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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4560 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

Approved for Reporting	Yes	No
	Yes	

HIRUBEN PPARBATBHAI SATASIYA

Versus

BHAGWANJIBHAI POPATBHAI RANPARIA & ORS.

Appearance:

MR BHAVESH P TRIVEDI(2731) for the Appellant(s) No. 1

MR RR TRIVEDI(941) for the Appellant(s) No. 1

MR JAYANT P BHATT(169) for the Defendant(s) No. 1,2,3,4

CORAM: HONOURABLE MR. JUSTICE J. C. DOSHI

CAV JUDGMENT

1. The appeal under section 96 of the Code of Civil Procedure, 1908 (for short '**CPC**') at the behest of original plaintiff questions the legality and propriety of the judgment and decree dated 12.04.2006, passed by the learned Principal Senior Civil Judge, Dhoraji in Civil Suit No.353 of 2001, by which learned Principal Senior Civil Judge, Dhoraji dismissed the suit of the plaintiff.

2. For convenience, parties are referred to their original status before the learned Trial Court.

3. The Plaintiff claims to be the adopted daughter of the deceased, Bhovanbhai Narsibhai, and claims ownership over his

immovable properties. Accordingly, she seeks a mandatory injunction directing the Defendants to hand over vacant and peaceful possession of the suit properties, alongside a permanent injunction restraining them from creating any third-party rights or alienating the same. Additionally, the Plaintiff has prayed for the grant of *mesne profit*. The particulars in regards to the suit properties is made in para 14(A) of the plaint as under. It reads as under (it is in Gujarati, for better understanding, it is translated in English):-

Agriculture Land :

Survey No.	Acre-Guntha
16	6-03
20/1 Paiki	10-02
12 Paiki	4-32
75	2-07
76	6-08
96/2 Paiki	2-27
135/2	2-29
191	1-16

3.1. The Plaintiff pleads that her mother, Maniben, was initially married to one Chaganbhai Naranbhai Vakariya, out of said wedlock, she was born in the year 1949. Following the demise of Chaganbhai, Maniben became a widow. One Bhovanbhai Narsibhai Ranpariya, a resident of Village Sanjadia, Taluka

Jamkandorna, was already married to Santokben, and had son named Keshubhai. However, Keshubhai passed away without issue in the year 1946. As Bhovanbhai was left without any surviving lineage, he contracted a second marriage with the Plaintiff's mother, Maniben, in the year 1949, at that time the Plaintiff was approximately six months. It is the specific case of the Plaintiff that the said second marriage was solemnized subject to a pre-condition that the Plaintiff would be taken in adoption by Bhovanbhai Narsibhai. Upon completion of the requisite adoption formalities, Maniben, along with the Plaintiff, started living with Bhovanbhai Narsibhai, who maintained both of them throughout his lifetime. Subsequently, upon the Plaintiff (Hiruben) attaining marriageable age, the deceased Bhovanbhai, considering his duty as adoptive father also performed her marriage ceremonies.

3.2. Santokben, the first wife of Bhovanbhai, passed away in the year 1988. Subsequently, Maniben, the mother of the Plaintiff and the second wife of Bhovanbhai, passed away in the year 1989, and Bhovanbhai expired on 08.01.1991. It is the case of the Plaintiff that upon their demise, she, being legally adopted daughter of Bhovanbhai, is the sole/lawful legal heir entitled to inherit the suit properties owned and possessed by the deceased Bhovanbhai.

3.3. According to the Plaintiff, Defendant No. 1 (Bhagvanjibhai Popatbhai Ranpariya) is the son of Bhovanbhai's brother, Popat Narsibhai, while Defendant Nos. 2 to 4 are the sons of the said Bhagvanjibhai. It is further alleged that Defendant Nos. 1 to 4, by fabricating and forging a bogus Will attributed to the

deceased Bhovanbhai, have unlawfully dispossessed the Plaintiff of the suit properties. It is also pleaded that lands bearing Survey Nos. 96/2 paiki, 135/2, and 91 were originally mutated in the name of the Plaintiff in the relevant revenue records and despite this, the Defendants have illegally siphoned off the income from the suit properties and got the revenue entries mutated in their favor based on the said forged Will.

3.4. In view of aforesaid pleading, plaintiff filed the Special Civil Suit No. 353 of 2001, claiming following relief (it is in Gujarati, for better understanding, it is translated in English) : -

- “(A) It is a humble prayer to declare that the Plaintiff, in the capacity of being the daughter of the deceased Bhovanbhai Narshibhai Ranpariya, is the sole owner of all the movable and immovable properties mentioned in paragraph 14 of the suit. It is a humble prayer to declare that the alleged Will is not binding upon the Plaintiff. It is a humble prayer to pass a decree directing that the peaceful, direct, and vacant possession of the suit land be handed over to the Plaintiff.*
- (B) It is a humble prayer to declare that the Defendants have no right to sell, mortgage, gift, or otherwise transfer the properties mentioned in paragraph 14 of the suit, or to hand over its possession to any third party.*
- (C) It is a humble prayer to grant a permanent injunction restraining the Defendants from selling, mortgaging, gifting, or otherwise transferring the properties mentioned in paragraph 14 of the suit, or from handing over its possession to any third party, and to grant an interim injunction until the final disposal of the suit.*
- (D) It is a humble prayer to grant mean profits of the suit property for the last two years up to the date of recovery of possession, and to pass a decree directing the recovery of the said mean profits in favor of the Plaintiff from the person and properties of the Defendants.*

(E) It is a humble prayer to grant any other relief that may be available and to award the costs of the suit.”

