Ranjit Kumar Jain Vs Kamal Kumar Chowdhury and Another

Court: Calcutta High Court

Date of Decision: Feb. 22, 1982

Acts Referred: Evidence Act, 1872 â€" Section 65
Succession Act, 1925 â€" Section 218, 227

Citation: AIR 1982 Cal 493

Hon'ble Judges: Padma Khastgir, J

Bench: Single Bench

Advocate: P.K. Roy, for the Appellant; Amiya Nath Bose, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Padma Khastgir, J.
The present suit had been filed by Ranjit Rumar Jain against Kamal Kumar Chowdhury and Ratan Kumar Chowdhury

for a declaration that the Registered Indenture of Settlement dated February 14, 1971 executed by Radha Debi (also known as Radha Rani Debi)

since deceased, was valid and subsisting, for a declaration that the plaintiff being the sole Trustee of the said Trust was exclusively entitled to

administer the premises No. 14/4, Sudhir Chatterjee Street, Calcutta as a Trust property, possession of the said premises and also for a

declaration that the Wills dated 9th July, 1974 and 15th July, 1974, claimed to have been executed by the said Radha Rani Debi, since deceased,

have no effect or bearing on the said premises. Under those circumstances, the defendants were not entitled to administer the said premises as

executors under those Wills and for other consequential reliefs.

2. The plaintiff"s case was that the plaintiff was the natural born son of one Budhmull Jain (also known as Budhmull Nahata), since deceased. On

or about January 30, 1956, the plaintiff was adopted by his maternal grandfather, Shew Karan Jain (Kalhotia) (also known as Shew Raj Singh).

The said adoption of the plaintiff was duly recorded in a Registered Deed of Adoption executed by the said adoptive father of the plaintiff.

According to the plaintiff, Shew Karan had left behind no other sons -- either natural born or adopted except the plaintiff.

3. One Radha Rani Debi (also known as Musstt. Radha Debi) since deceased was in the exclusive keeping of the said adoptive father of the

plaintiff and was seized and possessed of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta. Under a duly registered Indenture of

Settlement executed by the said Radha Rani Debi on the 14th February, 1971, the said Radha Rani Debi since deceased settled the premises No.

14/4, Sudhir Chatterjee Street, Calcutta upon Trust upon various terms and conditions more fully contained in the Indenture of Settlement full

particulars whereof will appear from the original Deed of Settlement dated 14th February, 1971. The salient terms and conditions of the said

Settlement were that the settlor herself would become the first Trustee of the said Trust and she duly granted transfer of the assets and conveyed

the said premises to the Trustee. On the date of the retirement of the said trustee and in such capacity the adoptive father of the plaintiff was to

become the Trustee and failing him, his eldest son would be the Trustee of the said Trust property and thereupon the said premises shall vest in

him. Shew Karan Jain, the adoptive father of the plaintiff, died on 18th December, 1972 and Radha Debi died on 17th July, 1974. According to

the plaintiff, the said Trust was acted upon by the Settlor Trustee herself inasmuch as she realised rents, issues and profits of the said premises till

her death. Shortly prior to the death of the Settlor Trustee, the defendants entered into, the said premises. It was the case of the plaintiff, as

pleaded in the Plaint, that the defendant No. 1 was contending to be sole executor of a Will dated 15th July, 1974, claimed to have teen executed

by Radha Rani Debi, whereas his son, the defendant No. 2 contended that he was the sole executor of another Will executed by Radha Rani Debi

on 9th July, 1974. According to the plaintiff, the defendants had been wrongfully contending that the premises had been disposed of by Radha

Rani Debi during her lifetime under those two Wills. However, it was the case of the plaintiff that the Settlor, Radha Rani Debi had no power or

authority to revoke the said Trust and dispose of the property under the Will inasmuch as the said Deed of Trust and/or Settlement was executed

by her, duly registered and acted upon by and between the parties. Inasmuch as it was an irrevocable Deed of Settlement, it was not within the

power of Radha Rani Debi after the execution of the document to dispose of the property, which formed a part of the said settlement by her Will.

4. It was further contended in paragraph 5 of the Plaint by the plaintiff that the defendants had removed and/or destroyed the original Indenture of

Settlement, which was in the possession and custody of the Settlor Trustee during her lifetime. Inasmuch as the defendants were interested in

denying the said Indenture of Trust created by the settlor, the plaintiff being apprehensive of the invasion of the defendants to the rights of the

plaintiff for the enjoyment of the said premises as a sole Trustee and the beneficiary of the said Deed of Settlement, had been compelled to file this

suit for necessary reliefs. In some of the suits filed by the Settlor during her lifetime and still pending before other Courts, the defendant No. 1,

according to the plaintiff, had wrongfully and surreptitiously got himself submitted in the place of the deceased, on the strength of the Will dated

15th July, 1974. Since the filing of this suit, the said Will, however, had been proved and probate had been granted in favour of the defendant No.

