APPELLATE CIVIL

Before Tek Chand, J.

BASDEO BHARDWAJ,—*Appellant*

versus

RAM SARUP AND OTHERS,—*Respondents*

R.S.A. 482 of 1962

January 5, 1968

Hindu Adoptions and Maintenance Act (LXXVIII of 1956)—S. 16—Statutory presumption under—Veracity of oral evidence led in support of adoption considered doubtful—Whether amounts to disproof of such statutory presumption—Evidence—When can be said to be doubtful.

Held, that under section 16 of The Hindu Adoption and Maintenance Act, where there is registered document relating to adoption, the presumption shall be drawn in favour of adoption and it is then for the other side to disprove that no adoption has been made under the Act. The oral evidence produced in support of the adoption is in the nature of an additional proof and if the Court casts doubt on its veracity, it can disregard it. Viewing of oral evidence with suspicion does not amount to disproof of statutory presumption under section 16 of the Act. An evidence is said to be doubtful when there exists uncertainty in relation to a fact or proposition which is sought to be proved. A doubt is not rebuttal. When a court is *in dubio,* it merely means that there is a condition of uncertainty. The term 'doubtful' refers to a condition of mind of the court as to whether a particular evidence or fact is established or not. The rejection of doubtful oral evidence cannot obliterate the effect of the legal presumption which the statute attaches to the execution of a registered deed of adoption. A distinction between the *factum probandum* and the *factum probans* has to be borne in mind.

Second Appeal from the decree of the court of the Additional District Judge, Gurgaon Camp Rohtak, dated the 20th day of February, 1962 reversing that of the Sub-Judge, 1st Class, Rohtak, dated the 29th May, 1961 and granting the plaintiffs a decree as prayed for possession of the suit land against the defendant with costs.

J. N. KAUSHAL, SENIOR ADVOCATE WITH M. R. AGNIHOTRI, ADVOCATE, for the Appellants.

D. N. AGGARWAL AND B. N. AGGARWAL, ADVOCATES, for Respondents.

TEK CHAND, J.—In order to appreciate the points arising in this regular second appeal, it is necessary to give an earlier history of litigation between parties. One Ramji Lal whose estate is the subject-matter of this litigation, died in 1925. His son Har Phul had pre-deceased him. On the death of Ramji Lal, mutation was sanctioned in favour of Basdev, appellant, on the ground that he was son of Har Phul, pre-deceased son of Ramji Lal. Plaintiffs twenty-six in number who were eighth degree collaterals of Ramji Lal, filed a suit for declaration that Basdev was not Ramji Lal's grandson and, therefore, not entitled to the property left by him. They sought possession of the property. The suit was decreed and the Revenue Authorities consequently sanctioned mutation in the name of the plaintiffs.

Another litigation started in 1927, Kishan Devi, daughter of Ramji Lal, sued plaintiffs for possession on the ground that the property of Ramji Lal was non-ancestral. Her suit was decreed on 11th of December, 1928 and the decree was maintained up to the High Court. Kishan Devi in pursuance of the decree entered into possession. Sometime later, Kishan Devi mortgaged this land in favour of one Ganga Ram and he transferred his mortgagee rights in favour of Basdev. On 20th of July, 1937, Kishan Devi made a gift of her entire property in favour of Basdev. The mortgage and the gift were challenged by the plaintiffs and their suit was decreed on 21st of December, 1940. It was held that Kishan Devi had only a life interest and after her death, the impugned gift and mortgage would not affect the plaintiffs reversionary rights.

The next stage in the litigation is that Kishan Devi adopted Mukesh Kumar, son of Basdev, as a son to herself and a registered deed of adoption was executed on 11th of July, 1957 which is also the date of adoption. Kishan Devi died on 3rd January, 1960.

On 14th of April, 1960, the present suit out of which regular second appeal has arisen was instituted by the plaintiffs for possession of the property on the basis of declaratory decree having been passed in their favour on 21st of December, 1940. Mukesh Kumar has not been impleaded as a party to these proceedings.

The defence of Basdev in this suit is that the declaratory decree was not binding as the former suit which has resulted in the decree was not properly conducted by his guardian. He was then a minor.

