REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.6373-6374 OF 2002

Ghisalal … Appellant

Versus

Dhapubai (Dead) by L.Rs. and others … Respondents

With

CIVIL APPEAL NOS. 6375 - 6376 OF 2002.

Dhapubai (Dead) Widow of Gopalji through L.Rs. … Appellants

Versus

Ghisalal and others … Respondents

J U D G M E N T

G.S. SINGHVI, J.

1. Whether mere presence of Dhapubai in the ceremonies performed by her husband Gopalji for adoption of Ghisalal amounted to her consent as

contemplated by the proviso to Section 7 of the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the 1956 Act') is the main question which arises for consideration in these appeals filed against judgment dated 12.9.2000 of the learned Single Judge of the Madhya Pradesh High Court, Indore Bench whereby he partly allowed the second appeals filed by the parties and modified the decree passed by the lower appellate Court, which had substantially reversed the decree passed by the trial Court in a suit for declaration, partition and possession.

2. Although, Gopalji, Dhapubai and Sunderbai who were impleaded as defendant Nos.1 to 3 in Suit No.54A of 1973 filed by Ghisalal died during the pendency of litigation, for the sake of convenience, we shall refer to them by their names and not by the description given in the suit and the appeals.

3. The pleaded case of Ghisalal was that in Baisakh of Samvat 2016 (1959) his father, Kishanlal gave him in adoption to Gopalji; that ceremonies like putting of tilak on his forehead and distribution of sweets were performed; that registered deed of adoption was executed by Kishanlal and Gopalji on 25.6.1964; that Gopalji had inherited certain agricultural lands of villages Jeeran, Arnya Barona, Kuchrod, a two storeyed house and one

court-yard from his father Roopji; that after adoption, he became coparcener in the family of Gopalji and thereby acquired right in the suit properties; that Gopalji executed three Gift Deeds dated 22.10.1966 whereby he transferred lands of villages Jeeran, Arnya Barona and Kuchrod to his wife Dhapubai and the latter sold a portion of land in survey No.945 of village Kuchrod to Sunderbai vide Sale Deed dated 19.1.1973; that the gift deeds executed by Gopalji in favour of Dhapubai were fraudulent and were intended to deprive him of his right in the ancestral properties and that even in his capacity as karta of the family, Gopalji could not have gifted more than 1/3rd of his share. On the basis of these pleadings, Ghisalal prayed that a decree of partition be passed and he be given one half share in the suit properties. He further prayed that Gopalji may be directed to give an account of the agricultural produce and pay him his share.

4. In the written statement filed by him, Gopalji pleaded that he had not adopted Ghisalal and no ceremony was performed; that the so called adoption deed was obtained by playing fraud and the same was not binding on him; that the suit properties were not ancestral and that he was entitled to execute gift deeds in favour of his wife. In her separate written statement, Dhapubai also denied the factum of the adoption of Ghisalal by Gopalji and

claimed that she had not given consent for the same. She then pleaded that if by taking advantage of the simplicity of Gopalji, the plaintiff obtained some writing or deed, the same is not binding on them. She further pleaded that the gift deeds were valid and Ghisalal has no right to challenge the alienation of property by her husband.

5. After filing of the written statement, Dhapubai sought and was granted leave to amend the written statement whereby she pleaded that Gopalji had earlier executed registered Gift Deed dated 29.11.1944 in her favour in respect of the lands comprised in Survey Nos.2097, 2763 and 3170 (old Survey Nos.2856, 3042/2 and 3528) of village Jeeran and she was in possession of the same. As a sequel to this, Ghisalal amended the plaint and pleaded that Gift Deed dated 29.11.1944 was not valid because the land of village Jeeran was not capable of being gifted and, in any case, the same was not binding on him. He further pleaded that Gift Deed dated 29.11.1944 was not acted upon inasmuch as the property had not been transferred in the name of Dhapubai.

6. During the pendency of the suit, Gopalji executed registered Will dated 27.10.1975 purporting to bequeath the suit properties to his wife Dhapubai. After some time, Gopalji died.

7. In the light of the pleadings of the parties, the trial Court framed the following issues:

1) Whether the suit properties mentioned in Para-6 of the plaint are the property of Joint Hindu Family?

2) Whether the plaintiff is the legally adopted son of defendant No.1 and 2?

