CASE NO.:
Appeal (civil) 3829-3830 of 2000

PETITIONER:
RAJGOPAL (DEAD) BY LRS.

RESPONDENT:
KISHAN GOPAL AND ANR.

DATE OF JUDGMENT: 16/09/2003

BENCH:
Y.K. SABHARWAL & B.N. AGRAWAL

JUDGMENT:
JUDGMENT

2003 Supp(3) SCR 732

The Judgment of the Court was delivered by

B.N. AGRAWAL, J.: These appeals by special leave have been filed by the heirs of defendant No. 1-Rajgopal (since deceased) against the judgment rendered by Karnataka High Court whereby judgment and decree passed by the first appellate court dismissing the suit have been set aside and those of the trial court decreeing the suit restored.

The plaintiffs/respondents filed a suit for declaration of title in relation to the properties described in schedule appended to the plaint and for recovery of possession thereof. Their case, inter alia, was that one Moti Lal had two wives. From the first wife, he had a son kishan Lal and from the second, son Goverdhan Das and the properties in question belonged to their joint family. Moti Lal and his brother Uday Ram belonged to Mantri family. In their community, there was a custom of adoption in 'Dwyamushyayana' from, according to which the person adopted would not sever his interest in the estate of natural parents and, at the same time, would acquire interest in the properties of adoptive father upon his adoption, provided there was an agreement between the natural father and the adoptive father to the effect that he will be considered to be son of both of them. As Uday Ram had no male issue, he adopted Goverdhan Das in 'Dwyamushyayana' form. One chandra Bai was the wife of Goverdhan Das and Kishan Gopal-plaintiff No. 1 and Srinivas-plaintiff No. 2 were their sons. Sundra Bai-defendant No. 3 was the keep of kishan Lal from whom he had two sons, namely, Rajgopal -defendant No. 1 and Ramgopal-defendant No. 2 and as Sundra Bai was not legally married wife of Kishan Lal, defendant Nos. 1 and 2 were illegitimate children of Kishan Lal from her. Goverdhan Das and his sons were in joint possession of the properties of Uday Ram with him as well as those of Moti Lal with Kishan Lal and his children. Kishan Lal died in the year 1939 and Goverdhan Das in 1945. Thereafter as the sons of Kishan Lal denied right of the plaintiff Nos. 1 and 2 and their father in the properties which belonged to the joint families of Kishan Lal and Goverdhan Das, the same necessitated filing of the present suit.

In the suit, defendants entered appearance denying claim of the plaintiffs that the adoption was in 'Dwyamushyayana' form and according to them, the same was in ordinary form, as such Goverdhan Das upon his adoption ceased to have any right in the estate of natural father-Moti Lal and upon the death of Kishan Lal, entire property devolved upon his two sons who were legitimate ones as Sundra Bai was legally married wife of Kishan Lal, accordingly plaintiffs had no right to file the present suit.

In support of their respective cases, both the parties adduced oral and documentary evidence and the trial court dismissed the suit on grounds that the same was barred by limitation, adoption of Goverdhan Das was not in 'Dwyamushyayana' form but in ordinary form as such Goverdhan Das after

adoption ceased to have any right in the estate of natural father, Goverdhan Das was given in adoption by his father Moti Lal and not by his brother Kishan Lal, Sundra Bai was legally married wife of Kishan Lal and defendant Nos. 1 and 2 were their legitimate sons as such upon the death of Kishan Lal, the entire property devolved upon his sons and his widow. Against the said judgment, when an appeal was preferred, the first appellate court upholding order of dismissal of suit on the ground of limitation dismissed the appeal. While so dismissing the appeal, the findings of the trial court on the question of marriage of Sundra Bai with Kishan Lal and legitimacy of their children were confirmed but on the question of adoption, the court observed that in whichever form the adoption might have taken place, the same was invalid as Goverdhan Das was given in adoption by his brother kishan Lal and not by his father Moti Lal, who, according to the law prevalent at that time, was competent to give in adoption. Against decision of the first appellate court, matter was taken by the plaintiffs, to the High Court of Karnataka in a second appeal wherein the defendants filed cross objection to the finding on the question of adoption. The High Court allowed the second appeal as in its opinion the question of limitation was not correctly decided by the lower appellate court, accordingly without considering correctness or otherwise of findings on other points recorded by the first appellate court, the Judgment and decree passed by the first appellate court were set aside and the matter was remanded to that court for deciding the appeal afresh on merits. In view of this, as it was not necessary for the High Court to consider the cross objection on merits, the same was dismissed. After remand, a petition under Order 41 Rule 27 of the Code of Civil Procedure, for taking certain documents into additional evidence, was filed before the first appellate court which having felt that it was a fit case for granting the prayer but as for admitting the same into evidence, witnesses were required to be examined, remanded the matter to the trial court after setting aside the judgment and decree of the trial court.

