption and the dead of adoption.

(4) During minority of Balkisandas, managers were appointed for looking after the property under Kanoon Hiphajat Va Jaidad Ratyasat Gwalior, Samvat I970 by the District Judge, Gwalior. The order passed on 13 12-1952 in Miscellaneous Judicial

Case No. 12 of l952, was not passed in any independent proceedings.

3. The trial Court held that the factum of adoption and execution of the registered deed of adoption (Ex P/7) is duly proved, but dismissed the suit only on the ground that the Balkisandas is not shown to have been declared to be man of unsound mind by a competent Court. As such, the alleged adoption cannot be regarded to be valid.

4 Aggrieved by this judgment and decree, the plaintiff has preferred the present appeal.

5. In this appeal, Shri B.L. Agarwal, learned counsel for the plaintiff appellant raised the following contentions :

(i) After holding the factum of adoption and the execution of deed of adoption (Ex. P/7) to have been proved, the suit ought to have been decreed in absence of effective rebuttal of the statutory presumption enacted by section 16 of the Hindu Adoption and Maintenance Act, 1956. Moreover, the evidence led by the plaintiff further corroborates the aforesaid presumption,

(ii) The order passed in Miscellaneous Judicial Case No. 12 of 1952 by the Additional District Judge, Gwalior dated 13-12-1952 involves a declaration of unsound mind of Balkisandas, as envisaged by section 8 of this Act.

(iii) The approach of the trial Court is erroneous in law and on facts.

6. Mr. Bhagwandas Gupta learned counsel for the defendant-respondent, submitted that none of the contentions raised for the appellant has any force and reiterated the contentions raised in written statement as per para 4.

7. From 21-12-19/6, adoptions amongst Hindus have come to be regulated by codified law. It was on this date that the Hindu Adoptions and Maintenance Act, 1956 (Act No. 78 of 1956) (hereinafter referred to as the Act) received assent of the President of India As provided in by section 5(1)(b) of the General Clauses Act, 1897, it became effective from the date of assent.

8. Chapter II of the Act deals with adoptions. Section 5 to 17 are placed in this Chapter. S. 5 of the Act, provides that no adoption shall be made after the commencement of this 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 provision shall be void. S. 6 lays down requisites of valid adoption. It provides that the person adopting must have a capacity and also the right to take in adoption; the person giving in adoption must have the capacity to do so; and the person adopted must be capable of being taken in adoption and the adoption must be made in compliance with (he other conditions mentioned in the Chapter. Section 7 lays down that any mate Hindu, who is of sound mind, and is not a minor, has the capacity to take a son or a daughter in adoption. If he has a wife living he shall not

adopt, except with the consent of his wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. Section 8 lays down the qualifications that any Hindu female taking in adoption must possess, i.e,;

(a) is of sound mind

(b) is not a minor: and

(c) is not a married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or "has been declared by a Court of competent jurisdiction to be of unsound mind" Section 9 provides as to who will be the person entitled to give the child in adoption. Section 10 provides as to who may be adopted-Section 11 enacts other conditions for a valid adoption Section 12 lays down effects of adoption Section 13 provides the extent of right of adoptive parents to dispose of their properties. Section 14 deals with determination of adoptive mother in certain cases. Section 15 provides that a valid adoption cannot be cancelled. Section 16 enacts a legal presumption as to the registered document relating to adoption. Section 17 enacts prohibition on payment of consideration or reward for the adoption.

9. From the aforesaid analysis, it is clear that the entire field covered by uncodified Hindu Law regarding adoptions is now covered by the Act, The Act enacts a special provision in section 16 to the effect 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 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." The use of the words ''shall presume'' in the section indicates that this presumption is of mandatory character. In Gangabai v. Ramsingh 1960 JLJSN 251, it has been held that:

The plaintiff filed a suit alleging the adoption by Gangabai was unauthorised as she was not a legal wife of the deceased person to whom the son was adopted. An adoption-deed was produced and it was alleged in the written statement that she was the legal wife of the deceased In the issue framed by the trial Court the burden of proof was placed on the defendants,

Held: According to section 16 of the Hindu Adoption and Maintenance Act when there is a deed of adoption, the Court must presume that it is a valid adoption unless otherwise proved. Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others, relied on.

