Supreme Court of India
Smt. Shanti Bai vs Smt. Miggo Devi And Ors. on 26 August, 1980
Equivalent citations: AIR 1980 SC 2008, (1980) 4 SCC 462, 1980 (12) UJ 881 SC
Author: P Bhagwati
Bench: E Venkataramiah, P Bhagwati
JUDGMENT P.N. Bhagwati, J.

1. This appeal by certificate arises out of a suit Sled by the appellant for partition of joist family properties. The appellant claimed to be entitled to one third share in the Joint family properties as the heir of her deceased husband Kedar Nath. It was common ground between the parties that Kedar Nath and his brother Kashi Prasad and Kailash Chand were members of a joint and undivided Hindu Family and each of them was entitled to one third share in the joint family properties. Kedar being him as only heir, his widow the appellant. Now ordinarily as the only heir of Kedar Nath, the appellant would be entitled to the one third share of Kedar Nath but Kailash Chand claimed that his son Girish Chand was adopted by the appellant on 1st March, 1944 and that Girish Chand was, therefore, entitled to a moiety of the one-third share of Kedar Nath and the appellant was entitled only to the other moiety. The appellant, therefore, filed suit No. 22 of 1948 in the Court of the Civil Judge, Agra for partition of her one third share in the joint family properties Kashi Prasad was joined as 1st defendant while Kailash Chand and Girish Chand were joined respectively as defendants Nos. 2 and 3 in the suit. Kashi Prasad died during the pendency of the suit and his widow Smt Miggo Devi was brought on record as legal representative of Kashi Prasad. Smt. Miggo Devi, Kailash Chard and Girish Chand are respectively respondents Nos. 1, 2 and 3 in the present appeal and we shall hereafter refer to them as respondents Nos. 1 2 and 3. The appellant challenged In the suit the validity of the adoption of the third respondent on two main grounds, one was that in fact no adoption was made nor were any ceremonies of adoption gore through by the appellant and the other was that, in any event, the appellant was at no time authorised by Kedar Nath to take a son in adoption and the parties being governed by the Banaras School of Hindu Law, no adoption could in law be made by the appellant without the authority of Kedar Nath. It seems that prior to the filing of the suit, respondents Nos, end 3 had set up a will said to have been executed by Kedar Nath on 3rd January, 1944 under which only ornaments, a sum of Rs. 5,000/- representing the amount of the policy of insurance and a sum of Rs. 15,000/-in cash were given to the appellant, leaving the residue of his estate undisposed of and the appellant also, therefore, challenged the validity of this will in the suit on the ground that Kedar Nath was pot in a sound and disposed of state of mind when he made the will and the will was not properly executed as required by law and in any event, even if it was valid, it could not operate to dispose of the one third share of Kedar Nath in the joint family properties. The respondents in their written statement admitted that Kedar Nath, the original respondent No. 1 and respondent No. 2 were members of & joint family governed by the Banaras School of Hindu Law and that Kedar Nath was entitled to one third share in the joint family properties at the time of his death, but their contention was that under the will dated 3rd January, 1944 which was properly executed by Kadar Nath in a sound and disposing state of mind and in accordance with law, the appellant was entitled to receive only the specific properties bequeathed to her under the will and she could not make a claim to any of the other properties left by Kedar Nath. The respondents contended is the alternative that, in any event, the adoption of the third respondent was valid and it was made by the appellant with the authority of Kedar Nath and the

appellant was, therefore, entitled only to half of the one third share of Kedar Nath In the joint family properties, the other one half being inherited by the third respondent as the adopted son of Kedar Nath. The respondents also raised certain other contentions which are not necessary to mention for the purpose of the present appeal.