3) Whether the Gift Deed dated 22.10.66 is illegal and void?

4) Whether the sale deed dated 19.1.73 has no effect on the plaintiff?

5) Whether the court fee has been properly paid?

6) Whether the statement made by the defendant in Suit No. 76 of 1964 is binding on the defendants as per the law of estopple?

7) Whether the lands mentioned in Paragraph 6 of the reply had been gifted on 29.11.1944 and what is its effect?

8) Relief and expenses.

8. After considering the pleadings and evidence produced by the parties, the trial Court held as under:

(1) The suit properties were ancestral properties of Gopalji.

(2) Ghisalal was validly adopted son of Gopalji and the consent of Dhapubai can be presumed from her presence in the adoption ceremonies.

(3) Gift Deeds dated 22.10.1966 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by her in favour of Sunderbai were invalid.

(4) Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai was invalid.

(5) Gift Deed dated 29.11.1944 executed by Gopalji in favour of Dhapubai was not valid inasmuch as there was no acceptance by the donee and alienation of ancestral property by Gopalji in favour of his wife was not for a pious purpose.

9. Dhapubai challenged the judgment and decree of the trial Court by filing an appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure. The lower appellate Court agreed with the trial Court that the suit properties were ancestral; that the adoption of Ghisalal by Gopalji was valid and that the gift deeds executed in favour of Dhapubai were not valid. However, the findings recorded on the legality of Gift Deed dated 29.11.1944 and Will dated 27.10.1975 (both executed by Gopalji in favour of Dhapubai) were set aside and it was declared that Ghisalal is entitled to 1/3rd share in the suit properties except the land covered by Gift Deed dated 29.11.1944. The lower appellate Court also directed that whole of the land

situated at village Kuchrod may be given to Ghisalal as his 1/3rd share so that there may not be any dispute between the parties in future.

10. Both, Ghisalal and Dhapubai challenged the judgment of the lower appellate Court by filing Second Appeal Nos.25 of 1978 and 61 of 1978. During the pendency of the second appeals, Dhapubai died and her legal representatives were brought on record.

11. While admitting the second appeal filed by Ghisalal, the High Court framed the following substantial questions of law:

(1) What would be the respective shares of the plaintiff-appellant and defendant No.1 Dhapubai in the suit properties according to law in case the Will Ex.D.2 is held to have been proved and what would be their shares in case it were to be held otherwise?

(2) Whether the execution and attestation of the Will Ex.D/2 have been proved in accordance with law?

(3) Whether there is legal evidence to prove the gift of the properties comprised in Ex.D/1 by Gopal in favour of Dhapubai?

(4) Whether the lower Court has acted without jurisdiction or erroneously in giving directions with respect to the apportionment of the plaintiff's share in the suit land?

12. In the second appeal filed by Dhapubai, the High Court framed the following substantial questions of law:

> (1) Whether there is any legal evidence on record to prove the consent of Mother Dhapubai as required by Section 7 of the Hindu Adoption and Maintenance Act, 1956 for the valid adoption of plaintiff Ghisalal?
>
> (2) Whether the court below had jurisdiction to impose a condition that Dhapubai will not get the lands situated in village Kuchhdod?
>
> (3) Whether the finding of the Court below that suit properties are ancestral is perverse?

13. The learned Single Judge confirmed the finding recorded by the two Courts on the legality of Ghisalal's adoption by Gopalji. The learned Single Judge also agreed with the lower appellate Court that Ghisalal was not entitled to challenge Gift Deed dated 29.11.1944 but held that Will dated 27.10.1975 cannot be treated to have been validly executed by Gopalji. The learned Single Judge further held that the lower appellate Court was not justified in issuing a direction that Ghisalal be given land in village Kuchrod and Dhapubai would not get any share in that land. He finally disposed of the second appeals with the following directions:

> "The appeal filed by each of the party is partly allowed. It is directed that each of the party is entitled to half share in the agricultural lands of village Jeeran, Kuchrod and Arnya Barona, barring the lands already given to Dhapubai under gift deed dated 29.11.1944. Each of the party i.e. Ghisalal and Dhapubai through her successors have half share in the house property situate at Village Jeeran. The property, already sold by Dhapubai to the defendant No.3 Sundarbai shall be brought