(1) In Sushil Chandra v. Roop Kunwar AIR 1977 AH 441, law on the point has been laid down thus:

Section 16 of the Hindu Adoptions and Maintenance Act casts a duty on the Courts to draw a mandatory presumption to the effect that whenever there is a registered

document "purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption", then the adopt on has been made in compliance with the provisions of the Act, unless and until it is disproved. Where the execution of a registered deed of adoption is challenged, on the ground that it was executed under fraund and undue influence and the evidence necessary to be led in respect of an attested document has been tendered, the burden of proving that the execution was vitiated by fraud and undue influence lies on the party challenging the document.

(2) The ratio of the case reported in (Radha Krishna Mohapatra Vs. Bhuyan Sri Shyam Sundar Mohapatra and Others, is in line with this view. It runs as under:

Section 16 of the Act prescribes 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 The registered adoption deed (Ex P/1) is signed by the natural father, who gave the petitioner in adoption, and also by Laximani, who too the petitioner in adoption On the production of Ex. P/1, the Court shall presume that the adoption has been made in compliance with the provisions of the Act. In absence of any rebutting evidence, the adoption is established. The learned Judge exercised his jurisdiction illegally and with material irregularity in not at all applying his mind to S. 16.

In order to attract applicability, the presumption enacted by section 16 of the Act, fulfillment of all the following conditions is necessary :

(i) The document produced before the Court must purport to record an adoption made;

(ii) It must be signed by the persons giving and taking the child in adoption; and

(iii) it must be registered under any law for the time being in force.

Proof of these conditions is basic requirement for bringing into play the presumption enacted by section 16. The amplitude of this presumption extends to the compliance with all the relevant provisions of the Act.

10. In the present case, the trial Court had passed an order dated 5-7-1977 to the effect that the presumption enacted by the section 16 will come into play on proof of the execution of the deed of adoption. The deed of adoption (Ex.P/7) dated 15-3-1971 is a duly registered document. It records factum of adoption of the plaintiff having been made it has been held to be proved by PW 2-Rambabu, PW 6 : Tikaramsing and PW 7; Gangadhar to have been executed and signed by Radhabai (the adoptive mother) and Rambabu (the natural father of the plaintiff. Accordingly, on those findings the presumption enacted by the section 16 came into play. As such, both the factum and validity of the adoption in question ought to have been

presumed As a sequel thereof, it must also have been presumed that Balkisandas had been declared by a competent Court to be of unsound mind within the contemplation of S 8c) of the Act and as such Radhabai was competent to take the plaintiff in adoption Once the presumption enacted by S. 16 of the Act became operative, it was not necessary for the plaintiff to have led any evidence about the factum of giving and taking and about the existence of conditions enacted by the Act about validity of the adoption. It was for the defendant-respondent to have rebutted the presumption It is true that burden of proof lay initially on the plaintiff to prove the execution of the registered deed of adoption Ex. D-7 but on proof of its execution, the onus of proof shifted by virtue of the provisions contained in section 16 of the Act to the defendant-respondent; and it was for her to have rebutted the same The learned trial Judge appears to have first a evaluated the evidence of the plaintiff appellant on the point of factum and validity of adoption. The trial Court has. in paras 8 to 15 of the impugned judgment, discussed the evidence as to the factum of adoption and has held that the adoption did take place on 13-3-1971. It has further been held that the execution of the registered deed of adoption (Ex. P/7 dated 15-3-1971 by the person giving and taking is duty proved. Thereafter, the learned trial Judge has proceeded to examine existence of the condition postulated by section 8(c) of the Ac'', and has held that the plaintiff his not proved that Balkisan das was declared by a Court of competent jurisdiction to be a man of unsound mind, and as such, his adoption is invalid.