2. When the suit reached hearing before the learned trial Judge, the respondents led the evidence of several witnesses to prove the execution of will as also the factum and validity of the adoption of the third respondent. The appellant also examined herself and two other witnesses to rebut the evidence led on behalf of the respondents. The learned trial Judge after considering the entire evidence adduced before him came to the conclusion that the will dated 3rd January, 1944 said to have been executed by Kedar Nath was invalid, since it had not been attested as required by law and in any event, it was not operative so as to dispose of the one-third share of Kadar Nath In the joint family properties. So far as the adoption of the third respondent was concerned, the learned trial lodge found that the factum of adoption was established and that Kedar Nath had authorised the appellant to make the adoption prior to his death and on this view, the learned trial Judge sustained the validity of the adoption and held that the appellant was entitled only to one sixth share in the joint family properties. It appears that there was also some dispute about 40 tolas of gold ornaments which the appellant claimed as her stridhana property but the learned trial Judge found that they were past, of the joint family properties and since she had already received them, their value be adjusted against her one sixth share. The learned trial Judge accordingly passed a preliminary decree for partition in these terms.

3. The appellant being aggrieved by the preliminary decree passed by the learned trial Judge preferred an appeal against the same, being first appeal No. 153 of 1966, in the High Court of Allahbad, There was no real controversy before the High Court in regard to the execution of the will, because even if the will were valid, it would not make any difference, since it would be ineffective to dispose of the on third share of Kedar Nath in the joint family properties. But the principal dispute was in regard to the factum and validity of the adoption of the third respondent. So far as this dispute was concerned, the High Court took the view that on the evidence led by the parties it was clear that the ceremonies of adoption were performed and the adoption was in fact made. The High Court was not quite satisfied with the evidence in regard to the giving of authority by Kedar Nath to the appellant to make the adoption but in view of the fact that the appellant had gone through the ceremonies of adoption executed a deed of adoption reciting that she had been authorised by Kedar Nath to adopt the third respondent and made an application for appointment of herself as guardian of the third respondent, the High Court held that the authority of Kedar Nath to make the adoption must be held to be established. The High Court, however, took the view that so far as the 40 tolas of gold ornaments were concerned, they were the stridhana property of the appellant and therefore they should not be adjusted against her one sixth share in the joint family properties. The High Court accordingly allowed the appeal to this limited extent and partially modified the preliminary decree passed by the learned trial Judge. The appellant thereupon preferred the present appeal after obtaining the necessary certificate from tin High Court.

4. The only question which arises for consideration in this appeal is whether the third respondent was adopted by the appellant with the authority of Kedar Nath. The determination of this question

raises two issues, one relating to the factum of adoption and the other relating to its validity. So far as the factum of adoption is concerned. Mr. Phadke, learned advocate appearing on behalf of the appellant, fairly and in our opinion rightly, conceded that there being a concurrent finding of fact recorded by the learned trial Judge and the High Court in first appeal, that the necessary ceremonies of adoption were performed. It wag not possible for him in the present appeal to contest this finding and dispute the factum of adoption. We must, therefore, proceed on the basis that the ceremonies required for taking a son in adoption were performed and the third respondent was in fact purported to be adopted by the appellant. But it is obvious that since the parties were governed by the Banaras School of Hindu Law, it was not competent to the appellant to take the third respondent in adoption without the authority of Kedar Nath. The entire controversy between the parties before us, therefore, centered round the question as to whether Kedar Nath prior to his death gave authority to the appellant to adopt the third respondent. The case of the respondents was that in the evening of 16th February, 1944, one day prior to his death, Kedar Nath asked the appellant to adopt the third respondent and this case was sought to be supported by the evidence of three eye witnesses, namely, Parmanand Chobey, Nawal Kishore and the second respondent. Now the evidence of Parmanand Chobey clearly does not inspire any confidence. He did not state anything at all in his examination in chief in regard to the giving of authority by Kedar Nath to the appellant to adopt the third respondent and it was only in cross-examination that he volunteered the statement that a few days after the arrival of the appellant and about one month before the date of his death, Kedar Nath told him that he would like to adopt the third respondent in preference to an outsider, It is difficult to appreciate how Parmanand Chobey omitted to make this statement in his examination in chief if it represented what in fact happened. It is obvious that he was a tutored witness and having forgotten to mention this alleged statement by Kedar Nath in his examination in chief, he tried to introduce it in his cross-examination. We cannot accept this statement at its face value, but even if it were true, it does not carry the case of the respondents any further, because it merely refers to a desire expressed by Kedar Nath to adopt the third respondent in preference to an outsider, but does not go so far as to say that Kedar Nath gave authority to the appellant to adopt the third respondent. Parmacand Chobey did not even state in his evidence that the appellant was present at the time when this talk took piece between him and Kedar Nath It is also significant to note that Parmanand Chobey did not state in his evidence even in his cross-examination, that he was present in the house of Kedar Nath in the evening of 16th February, 1944 or that at that time, Kedair Nath authorised the appellant to adopt the third respondent. The evidence of Parmanand Chobey is therefore clearly of no assistants to the respondents.