1.

5. The defendant No. 2 Ratan Kumar Chowdhury did not appear and contest this suit. However, written statement had been filed on behalf of

both the defendants wherein it had been stated that the plaintiff was not the natural born son of Budhmull Jain or Budhmull Nahata and in fact, the

defendants denied and disputed the factum and validity of the adoption that had been mentioned in the plaint. They also denied the factum and

validity of the Deed of Adoption. They denied that apart from the plaintiff, Shew Karan did not have any other son, inasmuch as, according to the

defendants, She\v Karan Jain had more than one son. In paragraph 3 of the Written Statement it had been stated that Radha Rani Debi was the

sole and absolute owner of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta. Inasmuch as she was the mistress of Shew Karan Jain for a

number of years during his lifetime, the purported indenture of Settlement was caused to be executed inasmuch as Radha Rani Debi did not

execute any Indenture of Settlement out of her free will and volition, inasmuch as she did not have the knowledge or understanding or appraisal of

the contents of the Deed of Settlement. It had further been contended that the said Deed of Settlement was never intended to be acted upon, nor in

fact, it was acted upon by the parties. The defendants denied that the plaintiff was the eldest son of Shew Karan Jain or that he acquired any right,

title or interest in respect of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta either on the strength of the Deed of Trust or otherwise.

Radha Rani Debi was the sole and absolute owner of the said premises till 17th July, 1974, when she died, during her lifetime she exercised due

control over the said premises and also exercised her right of ownership in respect of the said property.

6. It was the positive case of the defendants, as made out in the Written Statement, that she during her lifetime never acted as a Trustee but she

treated the property as her own. It had been further contended in the Written Statement that the defendants came to know from Radha Rani Debi

during her lifetime that apart from executing a power of attorney in favour of Shew Karan Jain, in order to enable him to manage her properties and

affairs and also to look after and conduct litigations on her behalf, she had never executed any other document in favour of Shew Karan Jain or in

respect of the said property, it was contended by the defendants that the signature on the said Deed of Trust was fraudulently procured by Shew

Karan Jain, after making her believe that she was executing a power of attorney in favour of Shew Karan Jain who made her to put her signature

on the said Deed of Trust, which never came into effect. Under those circumstances, according to the defendants, the said Deed of Trust was

vitiated by fraud. It was not binding on Radharani Debi. Radha Rani Debi by her last Will and Statement executed by her on the 15th July, 1974

bequeathed her properly in favour of the defendant No. 1 and also appointed him as the executor, under the said Will. The defendant No. 1 had

duly applied for probate of the said Will and in fact, the probate had been granted to him on 14th August, 1981. Prior to execution of the said Will

on 15th July, 1974. Radha Rani Debi on 9th July, 1974, executed the Will which was a registered one but she revoked the said prior Will by

execution of the Will and Testament dated 15th July, 1974. It was the case of the defendants in the Written Statement that Radha Rani Debi was

an illiterate lady. She could barely sign her name only with great difficulty. Under those circumstances, the defendants in their Written Statement

had stated that the plaintiff had no cause of action. The suit was misconceived and was not maintainable by the plaintiff. Under those

circumstances, they prayed for dismissal of the suit.

7. The following issues were raised and settled at the trial: Issues

1. (a) Was the plaintiff, in fact, adopted by Shew Karan Jain as his son as alleged in para 1 of the Plaint?

(b) Was the said alleged adoption valid in law?

2. Is there any valid Deed of Settlement by Radha Rani Debi dated the 14th Feb., 1971, as alleged in paras. 2 and 3 of the Plaint?

3. (a) Was the Will dated 15th July, 1974 probated, as alleged in para 6 of the amended Written Statement?

(b) If so, what was the effect thereof?

4. To what relief, if any, is the plaintiff entitled?

8. So far as issue No. 1 is concerned, it had been contended by the learned lawyer Mr. Amiya Nath Bose, appearing on behalf of the defendant

No. 1, first of all that the deed of adoption had not been properly proved by Ranjit K. Jain, Secondly he submitted that the fact of adoption had

not been proved by the plaintiff and thirdly it was the case of the defendant No. 1 that the adoption of Ranjit K. Jain, the daughter"s son by Shew

Karan Kathodia was invalid in the eye of law inasmuch as such adoption was not permitted in the regenerate class of Hindus. Shew Karan

Kathodia was a Hindu and was vaishya by caste, under these circumstances he contended that the adoption was not valid in the eye of law. So far

the oral evidence of Ranjit K. Jain on the deed of adoption was that his grandfather Shew Karan Jain in the year 1966 adopted him and a

registered deed of adoption was made on 30th Jan., 1956. He admitted that he was not acquainted with all the signatures on the document but he

could only prove the signatures of his mother, Lakshmi Bai and that of Shew Karan Kathodia. The other signatures of the witnesses as also of the

others being in Vernacular Language it was difficult for him to identify them. The said deed of adoption was registered at the office of the Sub-

Register Ladmu, Rajasthan on 30th Jan., 1956. He was specifically asked in question 17th in examinalion-in-Chief to the effect ""what was the

custom that was being referred to in the said deed of adoption."" However, his answer was that for the purpose of taking adoption there was a

system of taking adoption in their community which had been referred to. When he was specifically asked about the custom his answer was that

the custom was ""Godpatra"". His evidence was that Shew Karan Kathodia was a Jain. Ranjit K. Jain gave his name as Ranjit K. Jain alias Ranjil K.