11. As such, the approach of the learned Judge is not according to law. The learned trial Judge ought to have raised presumption both as to the factum as well as validity of the adoption. After raising this presumption. the learned Additional Judge to District Judge ought to have proceeded to examine the evidence led by the defendant to rebut the same. A close scrutiny of the evidence led by of the defendant-respondent discloses that it is wholly inadequate to rebut the presumption, it is only negative in character. The defendant respondent has examined DW 2 Mulchand Nai, DW 3 Mukund Krishna Pandit of the adoptive family, DW 4 Girdhardas, DW 5 Jagmnath Prasad DW 6 Bansidhar, brother of the defendant, DW 7 Jamnibai and DW 8 Icharajbai herself. The learned Judge held that it is ineffective to rebut the positive evidence afforded by the witnesses examined by the plaintiff on the point of the ceremony of giving and taking The reasoning employed by the learned trial Judge, on its merits, is cogent and is not shown to be vitiated, either by mistake of law or on misreading of evidence. Even granting that D. W. 2 Mulchand Nai was Nai of the community and Mukund Krishna was ''Pandit'' of the family at the relevant time, their employment during adoption ceremony is not shown to be a legal requirement. Their non-employment at the time of adoption is not shown to have any vitiating effect. It is not shown to be necessary that DW 5 Jagannath Prasad and Bansidhar, Manager, ought to have been called and/or present at the time of the ceremony of adoption. The negative testimony afforded by D W. 7: Jamunabai and DW 8; Ichrajbai also is ineffective to rebut the factum of

adoption. Rather factum of adoption by Radhabai appears to have been admitted by Ichrajbai, as is clear from the wire Ex. P/11) sent on her behalf. DW 1 Gopinath has nothing to say on the point. Thus, the evidence led by the defendant is wholly ineffective to constitute rebuttal of the aforesaid statutory presumption. Besides this, no such facts have been brought out by the defendant by cross-examination of PW. 1 Ramniwas, PW. 2 Rambaboo, PW 3 Hariram, PW 5 Virmadevi and the other witnesses of the plaintiff, as may constitute rebuttal effective enough to displace and/or dismantle the said presumption and/or the case of the plaintiff.

12. In the present case, there is no specific plea or proof on the point of the alleged undue influence. The plea taken by the defendant respondent in Britten-statement paragraph 2(d) is only to the effect that "it is likely that (Sambhav hai) transaction of adoption and the dead of adoption were out undue influence exercised by Bhajanlal, the brother of Radhabai. The use of the words, "Simabhav hai is indicative of the plea being vague and indefinite it lacks in particulars material in view of Order 6 rule 4 of the Code of Civil Procedure. Thus, the plea taken by the defendant-respondent, does nor even raise a triable issue, as held in Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, The relevant portion whereof runs as under:

Before, however, a Court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in case of fraud See Order 6 Rule 4 of the CPC This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others, above referred to.

In that case it was observed (at P. 285) (of SCR) (at p, 1283 of AIR)

A vague or general plea can never serve this purpose of; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other.

13. The learned counsel for the respondent placed reliance on the ratio of the case reported in Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, and contended that the position of Bhajanlal, being one of the managers of the estate of Balkisandas, the lunatic, was analogous to that of a trustee, and that it was in fact and in reality due to his undue influence over the parties concerned that the adoption was staged-managed. The respondent was failed not only to raise a triable issue but also to lead any evidence in order to show that Bhajanlal had exercised his influence in an undue manner and was guilty of misuse of his fudiciary relationship. Obviously, no advantage was intended to be taken and could be obtained by Bhajanlal out of the situation. Bhajanlal was to gain nothing, Thus, we are satisfied that facts consisting ingredients essential essential for applying principles underlying in section 16 of the Contract Act and/or section 111 of the Indian Evidence Act, have not been proved by the respondent Bhajanlal is not shown to be

guilty of breach of any trust reposed in him by any of the parties.

14. In order to successfully avail of the plea of undue influence within the contemplation of section 16 of the Indian Contract Act and the rule of burden of proof as enacted by section 111 of the Indian Evidence Act, three stages have to be crossed, as laid down in Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, The relevant portion whereof runs as under :

The three stages for consideration of a case of undue influence were expounded in the case of Raghunath Prasad v. Sarju Prasad AIR 1917 Mad 266 in the following words :

In the first place the relations between the parties to each other must be such that one is in a position to dominate the; will of the other. Once that position is substantiated the second stage has been reached namely, the issue whether the contract has been inducted by undue influence Upon the determination of this issue a third point emerges, which is that of the onous probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other :-

Error is almost sure ta arise in the order of these propositions be changed. The unconstitutional ableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties, were they such as to put one in a position to dominate the will of the order?