> back to the hotchpot. If the plaintiff agrees that land survey No.347 admeasuring 0.375 hectare of village Kuchrod can be given to the defendant No.3 Sundarbai then the said property can be given to her and that much of the property shall stand reduced from the share of Dhapubai, but if the plaintiff does not agree to it then survey No.947 of village Kuchrod shall be brought to the hotchpot and the property shall be partitioned in accordance with the provisions of law. Sundabai shall be entitled to 0.375 hectares of land from the share of Dhapubai which property could be given to her may be mutually settled and agreed between the successors of Dhapubai and Sundarbai. On such an agreement particular land falling in share of Dhapubai may be given to Sundarbai but in case such an agreement cannot be arrived at then the officer competent to partition the property shall give 0.375 hectare land to Sundarbai from the share of Dhapubai, after firstly effecting the partition between Ghisalal and successors of Dhapubai. The parties shall be at liberty to make an application to the trial court to refer the matter to the Collector for effecting partition or in the alternative with the permission of the trial court the party/parties may make necessary application for partition to the Collector or the competent Officer. Regarding partition of the house the party/parties may make an application to the trial Court for appointment of Commissioner. The terms of the commission and the fees of the Commissioner shall be fixed by the trial court."

14. Shri Puneet Jain, learned counsel for Ghisalal argued that Dhapubai's challenge to the adoption of Ghisalal by Gopalji was rightly negatived by the trial Court, the lower appellate Court and the High Court and in exercise of power under Article 136 of the Constitution, this Court is not entitled to interfere with the concurrent finding of fact. He pointed out that the trial Court and the lower appellate Court had concurrently held that Ghisalal was

taken in adoption strictly in accordance with law and a registered deed of adoption was also executed by the natural and adoptive fathers and argued that the High Court rightly declined to upset the said finding. Learned counsel emphasized that the consent of Dhapubai was rightly presumed by the Courts below because she was present in the ceremonies of adoption and did not question the adoption till the stage of filing written statement in the suit filed by Ghisalal. Shri Jain also referred to the averments contained in the written statement filed by Gopalji in Civil Suit No.76A of 1964 – Pannalal v. Ghisalal and another wherein he admitted the adoption of Ghisalal and argued that the contrary assertion made in the written statement filed in the suit of Ghisalal was rightly discarded by the Courts below and the High Court. Learned counsel further argued that after his adoption Ghisalal became a coparcener in the family of Gopalji and was entitled to half share in the properties inherited by his adoptive father and, as such, the finding recorded by the lower appellate Court and the High Court on his locus to challenge Gift Deed dated 29.11.1944, which adversely affected his right in the suit properties is legally unsustainable. Learned counsel submitted that even though no specific prayer was made in the suit for setting aside Gift Deed dated 29.11.1944, the trial Court had rightly declared the same to be invalid, ineffective and inoperative because Ghisalal had

challenged validity thereof by amending the plaint and the parties had adduced evidence knowing fully well that the legality of the gift deed of 1944 is subject matter of scrutiny by the Court. Shri Jain submitted that in the amended written statement, Dhapubai had pleaded Gift Deed dated 29.11.1944 as a weapon of defence with the sole object of defeating the right acquired by Ghisalal by virtue of his adoption and, therefore, the trial Court had rightly annulled the same on the ground of non fulfillment of the essentials of a valid gift and the lower appellate Court and the High Court committed serious error by invoking Section 12 of the 1956 Act and the bar of limitation for the purpose of non suiting him. Learned counsel relied upon the judgment of this Court in **K. Laxmanan v. Thekkayil Padmini** (2009) 1 SCC 354 and argued that the lower appellate Court seriously erred in reversing the finding and conclusion recorded by the trial Court on the issue of validity of Gift Deed dated 29.11.1944 ignoring that the burden to prove the competence of Gopalji to execute the gift deed in respect of a portion of the suit property was on Dhapubai, which she failed to discharge. Learned counsel also argued that gift of the joint family property was nullity and the same could be challenged at any time. Shri Jain referred to the judgment of this Court in **Janki Narayan Bhoir v. Narayan Namdeo Kadam** (2003) 2 SCC 91 and submitted that the trial Court and the High Court rightly

invalidated the Will executed by Gopalji in favour of Dhapubai.