Upon remand, the trial court decreed the suit in part only with respect to half share of the plaintiffs after recording findings that adoption was in 'Dwyamushyayana' form and not in ordinary form, Goverdhan Das was given in adoption by his brother Kishan Lal and not father Moti Lal, Sundra Bai was legally married wife of Kishan Lal and defendant Nos. 1 and 2 were his legitimate children from Sundra Bai and the suit was filed within time. Thereafter, two appeals were filed before the first appellate court, one by the defendants challenging decision of the trial court whereby the suit was decreed and the other by the plaintiffs challenging the findings of the trial court on the question of marriage of Kishan Lal with Sundra Bai and legitimacy of defendant Nos. 1 and 2. Appeal filed by the plaintiffs was dismissed but that filed by the defendants was allowed and suit was dismissed on the grounds that the same was barred by limitation, the adoption was not in 'Dwyamushyayana' form but in ordinary form and plaintiffs were estopped from saying that there was no valid adoption on account of the fact that Goverdhan Das was not given in adoption by his father Moti Lal. Challenging decision of the appellate Court, two second appeals were filed before the High Court by the plaintiffs which have been allowed, judgment and decree passed by the first appellate court dismissing plaintiffs' suit set aside and those of the trial court decreeing the suit restored as according to the High Court, the first appellate court had no jurisdiction to go into the question of adoption and recording any finding thereon as while passing the order of remand in the second appeal, cross objection filed against the findings on the question of adoption which was recorded in favour of the plaintiffs by the first appellate court on the earlier occasion, was dismissed, as such the same findings attained finality. Hence, these appeals.

Mr. S.S. Javali, learned Senior Advocate appearing in support of the appeals had raised three points. Firstly, it has been submitted that the High Court was not justified in observing that findings on the question of adoption recorded in favour of the plaintiffs by the first appellate court before the order of remand by the High Court, was confirmed by that Court

by dismissal of the cross objection filed by the defendants against the same. We have been taken through judgment of the High Court passed in the second appeal on the earlier occasion whereby the matter was remanded to the first appellate court which clearly shows that as in the opinion of the High Court, the question of limitation was decided by the first appellate court without taking into consideration certain factual matrix, it was a fit case for remitting the matter to it for deciding the entire matter afresh. As it was not a case of limited remand but an open remand, the High Court did not go into the merit of findings recorded by the first appellate court on other questions, including adoption, and, after setting aside the judg-ment and decree of the first appellate court, remanded the matter to it for deciding the appeal afresh, meaning thereby on all the points. So far as the cross objection is concerned, as the judgment and decree of the first appellate court were set aside, the same was rendered infructuous and accordingly dismissed. In this view of the matter, we are of the opinion that the High Court committed an error of law in observing that the findings on the question of adoption recorded in favour of the plaintiffs by the first appellate court on the earlier occasion before remand by the High Court had been confirmed by it while passing the remand order for which there is absolutely no foundation and the same is contrary to the materials on the record.

The other two points which fall for consideration of this Court are whether findings recorded by the first appellate court to the effect that (i) Goverdhan Das was given in adoption by natural father Moti Lal and (ii) the adoption was not in 'Dwyamushyayana' form but in ordinary form, are vitiated in law. Legality or otherwise of the aforesaid findings has not been taken into consideration by the High Court for the reasons enumerated above. Ordinarily, we would have remanded the matter to the High Court for considering the same, but we do not propose to adopt that course for two reasons, firstly, the suit was filed 47 years ago, i.e., in year 1956 and, secondly, the remand would be an exercise in futility in view of the fact that the second appeal before the High Court was concluded by findings of facts on the question of adoption recorded by the first appellate court, which was final court of fact.