His second defence is that Kishan Devi was absolute owner of the property in suit in view of section 14 of the Hindu Succession Act. Thirdly, it was contended that Kishan Devi had adopted Mukesh Kumar and no decree could be passed in favour of plaintiffs as they were no longer preferential heirs. Lastly, it was urged that Mukesh Kumar was a necessary party and in his absence, the suit could not proceed.

The plaintiffs, in their replication said that prior to the adoption of Mukesh Kumar, Kishan Devi had adopted one Asa Ram and therefore, the subsequent adoption of Mukesh Kumar was not valid. On the above pleas, the trial court framed the following issues :—

(1) Whether the declaratory decree, dated 21st December, 1940, obtained by plaintiffs is not binding upon the defendant Basdev, for reasons given in para 4, 5 of the written statements ? If so, its effect ?

(2) Whether Mst. Kishan Devi had validly adopted Mukesh Kumar ? If so, what is its effect on the present suit ? (competency of adopting Mukesh Kumar being included in this issue.)

(3) In case above issue No. 2 is proved, then whether Mukesh Kumar is not a necessary party to the suit.

(4) What is the effect of Hindu Succession Act, 1956, on decree, dated 21st December, 1940 ?

(5) Whether Mst. Kishan Devi had previously adopted one Asa Ram ? If so, what is its effect on the adoption of Mukesh and on the present suit ?

(6) Relief.

The trial court held on the first issue that the declaratory decree was binding but Mukesh Kumar was validly adopted by Kishan Devi. It was also held that Mukesh Kumar was a necessary party. On the fourth issue, it was held that the benefit of section 14 of the Hindu Succession Act could not be availed of by Kishan Devi and the decree passed on 21st of December, 1940, remained unaffected. The fifth issue as to the previous adoption of Asa Ram was decided

against the plaintiffs. The plaintiffs' suit was dismissed with costs. The plaintiffs preferred an appeal to the Additional District Judge, Gurgaon, which has been allowed and from which Basdev has presented this second appeal.

The points which have been agitated in the second appeal relate to the validity of the factum of adoption. The lower appellate court came to the conclusion that presumption, if any, arising from the registered document in support of the adoption must be deemed to have been sufficiently rebutted and the adoption was held as not established. It was, however, observed that though the plaintiffs were entitled to the possessory relief with regard to the suit land by virtue of the declaratory decree obtained in 1940, the rights of the minor Mukesh Kumar who was a necessary party and who had not been impleaded would remain unaffected; and his interest, if any, in the disputed land would not be deemed to be adversely hit by any observation of the court.

The Hindu Law of adoption has been codified and material changes have been made in the law. A Hindu female satisfying the requirements of section 8 now has the capacity to take a son or daughter in adoption. This is a far-reaching change and a departure from the strict Hindu Law. Another important provision is section 16, regarding presumptions as to registered documents relating to adoptions and it is reproduced below :—

> "Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

The significance of this provision is that once a registered document of adoption is executed, "the court shall presume" that the adoption is in compliance with the provisions of the Act "unless and until it is disproved". Under section 4 of the Indian Evidence Act, the term "shall presume" is understood to mean that the court shall presume a fact and shall regard such fact as proved unless and until it is disproved:—

> Under section 3 of the Indian Evidence Act, a fact is said to be disproved when, after considering the matters before

it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Thus, where there is a registered document relating to adoption, the presumption shall be drawn in favour of adoption and it is then for the other side to disprove that no adoption has been made under the Act. Exhibit D/3 is the original deed of adoption executed by Shrimati Kishan Devi, daughter of Ramji Lal, on 11th July, 1957. It bears her thumb impression. Exhibit D/3 bears the signatures of Basdev as *"god dehinda"* as the person giving in adoption. It is also attested by a number of witnesses and by the scribe. It is stated in the deed that Kishan Devi is a widow, eighty years old and has no male or female issue. That she has been generally living in the house of Basdev and his son Mukesh Kumar, aged five years, for whom she has got great affection and who lives with her as her son and she has adopted him as such and taken him in her lap; that she has done so after performing the customary rites of *havan, puja,* distribution of sweets and taking of photograph; that Basdev has consented to his son Mukesh Kumar being adopted by Kishan Devi. There has been produced on the record a photograph of the persons present when Mukesh Kumar was being put in her lap. Exhibit D/4 is a copy of the application, dated 18th of April, 1958, of Basdev for getting his son Mukesh Kumar admitted in the school at Sonepat. In the column for father's name are written words "Baldev adopted son of Mst. Kishan Devi". The date of birth of Mukesh Kumar is mentioned as 4th of March, 1953. The defendant has produced eight witnesses in proof of the factum of adoption. There is no evidence, disproving the proof of the adoption, led by the plaintiffs and the lower appellate court has not referred to any. Kishan Devi, adopter, died on 3rd of January, 1960, about two years and six months after the execution of the registered deed of adoption.