4. The Defendants, upon being duly served with summons, entered their appearance through their learned advocate. During the pendency of the suit, the temporary injunction application moved by the Plaintiff was allowed. The learned Trial Court, after framing issues at Exh. 26, permitted both parties to lead their respective oral and documentary evidence. Ultimately, upon appreciation of the evidence on record, the Trial Court observed that prior to the enactment of the Hindu Marriage Act, 1955, polygamy was legally permissible. It held that the long cohabitation of Maniben with Bhovanbhai sufficiently established her status as the legally wedded second wife of the deceased Bhovanbhai. However, the learned Trial Court refused to recognize the Plaintiff as the legally adopted daughter of Bhovanbhai, holding her status to be that of a foster child and on such findings, the Trial Court dismissed the suit. Being aggrieved and dissatisfied by the said judgment and decree of dismissal, the Plaintiff has preferred the present first appeal.

5. Learned advocate Mr. Bhavesh Trivedi, appearing on behalf of the Appellant, took this Court through the entire Record and Proceedings (R&P), including the evidence recorded before the learned Trial Court in juxtaposition with the issues framed. He submitted that the Trial Court erred in holding that the Plaintiff was not the legally adopted child of the deceased Bhovanbhai. He further contended that the Plaintiff had examined her maternal uncle, Mohanbhai Manjibhai Vadariya

(PW-1) at Exhibit 41, who categorically deposed that his sister, Maniben, married Bhovanbhai after demise of her first husband, Chaganbhai, subject to the condition that the Plaintiff (Hiruben) would be taken in adoption by Bhovanbhai. Learned advocate submitted that this condition was duly satisfied given that Bhovanbhai had no surviving lineage at the relevant time. He further argued that in the absence of any rebuttal evidence, a legitimate presumption arises in favor of the adoption, especially since the Plaintiff resided with Bhovanbhai and Maniben throughout her life, and her marriage was arranged and solemnized by Bhovanbhai in his capacity as her adoptive father. It was urged that Bhovanbhai treated and recognized the Plaintiff as his daughter in revenue records, thereby establish a valid adoption. Consequently, by virtue of Section 8 of the Hindu Succession Act, 1956, the Plaintiff, being the adopted daughter, is fully entitled to inherit the movable and immovable properties of the deceased Bhovanbhai as like biological daughter.

5.1. Learned advocate Mr. Trivedi further submitted that since the case involves an ancient adoption prior to the enactment of the Hindu Adoptions and Maintenance Act, 1956, the conduct and inter-se relationships of the parties assume paramount relevance under Section 50 of the Indian Evidence Act, 1872. He argued that since the Plaintiff had successfully established the factum of adoption through credible evidence, the learned Trial Court committed a grave error in misapplying the doctrine of *factum valet*. In support of his contentions, he placed reliance upon the judgment of the Orissa High Court in ***Khadali Sahu v. Malli Sahuani & Others (First Appeal No. 139 of 1999)***. He further cited the decision of the Hon'ble Supreme Court in ***L.***

Debi Prasad v. Smt. Tribeni Devi [AIR 1970 SC 1286] to submit that in all ancient transactions it is but natural that positive oral evidence will be looking passage of time gradually wipes out such evidence and thereby human affairs often have to be judged on the basis of probabilities. It is submitted that where an adoption of the year 1949 is pleaded and corroborated by the continuous conduct of the parties as father and daughter, the Court must consider that the substantial time lapse between the date of the alleged adoption and the date on which the party is called upon to adduce evidence with regard to the existence of such adoption.

5.2. In line of above submission, learned advocate Mr. Trivedi submitted that insisting upon proof of “dattak” datta -homa or other customary ritual carried to prove adoption would be travesty of the justice. He submitted that the learned Trial Court erred in holding that the Plaintiff was not the legally adopted child of the deceased Bhovanbhai. He further contended that since the Plaintiff had resided with Bhovanbhai from age of six months throughout his lifetime, and Bhovanbhai treated and nurtured her on par with a biological daughter proved that plaintiff was adoptive daughter. It is submitted that continuous treatment and social recognition are sufficient to establish that the Plaintiff was the legally adopted daughter of the deceased Bhovanbhai. It is submitted that plaintiff being the sole Class-I legal heir of the deceased under the Hindu Succession Act, 1956, is fully entitled to inherit the suit properties as the absolute owner thereof. It was thus submitted that the learned Trial Court committed a grave error in dismissing the suit.

5.3. Upon above submissions, learned advocate Mr. Trivedi submitted to allow this appeal and to quash and set aside impugned judgment.

