CASE NO.:
Appeal (civil) 7764 of 2001

PETITIONER:
Brijendra Singh

RESPONDENT:
State of M.P. & Anr.

DATE OF JUDGMENT: 11/01/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

The present appeal involves a very simple issue but when the background facts are considered it projects some highly emotional and sensitive aspects of human life.

Challenge in this appeal is to the judgment of the Madhya Pradesh High Court at Jabalpur in a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (in short the \021C.P.C.\022).

Background facts sans unnecessary details are as follows:

Sometime in 1948, one Mishri Bai, a crippled lady having practically no legs was given in marriage to one Padam Singh. The aforesaid marriage appears to have been solemnized because under the village custom, it was imperative for a virgin girl to get married. Evidence on record shows that Padam Singh had left Mishri Bai soon after the marriage and since then she was living with her parents at Village Kolinja. Seeing her plight, her parents had given her a piece of land measuring 32 acres out of their agricultural holdings for her maintenance. In 1970, Mishri Bai claims to have adopted appellant Brajendra Singh. Padam Singh died in the year 1974. The Sub-Divisional Officer, Vidisha served a notice on Mishri Bai under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 (in short the \021Ceiling Act\022) indicating that her holding of agricultural land was more than the prescribed limit. Mishri Bai filed a reply contended that Brajendra Singh is her adopted son and both of them constituted a Joint family and therefore are entitled to retain 54 acres of land. On 28.12.1981, the Sub Divisional officer by order dated 27.12.1981 disbelieved the claim of adoption on the ground inter alia that in the entries in educational institutions adoptive father\022s name was not recorded. On 10.1.1982, Mishri Bai filed Civil Suit No. SA/82 seeking a declaration that Brajendra Singh is her adopted son. On 19.7.1989, she executed a registered will bequeathing all her properties in favour of Brajendra Singh. Shortly thereafter, she breathed her last on 8.11.1989. The trial court by judgment and order dated 3.9.1993 decreed the suit of Mishri Bai. The same was challenged by the State. The first appellate court dismissed the appeal and affirmed the judgment and decree of the trial court. It was held concurring with the view of the trial court

that Mishri Bai had taken Brajendra Singh in adoption and in the will executed by Mishri Bai the factum of adoption has been mentioned. Respondents filed Second Appeal No. 482 of 1996 before the High Court. A point was raised that the adoption was not valid in the absence of the consent of Mishri Bai\022s husband. The High Court allowed the appeal holding that in view of Section 8(c) of Hindu Adoption and Maintenance Act, 1956 (in short the \021Act\022) stipulated that so far as a female Hindu is concerned, only those falling within the enumerated categories can adopt a son.

The High Court noted that there was a great deal of difference between a female Hindu who is divorced and who is leading life like a divorced woman. Accordingly the High Court held that the claimed adoption is not an adoption and had no sanctity in law. The suit filed by Mishri Bai was to be dismissed.

In support of the appeal learned counsel for the appellant submitted that as the factual position which is almost undisputed goes to show, there was in fact no consummation of marriage as the parties were living separately for a very long period practically from the date of marriage. That being so, an inference that Mishri Bai ceased to be a married woman, has been rightly recorded by the trial court and the first appellate court. It was also pointed out that the question of law framed proceeded on a wrong footing as if the consent of husband was necessary. There was no such stipulation in law. It is contented that the question as was considered by the High Court was not specifically dealt with by the trial court or the first appellate court. Strong reliance has been placed on a decision of this Court in Jolly Das (Smt.) Alias Moulick v. Tapan Ranjan Das [1994(4) SCC 363] to highlight the concept of \023Sham Marriage\024.

It was also submitted that the case of invalid adoption was specifically urged and taken note of by the trial court. Nevertheless the trial court analysed the material and evidence on record and came to the conclusion that Mishri Bai was living like a divorced woman.

Learned counsel for the respondents on the other hand submitted that admittedly Mishri Bai did not fall into any of the enumerated categories contained in Section 8 of the Act and therefore, she could not have validly taken Brajendra Singh in adoption.

It is to be noted that in the suit there was no declaration sought for by Mishri Bai either to the effect that she was not married or that the marriage was sham or that there was any divorce. The stand was that Mishri Bai and her husband were living separately for very long period.

Section 8 of the Act reads as follows:

\0238. Capacity of a female Hindu to take in adoption \026 Any female Hindu \026

(a) who is of sound mind,

(b) who is not 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 capacity to take a son or daughter in

adoption.\024

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 life time of the husband. She can only make an adoption in the cases indicated in clause (c). It is important to note that Section 6(1) 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 \021capacity\022. 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\022s son or grand son 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)& (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 of 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. 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 law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of 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.