The learned counsel for the appellant Basdev has urged that in view of the provisions of section 16 of the Hindu Adoptions and Maintenance Act, 1956, there was a presumption in favour of adoption and till this presumption had been disproved by evidence, the presumption could not be deemed of to have been disposed. Once a validly executed deed of adoption had been established, it was incumbent in law on the court to presume in favour of valid adoption

until the opposite party had discharged the onus of disproving it. It was also contended that the lower appellate court had erroneously cast doubts and suspicions on the veracity of oral evidence placed on the record. Even if the evidence was of doubtful credibility, it might have been ignored but that would not necessarily amount to disproving of adoption or rebuttal of the presumption under section 16. It was contended that rejection of oral evidence led by the defendant appellant would not amount to disproving the legal presumption. The oral evidence was in the nature of an additional proof and if the lower appellate court cast doubt on its veracity, it could disregard it. Viewing the oral evidence of the defendant appellant with suspicion did not amount to disproof of the statutory presumption under section 16. An evidence is said to be doubtful when there exists uncertainty in relation to a fact or proposition which is sought to be proved. A doubt is not rebuttal. When a court is *in dubio,* it merely means that there is a condition of uncertainty. The term 'doubtful' refers to a condition of mind of the court as to whether a particular evidence or fact is established or not. The rejection of doubtful oral evidence cannot obliterate the effect of the legal presumption which the statute attaches to the execution of a registered deed of adoption. Casting suspicion on the oral evidence in this case still leaves intact the legal presumption under section 16 of the Act. Even if no oral evidence had been led by the defendant appellant, the court was required to presume in favour of valid adoption. This presumption had to be disproved by the plaintiffs by leading cogent and credible evidence in rebuttal. The plaintiffs have led no evidence. The legal presumption thus remains unaffected not having been disproved. The lower appellate court has thus erred in law in dealing with the case under the law as it existed before coming into force of the Act and in misconstruing the effect of the legal presumption in favour of valid adoption.

A distinction between the *factum probandum* and the *factum probans* has to be borne in mind. The *factum probandum* or the fact to be proved in this case is that there was a registered document produced before the trial court purporting to record the adoption made and was signed by the person giving and the person taking the child in adoption. No doubt can be entertained on these *facti probandi.* The deed of registration records an adoption by Kishan Devi of Mukesh Kumar. Her thumb mark as the person taking the child in adoption, and the signatures of Basdev as the person giving in adoption (*god dehinda*) are borne on the deed. The

attesting witnesses have deposed to the execution of the deed. After such a document is produced, section 16 requires that the court shall presume that the adoption has been made in compliance with the provision of the Act unless and until it is disproved. All that has been said is that Basdev signed the document as an attesting witness and not as an executant, but that is not so. Apart from indicating that he was the *god dehinda*, he has signed his name under *'Alabd'* (signatures or prescription, and not under *'gawa shudh'* (witnessed). In my view, the requirements of section 16 have been satisfied. There is no option left to the court, and it is bound to take the fact as proved, until evidence is given to disprove it and the party interested in disproving it must produce such evidence if he can. The *factum probandum* was that the adoption had been made in accordance with the provisions of this Act. The presumptive proof is sought to be disproved by casting aspersions on the credibility of the oral evidence. Supposing that was successfully done, that will only prove that the witnesses are not to be relied upon but that would not suffice to disprove the presumption. It is true that the presumption is a *presumptio juris* and it is competent to a party to show that the inference was fallacious. It must be conceded that section 16 does not raise a *presumptio juris et de jure* when no evidence to displace presumption is allowed to be given. In decreeing the suit, the trial court has placed its reliance upon certain circumstances.