6. Learned counsel for the respondent, Mr. Jayant Bhatt, in converse supported the impugned judgment and order and submitted that the deceased, Bhovanbhai, had duly executed a registered Will whereby he bequeathed all his properties in favour of Defendant No. 1. He further submitted that the said Will was produced before the revenue authorities for the mutation of entry, and the authorities, upon satisfying themselves as to the genuineness of the Will, mutated the revenue records in favour of Defendant No. 1. It was also contended that although the plaintiff may have been brought up by the deceased Bhovanbhai, she was never legally adopted as his daughter at any point in time. He further argued that in the absence of any Class-I heir, the defendant, being the son of the biological brother of the deceased, was the sole legal heir entitled to inherit the immovable properties, and accordingly, the suit properties devolved upon him. Since the learned Trial Court has recorded cogent findings while dismissing the suit, no grounds arise to interfere with the impugned judgment and decree. It is therefore, prayed that the appeal be dismissed.

7. Regard had been to rival submission of both sides and considering impugned judgment and decree and Record and proceedings, at the outset question arise for consideration in the appeal is whether, prior to the enactment of the Hindu Adoptions and Maintenance Act, 1956, was it legally permissible to adopt a daughter ?. In other words, whether the adoption of a female

child was permissible under treaties ancient Hindu law ? Whether learned Trial Court has committed error to dismiss the suit? What order ?

8. The facts of the case are undisputed. The deceased, Bhovanbhai, was firstly married to Santokben, and during her lifetime, he contracted a second marriage with Maniben. Maniben was previously married to Chhaganbhai, and the plaintiff was born out of that wedlock. Upon the demise of Chhaganbhai, when plaintiff was merely six months old, Bhovanbhai contracted to second marriage with Maniben. Keshubhai, the son of Bhovanbhai born through Santokben, passed away prior to second marriage of Bhovanbhai in the year 1946. During his lifetime, the deceased Bhovanbhai cohabited with both of his wives, namely Santokben and Maniben, and the plaintiff was brought up by him. Regarding the validity of Bhovanbhai's second marriage to Maniben, the learned Trial Court observed that since it was proved on record that Maniben, upon becoming a widow, lived with Bhovanbhai as his second wife and as this arrangement preceded the enactment of the Hindu Marriage Act, 1955, the second marriage was legally permissible. However, applying the doctrine of *factum valet*, the learned Trial Court considered that even if the plaintiff's adoption by the deceased Bhovanbhai was proved, as a matter of fact, such an adoption could not be sustained as legal and valid under ancient Hindu Law. The Trial Court answered this question, accordingly, against the plaintiff.

9. Firstly, let got through issues framed by learned Trial

Court. Issues are framed at Exh.26. They are as under :-

"1. As per plaint para-2, whether plaintiff proves that Maniben married with Chhaganbhai Naranbhes and Chhagan bhai Narabhia expired ?

2. As per plaint pera-3, whether plaintiff proven that Bhovanbhai Narshibhai Ranparia born near about 1910 and he first married with Santokben and by this wedlock Keshubhai born and he expired in the year 1946 as unmarried ?

3. As per plaint para 4, whether plaintiff proves that Santokben could not deliver the child, therefore. Bhovanbhai married with Maniben near about 1949 and at that time plaintiff was aged about six months ?

4. As per plaint para-5, whether plaintiff proves that as per agreement Hiruben was adopted by Bhovanbhai and Santokben and maintained her as daughter and also married her and after marriage of Maniben with Bhovanbhai, Hiruben resided with Maniben and Bhovenbhai ?

5. As per plaint para-6, whether plaintiff proves that Santokben expired near about 1988, Maniben expired near about 1989 and Bhovanbhai expired on 08/01/91 ?

6. As per plaint para-7, whether plaintiff proves that before the death of Bhovanbhai in the year 1991, he was suffering from paralysis and not able to understand good and bad since six months prior to his death ?

7. As per plaint para-10, whether plaintiff proves that defendant no.1 was managing the property of Bhovanbhai during his life time ?

8. As per plaint para-11, whether plaintiff proves that defendant no.1 was connected with politics and her intention was to heirship the property ?

9. As per plaint para-12, whether plaintiff proves that she

was demanded account from deft.no.1 & deft.no.1 denied ?

10. As per plaint, para 13, whether plaintiff proves that under the will, defendant no.1 entered his name in record of rights ?

11. As per plaint, para 14 and 15, whether plaintiff proves the immovable property of Bhovanbhai ?

12. As per WS Exh.9, para 2, whether defendants prove that Santokben was alive and therefore, there was no legal necessity fr the second marriage ?

13. As per WS Exh.9, para 3 and 7, whether defendants prove plaintiff and her mother resides as refugees and on humanitarian ground, plaintiff married and expenditure born by Bhovanbhai ?

14. As per W.5.Ex.9 para-10,11 & 16, whether defendants prove that Bhovanbhai had executed registered will in favour of defendant no.) and under the will, revenue entry entered in the name of defendant no.1 ?

15. As per W.5.Ex. 9 para-12, whether defendants prove that they are the owners and possessors of the disputed property ?

16. As per para-13(1) of W.5.Ex.9, whether defendants prove that S.Nos.96/2, 135/2 and 191 enter the possession of the defendants and only name of the plaintiff inserted and under family agreement. plaintiff has handed over the land to defendants though, plaintiff has filed the suit ?