Even assuming that the plea of undue influence raises a triable issue, the defendant has not led evidence making out a case of crossing the three stages. Radhabai acted in the matter with her free consent. In order to show that plea of undue influence has been made out Mr.- B.D. Gupta, learned counsel for the respondent tried to press into service of the respondent the ratio of the following cases:

Seshamma v. Padmanabha Row AIR 1917 Mad 266, Somesekhara Raja v. Subhadramaji ILR 6 Bom 524. Sri Rajah Venkata Narsimha Appa Row v. Sri Rajah Rangayya Appa Row and others ILR 21 Mad 427

However, reliance on the ratio of none of the cases is available to the respondent.

The ratio of the case reported in Seshmma v. Padmanabha Row AIR 1917 Mad 265 is under :

Adoption is not an act which amounts to alienation of property like lease or mortgage. It affects status. A Hindu is not deprived by any statute of the power of making an adoption unless there are clear, unambiguous words to that effect. Therefore, in the absence of express words to that effect an order appointing a manager to the properties of a lunatic under Act 25 of 1858 does not incapacitate the lunatic from making an adoption till the order is set aside.

This was a case where the adopted boy was brother of the second wife and son of Bheema Row, who was at that time the sole guardian of the person of the boy; and it certainly looked as if the whole of this adoption was simply carried out according to the wishes of Bheema Row, who was anxious to get the property for his son. In view of these facts, the ratio of the case of Seshamma (supra) cannot be of any avail.

The ratio of the case reported in Somasekhara Raja v. Subhidramaji ILR 6 Bom 524 is as under:

The plaintiff, in support of his adoption, produced two documents executed by the defendant, viz. a deed of adoption and a compromise, in which the defendant had ratified the plaintiff''s adoption. It was found that the defendant was very young, and did not act independently in the execution of these documents.

Held that the adoption invalid on two grounds, viz, 1st, that the mother had no authority to give the plaintiff in adoption, because he was the only son of her deceased husband at the time of the adoption; and 2ndly that the defendant (whether an infant or not) was not, either at the time of the alleged adoption or at that of the alleged ratification of it, a free agent, but was subject to undue influence.

So far as reliance on Somasekhara Raja''s case (Supra) is concerned, it is not available because in that case, the decision turned on two grounds firstly that the mother had no authority to give the plaintiff in adoption because he was. the only son of her deceased husband at the time of adoption and, secondly that the defendant was not at the time of alleged adoption or rati fixation of died a free agent, but was subjected to implied authority under the mother to give such a son in adoption. Such is not the situation here.

The ratio of the case is reported in Sri Rajan Venkata Narsimha Appa Row v. Sri Rajah Rangayya Appa Raw and others ILR 29 Mad 437 is as under:

An adoption made under coercion is not void, but voidable, and will be valid i ratified subsequently if no one''s interest is prejudicially affected by such ratification before it is made.

The ration of Rajon Venkata Narsimha Appa Row''s case (supra) does not help the respondent in view of the fact that it does not lay down principles of universal application. It is distinguishable on facts also.

15. Accordingly, the adoption and the deed of adoption are not shown to be invalid and ineffective on account of any alleged undue influence.

16. Now, it may be examined, whether Radhabai had no right to adopt the plaintiff. In this connection it has to be seen, whether Balkisandas. who though admittedly a lunatic person, had been declared by any competent Court to be a man of unsound mind.

17. At this stage, it may be mentioned that by consent of the parties by order of this Court dated 16-4-1978, certified copy of order passed in Miscellaneous Judicial Case No. 12 of 1952, on 13-12-1952. was brought on record and the same is marked as CI. From this order, it is clear that the proceedings, in which this order was passed, ware under S. 67 read with S. 75 of the Indian Lunacy Act, 1912 for appointment of managers of the property of Balkisandas, the Lunatic Admittedly, during minority of Balkisandas, managers were appointed by the Court under Kanun Hiphajat Jat va Jaidad Riyasat Gwalior, Samvat 1970 (hereinafter referred to as ''Gwalior Law''). It was only afterwards that he became a man of unsound mind. It is significant to mention that charajbai, the defendant-respondent (mother of Balkisandas) and Radhabai (his wife) both had joined in moving this application under sections 67 and 75 of the Indian Lunacy Act.

