Dhanraj vs Smt. Suraj Bai on 3 April, 1975

Equivalent citations: 1975 AIR 1103, 1975 SCR 73, AIR 1975 SUPREME COURT 1103, 1975 2 SCC 251, 1975 (1) ALL LR 283, 1975 CURLJ 530

Author: N.L. Untwalia

Bench: N.L. Untwalia, V.R. Krishnaiyer

PETITIONER:
DHANRAJ

Vs.

RESPONDENT:
SMT. SURAJ BAI

DATE OF JUDGMENT03/04/1975

BENCH:
UNTWALIA, N.L.
BENCH:
UNTWALIA, N.L.
KRISHNAIYER, V.R.

CITATION:
1975 AIR 1103 1975 SCR 73
1975 SCC (2) 251

ACT:
Hindu Adoptions and Maintenance Act, 1956-Ss. 6(ii), 9 and 11-If step-mother could give step-von In adoption in the absence of natural parents--If a major could be given in adoption.

HEADNOTE:
Section 6(ii) of the Hindu Adoption and Maintenance Act, 1956 states that no adoption shall be valid unless the person giving in adoption had the capacity to do so. Section 9(1) says that no person except the father or mother or the guardian of a child shall have the capacity to give a child in adoption. Section 11(vi) says that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned.
The appellant, who was 21 years old, was adopted by the respondent and her husband. His natural parents having been dead, he was given in adoption by his step-mother.

Subsequently, however, the respondent and her husband filed a suit questioning the validity of the adoption and for declaration that the adoption was illegal and invalid. The appellant claimed that under the Hindu Adoptions and Maintenance Act, 1956 the step-mother was competent to give him in adoption.

The trial court held that the adoption was invalid on the grounds that the appellant had been given in adoption by his step-mother, who was not competent to do so. The High Court upheld the view of the trial court.

Dismissing the appeal to this Court.

HELD : (1) The physical act of giving and receiving was absolutely necessary to the validity of adoption under the Hindu Law as it existed before the coming into force of the Act. Identical is the position under the Hindu Adoptions and Maintenance Act, 1956. Nor is it different as to the incapacity of the step-mother to give her step-son in adoption. [76 E].

Papamma v. V. Appa Rau and Ors., I.L.R. 16, Mad. 384 and Haribhau and Anr. v. Ajabrao Ramji Ingale and Ors., A.I.R. 1947 Nagpur 143 referred to.

(2) Under s. 9(1) of the Act even the guardian of a child has the capacity to give him or her in adoption. But the step-mother as such has not. The father or mother mentioned in sub S. (1) must necessarily mean the natural father and the natural mother. [76 F].

(3) It is clear from s. 9 that the term 'mother' means the natural mother and not the step mother. A step mother for many purposes such as inheritance etc., is distinct and different from mother; while, generally speaking, an adoptive mother takes the place of mother to all intents and purposes. The necessity of the explanation (i) to s. 9 arose to exclude the adoptive mother from the expression mother so that an adoptive mother may not be competent to give the adopted son in adoption to somebody else. [76 H].

(4) Under the law as engrafted in s. 10 of the Act, a person is not capable of being taken in adoption if he or she has completed the age of 15 Years and that is the reason that the word "child" has- been used in ss. 9 and 11. The use of the word "person" in s. 6(iii) and at the commence-ment of s. 10 is not for the purpose of bringing about any difference in

74

law in regard to the giving of the child. If the custom permits a pet-son of the age of 15 years or more to be taken in adoption then even such person would be the child of the father or the mother. 'Child' would not necessarily mean in that context a minor child. If the child is a minor, in the absence of the father or the mother a guardian appointed by the will of the child's father a mother and a guardian appointed or declared by a court, would be competent to give the child in adoption. But in case of a major in the absence of the father or the mother, no body will be

competent to give him in adoption because no such provision has been made in the Act to meet such a contingency. The scheme of the Act was not to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in of a custom to the contrary. [77 C-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 476(N) of 1973.