17. As per W.S.Ex.9 para-14, whether defendants prove that suit is bad for res judicata, delay, laches and acquiescence ?

18. As per W.S.Ex.9 para-18 and 21. whether defendants prove that suit is under valued and on the deficit court fees stamp, therefore, plaint should be rejected ?

19. As per W.S.Ex.9 para-20, whether defendants prove that suit is without cause of action ?

20. As per WS Ex.9 para-21, whether defendants prove that suit barred by law of limitation ?

21. As per W.5.Ex.9 para-22, whether defendants prove that the estoppel is against the plaintiff ?

22. Whether plaintiff is entitled decree as per plaint para-18 ?

23. What order and decree ?”

10. In all, 23 issues were framed by the learned Trial Court. Issue No.3 was amended, instead of 6 years it was replaced by 6 month. After permitting parties to lead the evidence, learned Trial Court answered issue Nos.1, 2, 3, 5, 11, 18 in affirmative and answered issue no.12, 14, 17, 19 to 22 in negative. Issue No.4 and 13 in partly affirmative and partly negative; Issue No.15 partly affirmative, Issue No.6 to 10 and 16 not required to be discussed, and ultimately dismissed the suit.

11. The root question which governs the decision in this appeal is whether adoption of daughter was permissible, prior to enactment of Hindu Adoption and Maintenance Act 1956?

12. In **N. R. Raghavachariar's Hindu Law Principles and Precedents by Professor S. Venkataraman, 7th edition**, the adoption and its object are enumerated in section 78. Section 79 is with regard to texts on adoption and section 82 is in regard to who can adopt. Sections 78, 79 and 82 reads as under :-

“78. Adoption and its object. The origin of the custom of adoption is lost in antiquity, and may well have been no more than the natural desire for a son as an object of

affection, a protection in old age, and at the last an heir. However this may be, it is certain that through all the centuries which have seen the spread of Brahminical influence, and among all classes which have come under its sway, a peculiar religious significance has attached to the son. He is so essential to the spiritual welfare of the souls of his immediate ancestors that an extensive class of subsidiary sons was admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full rights of inheritance. Of these, among the orthodox classes, only the adopted son is now recognised, and he, in the absence of an aurasa or natural born son, is clothed with all the attributes of a son and is from the date of adoption regarded as having been born in his adoptive family. The 9th Chapter of Manu's Code, which has always been regarded as of paramount authority, is instinct with this doctrine and it is clear that 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 solemnisation of the necessary rites. Adoption may be defined as the formal affiliation. as the son of the person of one who is in fact not his son, and this was one of the means adopted by the primitive Aryans for satisfying the necessity for the male offspring which they felt so keenly in days when the security of person and property depended much upon the number of males which a family could claim as its members. But as days went on, and better order reigned in society, the number of subsidiary sons mentioned in the previous chapter diminished with the increasing abhorrence to the sexual looseness which characterised the recognition of many of them, and the importance of the adopted son began to increase. The rise of the adopted son in the estimation of the society was further accelerated by the Brahmin priests who advocated the institution of adoption as absolutely necessary for every sonless man's spiritual salvation both here and in the world beyond. Added to this, the natural craving of a man for the celebration of his name and the due perpetuation of his lineage, which increased with the desire for partition and self-acquisition becoming more and more common, gave an added impetus to the growth of this institution. It can therefore be said that the practice of adoption is due not only to the timorous superstition of the

Hindus that by leaving a male child in this world, one can secure oneself from the torments of the next, but also to the secular desire for the perpetuation of family properties and names. The substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a 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.

79. Texts on Adoption. -The whole Sanskrit law of adoption is evolved from two texts and a metaphor (Mayne, 137). The texts are those of Manu and Vasishta and the metaphor is that of Saunaka. Manu says: "He whom his father or mother gives to another nateel disposed, is considered as a son given, the gift being confirmed by pouring water." as his son, provided that the donee has no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water. Vasishta's text is in greater detail and runs "A son formed of sexual fluids and of blood. proceeds from his father and mother as an effect from its cause. Both parents have power to sell, or to desert him. But let no man give, or accept, an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son unless with the assent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the King and then having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive, as his son by adoption, a boy nearly allied to him or on failure of such, even on remotely allied. But if doubts arise let him treat the remote kinsman as a Sudra. The class ought to be at his son by adoption, a boy nearly allied to him, or on failure of such, even one remotely known, for through one son the adopter rescues many ancestors". These two texts read along with the metaphor of Saunaka that "the adopted son must be the reflection of a son have given rise to numerous rules for observance in the case of a valid adoption, and the Dattaka Mimamsa of Nanda Pandita and the Dattaka Chandrika of Devanda Bhatta, two treatises on the particular subject of adoption enjoying the highest reputation and respected all over India, are the chief

authorities governing questions of adoption, though when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be an infallible guide in the Mithila and Benaras Schools."