5. When we turn to the evidence of Nawal Kishore, we find that this evidence also does not go far enough to establish the conferment of authority by Kedar Nath on the appellant to adopt the third respondent. The only talk in regard to adoption, according to this witness, took place on the night between 16th and 17th February, 1944 and during the period of 5 or 6 months prior to his death, Kedar Nath had not even mentioned a word about his desire to adopt a son. Even on the night between 16th and 17th February, when Kedar Nath talked about the adoption, what we talked this witness wai to ask Kashi Prasad and the second respondent to agree to the adoption of the third respondent and thereupon this witness talked to Kashi Prasad and the second respondent and Kashi Prasad immediately agreed while the second respondent went inside the house to consult his wife and then communicated their approval. This evidence, even if accepted as wholly correct, merely

establishes that Kedar Nath proposed to adopt the third respondent and Kashi Prasad as well as the second respondent and his wife agreed with the proposal. It does not go further and say that Kedar Nath thereafter called the appellant and gave her authority to adopt the third respondent. We are not at all satisfied that even this conservation between Kedar Nath and Nawal Kishore took place on the night between 16th and 17th February. It is indeed rather strange that the conversation in regard to the adoption of the third respondent should have been taken place just on the previous night before the death of Kedar Nath. It was not the case of either party that Kedar Nath was in such a serious condition on 16th February that it was apprehended that he might die on the next day, so that he night entertain the idea of adopting a son on the night of 16th February. But even if we assume for the purpose of argument that such a conversation did take place between Kedar Nath and Nawal Kishore and the second respondent and his wife agreed to the proposal of adoption of the third respondent, it is quite possible that Kedar Nath might have put forward this proposal with a view to himself making the adoption, but before he could make the adoption, be died on 17th February, 1944. We do not, therefore, think that the evidence of Nawal Kishore goes anyway near establishing the case of the respondent.

6. That takes us to the evidence of the second respondent. Now the major draw-back from which this evidence suffers is that the second respondent is clearly an interesting witness. If the adoption of the third respondent is declared by the Court to be valid, the third respondent, who is his only natural son, would get additionally 1/6th share in the joint family properties. We would, therefore, have to scrutinize the evidence of the second respondent with great care and caution. Now it is no doubt true that, according to the evidence of the second respondent, the talk in regard to the adoption took place one day prior to the death of Kedar Nath and on that day, after obtaining the approval of the second respondent and his wife, Kedar Nath told the appellant to adopt the third respondent. But, we find it difficult to accept this evidence. Nawal Kishore, who according to the evidence of the second respondent, was present at the time when Kedar Nath asked the appellant to adopt the third respondent, did not support the second respondent in his evidence that any such authority was given by Kedar Nath to the appellant. Moreover, it is difficult to understand how this talk about taking the third respondent in adoption took place just on the previous night before the death of Kedar Nath. It would teem as if Kedar Nath and pre merit ion of his death and therefore on the previous night, he called the appellant and asked her to adopt the third respondent. That, we are afraid, is rather difficult to believe, It is also a strange that if in the middle of January when n the appellant came to Nagpur with her sister's son, Kedar Nath stated that he would not take the appellant sister's son in adoption,but that he would adopt the third respondent, why should he have waited till one day prior to his death to authorise the appellant to take the third respondent in adoption. We have already pointed out above that it was no body's case that Kedar Nath was so seriously ill on 16th February that he apprehended that he might die on next day. Then why should he have thought of giving authority to the appellant to adopt the third respondent on the night of 16th February : he could have himself mace the adoption on the next day. It is also difficult to understand why Kedar Nath who was lying ill even in the month of January should not have mentioned anything in his will about the adoption of a son to him, if he was thinking of taking a son in adoption. The entire story of Kedar Nath giving authority to the appellant to adept the third respondent on the night of 16th February, 1944 appears to be an after thought and we cannot accept the same.