Thus, we proceed to consider the question whether the finding recorded by the first appellate court that Goverdhan Das was given in adoption by his natural father Moti Lal suffered from any legal infirmity. At this stage, it may be relevant to state that as Goverdhan Das was given in adoption much before the coming into force of Hindu Adoptions and Maintenance Act, 1956, the parties will be governed by the law which was in force at the time of adoption. According to Paragraph 474 of Mulla 's Hindu Law, 18th Edition, "the only person who can lawfully give a boy in adoption are his father and his mother. " This shows that Goverdhan Das could have been given in adoption by his father Moti Lal and not brother Kishan Lal. From the pleadings, it becomes clear that the plaintiffs had nowhere averred in the plaint that Goverdhan Das was not given in adoption by his father Moti Lal but brother Kishan Lal. It was simply pleaded that the adoption was in 'Dwyamushyayana' form. As never such a case was pleaded in the plaint, there was no occasion for the defendants to plead in the written statement as to who gave Goverdhan Das in adoption and accordingly defendants in the written statement, only denied that adoption was in 'Dwyamushyayana' form and according to them, the same was in ordinary form. In the abence of any pleading whatsoever on the question as to whether Goverdhan Das was given in adoption by his father Moti Lal or brother Kishan Lal there was no lis between the parties on this question, as such courts could not have gone into the same even if some evidence was adduced and the lower appellate court rightly decided this question against the plaintiffs. Reference in this connection may be made to a decision of the Privy Council in the case of Siddik Mahomed Shah v. Mt. Saran, AIR (1930) PC 57, in which it was held that "Where a claim has been never made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward". The said case has been referred to by this Court with approval in the case of Bhagat Singh and Ors. v. Jaswant Singh, AIR (1966) SC 1861. In that

case, some evidence was led but the High Court refused to go into the question observing that where no plea was taken , it cannot be said that there was any lis between the parties thereon. This Court upheld decision of the High Court observing that the same was supported by decision of the Judicial Committee in the case of Siddik Mahomed Shah (supra). Thus we do not find any error in finding recorded by the first appellate court on this point.

Next question to be considered is as to whether the first appellate court was justified in holding that the adoption was not in 'Dwyamushyayana' form but in ordinary form. The present case relates to adoption under the custom prevalent in the community to which the parties belong. Undisputedly, there was a custom in the said community to adopt in 'Dwyamushyayana' form. At this stage, a question arises as to what is 'Dwyamushyayana' form of adoption.

The term 'Dwyamushyayana' is applicable to an adopted son retain-ing his filial relation to his natural father with his acquired relation to his adoptive parents when there is a mutual agreement between the natural father and the adoptive father that the adopted son shall be the son of both. The son so adopted is technically called dwyamushyayana'. See Dattaka Chandrika, section 2, pl. 24 and 40, and Vyavahara Mayukha, Chapter IV, section 5, pl 21 (Stokes' Hindu Law, pages 65, 641 and 646).

The dwyamushyayana, adopted son is of two kinds (1) absolute, i.e. nitya dwyamushyayana, and (2) incomplete, i.e. anitya dwyamushyayana. The absolute dwyamushyayana son is one who is given in adoption with this stipulation : "This is the son of us two (the natural father and the adopter)." The incomplete dwyamushyayana son is one who is initiated by the natural father in the cremonies ending with tonsure and by the adoptive father in the ceremonies commencing with the investiture of the sacred thread. As he is initiated in the gotras (family names) of both the natural father and the adoptive father, he is considered to be the son of two fathers but incompletely. If a child after being born is adopted so that his initiation under both gotras be wanting, he would partake only of the gotra of the adoptive father. See Dattaka Mimansa, Chapter 6, pl. 41 (Stokes' Hindu Law, page 610). Mayrte's treatise on Hindu Law & Usage, 14th Edition page 469, described the peculiar form of 'Dwyamushyayana' adoption thus:

"221. An exception to the rule that adoption severs a son from his natural family exists in the case of what is called a dwyamushyayana or son of two fathers. This term has a two-fold acceptation. Originally it appears to have been applied to a son who was begotten by one man upon the wife of another, but for and on behalf of that other. He was held to be entitled to inherit in both families, and was bound to perform the funeral oblation both of his actual and his fictitious father. This is the meaning in which the term is used in the Mitakshara; but sons of this class are now obsolete. Another meaning is that of a son who has been adopted with an express or an implied understanding that he is to be the son of both fathers. This again seems to take place in different circumstances. One is what is called the anitya, or temporary adoption, where the boy is taken from a different gotra, after the tonsure has been performed in his natural family. He performs the ceremonies of both fathers and inherits in both families but his son returns to his original gotra. This form of adoption is also obsolete.

The only form of dwyamushyayana adoption that is not obsolete is the nitya or absolute dwyamushyayana in which a son is taken in adoption under an agreement that he should be the son of both the natural and adoptive fathers."