82. *Who can adopt.*-"By a sonless person only should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water and obsequialrites." Atri cited in Mandlik's Hindu Law. Every Hindu male who has neither a son, a grandson or great-grandson, aurasa or adopted, 18 at the time of adoption, and is not then otherwise disqualified, can adopt a son to himself. But the mere physical existence of a son, grandson, or great-grandson is not sufficient to preclude the father from making an adoption, unless the son is in a position to render the spiritual services necessary for the father's salvation. Thus if an only son has been given away in adoption, his existence does not preclude his natural father from making an adoption, except when he has been given away in the diyamushyayana form, Nor does the existence of a son in embryo invalidate an adoption, Except in the case of kritrima adoption, an adoption is always made to a male, though it can be made as mentioned in section 101 by a woman. The adoption, however, by an unmarried woman prior to the Hindu Adoptions and Maintenance Act, 1956 was held to be 'unheard of and that it could not be recognised. A joint adoption of a person by two persons would be invalid."

13. The above text on ancient Hindu law distinctly establish that adoption was permitted only for the son. Origin of the custom of adoption is lost in antiquity but was no more than a natural desire for a son as an object of affection, protection in old age and to continue the lineage and also to perform the pind-dan.

14. **Mayne's Treatise on Hindu law and Usage, 11th edition by N. Chandrashekhar Aiyar** in section 138 to 140 observed as

under :-

"138. It is evident that the spiritual motive was not so largely When, owing to wars and other causes, families tended to become extinct, or rights to large estates and principalities were in jeopardy on the extinction of leading families and when claims had to be advanced before the rulers of the country for the recovery of estates, adoption must have become a fertile expedient for reviving or enforcing such claims. Adoption of a son to the last owner was a simple and intelligible device compared to the difficulty of proving or establishing the claim of a widowed rani or a remote male heir. It is not surprising therefore that in India, after the Gupta empire and especially in the Mohammedan period, adoption became even more important. Accordingly, when the Mitakshara was written, Vijnanesvara, in commenting upon Yajnavalkya who assigns the adopted son to the seventh rank and does not treat him as an heir to the adopted father's collaterals, treats of him adequately and restores him to the position assigned to him by Manu (1). The Smritichandrika is even more emphatic when it says that, in the Kali age, the adopted son is alone acknowledged, besides the aurasa son and it prohibits the appointment of a daughter (u). Since the sale of a son was blameworthy and gift was spiritually the most meritorious form of transferring dominion, it became the normal mode of adoption. The other adopted sons, the son bought (Krita), the deserted son (Apavidha) and the son self-given (Svayamda:ta) disappeared except the son made (Kritrima) in Mithila (v). The Kritrima son however is not an adopted son in the full sense. When the texts say that a man should adopt after giving intimation to the king (w), it is evident that the adoption partook more of a secular character than of a religious one as such intimation was obviously necessary in the case of relatively large possessions. The religious motive for taking a son in adoption could not have been very great if Vishnu, Yajnavalkya and Narada could assign him only a very low place. While his identity with the immediate agnatic family is now fully established, it is noteworthy that the adopted son's sapinda relationship in the adoptive family extends only to three degrees and not to the usual seven degrees,

and the period of pollution extends only to three days and not to the usual ten days. What is even more important is that on the anniversary of his adoptive father's death, he performs the sraddha in the ekoddishtha form in honour of the deceased only, ie, consecrated to a single ancestor and he does not, like the aurasa son, offer divided oblations to the fourth, fifth and sixth ancestors, even when he performs the sraddha in the usual way (x). While the continuance of the prohibition to marry in his own natural family is intelligible on grounds of consanguinity, that he should occupy a position greatly inferior to the son from the religious point of view, shows that the recognition of the institution of adoption has been more due to secular reasons than to any religious necessity.

139. The religious motive for adoption never altogether excluded the secular motive. The propriety of this motive was admitted by Sanskrit writers themselves. In the ceremonial for adoption given by Baudhayana, the adopter receives the child with the words: "I take thee for the fulfilment of religious duties. I take thee to continue the line of my ancestors" (y). The Dattaka Mimamsa quotes a text that a man should adopt a son "for the sake of the funeral cake, water and solemn rites, and for the celebrity of his name" (z). And the author of the Dattaka Chandrika admits that, even where no spiritual necessity exists, a son may, and even ought to, be adopted, for 'the celebration of name, and the due perpetuation of lineage' (a). In fact, the earliest instances of adoption found in the Hindu legend are of daughters (b). The Kritrima form of adoption, which is still in force in Mithila, has no connection with religious ideas. Among the tribes who have not come under Brahmanical influence, we find that adoption is equally practised; but without any of the rules which spring from the religious fiction. One Sanskrit purist actually laid it down that Sudras could not adopt, as they were incompetent to perform the proper religious rites (c). As a matter of fact they always did adopt; but were expressly freed from the restrictions which fettered the higher classes. They not only might, but did adopt the son of a sister, or of a daughter, who was forbidden to others. So in the Punjab, adoption is common to

Jats (d) and Sikhs, but with there it is simply the appointment of an heir. Similarly in Western India amongst the Talabda Koli caste and Kadwa Kunbi caste. though no religious significance attaches to adoption, the right to adopt has been upheld by the Courts (e). The Jains have so generally adopted the Hindu law that the Hindu rules of adoption are applied to them in the absence of a contrary usage (1) and adoptions are quite common among them. But since they repudiate the Brahminical doctrine of obsequial ceremonies, the offering of oblations for the salvation of the soul of the deceased and do not believe that a son either by birth or by adoption confers spiritual benefit on the father, the objects and motives of such adoptions are purely secular (g). Secular motives are pre-dominant in adoptions effected among Nattukottai Chettis who, more often than not, possess considerable property and desire to direct its devolution along approved channels, while at the same time ensuring the performance of some religious rites to which as Hindus they also attach value (g1).

