AFR

Court No. - 40

Case :- SPECIAL APPEAL No. - 22 of 2021

Appellant :- Bhanu Pratap Singh
Respondent :- State Of U.P. And 3 Others
Counsel for Appellant :- Anand Prakash Paul,Brij Bhushan Paul
Counsel for Respondent :- C.S.C.
the alleged date of adoption.

Hon'ble Manoj Misra,J.
Hon'ble Rohit Ranjan Agarwal,J.

In re: Delay Condonation Application No. NIL of 2021:

1. As the limitation expired during the period of COVID-19 pandemic, the office has not reported the appeal to be beyond the period of limitation but, as a delay condonation application has been filed, to avoid any technicalities, we deem it appropriate to allow the application and condone the delay, if any.

In re: Appeal

2. Heard Sri B.B. Paul for the appellant; the learned Standing Counsel for the respondents 1, 2 and 3; and perused the record.

3. This intra-court appeal has been filed by the writ-petitioner (for short the appellant) against the judgment and order dated 25.11.2020 passed by the learned Single Judge in Writ A No. 10300 of 2107 by which appellant's writ petition has been dismissed.

4. Facts, in brief, giving rise to this appeal are that on death of one Rajendra Singh on 03.06.2016, in harness, by claiming himself as his adopted son, the appellant applied for compassionate appointment. As the claim of the appellant was

not being addressed, the appellant filed Writ A No.53860 of 2016 and obtained a direction on 17.11.2016 for consideration of his claim. Pursuant to that direction, the Divisional Director, Social Forestry Division, Mau (for short Director), by order dated 17.12.2016, rejected the claim of the appellant upon finding as below : (a) Rajendra Singh had a living wife in Phoolmati against whom he had instituted suit no.145 of 1994 which was decided in terms of a compromise on 31.08.1997, as per which their relationship as a married couple were to continue; (b) Phoolmati claimed herself to be the sole heir of Rajendra Singh and had denied adoption of the appellant; (c) under Dying in Harness Rules, 1974, preference is to be accorded to the deceased's wife; (d) the adoption deed relied by the appellant appeared fraudulent as it recited that Rajendra Singh, the adoptive father, was unmarried even though he had a living wife in Phoolmati; (e) the educational certificates of the appellant, even those that were obtained post the date of alleged adoption, reflected the name of his natural parents, namely, Raj Narain and Kamla; (f) the extract of Parivar register also reflects the name of appellant's father and mother as Raj Narain and Kamla, respectively and, therefore, the plea of adoption set up by the appellant is nothing but fraudulent made with a view to make unlawful gain. Assailing the order dated 17.12.2016 the appellant filed Writ A No. 10300 of 2017 by claiming that as the adoption was by a deed of adoption, dated 07.02.2001, registered on 14.12.2009, there was no justification to deny the benefit of compassionate appointment to the appellant. In the counter affidavit to the writ petition, inter alia, the validity of the alleged adoption was questioned. In the rejoinder affidavit, to meet the objection that a married Hindu male could not lawfully take in adoption without the consent of

his wife, a stand was taken that Phoolmati, wife of Rajendra Singh, had left her husband and that in Suit No.145 of 1994, on the basis of compromise, dated 31.08.1997, a decree of divorce came to be passed on 01.09.1997, hence, her consent was not required.

5. The learned Single Judge dismissed the petition of the appellant upon finding that: (a) there was no decree of divorce obtained by Rajendra Singh (the deceased employee) against his wife Phoolmati who was alive at the time of the alleged adoption; (b) the adoption deed discloses Rajendra Singh's status as single, which implies that there was no consent of his wife for taking the appellant in adoption as is the mandatory requirement of the proviso to section 7 of the Hindu Adoption and Maintenance Act, 1956 (for short the 1956 Act); (c) mere separate living by the wife, or wife's estrangement from her husband, would not obviate the requirement of her consent to make a valid adoption. The learned single Judge concluded that the alleged adoption is invalid and also fraudulent because, despite alleged adoption, the name of natural parents of the appellant continued in educational certificates that were obtained post the date of alleged adoption.

6. Sri B.B. Paul, learned counsel for the appellant, has questioned the correctness of the order passed by the learned Single Judge by claiming that the learned Single Judge has failed to notice that by a decree dated 31.08.1997 the marriage of Rajendra Singh with his wife Smt. Phoolmati stood dissolved. Moreover, even if it is assumed that there was no legal divorce, she, by living separate from her husband, had renounced the world therefore her consent was not necessary. The next submission is that the learned single judge had failed to

consider the import of section 16 of the1956 Act which, upon existence of a registered deed of adoption, raises a presumption as to the validity of adoption and since there was no serious contest to the adoption of the appellant by any of the successors of the deceased employee, the appellant ought to have been provided the benefit of adoption by raising that presumption. In support of this submission reliance was placed on a decision of the Apex Court in ***Laxmibai v. Bhagwantbuva*, (2013) 4 SCC 97** where it was held that if there is a registered document pertaining to the adoption there is a presumption, under Section 16 of the 1956 Act, to the effect that the adoption has been made in compliance with the provisions of the 1956 Act, until and unless such presumption is disproved.