For the exercise of jurisdiction to appoint managers under S. 67 of the Act, is a condition precedent that the person for managing whose property managers are to be appointed should be incapable of managing his affairs though he may not be dangerous to himself or to others. Shortly put, he should be a man of unsound mind In the present came, factum of Balkisandas, being a lunatic at the time, is an admitted fact. The record of the Miscellaneous Judicial Case No. 12 of 1952 has been destroyed as per record weeding out rules. What is now available is the certified copy of the order dated 13 12-1952 (Ex, C-1). In this order following words are significant :

Prakritjan Ke Prarthananusar Shri Jagannath Prasad. Bhajanlal Va Baoshidhar Ko Balkisan Lunatic Ki Jayadad Ka Prabhandak Niyukta Kiya Jata Hai.

By this order Balk sandas has been held to be lunatic and three managers for his estate have also been appointed. Sections 3(5) of the Indian Lunacy Act, 1912, defines ''lunatic'' thus:

Lunatic means an idiot or person of unsound mind.

18. There is no prohibition in the Gwalior law and the Indian Lunacy Act, against appointment for re appointment of persons already acting as managers of the estate of a person during his minority who later on became a lunatic either before after attainment of majority. Consequently, the factum of appointment of persons named in the order (Ex D as managers of the property of Balkisandas on his becormrig" a lunatic does not militate against his being a man of unsound mind. Accordingly, the proceedings u/s 67 culminating in the order dated 13-12-1952 is not a judgment in rem within the contemplation of section 41 of the Indian Evidence Act, yet it is binding on the parties thereto, as held in Subba Naicker Vs. Solaippa Naicker and Others, . Relevant portion where of runs as under:

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41, Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any

other judgment of Civil Court. When a person has been found a lunatic by inquisition so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property The Court will not recognize such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic''s mind when it was executed, but will treat the deed as entirely null and void.

Ichrajbai, bring a party to the proceedings in which order was passed, is bound by it. Therefore, the contention on behalf of Ichrajbai that Balkisandas cannot be considered to have been declared to be a man of unsound mind by a competent Court deserves to be rejected. Condition contemplated by S. 8(c) of the Act is not shown to be missing in the case. It stands fulfilled in the present case.

19. This brings us to the other contention, whether Naresh should be treated an adopted son of Mst. Radhabai only or of both Balkisandas and Radhabai.

20. Concept of adoption to a woman alone is germane only in respect of unmarried Hindu woman. But when an adoption by Hindu wife (whose husband is living), it has to be regarded as adoption to both husband and wife. If the husband, on account of unsoundness of his mind is incapable of exercising his right to take son in adoption, his wife may adopt a son. This is the position of law, which emerges from a combined reading of S. 11, 12 and 14 of the Act. This is what has been held by their Lordships of the Supreme Court in a case reported in Subba Naicker Vs. Solaippa Naicker and Others, , The relevant ratio whereof runs as under:

6. It is clear on a reading of the main part of section 12 and sub-section (vi) of section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in section 14 (I) namely where a wife is living, adoption by the husband result in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to the adoption becomes the step-father of the adopted child. The scheme of sections 11 and 12 therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of son ship with the deceased

husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband''s brother would necessarily the uncle of the adopted child. The daughter of the adopted mother (and father) would necessary be the sister of the accorded son, and in this way the adopted son would become a member of the widow''s family, with the ties relationship with the deceased husband of the widow as his adoptive father. It is true that section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sections 2 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband It is for this reason that we find in sub-section (4) of section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the ''step father'' of the adopted child. The true effect and interpretation of sections II and 12 of the Act No. 16 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. ''In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spoused.'' This view is borne out by the decision of the Bombay High Court in Ankush Narayan Shingate Vs. Janabai Kom Rama Sawat and Others, . It follows that in the present case plaintiff No. 2 Suresh Chandra, when he was adopted by Bhagirath''s widow, became the adopted son of both the widow and her deceased husband Bhagirath and, therefore, became a coparcener with Dulichand in the joint family properties. After the death of Dulichand, plaintiff No. 2 became the sole surviving coparcener and was entitled to the possession of all joint family properties. The Additional District Judge was, therefore, right in granting a decree in favour of the plaintiff No. - declaring his title to the agricultural lands in the village Palasia and half share of the house situated in the village.
(Emphasis by us)

There Lordships of the Supreme Court in that case have affirmed the view of the Bombay High Court on the point reported Jo Anuksh v. ianabai (supra) the ratio of which runs as under:

In our opinion, the true effect of the provisions in sub section (VI) of section 11 and section 12 of the Act is that when either of the spouses adopts a child all the ties of the child in the family of his or her birth became completely severed, and these are all replaced by those created by the adoption in the adoptive family. This would be so far each and all different purposes, Obviously, the result of adoption by either spouses is that the adoptive child becomes the child of both the spouses. This is the only possible view which can be taken of the scheme and intent of adoption under the Act in view of the provisions of sections 11, 12 and 14.