Amongst the vast majority of Hindus, mere gift and acceptance are quite sufficient to constitute adoption; they are secular acts primarily. though the son adopted is expected to and does perform the customary funeral rites. In Mithila, where the Hindus are as religious as in the rest of India, the religious duty of a widow is not recognised and she is not entitled to make an adoption in the dataka form. The prohibition shows that adoption is treated as a secular institution, though it may carry with it religious obligations on the part of the son adopted. Again, a widow who has the authority of her husband or the assent of his sapindas is not bound to adopt a son to perform the sraddhas for her husband. The religious motive here is very much weakened. Where a widow has the right to adopt, even without the permission of her husband or the assent of his sapindas, as in Bombay, but need not, the reasonable inference is, that it is her right because adoption may be a proper act, but not a religious duty on her part. The religious motive must therefore be admitted to be not very appreciable, even in Bombay, especially as a man is allowed to adopt one older than himself, or a married man with children (k). Even in cases where the Court has held that there is a mandate to

the widow to adopt, she is not bound to make an adoption. In most cases, the authorities given by husbands in wills and other documents are purely permissive, showing no consciousness on the part of the husband of the religious necessity for adopting a son. On the other hand, a husband often purely from secular motives empowers his wife to adopt a son after his death to continue his line and to inherit his property and keep up his name (i). His authority merely equips the widow with either a sword or a shield for her protection against the reversioners. In Venkatanarasimha v. Parthasarathy Appa Rao (j), in construing a will containing an authority to adopt, the religious motive was not allowed to aid the construction, and the Privy Council held that, in the absence of a direction by the testator that there should be an adoption, as he would naturally have done, had he wished in all events to secure that there should be a son to perform the due religious rites, the language of permission pointed to the predominance of the secular motive.

The acceptance of an only son in adoption, in contravention of a strict religious precept, is certainly against the attribution of a religious motive. So too, any family or local usage which permits the adoption of one's daughter's son or sister's son or a mother's sister's son, in contravention of a rule which is both religious and legal, cannot be held to indicate anything but an overmastering secular motive. It is, however, undeniable that, in the vast majority of cases amongst the Hindus, there is a religious motive, if varying in degree (k), though it is equally undeniable that the secular motive is in almost all cases the more dominant. The question whether an adoption is inspired by secular or religious motives has naturally arisen in the case of adoptions by widows, made long after their husbands' deaths. In many of the cases, it cannot be said that such adoptions by widows are made from religious motives. They are often made to divert the course of succession, or to dispossess an heir in whom the inheritance has already vested. Religious motives in such cases are in fact conspicuously absent.

At the same time, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular

adoption were religious or secular. An intermediate view is possible, namely, that while an adoption in itself 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 the widow and not as the fulfilment by her of a religious duty; and that the limits to the exercise of her power should be set, not so much from the religious point of view, as from that of conflicting rights. The controversy, however, must be taken to have been set at rest in favour of the conventional view by the judgment of the Judicial Committee in Amarendra's case (1) which, reiterating "the well-established doctrine as to the religious efficacy of sonship", gives full effect to it.

140. The whole Sanskrit law of adoption is evolved from a few texts and a metaphor. The metaphor is that of Saunaka, that the boy to be adopted must bear the reflection of a son (m). The texts are those of Manu, Vasishtha, Baudhayana, Saunaka and Sakala, Manu says: "That boy, equal by caste, whom his mother or his father affectionately gives, confirming the gift with a libation of water, in times of distress to a man as his son, must be considered as an adopted son (Datrima)". "Of the man who has an adopted (Datrima) son possessing all good qualities, that same son shall take the inheritance, though brought from another family", "An adopted son shall never take the family name and the estate of his natural father; the funeral cake follows the family name and the estate, the funeral offerings of him who gives his son in adoption cease as far as that son is concerned" (n). Vasishtha says, "(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause. (2) Therefore the father and the mother have power to give, to sell, and to abandon their son. (3) But let him not give or receive in adoption an only son. (4) For he must remain to continue the line of the ancestors. (5) Let a woman neither give nor receive a son except with her husband's permission. (6) He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the King, make burnt-offerings in the middle of the house, reciting the Vyahritis, and take as a son a not remote kinsman, just the nearest among his relatives" (o). To the same effect is Baudhayana in his Grihyasutra (p).