Kathodia. In question 248 the learned cross-examining counsel suggested to Ranjit K. Jain that ""there was no ceremony of adoption"". In answer to

that Ranjit K. Jain stated that there was a ceremony of adoption and about 30 to 40 relatives were there. ""A function was arranged and all the

people who attended there were given food and all those things, as was customary in our society"". When he was specifically asked whether he was

prepared to call the persons whom he stated to be present during such adoption his answer was "yes" and when he was asked to give out the

names of such persons he gave the name of one as ""Golat Ram Bothra"". According to his evidence excepting his mother all other gentlemen

present there were dead as far as he was aware. Under the circumstances it appeared that save and except proving the two signatures on the said

deed of adoption Ranjit K. Jain the plaintiff herein could neither prove the document nor the other signatures on the said document. Inasmuch as

Ranjit K. Jain had nothing to do with the preparation or creation of the said document nor could he enlighten as to the ceremony that had taken

place under those circumstances strictly speaking apart from the signatures of his mother and that of his grandfather nothing else on the document

could be proved by him. So far the factual part of adoption was concerned his evidence was scanty inasmuch as, although he had spoken of a

custom prevalent amongst his community and ac-cording to him such custom and/or ceremony was performed inasmuch as the ""Godpatra"" was

created and 30 to 40 people were entertained at such ceremony but in spite of giving opportunities during cross-examination he failed to enlighten

this Court as to whether in fact the giving and taking ceremony which was essential to such act of adoption had been complied with and/or

performed or not. He did not come out in his Examination-in-Chief with such fact nor even when given an opportunity in cross-examination did he

assert that such ceremony had taken place. Although he agreed to call other witnesses to the ceremony, he failed to do so. It was his positive

evidence that his mother, was alive and who was a signatory to the said document and had all the knowledge of such adoption, in spite of that, the

plaintiff chose not to call her as a witness and in spite of a challenge being thrown to such fact of adoption. It had also been brought out in cross-

examination that some of vital signatures of Shew Karan Kathodia had been penned through in ink in the said Deed of adoption. Under those

circumstances the defendant No. 1 contended that the plaintiff was relying on a cancelled document for the purpose of establishing the fact of

adoption. At the beginning the plaintiff contended that originally the signatures were intact but subsequently they had been penned through while the

document was in the custody of the Court. However when an opportunity was given to the plaintiff to lodge necessary complaint before the

appropriate authority if that was his case, he declined to do so instead he called an interpreter and/or a translator of this Court to give evidence that

in some parts of Rajasthan it was a prevalent practice of putting a vertical as also a horizontal line on a document where the signature of the

executant would be taken but from the document itself it would appear that not all such signatories of Shew Karan Kathodia had been put on such

horizontal and/or vertical lines. No other document had been produced to indicate that in fact that was the custom which was being followed in

some part of Rajasthan.

9. The Hindu Adoptions and Maintenance Act, 1956 came into effect on 21st of December 1956. Under those circum-cumstances this particular

adoption having taken place in the month of January 1956 was not governed by the provisions of the said Act. Under the circumstances the

provisions under the Hindu Law were applicable in the instant case. From the deed of adoption it would appear that Shewkaran Kathodia had

described himself as ""Son of Multamal, Caste Oswal Katholia"". He further recited in the said document that as he had no son of his own and

according to his religion, one who did not have a son could not have salvation. Under those circumstances he took the eldest son of his daughter

Lak-shmi Devi, in adoption. He had further recited that the custom of taking in adoption and handing in adoption and other customs in the

brotherhood had been fulfilled. From the said recital it would appear that Shewkaran did not describe himself as a Jain in as much as he had given

his caste as Oswal Kathotia. Under those circumstances the plaintiff''s evidence that the Jains were caste-less and Shewkaran Kathotia was a Jain

is contradictory to what has been recited in the deed itself. Gopal Chandra Sarkar Sastri''s Hindu Law, 8th Edn. Page 194 observes:

The ceremonies of giving and taking are absolutely necessary in all cases. These ceremonies must be accompanied by the actual delivery of the

child; symbolical or constructive delivery by the mere parole expression or intention on the part of the giver and the taker without the presence of

the boy is not sufficient nor are deeds of giftg and acceptance executed and registered in anticipation of intended adoption, nor acknowledgment

sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; a formal

ceremony being essential for that purpose. In a Sudra''s adoption no other ceremony is necessary, giving and faking being sufficient, Among the

Jains the giving and taking are essential but the religious ceremonies are not necessary; but there is no bar in their adopting in the Dattak Form.