15. Shri Nikhil Majithia, learned counsel for Dhapubai argued that even though all the Courts concurrently held that Ghisalal was validly adopted by Gopalji, the finding recorded on this issue is liable to be set aside because his client had not given consent for the adoption. Learned counsel submitted that the plaint filed by Ghisalal was totally bereft of the material particulars regarding the date, time and place of adoption as also the crucial ceremony of give and take and the Courts below as well as the High Court committed serious error by recording a finding that the adoption was validly made and that too by presuming the consent of Dhapubai. Learned counsel emphasized that mere presence of Dhapubai at the place where the ceremonies of adoption are said to have been performed could not be made basis for assuming that she had willingly consented to the adoption of Ghisalal by Gopalji. He submitted that the consent contemplated by the proviso to Section 7 of the 1956 Act is mandatory and unless the consent of the wife is proved, the adoption cannot be treated valid. In support of this argument, Shri Majithia placed reliance on the judgments of this Court in **Kashibai v. Parwatibai** (1995) 6 SCC 213 and **Brajendra Singh v. State of M.P.** (2008) 13 SCC 161. Learned counsel also assailed the High Court's finding

on the legality of the Will executed by Gopalji in favour of Dhapubai and argued that examination of one attesting witness was sufficient to prove execution of the Will. Learned counsel supported the impugned judgment insofar as it relates to Gift Deed dated 29.11.1944 and argued that even if this Court was to approve the finding recorded by the Courts below on the issue of Ghisalal's adoption, his challenge to Gift Deed dated 29.11.1944 should be treated as misconceived and negatived because the adoption cannot relate back to any date prior to 1959.

16. We have considered the respective submissions and gone through the written arguments filed by the learned counsel. For deciding the question whether the adoption of Ghisalal by Gopalji was valid, it will be useful to notice the relevant provisions of the 1956 Act. The same read as under:

> "**6. Requisites of a valid adoption. –** No adoption shall be valid unless –
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> (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.
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> **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.

12. Effects of adoption. – An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that –

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching

to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

16. Presumption as to registered documents relating to adoption. – 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."

17. Section 6 reproduced above enumerates the requisites of a valid adoption. It lays down that no adoption shall be valid unless the person adopting has the capacity as also the right to take in adoption; the person giving in adoption has the capacity to do so; the person adopted is capable of being taken in adoption, and the adoption is made in compliance with the other conditions mentioned in Chapter II. Section 7 lays down that any male Hindu who is of sound mind and is not minor has the capacity to take a son or a daughter in adoption. This is subject to the rider enshrined in the proviso which lays down that if the male Hindu has a wife living then he shall not adopt except with the consent of his wife unless she is incapacitated to give the consent by reason of her having completely and finally renounced the world or her having ceased to be a Hindu or she has

been declared by a court of competent jurisdiction to be of unsound mind. The explanation appended to Section 7 lays down that if a person has more than one wife living at the time of adoption, then the consent of all the wives is *sine qua non* for a valid adoption unless either of them suffers from any of the disabilities specified in the proviso to Section 7. Section 8 enumerates the conditions, which must be satisfied for adoption by a female Hindu. Section 12 deals with effects of adoption. It declares that from the date of the adoption, an adopted child is deemed to be a child of his/her adoptive father or mother for all purposes and his ties in the family of his or her birth shall stand severed and replaced by those created in the adoptive family. Proviso (a) to this section contains a restriction on the marriage of adopted child with a person to whom he or she could not have married if he or she had continued in the family of his or her birth. Clause (b) of the proviso saves the vested right of the adopted child in the property subject to the obligations, if any, attached to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth. Likewise, clause (c) to the proviso lays down that the adopted child shall not divest any person of any estate vested in him or her before the date of adoption. Section 16 which embodies a rule of presumption lays down that whenever any document registered under any law for the time being in force evidencing

adoption and signed by the person giving and person taking the child in adoption is produced before any court, then it shall presume that the adoption has been made after complying with the provisions of the Act unless proved otherwise.

18. In Indian society, a male spouse enjoyed the position of dominance for centuries together. This was particularly so in Hindu families. Under the old Hindu Law, a Hindu male had an absolute right to adopt a male child and his wife did not have the locus to question his right or to object to the adoption. A wife could adopt a son to her husband but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorized her to do so. In other parts of India, she could adopt without such authority. However, in no case a wife or a widow could adopt a son to herself. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the adopted person. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to *datta homam*, that is, oblations of clarified butter to fire, the law was not finally settled and there was divergence of judicial opinion.