11. If the contentions made by the respondents are accepted, absurd results must follow,. The result of accepting their contention would be that a son adopted by a widow would not be the son of her deceased husband. Even so, it is not contended that he will not becomes collaterally, related with husband''s collateral relations, such as husband''s father, mother, brother etc Mr. Sukthankar is not prepared to state that these relations would not become as a result of the adoption by the widow, grand mother or grandfather or uncle (as the case may be of the adopted son. It is not possible for the respondents to contend that the son adopted by the widow will not become coparceners with the other coparceners surving alter the death of her deceased husband It appears to us that there is nothing in the Act to indicate that the provision in the Act were intended to abrogate the position which arose under the customary Hindu Law as regards the new ties of the adoptive son in the adoptive family in consequence of adoption by a widow On the contrary, as we have already observed, upon an adoption by a widow, the adopted son''s art the in the family of his birth become completely severed and are replaced by those created by his adoption in the adoptive family (of the widow and her deceased husband) The learned Judge''s finding that under the Act, a son adopted by a widow does not become the son of deceased adoptive father is contrary to the provisions of the Act and is set aside.

21. Placing reliance on the ratio of Sawan Ram and Others Vs. Kala Wanti and Others, , Mr. Gupta contended that the appellant cannot be considered to be an adoptive son of Balkisandas, We are afraid, the ratio of the case of Swaan Ram does not go to support the respondent. It rather goes against the respondent in view of what has been stated in the following portion of para 8 thereof:

The section in its principle clause not only lays down that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, but, in addition, goes to define the rights of such an adopted child It lays down that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. A question naturally arises what is the adoptive family of a child who is adopted by a widow, ''or by a married woman whose husband has. completely and finally renounced the word or has been declared to be of unsound mind even though alive it is well recognised that after a female is married she belongs to the family of her husband The child adopted by her must also, therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow, further still, he loses all his rights in the family of his birth and those rights are replaced by the tights created by the adoption in the adoptive family. The right, which the child bad, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is thus, clearly to be replaced by similar rights in the adoptive family, and consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the

deceased husband of the widow, or the married female, taking him in adoption, "This provision in S 12 of the Act, thus its. If makes it clear that, no adoption by a Hindu female who has been married, the adopted son will, in effect, be the adopted son of her husband also.

(Emphasis by us)

22. Accordingly, the contention advanced on behalf of the defendant respondent to the effect that even if the adoption of the appellant is taken to be a valid adoption, he can be regarded only as the son of Radhabai and not of Balkisandas also, does not merits acceptance.

23. Faced with this situation, Shri B.D. Gupta, learned counsel for the defendant-respondent, contended lastly that in view of the provisions of Order 6 rule 6 of the Code of Civil Procedure, it was incumbent on the plaintiff appellant to have specifically pleaded that Balkisandas was declared to be a man of unsound mind by a competent Court because that was a condition precedent for validity of the adoption by virtue of section 8(c) of the Act. It was further contended in absence of such averment, the plaintiff appellant cannot be permitted to make out a new case not set out in the plaint and for this reason also he should be non suited This argument too does not merit acceptance, inasmuch as it overlooks the mandatory presumption enacted by section 16 of the Act. As already held by us, the statutory presumption enacted by section 16 of the Act is of mandatory character and has been enacted by special law on the subject. The principle-well settled is that special law prevails over the general law. Moreover, overriding effect has been given to the provisions of the Act by section 5 thereof.

24. In view of the aforesaid discussion the trial Court has erred in holding the adoption of the plaintiff-appellant to be invalid in the eye of law. The plaintiff appellant is duly adopted son of Balkisandas and deserves to be declared so.

25. Consequently, the appeal succeeds and is hereby allowed, with costs throughout. Impugned judgment and decree are set aside and it is declared that the plaintiff is adopted son of Balkisandas. Counsel''s fee according to Schedule, if certified.