With reference to the three regenerate casts among the Hindus, the ceremony of Dattahoma or burnt offering is said to be necessary in addition to

giving and taking. Under those circumstances even amongst the Jains the ceremony of giving and taking is essential in as much as the law of the

Hindus applied to the Jaine.

N. R. Raghavachariar''s Hindu Law, 7th Edn. Vol. page 141 under Article 134 observed:

As regards the eligibility of the boy within the casts of the adopter, there is a rule of Sutherland that the boy to be adopted should not be the son

of a woman whom the adopter could not have married in her maiden slate. This rule, though formulated by Mr. Sutherland as the rule of

Nandapandita, is really different from Nandapandita''s rule which is that the boy to be adopted must be the son of a woman on whom the adopter

could have begotlen him in the Kshetraja form. Nandapandita''s rule is based really on Saunake''s methaphor that the adopted son is the reflexion

of a son and hence disqualifies the daughter''s son, the sister''s son, the brother, the paternal and maternal uncles, etc., from being adopted"".

Under Article 178 the same author observed:

According to the customary law prevailing among the Jains no authority express or implied is necessary for a widow of a sonless man making an

adoption to him, and the son adopted may even be a grown-up and married man. The only essential ceremony for the validity of the adoption is the

giving and taking of the adopted son. The Jains differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all the

obsequies after the corpse is burnt or buried. The birth of a son has no effect according to them on the future state of his progenitor and

consequently, adoption is merely a temporal arrangement, having no spiritual object.

Under the circumstances although according to Jains the adoption is merely a temporal arrangement having no spiritual object but even then the

only essential ceremony for the validity of the adoption is of giving and taking the adopted son.

From the recital made in the deed by the adoptive father it is indicated that he believed that as he had no son either natural or adopted, he de-sired

to adopt a son inasmuch as according to his own religion, he could not have salvation without a son. If in fact Shew-karan was a Jain, he could not

have such belief.

10. In the case reported in L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others, it had been held that (para 8):

That is also the view expressed in Mayne''s Hindu Law wherein it is observed that the giving and receiving are absolutely necessary to the validity

of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu

Law does not require that there shall be any particular form so far as giving and acceptance are concerned; for a valid adoption all that the law

requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken

for this purpose"".

It had been observed that there was no doubt that the burden of proving salisfactorily that he was given by his nalural father and received by his

adoptive father was on the adoptive son. I! had further been observed in that case that in the absence of direct evidence much value had to be

attached to the fact that the alleged adopted son without controversy succeeded to his adoptive father''s estate and enjoyed till his death and that

the documents during his life and after his death were framed upon the basis of adoption. The instant case is not a case of ancient transaction

inasmuch as the adoption had taken place according to the plaintiff in the year 1956 and his mother who was still alive at the time of hearing of the

suit had been a witness to the document by putting her signature thereon. Moreover according to the plaintiff others who were also present at such

ceremony, out of them at least one would be called by the plaintiff to corroborate his oral testimony, but ultimately the plaintiff did not examine his

mother nor the gentleman named by him to support and/or corroborate his oral testimony. In the case reported in Lakshman Singh Kothari Vs.

Smt. Rup Kanwar, it had been held that (para 10):

Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is

transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporal giving and

receiving in adoption is to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for

the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of

the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it.

The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and therefore, the

parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the

boy or receiving him, as the case may be, to a third party"".

In that particular case it was held that the ceremony of giving and taking which wag very essential for the validity of an adoption had not taken

place. In para 8 of the said judgment it was held:

To appreciate this argument it is necessary to notice briefly the law of adoption vis-a-vis, the ceremony of ""giving and taking"", Gopal Chandra

Sarkar Sastri in his book on Hindu Law, 8th Edn. succinctly describes the ceremony of ""giving and taking"" thus at p. 194:

The ceremonies of giving and taking are absolutely necessary in all cases. These ceremonies must be accompanied by the actual delivery of the

child; symbolical or constructive delivery by the mere parole expression of intention on the part of the giver and the taker without the presence of

the boy is not sufficient. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, nor

acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery;

a formal ceremony being essential for that purpose"".

Much to the same effect it is stated in Mayne"s Hindu Law, 11th Edn. at p. 237:

The giving and receiving are absolutely necessary to the validity of an adoption. They are operative part of the ceremony, being that part of it

which transfers the boy from one family into another. But the Hindu Law does not require that there shall be any particular form so far as giving and

acceptance are concerned. For a valid adoption, all that the law requires is that the natural father shall be asked by the adoptive parent to give his

son in adoption, and that the boy shall be handed over and taken for this purpose"".