19. After India became a sovereign, democratic republic, this position has undergone a sea change. The old Hindu Law has been codified to a large extent on the basis of constitutional principles of equality. The Hindu Marriage Act, 1955 codifies the law on the subject of marriage and divorce. The Hindu Succession Act, 1956 codifies the law relating to intestate succession. The Hindu Minority and Guardianship Act, 1956 codifies the law relating to minority and guardianship among Hindus. The 1956 Act is also a part of the scheme of codification of laws. Once the Hindu Succession Act was passed giving equal treatment to the sons and daughters in the matter of succession, it was only logical that the fundamental guarantee of equality of a status and equality before law is recognized in the matter of adoption. The 1956 Act now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also

take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption [Sections 8, 11(1) and 11(2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

20. 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.

21. At this stage, we may notice some precedents which have bearing on the interpretation of proviso to Section 7 of the 1956 Act. In **Kashibai v. Parwatibai** (supra), this Court was called upon to consider whether in the absence of the consent of one of the two wives, the adoption by the husband could be treated valid. The facts of the case show that plaintiff No.1 and defendant No.1 were two widows of deceased Lachiram. Plaintiff No.2 was daughter of Lachiram from his first wife Kashibai and defendant No.2 was

the daughter from his second wife Parwati. Defendant No.3, Purshottam son of Meena Bai and grandson of Lachiram. The plaintiffs filed suit for separate possession by partition of a double storey house, open plot and some agricultural lands. The defendants contested the suit. One of the pleas taken by them was that Purshottam son of Meena Bai had been adopted by deceased Lachiram vide registered deed of adoption dated 29.4.1970, who had also executed deed of Will in favour of the adopted son bequeathing the suit properties to him and thereby denying any right to the plaintiffs to claim partition. The trial Court decreed the suit for separate possession by partition by observing that the defendants have failed to prove the adoption of Purshottam by Lachiram and the execution of Will in his favour. The High Court reversed the judgment of the trial Court and held that the defendants had succeeded in proving execution of the deed of adoption and the deed of Will in accordance of law and as such the plaintiffs were not entitled to any share in the suit properties. On appeal, this Court reversed the judgment of the High Court and restored the decree passed by the trial Court. On the issue of adoption of Purshottam, this Court observed:

> "It is no doubt true that after analysing the parties' evidence minutely the trial court took a definite view that the defendants had failed to establish that Plaintiff 1, Defendant 1 and deceased Lachiram had taken Defendant 3, Purshottam in adoption. The trial court also recorded the finding that Plaintiff

> 1 was not a party to the Deed of Adoption as Plaintiff 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial court took the view that the alleged adoption being against the consent of Kashi Bai, Plaintiff 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act 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. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present case as seen from the evidence discussed by the trial court it is abundantly clear that Plaintiff 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the defendants was clearly hit by the provisions of Section 7 and the adoption cannot be said to be a valid adoption."
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> (emphasis supplied)

22. In **Brajendra Singh v. State of M.P.** (supra), the Court considered the scope of Sections 7 and 8(c) of the 1956 Act in the backdrop of the claim made by the appellant that he was validly adopted son of Mishri Bai, who was married to Padam Singh but was forced to live with her parents. In 1970, Mishri Bai claims to have adopted the appellant. After some time, she was served with a notice under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 indicating that her holding of agricultural land was more than the prescribed limit. In her reply, Mishri Bai claimed

that she and her adopted son were entitled to retain 54 acres land. The competent authority did not accept her claim. Thereupon, Mishri Bai filed suit for declaration that the appellant is her adopted son. During the pendency of the suit, she executed a registered Will bequeathing all her properties in favour of the appellant. The trial Court decreed the suit. The first appellate Court dismissed the appeal preferred by the State of Madhya Pradesh. The High Court allowed the second appeal and held that in the absence of the consent of Mishri Bai's husband, adoption of the appellant cannot be treated as valid. This Court noticed that language of Sections 7 and 8 was different and observed:

> "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 dispossesses 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 Sections 7 and 8(*c*) refer to certain circumstances which have effect on the capacity to make an adoption."
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> (emphasis supplied)