From the Judgment and decree dated the 23rd August, 1973 of the Rajasthan High Court in D. B. Civil Regular First Appeal No. 70 of 1966.

S. M. Jain for the appellant.

L.M. Singhvi, Urmila Sarur, A. Gupta and J. K. fain for the respondent.

The Judgment of the Court was delivered by UNTWALIA, J.-In this appeal filed by certificate of the Rajasthan High Court we are concerned with the question of the legality and validity of the adoption of the appellant by the husband of the respondent. Amichand, respondents husband, adopted the appellant with the consent of the respondent on the 18th November, 1959 and executed a registered deed evidencing the fact of adoption. The ap- pellant at that time was 21 years of age. Both his natural father and mother were dead. He had a step-mother Bhuri Bai with whom the appellant was residing at the time of the impugned adoption. The appellant was given in adoption by his step-mother. Subsequently the respondent's husband and the respondent filed a suit in the year 1963 against the appellant impeaching his adoption on various grounds and for a declaration that the adoption was illegal and invalid. The appellant contested the suit and, inter alia, pleaded a custom applicable to the parties according to which a person being of the age of 15 years or more could be taken in adoption. The custom was pleaded in view of the provision of the law contained in clause (iv) of section 10 of the Hindu Adoptions and Maintenance Act, 1956hereinafter referred to as the Act. The appellant also stated in his written statement that under the Act the step-mother was competent to give him in adoption.

Several issues were framed including an issue regarding the custom as pleaded. Issue No. I-A by agreement of the parties without the adducing of any evidence was tried as a preliminary issue by the Trial Court. The said issue runs as follows "Whether the adoption of Dhanraj is invalid on the ground that he has been given in adoption by his stepmother Mst. Bhuri Bai."

The Trial Court decided the issue in favour of the plaintiffs and against the defendant. The latter filed a first appeal in the High Court. During the pendency of the appeal, plaintiff no. 1 died. The only respondent left was his widow. The High Court has held that the step-mother was not competent to give the appellant in adoption and maintained the dismissal of the suit on that preliminary issue. Hence this appeal.

The only point, therefore, which falls for determination in this appeal is whether the step-mother was competent to give the appellant in adoption. If not, whether the adoption is void ?

In Mayne on Hindu Law aid Usage, eleventh edition is found a passage at page 226 to say-

> "No other relation but the father or mother can give away a boy. For instance, a step-mother cannot give away her stepson, a brother cannot give away his brother. Nor can the paternal grandfather, or any other person. Nor is a woman competent to give in adoption her illegitimate son born of adulterous intercourse. It is well settled that the parents cannot delegate their authority to another person, for instance, a son, so as to enable him, after their death, to give away his brother in adoption, for the act when done must have parental sanction. And, therefore, even an adult orphan cannot be adopted, because he can neither give himself away, nor be given by anyone with authority to do so."

In Papamma v. V Appa Rau and others(1) Muttusami Ayyar ,and Best, JJ. have held that under the Hindu Law the step-mother could not give her step-son in adoption. An identical view has been expressed in the case of Haribhau and another v. Ajabrao Ramji Ingale and others(2).

The question for consideration is whether the law that a stepmother could not give a step-son in adoption is changed after coming into force of the Act.

Section 4(1) of the Act provides "Save as otherwise expressly provided in this Act

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

Section 5(1) says "No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provi-

(1) I.L.R. 16, Mad. 384.

(2) A.I.R 1947, Nagpur, 143.

sions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void."

No adoption shall be valid as mentioned in section 6 unless-

> "(ii) the person giving in adoption has the capacity to do, so ;"

Other conditions for a valid adoption under the Act are stated in section 11 which provides :

> "In every adoption, the following conditions must be complied with :-
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> (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption : "

The physical act of giving and receiving was absolutely necessary to the validity of an adoption tinder the Hindu Law as it existed before coming into force of the Act : vide para 489 at page 554 of Mulia's Hindu Law, Fourteenth Edition. Identical is the position under the Act. Nor is it different as to the incapacity of the stepmother to give her step-son in adoption. Section 9 of the Act enumerates the persons capable of giving in adoption. Sub-section (1) says "No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption."

