

(1976) 09 BOM CK 0031

Bombay High Court

Case No: Second Appeal No. 904 of 1969

Dashrath Ramchandra
Khairnar

APPELLANT

Vs

Pandu Chila Khairnar

RESPONDENT

Date of Decision: Sept. 3, 1976

Acts Referred:

- Hindu Adoptions and Maintenance Act, 1956 - Section 12, 4, 5, 7, 8
- Hindu Succession Act, 1956 - Section 4

Citation: (1977) 79 BOMLR 426 : (1977) MhLj 358

Hon'ble Judges: Naik, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Naik, J.

This appeal raises an interesting question of law under the Hindu Adoptions and Maintenance Act, 1956. It arises in this way : Pandu, plaintiff No. 1 is the husband of Manjulabai, the first defendant and Sitabai plaintiff No. 2. On February 25, 1961 by the gift-deed exh. 54, Pandu gifted survey No. 154/2 of Chinchave, taluka Malegaon to the junior wife Sitabai and survey No. 104/3 to the senior wife Manjulabai. Pandu and Sitabai purported to adopt plaintiff No. 3 on July 26, 1964. Manjulabai the senior wife being opposed to that adoption and not having given her consent to the same, a dispute arose and that dispute was tried to be settled by the first plaintiff Pandu and plaintiff No. 2 Sitabai executing an agreement exh. 62 dated August 18, 1964, in favour of Manjulabai, defendant No. 1 whereby Pandu consented to Manjulabai taking defendant No. 5 in adoption. On the basis of the said consent, the first defendant did take defendant No. 5 in adoption.

2. Disputes having arisen, the plaintiffs filed the suit giving rise to this appeal for a declaration that defendant No. 5. is not the validly adopted son of plaintiff No. 1 and

for an injunction restraining the defendants from interfering with the plaintiffs' right of peaceful enjoyment of the family properties excluding the land which is gifted to defendant No. 1. The relief was founded on the allegation that the consent deed or agreement exh. 62 dated August 18, 1964 for adoption of defendant No. 5 by defendant No. 1 was taken by threat and that even otherwise as plaintiff No. 3 was already adopted by plaintiff No. 1, the subsequent adoption of defendant No. 5 by defendant No. 1 was not valid and legal.

3. The suit was resisted by all the defendants. They contended that defendant No. 5's adoption is perfectly valid and legal as the plaintiff No. 1 had voluntarily given his consent for the same. They also contended that the alleged adoption of plaintiff No. 3 by plaintiff No. 1 was null and void, as it was made without the consent and knowledge of defendant No. 1.

4. Both the Courts below have upheld the defendants contention that the adoption of plaintiff No. 3 by the first two plaintiffs is null and void. Both the Courts have further held that plaintiff No. 1 had voluntarily given his consent exh. 62 for the adoption of defendant No. 5 by defendant No. 1 and that the factum of that adoption is also proved. But both the Courts have, however, held that that adoption is invalid having regard to the provisions of the Hindu Adoptions and Maintenance Act, 1956-hereinafter referred to as the "Act". Since there was no dispute that the gift-deed exh. 54 is valid, the plaintiffs' suit has been decreed by both the Courts. They have also declared that the adoption of plaintiff No. 3 by plaintiff No. 1 also is null and void.

5. The correctness of the findings of both the Courts is challenged by defendants Nos. 2 to 5.

6. Mr. Dalvi who has appeared in support of this appeal has assailed the judgments of both the Courts below by contending that both the Courts have erred in not correctly interpreting the provisions of Sections 4 and 8 of the Act. Mr. Dalvi having drawn my attention to Sections 4 and 8 of the Act, has submitted that since according to the text, rule or interpretation of Hindu law, a Hindu wife could adopt with the consent of her husband and since no such provision is made in Section 8 of the Act, having regard to the provisions of Section 4 since the Courts below have concurrently held that plaintiff No. 1 had in fact given consent to the adoption of defendant No. 5 by defendant No. 1, they were in error in holding that the adoption of defendant No. 5 is invalid.