Saunaka lays down rules substantially similar but the following which is not covered by the other writers is important: "The adopter having taken the boy by both hands, with the recitation of the prayer, having inaudibly repeated the mystical invocation :having kissed the forehead of the child; having adorned with clothes, and so forth, the boy, bearing the reflection of a son; accompanied with dancing, songs and benedictory words, having seated him in the middle of the house ; and having performed the homa or burnt sacrifice with the holy texts, should complete the remaining part of the ceremony. The adoption of a son, by any Brahmana, must be made from amongst sapindas. ; or on failure of these, an asapinda may be adopted; otherwise let him not adopt. Of Kshatriyas, in their own class positively: and (on default of a sapinda kinsman) even in the general family, following the same guru; of Vaisyas, from amongst those of the Vaisya class; of Sudras, from amongst those of the Sudra class. Of all, and the tribes likewise, (in their own) classes only: and not otherwise. But a daughter's son, and a sister's son, are affiliated by Sudras. For the three superior tribes, a sister's son is nowhere (mentioned as) a son (q). By no man, having an only son, is the gift of a son to be ever made. By a man having several sons, such gift is to be made, on account of difficulty" (r).

Sakala says: "Let one of a regenerate tribe destitute of male issue on that account adopt as a son the offspring of a 'sapinda' relation particularly: or also next to him, one born in the same general family. If such exist not, let him adopt one born in another family: except a daughter's son, and a sister's son, and the son of the mother's sister" (s).

These texts apply only to the dattaka form. From these texts and the commentaries, a body of law has been developed, which will be considered under the following heads: First, who may take in adoption; Second, who may give in adoption; Third, who may be adopted; Fourth, the ceremonies necessary to an adoption; Fifth, the results of adoption; Sixth, the evidence of adoption."

15. Thus the object of adoption are twofold; the first is religious to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the soul of the adopter and his ancestor. The other is secular object to secure an heir and perpetuate the adopter's name. The substitution of son of deceased for spiritual reasons is the essence of the things and the consequent devolution of property a mere accessory to it, thereby even if person not in possession of property, he was permitted to adopt son.

16. **Prof. Mulla in 24th Edition on Hindu Law**, in regards to law prior to Hindu Adoptions and Maintenance Act, 1956 in section 444 held as under :-

“444. Object of adoption

The objects of adoption are twofold the first is religious, to secure spiritual adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of the adopter and his ancestors. The second is secular, to secure as heir and perpetuate the adopter's name.

The Supreme Court, agreeing with earlier decisions of the Privy Council has expressed the view that the validity of an adoption is to be determined by spiritual rather than temporal considerations, and that devolution of property is only of secondary importance.

When a Hindu gives a boy in adoption, his act is, according to the Hindu shastra, in the nature of a sacred gift voluntarily made. It is on that account, that Manu requires the gift to be confirmed by pouring water. A daughter given in marriage, which to called kanyadan and a son given in adoption, which is called putradan, stand in this respect on the same footing. Both are gifts for religious and secular

purposes."

17. Even in Hindu Nibadhan by His Excellency of State of Baroda in section 20 recognized adoption of only son.

18. In view of above what is to be noticed that the plaintiff though has been brought up as his own child by the deceased Bhovanbhai, the treaties and source of Hindu law, prior to enactment of Adoption and Maintenance Act, 1956, lawfully does not recognize adoption of female. In other words, ancient Hindu Law does not recognize girl to be adopted child.

19. It was argued by the learned counsel, Mr. Trivedi, that the plaintiff accompanied her mother, Maniben, to her matrimonial home as an *Angaliyat* child, subject to the condition that she would be formally adopted by Bhovanbhai. However, as evaluated and discussed hereinabove, the customs, texts, and sources of Hindu Law prevailing prior to the enforcement of the Hindu Adoptions and Maintenance Act, 1956, demonstrate that the adoption of a female child was not legally recognized under ancient Hindu law. It is the specific case of the plaintiff that she was brought into the household as an *Angaliyat* by her mother in the year 1949. According to the *Bhagavadgomandal* Gujarati dictionary, the term *Angaliyat* signifies a son or daughter born out of a mother's previous wedlock who accompanies her to a subsequent union, carrying child by the finger or hand. This customary practice is predominantly prevalent among certain communities in Gujarat, such as the Patidars, Kanbis, and Dalit communities, among others. It describes a situation where a woman brings a child from an earlier union into her new

household upon remarriage or when entering a new domestic arrangement. Normally *Angaliyat* child is absorbed into the stepfather's household and is typically accepted and treated socially as his own child keeping in kinship relation. She after treated as foster child with affinity nonetheless, since Ancient Hindu Law does not acknowledge girl child adoption, plaintiff legitimately cannot raise claim of adopted daughter of Bhovanbhai.

20. In the present case, learned counsel, Mr. Trivedi, contended that since the plaintiff was brought into the family as an *Angaliyat* and had been treated by the deceased, Bhovanbhai, as his own child, she should be held entitled to inherit his immovable properties. It is also submitted that learned Trial Court has wrongly applied the principal of *factum valet*. It is also proved that plaintiff was led by hand/finger of her mother from her earlier union and continued when her mother remarried and entered into the domestic union with deceased Bhovanbhai as second wife. It is also undisputed that she was absorbed in Bhovanbhai's family and household, but in absence of any custom or any source of ancient Hindu Law concede adoption of a female child, she cannot be treated more than a foster child or *Angaliyat* daughter brought up as duty of stepfather.