7. We may point out that even the High Court felt that the evidence of Parmanand Chobey,Nawal Kishore and the second respondent was not sufficient to establish that authority bad been given to the appellant by Kedar Nath to adopt the third respondent. The High Court observed that "Had the matter rested there, it would undoubtedly have been difficult to hold that the appellant had been authorised by her husband to make the adoption". But the High Court took the view that the subsequent conduct of the appellant in going through the ceremonies of adoption, executing deed of adoption reciting that the had been authorised by her husband to make the adoption and making an application for appointment of herself as guardian of the third respondent led to the irresistible interference that she had been authorised by Kedar Nath to adopt the third respondent. We find if difficult to agree with the reasoning of the High Court. It Is no doubt true, as concurrently found by the learned trial Judge and the High Court, that the appellant went through the ceremonies of adoption and executed a deed of adoption containing a recital that Kedar Nath bad expressed his desire that the appellant should adopt the third respondent and also made an application for appointment of herself as the guardian of the third respondent. But we do not think that these circumstances are sufficient to establish the giving of authority by Kedar Nath to the appellant to make the adoption of the third respondent. There is nothing to show that the appellant was at any time aware that she could not make a valid adoption without the authority of her deceased husband Kedar Nath. It is indeed difficult to believe that an uneducated rustic women like the appellant would be conversant with the requirement of the Banaras School of Hindu Law that an adoption cannot be made by a Hindu Widow without the authority of her deceased husband. It is quite possible we would even say, quite certain that the appellant went through the ceremonies of adoption under the impression that what she was accomplishing was a valid act of adoption and its these circumstances, to conclude from the factum of adoption that authority must have been conferred upon her by Kedar Nath to adopt a son would be a long Jump in the argument which we cannot take The deed of adoption undoubtedly contained a recital that Kedar Nath at the time of his illness expressed his desire that the appellant should adopt the third respondent, but significantly enough the deed of adoption does not state as to when this desire was expressed. Nor does it state that the second respondent and his wife agreed to the proposal made by Kedar Nath and thereafter Kedar Nath told the appellant to adopt the third respondent. On the contrary what the recital says is that in obedience to the last desire of Kedar Nath, the appellant requested the second respondent to give the third respondent in adoption and the second respondent agreed to this request. More over even if this recital was read over to the appellant before she signed the deed of adoption, we cannot attach any undue importance to it, because the deed of adoption was executed on lst March, 1944, on the 13th day after the death of Kedar Nath, and we find it difficult to believe that the appellant in the state of mind in which she must have been at that time in view at the death of her deceased husband, could possibly have understood all that was written in the deed of adoption or appreciated the implications of their recital set out in the deed of adoption. It cannot be gain said that the appellant made an application for appointment of herself as guardian of the third respondent, but that gain may have been done by the appellant because she might have bonafide believed that the third respondent was her validly adopted son and from this, no inference can be drawn that she must have been authorised by Kedar Nath to adopt a son, unless It can be shown that at all material times she was aware that she could not make a valid adoption without the authority of her deceased husband Kedar Nath. We are therefore of the view that the subsequent conduct of the appellant has no bearing at all on the decision of the question whether authority was given by Kedar Nath to the

appellant to make an adoption. The High Court was in the circumstances clearly wrong in taking the view that the adoption of the third respondent was valid and binding,

8. We accordingly allow the appeal and modify the preliminary decrees passed by the High Court by declaring that the appellant is entitled to one third share in the joint family properties. The preliminary decree in so far as it holds that 40 tolas of gold ornaments were the stridhan properties of the appellant and were not liable to be adjusted against her share in the joint family properties in confirmed, The respondent will pay to the appellant costs throughout.