7. Mr. Walawalkar on the other hand while supporting the judgments of the Courts below submits that it could not be said that no provision is made in the Act for enabling a wife to adopt a son and since elaborate provisions are made in Section 8, enabling a wife to adopt a son, having regard to the provisions of Sections 4(a) and 8 of the Act, the Courts below were perfectly justified in holding that defendant No. 1 not having the requisite capacity to adopt a son, the adoption though proved as a

fact and though with the consent of plaintiff No. 1 the husband, could not be valid in law.

8. The Hindu Adoptions and Maintenance Act, 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

9. Section 4 of the Act, is to this effect:

4. Save as otherwise expressly provided in this Act,-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

10. The question about the capacity of a Hindu wife to adopt during the lifetime of her husband as per the text, rule or interpretation of Hindu law came to be considered by this Court in *Narayan Babaji v. Nana Manohar* (1870) 7 B.H.C.R. A.C.J. 153., it is observed as under:

Recapitulating the Hindu authorities held in highest repute here as to adoption by a wife, we find Manu and the Mitakshara silent as to adoption by any woman : Vasishtha allowing adoption by a woman with the consent of her husband; Devanda Bhatta, reciting the text of Vasishtha, and if our opinion be right, leaving that text uncontroverted and unexplained so far as it relates to a taking in adoption by a woman; Nanda Pandita reciting the same text, and admitting that a wife may, with the assent of her husband, adopt, but denying that a widow can adopt at all, because she cannot, as he says, obtain the consent of her husband; and Nilakantha, whose authority, amongst those who have actually written on the point, stands highest here, also reciting the text of Vasishtha, and requiring the order or command of the husband to the wife, but dispensing with it in the case of the widow, and substituting for it the consent of kinsmen.

Thus, upon the highest authorities in repute here, so far as they have spoken, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

11. The above view was approved in [Ramkishna Timmanna Bhat Vs. Laxminarayan Narna Hegde](#). In that case, the wife of a lunatic had adopted to her husband. This Court pointed out that in this Presidency the wife cannot adopt to her husband while he is alive without his express consent. Since the husband was a lunatic and could not give the consent, the adoption was held to be invalid. Therefore, so far as the law in Bombay State stood, as per the text, rule or interpretation of Hindu law, a wife could adopt only with the consent of her husband.

12. It appears from the observations in Raghavachariar's Hindu Law, 6th edn., at page 1156, that that was also the position according to all the schools of Hindu law. It is, therefore, clear that prior to the coming into force of the Act, which is an Act to amend and codify the law relating to adoptions and maintenance among Hindus, a Hindu wife could adopt only with the consent of her husband and in no other case.

13. Having regard to Section 4 of the Act, save as otherwise expressly provided by the Act any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of that Act, shall cease to have effect with respect to any matter for which provision is made in the Act. What is more, Section 4(b) provides that any other law in force immediately before the commencement of the Act, shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act.

13. That leads us to the examination of the provisions of the Act. Section 5 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 this Chapter, and any adoption made in contravention of the said provisions shall be void.

14. Sections 7 and 8 deal respectively with the capacity of a male Hindu to take in adoption and the capacity of a female Hindu to take in adoption. Section 7 provides that:

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, 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.

15. There is an Explanation which is also relevant for our purpose. That Explanation provides that:

If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

16. So this proviso which deals with the capacity of a male Hindu to adopt, introduces for the first. time restrictions on the male Hindu having a wife or wives living, providing inter alia, that he could not adopt except with the consent of the wife" or wives as the case may be except when the wife or wives have been incapacitated from giving consent for the reasons mentioned therein. This is a drastic encroachment on the right of a Hindu male to adopt, compared to his right or capacity to adopt prior to the coming into force of the Act.

17. Section 8 which deals with the capacity of a female Hindu to take in adoption provides that:

Any female Hindu-

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not 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,

has the capacity to take a son or daughter in adoption.