The leading decision on this subject is that of the Judicial Committee in Shoshi-nath Ghose v. Krishnasunderi Dasi ILR (1880) Cal 382. That was,

like the present, a case of adoption among Sudras. There, it was contended, inter alia, that there was a formal adoption by giving and taking, and in

the alternative it was contended that even if there had been no formal adoption as alleged, the deeds of giving and taking, executed in 1864, were

sufficient to bring about the adoption and that was all that was essential in the case of Sudras. Sir J. W. Colvile, speaking for the Board rejected

both the contentions. He accepted the finding of the lower courts that there was no formal giving and taking and rejected the argument that the

documents themselves operated as a complete giving and taking of the adoptive boy. The learned Judge observed at p. 388 thus:

There is no decided case which shows that there can be an adoption by deed in the manner contended for; all that has been decided is that,

amongst Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption.....It would seem, therefore, that,

according to Hindu usage which the Courts should accept as governing the law, the giving and taking in adoption ought to fake place by the father

handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

That a formal ceremony of giving and taking is essential to validate the adoption has been emphasized by the Judicial Committee again in AIR 1931

109 (Privy Council) .

Under those circumstances a mere recital in the deed itself that such a ceremony had taken place in the absence of either oral or documentary

evidence to that effect is not sufficient, and it was difficult to accept the case of the plaintiff. Mr. Amiya Nath Bose"s submission that in any event

Shewkaran Katho-dia belonging to Vaishya caste of Hindus could not adopt the son of his daughter in as much as he belonged to the regenerate

class of the Hindus who could not according to Hindu Law adopt a son whose mother he could not have married. Mr. P. K. Roy the learned

lawyer appearing on behalf of the plaintiff cited many cases indicating that such adoption was possible amongst the Jains who did not have any

caste amongst themselves. In view of my finding that the plaintiff had failed to give sufficient evidence of the ceremony of giving and taking at the

time of the adoption and in view of my finding that the plaintiff had also failed to prove the deed of adoption properly in as much as he could only

prove the signature of the executant as also his mother. Under those circumstances it appeared that the plaintiff had failed to prove the actual

ceremony of adoption which is also required in the case of Jains. Under those circumstances the question whether Shewkaran Kathodia belonged

to the regenerate class or could adopt his daughter''s son need not be considered. Mulla on Hindu Law 14th Edn. under Article 613 observed:

It is too late in the day to contend that Jains are not included in the term ''Hindus''. The Jains are governed by all the incidents relating to the Hindu

joint family, as was very recently held by the Supreme Court. The ordinary Hindu Law is to be applied to Jains, in the absence? of proof of special

customs and usages varying that law. Those customs and usages must be proved by evidence, as other special customs and usages varying the

general law should be proved, and in the absence of proof the ordinary law must prevail. There is, however, nothing to limit the scope of the

inquiry to the particular locality in which the persons setting up the custom reside. Judicial decisions recognising the existence of a disputed custom

among the Jains of one place are relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown

that the customs are different; and oral evidence of the same kind is equally admissible, (a) Where, however a custom is negatived by a Judicial

decision in one place, e. g. Madras, the fact that among Jains in the other Stales such a custom has been upheld by Courts does not warrant a

general presumption of the prevalence of the custom in the Madras Stale"".

Under Article 622 it had been observed that a daughter''s son may be adopted among the Agarwala Bania of the Sarogi Sect. In the instant case

there had been no evidence tendered on behalf of the plaintiff proving such custom prevalent amongst the community, to which he belonged.

In the case reported in Bhajandas Vs. Nanuram and Another, it had been held that in Mar-war, where the deed itself mentioned that the boy had

been given and received in adoption and nothing was shown whereby it could be inferred that the physical act could not take place as mentioned in

the deed, a presumption did arise that the recital in the deed had been complied with good sense but on the basis of when a person does take the

transfer of sending for a scribe and executing the document and getting it registered there, in nothing to prevent him from performing the aclual

physical act of giving and taking, (sic) But if any party to the litigation proves circumstances which would show that the physical act of giving and

taking could not have been performed as recited in the deed of adoption then it would be for the party setting up the adoption to prove by positive

evidence that the physical act of giving and taking had taken place. In the instant case the plaintiff failed to give any evidence whatsoever and state

as to that ceremony having taken place in his examination-in-chief. On cross-examination also he failed to substantiate that such ceremony had

taken place. He did not call any independent witness to prove that such ceremony had taken place. Under those circumstances on the mere recital

in the deed itself, no presumption could be drawn in view of serious challenge being thrown by the defendants. Considering the peculiar facts of the

case it could not be expected ihat the defendants belonging completely to different community and family could by positive evidence show that

such ceremony had not taken place, save and except challenging the said adoption thereby requiring the party setting up the adoption to prove by

positive evidence that the physical act of giving and taking had taken place.