23. We shall now consider whether the trial Court and the lower appellate Court had rightly held that Ghisalal was validly adopted by Gopalji and he became coparcener in the family of adoptive father and the learned Single Judge of the High Court did not commit any error by declining to interfere with the concurrent finding recorded by the two Courts. The consideration of this issue deserves to be prefaced with an observation that this Court is extremely loath to interfere with the concurrent finding of fact recorded by the Courts below more particularly when such finding has been approved by the High Court. In such matters, interference is warranted only when this Court is convinced that the finding is *ex facie* perverse. A finding of fact can be treated as perverse if it is based on no evidence or there is total misreading of pleadings and/or evidence of the parties or the finding is based on unfounded assumptions or conjectures.

24. A careful scrutiny of the record reveals that in the suit filed by him, Ghisalal had pleaded that Gopalji had taken him in adoption in Baisakh of Samvat 2016 and the deed of adoption was executed and got registered on 25.6.1964 and that Dhapubai had consented to the adoption. He challenged Gift Deeds dated 22.10.1966 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by the latter in favour of Sunderbai in respect of one parcel of land. Later on, he amended the plaint and pleaded that Gift Deed dated 29.11.1944 was invalid, inoperative and ineffective and did not affect his right to get share in the ancestral properties. He alleged that the gift deeds were obtained by fraud. Of course, he did not make a specific prayer for invalidation of Gift Deed dated 29.11.1944. In her written statement, Dhapubai not only disputed the adoption of Ghisalal by Gopalji, but categorically averred that she had not consented to the adoption. She also questioned the *locus standi* of Ghisalal to challenge the gift deeds.

25. In support of his claim that he had been adopted by Gopalji, Ghisalal appeared in the witness box as PW-1 and examined PW-2 Omkar Lal, PW-3 Devram and PW-4 Ramniwas. He produced copy of the deed of adoption (Exhibit P-1), the plaint (Exhibit P-21) of Suit No.76A of 1964 filed by Pannalal in which he and Gopalji were impleaded as defendant Nos.1 and 2

and copies of the written statements (Exhibits P-2 and P-3) filed in that suit. He also examined PW-5 Gumbhir Singh, PW-6 Hiralal, PW-7 Ramchander Sharma, PW-8 Imdad Ali, PW-9 Moolchand, PW-10 Soorajmal and PW-11 Dhoolchand to prove these documents. According to Ghisalal, he was taken in adoption at the age of 5-6 years. He gave description of the adoption ceremonies by stating that his natural father, Kishanlal had made him to sit in the lap of Gopalji and the latter accepted him as the adopted son. In paragraph 3 of his statement, Ghisalal gave out that the adoption ceremonies were performed in village Jeeran on the road in front of the house of Gopalji and about 25 to 30 persons including PW-2 Omkar Lal, PW-3 Devram were present. He further stated that Dhapubai was also there. In cross-examination, he admitted that after one to two years of adoption, he started his education in the school at Jeeran and in the school records the name of his natural father, Kishanlal was entered. He then volunteered to say that when he had gone to the Principal to get the name of his father changed, the latter told him that it will involve cost and, therefore, the change was not effected. In paragraph 5 of the cross-examination, Ghisalal disclosed that his father Kishanlal had got him admitted in the school. He then stated that after three years of execution of the adoption deed, he was separated by Gopalji. In para 10 of the cross-examination, he stated that at the time of

registration, Ramlal, Gopalji, his father Kishanlal, brother Ramniwas and Dhapubai had come along with him but he does not know whether Dhapubai had signed on the registry. He also stated that there was no talk of obtaining signature of Dhapubai in his presence but volunteered to say that she was agreeable. The other three witnesses also spoke about the ceremonies of adoption. According to them, Dhapubai was sitting below the platform (chabutra). In his cross-examination, Omkar Lal stated that he does not know whether Ghisalal was taken to Dhapubai. He further stated that in his presence no talk had taken place with Dhapubai. In his cross-examination, Devram stated that Dhapubai was also there and she was sitting with the other ladies. Similarly, Ramniwas spoke about presence of Dhapubai by stating that she was sitting by the side of the platform along with other ladies. In her statement, Dhapubai categorically stated that Gopalji had not obtained her consent for the adoption of Ghisalal and that she had not gone to tehsil for the purpose of registry. Dhabubai also stated that she does not know whether Gopalji had gone to tehsil and got the registry of adoption deed. In paragraph 11 of the cross-examination, she expressed ignorance about the adoption of Ghisalal by Gopalji. She then stated that she did not want to take anyone in adoption. She also spelt reasons for some of the PWs deposing in favour of Ghisalal. The other witnesses examined by Dhapubai,

namely, Rajaram (DW-2), Bherulal (DW-3), Khanhiram (DW-4) and Madhulal (DW-5) expressed their ignorance about the adoption of Ghisalal by Gopalji.