21. In view of the above, where the foundation of adoption under Shastric Hindu Law sourced from religious texts necessitating a son only to be adoptive child for the spiritual benefit of the adopter and his ancestors, it is observed that only a male child could be validly adopted. Furthermore, the

performance of religious ceremonies, specifically the *Datta Homam* was considered essential to validate an adoption, except in certain schools of thought or among specific communities. Aptly, the position of law has been drastically changed after the year 1956. Hindu Adoption and Maintenance Act, 1956 permits adoption of girls and whom were given independent statutory custody to adopt.

22. In its authoritative pronouncement, the Privy Council in case of **Amarendra Mansingh Bharamarbar v/s. Sanatan Singh [AIR 1993 Privy Council, 155]** held that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuation of the line and for solemnization of the necessary rites.

22.1. Thus in all, text and custom of ancient Hindu Law acknowledge adoption of son only.

23. In view of the above, appellant – plaintiff in the present case fails to prove that adoption of the girl child prior to the year 1956 was not permissible in the Hindu Law. The case of the plaintiff that she was adopted by deceased Bhovanbhai in the year 1949 as a condition precedent to marry with Maniben, mother of the plaintiff, at the most could prove that she was treated and absorbed as foster daughter and nothing beyond it.

24. It was also case of the plaintiff that revenue authorities at some point of time have mutated her name in three different survey number on the basis that she is adopted girl of the deceased Bhovanbhai. This Court in the aforesaid terms and

relying upon the various commentary of the various prominent authors as well as judgment of Privy Council believes that prior to enactment of Hindu Adoption and Maintenance Act 1956, adoption of the girl child was not permissible and therefore, based upon the theory of adoption if revenue entry has been mutated, it would not create any title in favor of the plaintiff.

25. Division Bench of this Court in **Letters Patent Appeal No.1217 of 2023 in Special Civil Application No.2679 of 2021 between The Special Secretary (Appeals), Revenue Department v/s. Boricha Ashokbhai Palabhai dated 22.09.2023** held that in absence of valid adoption or any other legal document merely, on the basis of mutation no revenue entry can be mutated. Relevant para 6 reads as under :-

“6. Heard the learned counsel for the parties and perused the documents on record. In the present case, it is an admitted position that the only proof of adoption of the respondent is an affidavit made on a Rs.10 stamp paper, purportedly by late Punjiben, the original allottee of the subject land, attested before the Executive Magistrate, which states that she has taken the respondent in adoption. Being an illiterate lady, the affidavit bears the thumb impression of late Punjiben. On the basis of such an affidavit, the respondent herein claims to be the adopted son of late Punjiben, who has been adopted after customary procedure, prevalent in their society. The said affidavit by any stretch of imagination cannot be said to be an Adoption Deed and the same cannot be registered. As per the provisions of the Gujarat Land Revenue Code, a person entitled to hold the land as a legal heir, has to produce a valid document of adoption. The said affidavit has been produced after the death of Punjiben and has not been proved legally nor is verified. In the absence of any proof produced by the respondent with respect to the valid adoption and in the absence of any other legal document as permissible in law,

we are of the opinion that on the basis of such a document, the respondent could not have claimed any right to be the legal heir of the original allottee namely late Punjiben and the Succession Entry No. 704 dated 07.11.1994 in favour of the respondent could not have been effected, as such a document has no value in the eyes of law and is an invalid document under the provisions of the Code, for making such a mutation entry in respect of heir-ship. After coming to know about such a discrepancy in the revenue record, the revenue authorities have rightly initiated the proceedings under Section 79A of the Code on the proposal made by the Mamlatdar. There is no delay in initiating such proceedings from the date of knowledge of such discrepancy. The land allotted to late Punjiben was the Government land, which was allotted for cultivation on Santhani basis. It was not of her ownership. In the present case, the respondent has not initiated any civil proceedings to declare him as the legal heir of late Punjiben. The said affidavit cannot be treated as a valid legal document to decide the heir-ship of the respondent.”

26. The plaintiff entered into witness box at Exh.31. She has been cross examined. In cross-examination she has admitted that she is the only heir of deceased Chhaganbhai, her biological father and she received the inheritance as she is the sole survivor of Chhaganbhai. From the oral evidence, what could be inferred that the plaintiff has not renounced her family of her biological father. She cannot receive the inheritance from both biological as well as adoptive father. Once she is considered as adopted daughter, necessarily she renounces the biological family. But in the present case, cross-examination of the plaintiff proves that she has also received inheritance from biological family, thus it exclude her from claiming inheritance right, if any, in regard to immovable property of deceased

Bhovanbhai, the so called adoptive father.

27. The judgment relied by learned advocate for the appellant plaintiff is factually different and therefore, it is not helpful to the appellant / plaintiff.

28. In the aforesaid reasons, according to this court, the learned trial Court has not committed any error, much less error of understanding law or facts or appreciating evidence.

29. For the foregoing reasons, the appeal fails and accordingly, stands dismissed. Interim relief granted earlier, if any, stands vacated. Record and proceedings, if any, be send back to learned Trial Court concerned.

SATISH

(J. C. DOSHI,J)