Under those circumstances so far issue No. 1 is concerned I hold that the plaintiff had failed to prove the adoption as pleaded in the plaint.

11.-12. So far issue No. 2 is concerned the plaintiff relied on a certified copy of of a deed of settlement executed by Radha Hani Debi on 14th of

February, 1971. The learned lawyer of the plaintiff relied first of all on Section 74(2) of the Evidence Act and in the alternative on Section 65 (a)

or (c) of the said act. So far the evidence of Ranjit K. Jain is concerned that was not absolutely clear inasmuch as he could not positively state that

the said document was in the custody of the defendant nor he could give substantial evidence as to the loss or destruction of the document. He

could only state with regard thereto by stating that on 7th July, the defendants came to occupy the suit premises. They took charge of whatever

belonged to Radha Rani Debi. There was no positive allegation that such document came into the possession of the defendants or that they had

destroyed the same. However, it had been stated in the plaint itself in paragraph 5 that the defendants had removed and/or destroyed the original

deed of settlement which was in the possession and custody of the Settlor and/or trustee, during her lifetime. Save and except a bare denial in the

written statement, there was no specific denial that the said deed of settlement never came into possession of the defendants or they had no

occasion of destroying and/or losing the said document. Under those circumstances Mr. Roy appearing on behalf of the plaintiff contended that the

certified copy of the said deed should be treated as an exhibit and admitted in evidence. He relied on various cases.

13. In the case reported in Chandra Sekhar Pati and Another Vs. Ahalya Devi and Others, it had been held that (Para 7):

Ext. 1 is a draft of the Anumati Patra alleged to have been executed by P. Somalingam, the admitted owner of the house, in favour of defendants

1 and 2 on 25-12-43. The original of Ext. 1 was not before the Court. The learned Subordinate Judge held that in the absence of the original being

called for from defendants 1 and 2 Ext. 1 is inadmissible in evidence. Here, he committed a serious error of law. In the plaint, Ext. 1 was referred

to. Defendants 1 and 2 denied existence of such a document. u/s 66 of the Evidence Act, secondary evidence of the contents of the documents

referred to in Section 65 clause (a) shall not be admissible unless certain steps are taken under this section, as prescribed. The proviso to the

section engrafts certain exceptions. Clause (2) of the proviso lays down that no notice shall be required in order to render secondary evidence

admissible in a case when from the very nature of the case, the adverse party roust know that he will be required to produce it, In this case,

plaintiffs clearly made a reference to Ext. 1 in the plaint. Defendants 1 and 2 denied existence of such a document. The question of calling for the

document from them did not arise. Ext. 1 cannot, therefore, be said to be inadmissible in evidence due to the absence of primary evidence.

In the case reported in Vishwanath Vithoba Vs. Genu Kisan and Others, it had been held that (Para 3):

The first point, which has been urged by Mr. Sukhthankar in this appeal is that the plaintiff has not proved that the three suit houses were

purchased by Gyanuji. In order to prove his assertion on this point, the plaintiff has produced the certified copies of three sale deeds, Exhibits 75,

76 and 77.

Mr. Sukhthankar has urged that these copies of the sale deeds are not admissible in evidence. The plaintiff has stated in his evidence that the

original sale deeds are not in his possession but they are in the possession of defendant 1. The plaintiff did not, however, give any notice to

defendant 1 asking him to produce the original sale deeds.

Mr. Sukhthankar has, therefore, urged that the certified copies are not admissible in evidence as no notice was given to defendant 1 as required by

Clause (a) of Section 65, Evidence Act. The proviso to Section 66, however, enables the court to dispense with such notice in any case, in which

the Court so thinks fit. In Su-rendra Krishna v. Mirza Mahammad Syed Ali, AIR 1936 PC 15, their Lordships observed:

The only purpose of a notice under Sections 65 and 66, Evidence Act, is to give the party an opportunity by producing the original document to

secure, if he pleases; the best evidence of its contents. The difference between a certified copy and the original for the purposes of the present case

is not very obvious but secondary evidence is admissible when the party offering.....

In the present case after the death of Gyanuji, the next senior member of the family is Vithoba. The three sale deeds therefore in all probability

went into the possession of Vithoba and after his death into the possession of the defendants. The plaintiff has stated that the original sale deeds are

not with him. He has also stated that they are in the possession of defendant 1. There was no cross-examination of the plaintiff in regard to his

statement on this point.

Defendant 1 in his evidence did not deny that the original sale-deeds were in his possession. It would have been desirable if a question had been

put to him on this point in the cross-examination by the plaintiff. But as the record stands, the plaintiff''s slalement that the original sale-deeds are

with defendant 1 remains unchallenged. This is also in accordance with the probabilities of the case.