26. The trial Court relied upon the statements of Ghisalal and his witnesses and recorded its conclusion in the following words:

> "From the statements of plaintiff witnesses Ghisalal, Onkarlal, Devram and Ramniwas, it becomes clear that at the adoption ceremony, Ghisalal was made to sit in the laps of Gopal and a turbon was tied on his head, batashe and coconuts were distributed, Havan was not performed. And Dhapubai was also present there along with other men and women. With respect to the aforesaid facts and also about the adoption ceremony, no contradiction has been noticed in the statement of these witnesses. In these circumstances, it becomes clear that when the adoption ceremony was conducted in the presence of Dhapubai, then certainly her consent was there and it can be taken as implied consent of Dhapubai."
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> (emphasis supplied)

27. The trial Court also gave weightage to the statement contained in the adoption deed suggesting that Gopalji and his wife were anxious to take Ghisalal in adoption.

28. The lower appellate Court briefly referred to the contents of the adoption deed and proceeded to observe:

> "…….. It is true that there is no mention as to on which date the formalities of adoption were completed, either in the plaint or in

> the adoption deed, whereas the witnesses have stated in their statements that it was in Sambat, 2016 on the day of Teej when the adoption formalities were completed. Adoption deed is Exhibit P-1. Ghisalal's original father Kishan Lal has given in writing that he has given Ghisalal in adoption to Gopal and he has accepted to take him in adoption. Similarly, Gopal has also accepted that he has adopted Ghisalal as his son and he has affixed his signatures. Under Section 6 of the Hindu Adoption Act, the document Exh. P-1 proved that Ghisalal was taken in adoption. It has not been proved as to whether the mother of Ghisalal gave her consent for adoption. Such an argument was advanced by the learned advocate of the appellant, but acceptance of such type is essential. There is no such provision in the aforesaid Hindu Adoption Act. <u>It is proved by the circumstantial evidence that the appellant Dhapubai had given her consent to Gopal to adopt Ghisalal as his son.</u> The brothers of Ghisalal i.e. Ramnivas (P.W.4), Omkarlal, PW-2 and Devram, PW-3 in their statements have accepted that customary function of adoption was held and in that function the appellant Dhapubai herself was present."
>
> (emphasis supplied)

29. Though, the trial Court and the lower appellate Court did not advert to Section 7 of the 1956 Act, the learned Single Judge referred to that section and the judgment of the Madhya Pradesh High Court in Moolchand Chhotalal v. Amritbai Manji Khoda Bhai and others (1976) MPLJ 382 and held that the consent of wife can be inferred from the circumstances. The learned Single Judge noted that the adoption deed was duly registered and held that in view of Section 16 of the 1956 Act, a presumption can be raised that the adoption had been made after complying with the relevant

provisions. The learned Single Judge then observed that Dhapubai had not challenged the correctness, authenticity and validity of the adoption deed till the filing of written statement and held that the gift deeds appear to have been executed to frustrate the effect of the adoption and ordinarily there was no reason for the husband to gift his entire estate to his wife.

30. In our view, the trial Court, the lower appellate Court and the learned Single Judge of the High Court misdirected themselves in deciding the issue relating to Dhapubai's consent to the adoption of Ghisalal by Gopalji. All the Courts held that the consent of Dhapubai can be presumed because she was present in the ceremonies of adoption. The learned Single Judge went a step further and observed that failure of Dhapubai to challenge the adoption deed is a strong circumstance which goes to show that she had consented to the adoption of Ghisalal by her husband. Unfortunately, all the Courts completely ignored that presence of Dhapubai in the ceremonies of adoption was only as a mute spectator and not as an active participant. Neither Ghisalal nor any of the witnesses examined by him stated that before taking Ghisalal in adoption, Gopalji had consulted Dhapubai or taken her in confidence and the latter had given her consent or agreed to the adoption of Ghisalal or that she had taken prominent part in the adoption ceremonies.