It was said by the lower appellate court that this transaction was to be suspected because on two previous occasions, abortive attempt had been made by or on behalf of Basdev, defendant, to lay claim to the land left by Ramji Lal. It is true that Basdev was unsuccessful in previous two attempts but on this occasion, the circumstances had entirely changed in his favour in so far as the Hindu Adoptions and Maintenance Act, 1956, was enacted by Parliament making drastic changes in the traditional Hindu Law of Adoptions. A power was given to a female Hindu to take in adoption. This change had the effect of enabling Kishan Devi to adopt Mukesh Kumar by taking advantage of the codification of the law of adoption. Nothing illegal was done by Basdev in giving away his son in adoption to Kishan Devi so long as she knew what she was doing and did so. The law had given to her the power of adopting a child. The second circumstance is that she was a woman of eighty years and she had no use for a child at that age. It was also said that she became widow in 1915-1916 and she never thought

of adopting earlier. The right to adopt was conferred upon her by the Act in 1956. Formerly, a widow had a right to adopt to her husband provided that that was the wish conveyed by the husband to her. In certain cases, she could do so despite such injunctions from her husband. But assuming, a widow thought of adopting a child when she had become eighty years, no law prevented her from doing so. The sanctity which law attaches to a registered document cannot be taken away by a suspicion that she was not in a disposing frame of mind to execute such a document. There is nothing to suggest that the Registrar's endorsement is false. It was then said that she had no property left and there was no necessity for adopting a son to whom she could leave nothing. But the act of adoption is independent of the adopter possessing any property or not.

The learned counsel for the respondent then urged, that when the lower appellate court in respect to the performance of the ceremony of giving and taking, uses the expression "I doubt", it should be construed as saying "I disbelieve" meaning that the adoption is disproved. The lower appellate court could entertain suspicions regarding the happenings of certain events as deposed to by witnesses but that would not be tantamount to disproving of what was stated in the registered deed. Again, it was said that the child did not live with her, in her village except during vacation and that circumstance derogated from the factum of adoption. Once an adoption takes place and the fact is evidenced by a registered document, the child not living in the village with the adoptive mother would not be a circumstance so as to disprove the legal presumption.

Wills in his book on Circumstantial Evidence, Seventh Edition, observed at pages 296-297 :

> "In moral investigation the facts are generally more obscurely developed than when physical phenomena form the subjects of inquiry; and they are frequently blended with foreign and irrelevant circumstances, so that the establishment of their connection with the *factum probandum* becomes matter of considerable difficulty. No weight, therefore, must be attached to circumstances which, however, they may excite conjecture, do not warrant belief. Occurrences may be mysterious and justify even vehement suspicion, and yet the supposed

connection between them may be but imaginary, and their co-existence indicative of accidental concurrence merely, and not of mutual correlation."

Mr. J. N. Kaushal, learned counsel for the appellant, urged that the lower appellate court had committed errors of law while considering the evidence. For instance, the Additional District Judge said on the basis of *Dal Bahadur Singh and others* v. *Bijai Bahadur Singh and others* (1), that the adoption which disturbed the natural succession to property must be proved by strict and strong evidence, and he thought, that the proof in a given case of pleaded adoption required strict and almost severe scrutiny. In the face of a legal presumption which is to be drawn in accordance with section 16, the above principle does not hold good. The case had to be judged not by the old law as laid down by the Privy Council but by the law as codified by the new Act. The next proposition upheld by the lower appellate court was, that the execution and registration of a deed of adoption in the case of an illiterate person could only be held as supplying sufficient proof of adoption. This proposition is entirely wrong and contrary to section 16. The law relating to sanctity attaching to registered document does not make a distinction between literate or illiterate executants.