7. Having noticed the submissions made, on a careful perusal of the record, we find that the submission of Sri Paul that there exists a decree of divorce, dated 31.08.1997, severing the marital bond between Rajendra Singh and his wife Phoolmati, is contrary to the record. The alleged decree, which has been brought on the record as Annexure RA III to the rejoinder affidavit filed in the writ proceeding, is not a decree of divorce. It only disposes off divorce proceeding in terms of the compromise. The compromise records payment of Rs.5000/- to Phoolmati towards litigation expenses and its terms (at page 209 of the paper-book) are: (a) that Rajendra Singh and Phoolmati shall continue to remain husband and wife; (b) that Phoolmati's name, as Rajendra Singh's wife, would be entered in his service-book; and (c) that she would get maintenance @ Rs.500 pm. In view of the above, the submission of the learned counsel for the appellant that on account of divorce between Phoolmati and Rajendra Singh her consent was not required for

adoption has no basis on facts and is rejected outright.

8. Before we weigh the merit of other submissions made by the learned counsel for the appellant, it would be apposite to notice the provisions of sections 6, 7, 8 and 16 of the 1956 Act, the applicability of which on the parties is not in issue. These are as below:

> *"**6. Requisites of a valid adoption**.—No adoption shall be valid unless—*
>
> *(i) the person adopting has the capacity, and also the right, to take in adoption;*
>
> *(ii) the person giving in adoption has the capacity to do so;*
>
> *(iii) the person adopted is capable of being taken in adoption; and*
>
> *(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.*
>
> ***7. Capacity of a male Hindu to take in adoption**.—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.*
>
> *Explanation.—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.*
>
> ***8. Capacity of a female Hindu to take in adoption**.—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.*
>
> ***16. Presumption as to registered documents relating to adoptions**.—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."*

9. From a perusal of the provisions extracted above, it is clear that for an adoption to be valid one of the conditions is that the person taking in adoption must have the capacity to adopt. As per section 7, a male Hindu, who is of sound mind and is not a minor, could take a son or daughter in adoption provided, 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. In the instant case, the argument on behalf of the appellant is that as the wife had not been in the company of her husband therefore it could be taken that she had renounced the world and, as such, her consent would not be required. This contention was specifically repelled by the learned single judge by placing reliance on a decision of the Apex Court in the case of ***Brajendra Singh v. State of M.P.*, (2008) 13 SCC 161** where the Apex Court while dealing with the capacity of a female Hindu to take in adoption interpreted the provisions of section 8 of 1956 Act, in paragraphs 15 to 17 and 19 of its judgment, as under:

> *"15. We are concerned in the present case with clause (c) of Section 8. The section brings about a very important and*

far-reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the section expressly provides for cases in which she can adopt a son or daughter to herself during the lifetime of the husband. She can only make an adoption in the cases indicated in clause (c).

16. It is important to note that Section 6(i) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as "capacity". Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grandson by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with clauses (I) and (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance with the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void.

17. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. There is conceptual and

contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of the law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of the law. Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

19. A married woman cannot adopt at all during the subsistence of the marriage except when the husband 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. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the 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. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically departs from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossess the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and

adoption without wife's consent would be void. Both proviso to Section 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption."

(Emphasis supplied)

10. Learned single judge upon noticing that the provisions of the proviso to section 7 of the 1956 Act are, in part, *pari materia* to clause (c) of section 8 of the 1956 Act, by applying the interpretation accorded to clause (c) of section 8 of the 1956 Act by the Apex Court in **Brajendra Singh's case (supra),** held that the requirement of consent of the wife, under the proviso to section 7 of the 1956 Act, cannot be dispensed with where there is no dissolution of marriage even though the wife might be estranged from her husband and staying separate. In our considered view, the learned single judge was right in holding that the consent of even an estranged wife for taking in adoption would be required, if the marriage has not been dissolved. No doubt, consent of wife would not be required where the marriage has been dissolved or the wife has completely 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. But, here, it has not been proved that the marriage was dissolved. Rather, the document produced is to the contrary. Further, there is nothing on record to suggest that Phoolmati has completely renounced the world or has ceased to be a Hindu or has been declared of unsound mind by any court. Mere staying separate from one's husband may amount to renouncing the husband but not the world. Under the circumstances, Phoolmati's consent was required before her husband could take in adoption.