18. It would appear that this section also makes a drastic change in the law of adoption as it existed prior to the coming into force of the Act. This provision enables a Hindu female who is of sound mind and who has attained majority, to adopt a daughter or son, whether she is married or divorced. It also provides that if she is married, she could have the capacity to adopt if her 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. It would, therefore, appear that elaborate provisions are made in the matter of enabling a Hindu wife to adopt either a son or a daughter where (1) the husband has completely and finally renounced the world; or (2) has ceased to be a Hindu; or (3) has been declared by a Court of competent jurisdiction to be of unsound mind. So far as this provision viz. Section 8 is concerned, it provides for only three cases when a Hindu wife whose husband is living could adopt a son or a daughter. Though according to the text or interpretation of Hindu law, a Hindu wife could have the capacity to adopt a son with the consent or assent of the husband, no provision is made in Section 8 to confirm and ratify that right or capacity of a Hindu wife to adopt a son. The Legislature could not have been unaware that prior to the coming into force of the Act according to the text, rule or interpretation of Hindu law the wife could only adopt with the consent or assent of the husband. Notwithstanding that fact, and notwithstanding the fact, that the question of the consent of the spouse was very much present to the mind of the Legislature as appears from a reference to Section 7 dealing with the capacity of a Hindu male, the fact that even while enlarging and liberalising the powers of a Hindu female to adopt as provided in Section 8, on grounds which never existed prior to the coming into force of the Act, the Legislature did not think it proper or necessary to recognize the pre-existing right of the wife to adopt a son to her husband with the consent of the husband, would show that that omission must have been deliberate and intentional.

19. In this connection reference may be made to Maxwell on the Interpretation of Statutes, twelfth edn. At page 25 it is observed as under:

A codifying statute is one which purports to state exhaustively the whole of the law upon a particular subject, the draftsman attempting to subsume in his code both the pre-existing statutory provisions (as in a consolidation Act) and also the common law rules relating to the matter.

...The law is now to be determined by interpreting the language used, not (as before) "by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions". (p. 26)

20. Again at page 26, Maxwell has observed as under:

And the Earl of Selborne said (at p. 130) *Bank of England v. Vagliano Brothers* [1891] A.C. 107 that the previous authorities, which treated knowledge as necessary, "were no doubt within the view of the legislature, and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction".

21. To my mind there are obvious reasons for this omission, After all an adoption which is made by a Hindu wife under the enabling provisions of Section 8, is not only to herself but to both herself and her husband. See [Sawan Ram and Others Vs. Kala Wanti and Others](#), . The Supreme Court has observed that the provisions of Section 12 of the Act makes it clear that on adoption by a Hindu female who has been married, the adopted son will, in effect, be the adopted son of her husband also. See also [Ankush Narayan Shingate Vs. Janabai Kom Rama Sawat and Others](#), . A division Bench of this Court has held that the result of adoption by either spouses is that the adoptive child becomes child of both spouses.

22. Now since Section 7 specifically provides that the Hindu husband could only adopt with the consent of the wife or wives unless that consent could be dispensed with for the reasons mentioned therein and since an adoption made by the husband u/s 7 is both for himself and his wife or wives it would follow that it was wholly unnecessary and redundant to recognise or continue the pre-existing right of a Hindu wife to adopt with the consent of the husband.

23. It is significant to note that u/s 4, save as otherwise expressly provided in the Act, any text, rule or interpretation Of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. The saving clause has evidently no application so far as the capacity of the wife to adopt with the consent of the husband is concerned. If a provision is made in the Act with respect to any matter, it is clear that it is the Act which will have an overriding effect over any text, rule or interpretation of Hindu Law, custom or usage in respect of that matter.

24. As I have already pointed out Section 5(1) in Chapter II provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in the said chapter and that any adoption made in contravention of the said provisions shall be void. It is in this chapter that Sections 7 and 8 occur. The marginal note of Section 8 reads as "capacity of a female Hindu to take in adoption". Even the section read as a whole provides for specific provisions laying down the conditions requisite for a Hindu wife to have the requisite capacity to make a valid adoption.