The certified copies of three sale-deeds Exhs. 75, 76 and 77 were also produced by the plaintiff along with the plaint. He has specifically staled in

the plaint that these sale-deeds related to the three suit houses. There was no denial of this statement in the defendants'' written statement.

If, therefore, the original sale deeds are in the possession of the defendant 1 as deposed to by the plaintiff and as the plaintiff''s statement that the

certified copies of the three sale-deeds produced by him related to the suit houses has not been denied by the defendants, we think this would be a

proper case in which notice as required under Clause (a) of Section 65, Evidence Act, should be dispensed with. In that case, the three certified

copies, Exhibits 75, 76 and 77 would be admissible under Clause (a) of Section 65, Evidence Act.

On the other hand if the sale deeds are not in the possession of the defendants and as they are also not in the possession of the plaintiff, they must

be deemed to have been lost. In that case, the certified copies would be admissible under Clause (a) of Section 65. The learned Judge was

therefore right in admitting these three documents in evidence"".

In the case reported in Karuppanna Gounder and Others Vs. Kolandaswami Gounder and Others, it has been held that (Para 4):

When once the case for the introduction of secondary evidence is made out, certified copy got from the Registrar''s office can be admitted u/s 57,

Sub-section (5) of the Registration Act, without other proof than the Registrar''s certificate of the correctness of the copy and shall be taken as a

true copy. As the certified copy obtained from a Registrar''s office is admissible u/s 57(5), Registration Act, for the purpose of proving the contents

of the original documents, the mere production of such copy, without any further oral evidence to support it, would be enough to show what the

original document contained"".

In the case reported in Arya Printinidhi Sabha, Punjab Jullundur Vs. Dev Raj Vir Bhan and Another, it had been held that;

Where the will would come into possession and did come into possession of the persons interested to deny it rib presumption that it was revoked

by the testator can be raised specially when no bona fide search for it was proved to have been made at the testator''s death, nor was there any

occasion for such a search. This is a case where the original will is not lost but is being withheld by the interested parties.

The will was executed in 1914 by a Hindu, in the Punjab when no formalities were required to effectuate the same. The will was duly registered.

The original was in possession of the persons who were interested to deny the same. A registered copy of the will was provided. The attesting

witnesses were not in a position to say whether the contents of the will were the same as those in the copy.

Held that so far as the execution of the original will was concerned, it was proved by the endorsement of the Registrar. That endorsement left no

manner of doubt that the will was executed by the testator to whom it was read over and who admitted its contents to be correct. Therefore, a

certified copy of that will would be admissible in evidence in view of the fact that the original was not forthcoming and was being withheld by

persons who were interested to deny it. u/s 65(F), Evi-denfe Act read with Section 57 of Registration Act, the certified copy of the will was

sufficient proof of the will.

The learned Counsel sought to contend that the certified copy of the registered will is not admissible in evidence. The short answer to this argument

is that in view of the fact that the original will is not available, its secondary evidence can be led as required by Section 63 read with Section 65 of

the Evidence Act. The Courts below have unanimously come to the conclusion that secondary evidence is admissible in this case, for the reason

that the will is being withheld by the respondents. According to Clause (f) of Section 65 of the Indian Evidence Act, secondary evidence may be

given of the existence, condition and contents of a document when the original is a document of which a certified copy is permitted by this Act or

by any other law in force in India to be given in evidence, and in such a case according to Section 65, it is only the certified copy of the document

which is admissible. According to Section 57 of the Indian Registration Act, certified copies of documents registered have to be supplied by the

Registrar to all persons, applying for the same and according to Sub-section (5) of Section 57 such copies given under this section be admissible

for the purpose to prove the contents of the original documents"".

In the case reported in Rabindra N. Das Vs. Santosh Kumar Mitra and Others, , it had been further observed (at p. 385):

Now in order to admit secondary avidenee in proof of a document of this nature it is important to bear in mind the nature of the document, the

evidence about the search, the evidence about the enquiries made and the evidence about the loss of the original. In this case is is undisputed that

the deed of trust which was executed was also registered, That point is not controverted. It is further apparent from the evidence of Jagdish

Chandra Sil that he had the document registered. Ex. H is a certified copy issued by the Registrar of Assurance of the said deed. The fact that on

that date 2nd July, 1946, a deed was executed cannot also now be disputed and it is apparent from the conduct of Sm. Provabati Biswas herself is

instituting a suit challenging the execution of the said document, it is nobody"s case that any other deed or document had been executed on that

date. In the background of the aforesaid facts I am of the opinion that on the presumption of regularity u/s 114(c) of the Evidence Act the certified

copy issued by the Registrar of Assurance should be accepted as the correct copy of the deed executed on the 2nd July, 1946. If that is so, then

the evidence about the loss of the original will have to be adjudged in the light of the factors noted hereinbefore and on a consideration of all the

facts and circumstances, I am of the opinion, that this certified copy should be admitted in the evidence as a copy of the deed of 2nd July, 1946"".