The departure in the law is that under the Act even the guardian of a child has the capacity to give him or her in adoption. But the step-mother as such has not. The father or mother mentioned in sub-section (1) must necessarily mean the natural father and the natural mother. Explanation (i) appended to section 9 was pressed into service to say that the step-mother is included in the term "mothers because the said explanation says "the expressions "father" and "

> mother" do not include an adoptive father and an adoptive mother." Learned counsel for the appellant submitted that step-mother has not been excluded from the expression "mother" and only an adoptive mother has been so excluded. By necessary implications, therefore, it was submitted that it ought to be held that the word "mother" in sub-section
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> (i) includes a step-mother. We have no difficulty in rejecting this argument. Reading section 9 as a whole and specially in the context of sub-sections (2), (3) and (4) it is clear that the term "mother" means the natural mother and not the step-mother. A step-mother for many purposes such as inheritance etc. is distinct and different from mother;

while, generally speaking, an adoptive, mother takes the place of mother to all intents and purposes. The necessity of the explanation, therefore, arose to exclude the adoptive mother from the expression mother so that an adoptive mother may not be competent to give the adopted son in adoption to somebody else.

Learned counsel for the appellant then submitted that in case of an adult orphan, as the appellant was at the time of adoption, no consent was necessary of any person except the adopter himself. No body could be available to give him in adoption. The use of the word "child" in clause (vi) of section 11 and in section 9(1) read in contra-distinction of the use of word "person" in clause (iii) of section 6 would make it clear, counsel submitted, that the condition of giving in adoption is applicable only to a minor child and not to an adult. We see no substance in this argument. Under the law as engrafted

in section 10 of the Act, a person is not capable of being taken in adoption if he or she has completed the age of 15 years and that is the reason that the word "child" has been used in sections 9 and 11. The use of the word "person" in section 6(iii) and at the commencement of section 10 is not for the purpose of bringing about any difference in law in regard to the giving of the child. If the custom permits a person of the age of 15 years or more to be taken in adoption then even such person would be the child of the father or the mother. 'Child' would not necessarily mean in that context a minor child. If the child is a minor, in absence of the father or the mother, a guardian appointed by the will of the child's father or mother and a guardian appointed or declared by a court, would be competent to give the child in adoption. But in case of a major in absence of the father or the mother, no body will be competent to give him in adoption because no such provision has been made in the Act to meet such a contingency. The scheme of the Act was not to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in favour of a custom to the contrary.

Learned counsel for the appellant then attempted to argue on the basis of the decisions of the Bombay High Court in the cases of Motilal Mansukhram v. Maneklal Dayabha(1) and Prahlad Sheonarayan Chokhani v. Damodhar Rankaran Vaishnao and others,(2) that even under the old Hindu Law the adoption of an orphan was not valid except by custom; but if the custom permitted it, and in the case of Porwal Jains it did permit, then an orphan who was not minor could go in adoption by his own consent without the consent of and the giving by anybody else. We think that it would be a ticklish and debatable question to decide whether the second part of clause (a) of section 4 would have such a custom from the overriding effects of sections 6, 9, and 11. But it will be a futile exercise her-, to embark upon the decision of this point as in our judgment it does not arise at all in this case. In paragraph 4 of the written statement the only custom pleaded was that a person more than 15 years old could be taken in adoption. Nothing was pleaded to say that there was a custom of giving an orphan in adoption or that a person above the age of 15 years could go in adoption without the physical act of 'giving by anybody, on his own and with his consent only. On the other hand the pleading in sub-paras (1) and (1) A.I.R. 1921, Bombay, 147 (2) A.T.R. 1958.'Bombay, 79.

(3) of paragraph 4 of the written statement was that under the Act the step-mother was competent to give the defendant in adoption and that she did give him in adoption. It was not open to the appellant, therefore, to take this new point of law for the first time in this Court without the foundation of facts to found it upon.

For the reasons stated above, we dismiss this appeal. No costs.

P.B.R Appeal dismissed.