All of them made a parrot like statement that Dhapubai was sitting with other women below the platform (chabutra). By no stretch of imagination, this could be equated with her active participation in the adoption ceremonies so as to enable the Courts to draw an inference that she had given consent for the adoption of Ghisalal.

31. Another grave error committed by all the Courts is that they have presumed the consent of Dhapubai by relying upon the contents of the deed of adoption (Exhibit P-1) in which Gopalji is said to have recorded that it was his and his wife's esteemed desire to take Ghisalal in adoption. It was neither the pleaded case of Ghisalal nor any evidence was produced by him to prove that Dhapubai was a signatory to Exhibit P-1 or that she was present at the time of execution and/or registration of Exhibit P-1. Therefore, the contents of Exhibit P-1 could not be made basis for assuming that Dhapubai was a party to the adoption of Ghisalal.

32. The so called failure of Dhapubai to challenge Exhibit P-1 cannot be used against her because Ghisalal did not adduce any evidence to show that after execution of the deed of adoption, Dhapubai was made aware of the same or a copy thereof was made available to her. In the absence of such evidence, it cannot be assumed that Dhapubai was aware of the execution

and registration of the deed of adoption and she deliberately omitted to challenge the same.

33. While analyzing and evaluating the evidence of the parties, the Courts below failed to notice an important lacuna in Ghisalal's case, that is, non examination of Kishanlal who, as per Ghisalal's own version had not only taken active part in the ceremonies of adoption but was also a signatory to the deed of adoption. The statements of PW-7 Ramchander Sharma, Advocate and his clerk PW-8 Imdad Ali show that the written statement in the suit filed by Pannalal was drafted under the instructions of Kishanlal and he had signed the same as guardian of Ghisalal. This shows that Kishanlal had played the most pivotal role in the adoption of Ghisalal by Gopalji. Therefore, he was the best person who could support Ghisalal's plea that he was taken in adoption by Gopalji and Dhapubai had given consent for the same. No explanation has been given why Kishanlal was not examined despite the fact that he was not only actively involved at various stages of the adoption but was also instrumental in Ghisalal's admission in the school and defending the case filed by Pannalal. If the statements of Ghisalal and Devram are read in conjunction with the fact that written statement in Suit No.76A of 1964 Pannalal v. Ghisalal and another was filed by Kishanlal in

February, 1966, there remains no doubt that testimony of Kishanlal was most crucial and yet he was not examined. The trial Court did take cognizance of this omission but brushed aside the same with a cryptic observation that no objection was raised from the side of the defendants that plaintiff was not given in adoption by his natural father. The lower appellate Court and the learned Single Judge of the High Court did not even advert to this important lacuna which, in our view, would have made any person of reasonable prudence to doubt the bonafides of Ghisalal's claim that he was adopted by Gopalji with the consent of Dhapubai.

34. In view of the above discussion, we hold that the concurrent finding recorded by the trial Court and the lower appellate Court, which was approved by the learned Single Judge of the High Court that Gopalji had adopted Ghisalal with the consent of Dhapubai is perverse inasmuch as the same is based on unfounded assumptions and pure conjectures. We further hold that Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid because her consent had not been obtained as per the mandate of the proviso to Section 7 of the 1956 Act. As a corollary, it is held that the suit filed by Ghisalal for grant of a decree that he is entitled to one half share in the properties of Gopalji was not maintainable and the

findings recorded by the trial Court, the lower appellate Court and/or the High Court on the validity of Gift Deeds dated 29.11.1944 and 22.10.1966, Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by her in favour of Sunderbai are liable to be set aside.

35. In the result, Civil Appeal Nos.6375-6376 of 2002 are allowed. The judgments and decrees passed by the trial Court, the lower appellate Court and the High Court are set aside and the suit filed by Ghisalal is dismissed. As a sequel to this, Civil Appeal Nos.6373-6374 of 2002 are dismissed. The parties are left to bear their own costs.

……..…

J.

[G.S. Singhvi]

……

……..J.

[Asok Kumar Ganguly]

New Delhi
January 12, 2011.