Under those circumstances although the plaintiff"s evidence was not positive to that effect but from all the facts taken together the certified copy of

the deed of settlement should be tendered in evidence. So far as the contention of the defendant that the said deed of settlement was not a valid

document or that it was executed under undue influence, inasmuch as Radha Rani Debi was an illiterate woman, under those circumstances the

principles applicable to a case of pardanasin lady would also be applicable in. the instant case, was unacceptable to this Court in as much as the

defendant Kamal K. Chowdhury failed to substantiate such case by cogent evidence. His oral testimony was far from satisfactory, full of

contradictions and he travelled far beyond the case as purported to have been made out in the written statement. Radha Rani Debi admitted the

execution of the said document in subsequent pleadings.

In the case reported in Biswanath Agarwalla Vs. Sm. Dhapur Debi Jejodia and Others, it had been held that (Para 26):

In order to enable the plaintiff to tender the certified copy as a secondary evidence it is enough for the plaintiff to prove that the original is not in his

possession and so far he is concerned it is lost"".

The plaintiff in the instant case had relied on the deed of settlement. Under those circumstances if the plaintiff had the original with him he would

have been the first person to produce the original before this Court. It had been contended by the plaintiff in the plaint that the said document had

been destoryed by the defendants. There was no specific denial of such an allegation. Inasmuch as the defendants were relying on a will executed

by Radha Rani Debi on the 15th July, 1974 it was to their interest that the original deed of settlement would not see the light of the day. Under the

circumstances on the death of Radha Rani Debi the defendant No. 1 not only applied for the probate of the will dated 15th July, 1974 but as an

executor had taken charge of all the properties belonging to Radha Rani Debi during her lifetime. In fact probate had been granted in respect of the

said will. Although the original deed of settlement had been challenged by the defendant on the ground that the same was obtained by perpetrating

fraud and/or under undue influence exercised by Shewkaran Ka-thodia who prevailed upon Radha Rani to execute such deed of settlement, such

case was unacceptable to this Court as Kamal K. Chowdhury failed to substantiate such case in his oral evidence which was contradictory and

unreliable. He could not corroborate his statement by any other reliable evidence either oral and/or documentary. Under those circumstances that

part of the defendant''s case was unacceptable to this Court. In the alternative it was contended on behalf of the defendant No. 1 that even if there

was a valid deed of settlement created by Radha Rani Debi such deed was not acted upon by her inasmuch as in the Corporation rate bills, rent

receipts and other documents Radha Rani did not describe herself as a trustee under the said deed of settlement, moreover she had disposed of

the said property by her will dated 15th July, 1974. Mr. Amiya Nath Bose very strenenuously contended that Radha Rani Debi put her signature in

Hindi on a document which was prepared in English script. Under those circumstances this Court should infer that the document was not

understood by her properly and she did execute at the instance of Shewkaran Kathodia. The plaintiff examined Dhanesh Ch, Mitra an advocate

who gave evidence stating that Sanat K. Mitra, the advocate who acted for Radha Rani not only in this particular document but also in all other

suits where Radha Rani either filed the suit as a plaintiff or defended the suits as a defendant, in all those litigations Sanat K. Mitra had acted as her

lawyer. According to the evidence of Dhanesh Ch. Mitra this deed of settlement was prepared at the instance of Radha Rani and as per her

instructions and after the preparation of the original document the same was duly read over and explained by Dhanesh Ch. Mitra and after

understanding the purports and contents thereof she duly executed the said deed. Although he could not produce his day book or other papers to

indicate that he had such consultation with Radha Rani Debi but from the certified copy of the said deed it would appear that Dhanesh Ch. Mitra

acted and signed as a witness to the said document and also he explained and read over the document to Radha Rani Debi before it was executed

by her. Under those circumstances relying on the certified copy as also the evidence of Dhanesh Ch. Mitra it appeared that such a deed of

settlement was executed by Kadha Rani Debi during her lifetime which fact had also been acknowledged by her in her written statement filed in the

suits referred to above, Under the deed of settlement she appointed herself the first trustee and she managed the said property till she died. Under

those circumstances relying on the evidence as tendered in this suit I answer issue No. 2 in the positive. So far issue No. 3 (a) is concerned it is an

admitted fact that the said Will dated 15th July, 1974 had been probated by a competent court. Under those circumstances I answer issue No. 3

(a) in the positive. So far issue No. 3 (b) is concerned till the said probate is revoked and/or set aside and till the question of authority of Radha

Rani Debi to execute a will in respect of a property which was the subject-matter of the deed of settlement, is validly and properly decided in a

properly constituted suit the said probate is binding. So far issue No. 4 is concerned in view of my finding that the plaintiff could not prove the deed

of adoption properly as such this suit is not maintainable by the plaintiff. Under those circumstances I dismiss the suit with costs. There will

however, be a stay for three weeks.