11. Noticeably, there is no evidence brought on record to demonstrate that consent of Phoolmati was obtained or was

there, before her husband allegedly took the appellant in adoption. In ***Ghisalal v. Dhapubai*, (2011) 2 SCC 298,** the Apex Court after laying emphasis on the mandatory requirement of obtaining consent of wife before the husband could validly take a son or a daughter in adoption, interpreted the term consent, in paragraph 26 of the judgment, as follows:

> ***"26.*** *The term "consent" used in the proviso to Section 7 and the Explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject-matter of challenge before the court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption."*
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> ***(Emphasis supplied)***

12. From the decision noticed above, the legal principle deducible is that the party propounding an adoption by a Hindu male, who has a living wife, has to adduce evidence to prove

that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. In other words, the court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

13. Now, we shall examine the nature of presumption that arises under section 16 of the 1956 Act. In ***Jai Singh v. Shakuntala*****, (2002) 3 SCC 634,** the Apex Court had held that the presumption that arises out of section 16 of the 1956 Act is rebuttable and the inclusion of the words “unless and until it is disproved” appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence on record in support of adoption. The relevant portion of that judgment, as found in paragraph No.2 thereof, is extracted below:

> ***“2.*** *The section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the statute is rather definite since the legislature has used “shall” instead of any other word of lesser significance. Incidentally, however, the inclusion of the words “unless and until it is disproved” appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession — thus onus of proof is rather heavy. Statute*

> *has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above."*

14. Even in the decision in ***Laxmibai's case (supra),*** relied by the learned counsel for the appellant, the Apex Court held that a very heavy burden is placed upon the propounder to prove adoption but once a registered document recording the adoption is brought before the court the onus shifts. The court however clarified that this aspect must be considered taking note of various attending circumstances. The relevant portion of that judgment i.e.paragraph 33, is extracted below:

> ***"33.*** *The appellate court could therefore, not have drawn any adverse inference against the appellant-plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document. Undoubtedly, adoption disturbs the natural line of succession, owing to which, a very heavy burden is placed upon the propounder to prove the adoption. However, this onus shifts to the person who challenges the adoption, once a registered document recording the adoption is brought before the court. This aspect must be considered taking note of various other attending circumstances i.e. evidence regarding the religious ceremony (giving and taking of the child), as the same is a sine qua non for valid adoption."*
>
> ***(Emphasis supplied)***

15. The legal principle deducible from the decisions

noticed above is that once a registered deed of adoption is produced though there arises a presumption that the adoption has been made in compliance with the provisions of the 1956 Act but that presumption is rebuttable. Whether that presumption has been rebutted depends on the facts of each case borne out from the evidence on record.

16. In the instant case, the adoption deed on which reliance has been placed by the appellant declares Rajendra Singh as unmarried whereas, it is established on the record, he was married and had a wife living on the date of adoption. Therefore once it was proved that Rajendra Singh had a living wife, the presumption, if any, arising from that deed with regard to the adoption being in accordance with the provisions of the 1956 Act stood demolished because how could it be presumed that the wife had given her consent for her husband to take a son in adoption when even the existence of that wife is not acknowledged. In fact in the adoption deed Rajendra Singh has been described as unmarried. Thus, when clinching evidence had come on board that the person who allegedly took the appellant in adoption had a living wife, whose existence was denied in the deed, the presumption, whatever available, stood rebutted.

17. At this stage, we may notice another statement of the learned counsel for the appellant though not vehemently pressed as an argument. It was stated that there were property documents on record to show that the estate of the deceased employee (Rajendra Singh) had come to the appellant and, therefore, for all practical purposes he was the son of the deceased employee. We find not much value in those facts because here, to qualify as a dependent of an employee who died in harness, the appellant had set up a plea that he was the

adopted son of the deceased employee. Once that plea stood discarded upon finding that a valid adoption could not be established, as to how the property of the deceased employee devolved was not important and binding on the authorities who were to deal with the claim for compassionate appointment on the strength of adoption. That apart, there were other circumstances also, such as continuance of name of natural parents of the appellant in educational certificates, obtained after the alleged date of adoption, to suggest that adoption was sham may be to divest the estranged wife of her claim in the deceased employee's property.

18. For all the reasons recorded above, we are of the considered view that the learned single judge was justified in negativing the claim of the writ petitioner (the appellant) for compassionate appointment on the basis of his alleged adoption by the deceased employee.

19. The appeal is, accordingly, **dismissed**.

Order Date :- 22.2.2021
Sunil Kr Tiwari