The lower appellate court then observed that the deed of adoption was executed a very short time before the death of the adopter and that circumstance should be looked upon with great suspicion and further added that the courts have invariably refused to treat such a deed as evidence of an intention to adopt. This proposition is equally wrong and cannot be supported as stated. In this case, however, the fact is that there was a lapse of two and a half years between the execution of the adoption deed and Kishan Devi's death. It was then said that in the circumstances, Kishan Devi must have been subjected to some undue influence. This conclusion is not supported by any fact. It is possible that the lady who was old and had no near relations who could legitimately be the subject of her bounty were in existence. It is one thing that she might have been persuaded by Basdev to adopt his child, but that does not mean that he coerced her, or subjected her to undue influence to adopt the child, especially when she had already made a gift and stood to loss or gain nothing by executing the deed of

(1) A.I.R. 1930 P.C. 79.

adoption. In the absence of any evidence of undue influence, no such inference can be drawn in favour of any pressure having been brought to bear on her.

The lower appellate court merely said that this "cannot be ruled out". The matter has to be established either positively or with reasonable probability. In ability to rule out an inference is not tantamount to proof of use of undue influence. To my mind, the circumstances on which the lower appellate court has learned are not sufficient in law to display the legal presumption under section 16. Moreover, the conclusions of the lower appellate court even as to certain factual contingencies are vitiated by errors of law. Most of the conclusions of the lower appellate court are vitiated as they are in the nature of conjectures which are suppositions without a premise of fact. Conjectures is an idea or a notion founded on a probability without any demonstration of its truth. The conclusions are surmises founded upon some possible perhaps probable fact of which there is no positive evidence. These are in the nature of explanations consistent with, but not deducable as reasonable inference from known facts or conditions.

Learned counsel for the appellant referred to *Dhirajlal Girdharilal* v. *Commr. of Income-tax, Bombay* (2), wherein it was observed that if the court of fact whose decision of fact is final, arrived at a decision of fact by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation clearly an issue of law arises. Such a finding of fact is vitiated because of the use of inadmissible material and thereby an issue of law arises.

In *Sree Meenakshi Mills Ltd., Madurai* v. *Commissioner of Income-tax, Madras* (3), it was observed at page 65 that a finding on a question of fact was open to attack as erroneous in law when there was no evidence to support it or if it was perverse.

It was remarked by the Supreme Court in *V. Ramachandra Ayyar and another* v. *Ramalingam Chettiar and another* (4), that

(2) A.I.R. 1955 S.C. 271
(3) A.I.R. 1957 S.C. 49.
(4) A.I.R. 1963 S.C. 302.

if in dealing with a question of fact, the lower appellate court has placed the onus on a wrong party and its finding of fact was the result, substantially, of this wrong approach, that might be regarded as a defect in procedure.

The considerations which weighed with the lower appellate court were conjectural in the above sense as for instance, the fact that Basdev had claimed himself once to be the grandson of Ramji Lal, but was not found to be so by the court and, therefore, it should have been held that the adoption was in the nature of a farce. Similarly, the lower appellate court was influenced by the circumstance that a woman of eighty years had no reason to adopt a child and this should have been treated as a ground for holding that in fact there was no giving and taking in adoption. Another consideration was that if she wanted to adopt a child in accordance with the wishes of her husband, she might have done so earlier as she became a widow sometime in 1915 or 1916.

In this case, it is to be noticed that it was never alleged that the registration was bogus and once there is a registered deed of adoption and the factum of registration has not been doubted, what is open to disprove is non-compliance with the provisions of the Act. The circumstances considered by the lower appellate court do not displace the presumption which has to be raised under section 16 of the Act.

I am satisfied that the lower appellate court disregarded the presumption of section 16 and in doing so, committed an error of law. I would allow the appeal, set aside the decree of the lower appellate court and affirm that of the trial court. The defendant appellant will be entitled to his costs throughout.

K. S. K.

LETTERS PATENT APPEAL

Before Mehar Singh, C.J. and R. S. Narula, J.

RAM DITTA SINGH,—*Petitioner*

versus

THE DEPUTY COMMISSIONER, FEROZEPORE AND OTHERS,—*Respondents*

Letters Patent Appeal No. 382 of 1967

January 10, 1968

Punjab Gram Panchayat Act (IV of 1953)—S. 102—Deputy Commissioner—Whether can suspend a panch when no inquiry against him has been ordered by