25. What is argued by Mr. Dalvi is that since there is no provision made in Section 8(c) providing or enabling the wife to adopt a son with the consent of her husband that is not "a matter" for which provision is made in the Act, and, therefore, Mr. Dalvi argues that the text, rule or interpretation of Hindu law as existed prior to the coming into force of the Act could not cease to have effect having regard to the provisions of Section 4 of the Act. In other words he argues that the earlier law which enabled a wife to adopt a son with the consent of the husband is still good law notwithstanding the provisions of Sections 4 and 8 of the Act.

26. I am unable to agree with the submissions of Mr. Dalvi, that because there is no provision in Section 8 enabling a wife to adopt a son with the consent of her husband, that section should be interpreted as meaning that there is no provision made "in the matter" of the wife's capacity to adopt during the lifetime of the husband.

27. The Act itself is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. Elaborate provisions are made in chap. II which must be complied with if the adoption is to be valid and a contravention of which would invalidate the adoption as provided in Section 5.

28. The capacity of a Hindu male to take in adoption provided in Section 7 and the capacity of a Hindu female to take in adoption provided in Section 8 respectively are certainly some of the important provisions in the matter of a valid adoption. In other words, the capacity of a wife to adopt during the lifetime of her husband is "a matter for which provision is made in this Act" to use the language of Section 4(a) of the Act.

29. My attention has been invited to the case reported in [Hans Raj Basant Ram Vs. Dhanwant Singh Balwant Singh](#), where the Court was concerned with the interpretation of Section 4 of the Hindu Succession Act, 1956 which is identical to Section 4 of the Act. In that case, Mahajan J., as he then was, delivering the judgment of the Bench, after referring to the provisions of Section 4(1) of the Hindu Succession Act, has observed that this provision does away with the rule of custom so far as succession is concerned and therefore after the Hindu Succession Act came into force, no Hindu can be said to be governed by the rules, of customary law and the succession to the property held by a Hindu must be regulated by the provisions

of the Hindu Succession Act. In other words, the expression "any matter for which provision is made in this Act" occurring in Section 4(1)(a) of the Hindu Succession Act which is identical with the provisions of Section 4(a) of the Act, was interpreted as a question in the matter of succession for which provision was made in the Act. This authority would show that I am fortified in my view that the expression "any matter for which provision is made in this Act" occurring in Section 4(a) of the Act would mean the provisions of the Act in the matter of adoption by a Hindu to a Hindu, which are made in chap. II of the Act in which Section 8 occurs.

30. I may also point out that in Mulla's Hindu Law, in the commentary u/s 8 of the Act, it is observed that any adoption made by a female Hindu who does not have the requisite capacity mentioned in Section 8 to take in adoption or the right to take in adoption is null and void.

31. In Raghavachariar's Hindu Law, Principles and Precedents, sixth edn., in the commentary u/s 8, it is observed that if the husband is not under the disqualifications mentioned in Section 8, the wife cannot adopt even with the consent of the husband and that the husband can adopt with the wife's consent. With respect I am in agreement with these observations.

32. If I am right in that view, it would follow that since elaborate provisions are made in Section 8, setting out the circumstances under which a wife could have a capacity to adopt and the consent of the husband to enable the wife to adopt is not one of the enabling circumstances under that provision, it would follow that notwithstanding the text or rule of interpretation of Hindu law, after the coming into force of the Act, having regard to the specific provisions of Sections 4, 5 and 8 of the Act, it must be held that a Hindu wife cannot validly adopt even with the consent of her husband. Therefore notwithstanding the consent given by plaintiff No. 1 to the adoption of defendant No. 5 by the defendant No. 1, the said adoption could not be valid.

33. In the result, I see no reason to interfere with the decree passed by the Courts below and, therefore, the appeal is dismissed with costs.