Section 5 provides that adoptions are to be regulated in terms of the provisions contained in Chapter II. Section 6 deals with the requisites of a valid adoption. Section 11 prohibits adoption; in case it is of a son, where the adoptive father or mother by whom the adoption is made has a Hindu son, son\022s son, or son\022s son\022s son, whether by legitimate blood relationship or by adoption, living at the time of adoption. Prior to the Act under the old Hindu law, Article 3 provided as follows:

\0233. (1) A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provided he has no male issue in existence at the date of the adoption.
(2) A Hindu who is competent to adopt may authorize either his (i) wife, or (ii) widow (except in Mithila) to adopt a son to himself.\024

Therefore, prior to the enactment of the Act also adoption of a son during the lifetime of a male issue was prohibited and the position continues to be so after the enactment of the Act. Where a son became an outcast or renounced the Hindu religion, his father became entitled to adopt another. The position has not changed after the enactment of the Caste Disabilities Removal Act (21 of 1850), as the outcast son does not retain the religious capacity to perform the obsequial rites. In case parties are governed by Mitakshara law, additionally adoption can be made if the natural son is a congenital lunatic or an idiot.

The origin of custom of adoption is lost in antiquity. The ancient Hindu law recognized twelve kinds of sons of whom five were adopted. The five kinds of adopted sons in early times must have been of very secondary importance, for, on the whole, they were relegated to an inferior rank in the order of sons. Out of the five kinds of adopted sons, only two survive today, namely, the dattaka form prevalent throughout India and the kritrima form confined to Mithila and the adjoining districts. The primary object of adoption was to gratify the means of the ancestors by annual offerings and, therefore, it was considered necessary that the offerer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son. Therefore, the body of rules was evolved out of a phrase of Saunaka that he must be \023the reflection of a son\024. The restrictions flowing from this maxim had the effect of eliminating most of the forms of adoption. (See Hindu Law by S.V. Gupte, 3rd Edn., at pp. 899-900.) The whole law of dattaka adoption is evolved from two important texts and a metaphor. The texts are of Manu and Vasistha, and the metaphor that of Saunaka. Manu provided for the identity of an adopted son with the family into which he was adopted. (See Manu, Chapter IX, pp. 141-42, as translated by Sir W. Jones.) The object of an adoption is mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in the early times had been more due to secular reasons than to any religious necessity, and the religious motive was only secondary; but although the secular motive was dominant, the religious motive was undeniable. The religious motive for adoption never altogether excluded the secular motive. (See Mayne\022s Hindu Law and Usage, 12th Edn., p. 329.)

As held by this Court in V.T.S. Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar (AIR 1963 SC 185) substitution of a son for spiritual reasons is the essence of adoption, and consequent devolution of property is mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.

In Hem Singh v. Harnam Singh (AIR 1954 SC 581) it was observed by this Court that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rituals have, therefore, been held to be mandatory, and compliance with them regarded as a

condition of the validity of the adoption. The first important case on the question of adoption was decided by the Privy Council in the case of Amarendra Man Singh Bhramarbar v. Sanatan Singh (AIR 1933 PC 155). The Privy Council said:

Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoption was perhaps purely secular. The texts of the Hindus are themselves instinct with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.

With these observations it decided the question before it viz. that of setting the limits to the exercise of the power of a widow to adopt, having regard to the well-established doctrine as to the religious efficacy of sonship. In fact, the Privy Council in that case regarded the religious motive as dominant and the secular motive as only secondary.

The object is further amplified by certain observations of this Court. It has been held that an adoption results in changing the course of succession, depriving wife and daughters of their rights, and transferring the properties to comparative strangers or more remote relations. [See: Kishori Lal v. Chaltibai (AIR 1959 SC 504)]. Though undeniably in most of the cases, motive is religious, the secular motive is also dominantly present. We are not concerned much with this controversy, and as observed by Mayne, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular and an intermediate view is possible that while an adoption may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by certain persons. The Privy Council\022s decision in Amarendra Man Singh\022s case (supra) has reiterated the well-established doctrine as to the religious efficacy of sonship as the foundation of adoption. The emphasis has been on the absence of a male issue. An adoption may either be made by a man himself or by his widow on his behalf with his authority conveyed therefor. The adoption is to the male and it is obvious that an unmarried woman cannot adopt, for the purpose of adoption is to ensure spiritual benefit for a man after his death and to his ancestors by offering of oblations of rice and libations of water to them periodically. A woman having no spiritual needs to be satisfied, was not allowed to adopt for herself. But in either case it is a condition precedent for a valid adoption that he should be without any male issue living at the time of adoption.

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 depicts 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\022s 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\022s 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.

At this juncture it would be relevant to take note of Jolly Das\022s case (supra). The decision in that case related to an entirely different factual scenario. There was no principle of law enunciated. That decision was rendered on the peculiar factual background. That decision has therefore no relevance to the present case.

Learned counsel for the appellant submitted that in any event, the land which is declared to be in excess of the prescribed limit vests in the Government to be allotted to persons selected by the Government. It was submitted that in view of the peculiar background, the Government may be directed to consider the appellant\022s case for allotment of the land from the surplus land so that the purpose for which adoption was made and the fact that the appellant nourished a crippled lady treating her to be his own mother would set a healthy tradition and example. We express no opinion in that regard. It is for the State Government to take a decision in the matter in accordance with law. But while dismissing the appeal, we permit the appellant to be in possession of land for a period of six months by which time the Government may be moved for an appropriate decision in the matter. We make it clear that by giving this protection we have not expressed any opinion on the acceptability or otherwise of the appellant\022s request to the State Government to allot the land to him.

The appeal is dismissed subject to the aforesaid observations.