Mulla on Principles of Hindu Law, 18th Edition, page 821, has enumerated the form of 'dwyamushyayana' adoption which runs thus :

"486. (1) Where a person gives his son to another under an agreement that he should be considered to be the son of both the natural and the adoptive fathers, the son so given in adoption is called dwyamushyayana. In this form of adoption, it is essential to prove such an agreement and it should also be proved that there was the ceremony of giving and taking of the adoptive son.

(2) A dwyamushyayana inherits both in his natural and adoptive families."

Likewise Raghavachariar in his treatise Hindu Law, 9th Edition, has referred to '.dwyamushyayana' form of adoption at page 148 thus :

"174. Dwyamushyayana is the name given to a person who is given in adoption under an agreement that he should be consid-ered to be the son both the adoptive father and the natural father. In this form, it is essential to prove such an agreement and also the performance of the ceremony of giving and taking of the adoptive son."

Nitya i.e., absolute dwyamushyayana form of adoption has been recognised by the Judicial Committee in the case of Nilmadhub Doss v. Bishumber Doss and Ors., (1869) 13 Moore's Indian Appeals 85, in which it was held that the effect by the Hindu Law of an adoption in dwyamushyayana (son of two fathers) form is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his natural father's estate.

Another decision of the Judicial Committee is the case of Wooma Daee v. Gokoolanund Doss, ILR (1878) 3 Calcutta 587 wherein their Lordships, after referring to certain passages in the Dattaka Mimansa and Dattaka Chandrika, conceded at page 597 that :

"they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other per-son; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a broth-er's son, he should, nevertheless, be adopted in preference to any other person as a dwyamushyayana, or son of two fathers."

Further, their Lordships observed at page 598 :

"Again, to constitute a Dwyamushyayana there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indi-cated by Sir William MacNaghten at p.71 of his Principles and Precedents." In every case of absolute dwyamushyayana form of adoption, there must be an agreement to the effect that the person given in adoption shall be the son of both, i.e. the natural father as well as adoptive father and such an agreement must be proved like any other fact by the party alleging the same. See Laxmipatirao Shrinivas Deshpande v. Venkatesh Tirmal Deshpande, AIR (1916) Bombay 68 and Mohna Mal v. Mula Mal and Ors., (1925) 89 Indian Cases 688.

Dwyamushyayana form of adoption was subject matter of considera-tion before this Court in the case of M.Ct. Muthiah and Anr. v. Controller of Estate Duty, Madras, AIR (1986) SC 1863 wherein the decisions of Judicial Committee referred to above were noticed with approval. In that case question had arisen in relation to payment of estate duty in the hands of the accountable person upon the death of one M.Chindambaram Chettiar who had given his only son in adoption in dwyamushyanana form and after adoption, another son was born to him. Upon the death of the natural father, question had arisen for the payment of estate duty upon the estate of the deceased. On behalf of the Revenue, it was contended that the share of deceased in the joint family property was only half as one son was given in adoption. On behalf of the accountable person, stand was taken that as adoption was in dwyamushyayana form, the adopted son did not sever his

interest in the estate of the natural father and was entitled to inherit properties of adoptive as well as natural father both, as such share of the natural father in the joint family property was only one third and not half. The High Court of Allahabad held that the share of deceased was one third and not half in view of the fact that adoption being in dwyamushyayana form, the adopted son had also one third share. This Court upheld decision of the High Court and dismissed the appeal.

In the case on hand, the first appellate Court, after taking into consideration and discussing the oral and documentary evidence thread-bare, recorded a finding that the plaintiffs failed to prove that there was an agreement between the natural and the adoptive fathers to the effect that adopted son shall be treated to be the son of both of them and entitled to inherit their properties and consequently, the adoption of Goverdhan Das was in ordinary form. Mr. V.A. Mohta, learned Senior counsel appearing on behalf of the respondents strenuously contended that the finding recorded by the first appellate court was unwarranted. The finding on this point recorded by the first appellate court which was final court of fact was a pure finding of fact and could not have been interfered with by the High Court in the exercise of powers conferred upon it under Section 100 of the Code of Civil Procedure, 1908, more so when no question of law much less substantial one was involved. Apart from that, after giving our anxious consideration, we do not find any ground whatsoever to interfere with the said finding recorded by the final court of fact. This being the position, in our view, the High Court was not justified in allowing the appeals and decreeing the suit by restoring judgment and decree passed by the trial court.

In the result, the appeals are allowed, impugned judgment and decree rendered by the High Court are set aside and those passed by the first appellate court are restored. In the circumstances, there shall be no order as to costs.