

PETITIONER:
RAM DAS ALIAS RAM SURAJ

Vs.

RESPONDENT:
SMT. GADIABAI & ORS.

DATE OF JUDGMENT: 20/11/1996

BENCH:
N.P. SINGH, S.B. MAJMUDAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.B. Majmudar, J.

This appeal by special leave to appeal granted under Article 136 of the Constitution of India brings in challenge the judgment and order rendered by the High Court of Bombay at Nagpur in Second Appeal No. 310 of 1960. By the impugned judgment and order the learned Single Judge of the High Court dismissed the appellant-plaintiff's Second Appeal and confirmed the decree of dismissal of his suit for partition as rendered by the Trial Court and as confirmed by the First Appellate Court. We shall refer to the appellant as plaintiff and respondents 1 to 7, heirs of original defendant, as defendants for the sake of convenience in the latter part of this judgment. The plaintiff's suit against the original defendant Prayag who died pending the litigation was based on the ground that defendant was his uncle. That his father Ram Prasad and the defendant Prayag were sons of one Balbhaddar Teli. That plaintiff's father and the defendant had joint interest in the suit properties which were inherited by their father from his ancestors. That as there was no partition of these properties during the lifetime of his father on the one hand and defendant on the other he had acquired one half undivided share in these properties along with the defendant who had the other half share. He, therefore, filed a Civil Suit No. 289-A of 1960 in the Court of the Civil Judge (Junior Division), Gondia against the defendant for partition and separation of his half share in the properties described in the Schedule attached to the plaint and for mesne profits. According to the plaintiff his grandfather Balbhaddar died in or about the year 1911 leaving behind him his two sons Prayag, original defendant, and Ram Prasad, plaintiff's father. Plaintiff's father Ram Prasad died in or about the year 1938 leaving plaintiff Ram Das as his son, daughter Tulsabai and Kusumabai as his widow. Plaintiff was six months' old when his father Ram Prasad died. According to the plaintiff as he was minor the properties after death of his father used to be managed by the defendant as 'Karta' of the family. Property was thus in joint possession of the parties. That plaintiff was staying with his mother at Nagpur and

defendant used to give his share in the crops every year. After attaining majority he sought for partition and separate possession of his one half share which the defendant refused and hence the aforesaid suit.

The defence of the original defendant was three-fold. Firstly it was contended that plaintiff's mother after death of plaintiff's father Ram Prasad re-married one Ram Charan and before her re-marriage with Ram Charan she gave the plaintiff in adoption to Ram Charan and consequently plaintiff had ceased to belong to the family of defendant and his deceased father Ram Prasad and consequently he had no right, title or interest in the suit properties. The second defence was that in the lifetime of plaintiff's father Ram Prasad there was partition of properties and Ram Prasad was given his share in co-ownership properties and other movables and, therefore, also plaintiff had no right, title and interest in the suit properties which on partition fell to the exclusive share of original defendant. The third defence was that in any case defendant had become owner of suit properties by adverse possession.

After recording evidence the learned Trial Judge came to the conclusion that all the three defences put forward by the original defendant were worth acceptance. In short the learned Trial judge held that the plaintiff was adopted by his step-father Ram Charan before his re-marriage with plaintiff's mother and, therefore, plaintiff had no right, title or interest left in the properties of his deceased natural father. It was also held that there was partition between plaintiff's natural father Ram Prasad and the defendant during the former's lifetime and that the plaintiff's father had squandered away the properties which fell to his share and, therefore, also plaintiff had no share in the suit properties which had fallen exclusively to the share of the defendant on partition. It was also held that in any case the defendant had become owner of the properties by adverse possession.

The plaintiff carried the matter in appeal. The learned Appellate Judge on re-appreciation of evidence came to the conclusion that there was no partition between plaintiff's father on the one hand and the defendant on the other during plaintiff's father's lifetime and, therefore, the finding of the Trial Court on this issue was reversed. The learned Appellate Judge also held that the defendant had failed to provide his defence that the plaintiff was given in adoption by his mother before her re-marriage with Ram Charan. However the learned Appellate Judge confirmed the decree of dismissal of suit on the third ground, namely, that the defendant had become owner of suit properties by adverse possession. Thus out of the three grounds the plaintiff succeeded on two grounds before the Appellate Court but lost on the last ground. The plaintiff carried the matter in Second Appeal being Second Appeal No. 310 of 1969. A learned Single Judge of the High Court agreed with the finding of fact reached by First Appellate Court that there was no partition of properties between the plaintiff's natural father on the one hand and the original defendant on the other. However, it was further held that the defendant's defence about the adverse possession was not established on record as it was not proved that the defendant had ousted the plaintiff so far as the suit properties were concerned. Hence the defence of adverse possession failed. Thus out of the three defences which had originally appealed to the Trial Court two defences were held by the High Court to be unsustainable on the evidence on record. However, so far as the finding of adoption in favour of the plaintiff-appellant

was concerned the learned Single Judge of the High Court while allowing the heirs of the original defendant, respondents herein, to support the decree of dismissal as confirmed by the First Appellate Court on the finding held against them as per the provisions of Order 41 Rule 22 Code of Civil Procedure ('CPC' for short), took the view that plaintiff's adoption by Ram Charan who subsequently became his step-father was well established and the contrary finding of the lower Appellate Court was required to be set aside and that is how the Second Appeal was dismissed on the sole ground that the plaintiff was adopted by Ram Charan and had no longer remained in the family of this deceased father and uncle, original defendant, and consequently could not claim partition of the properties in question.

Mr. Bobde, learned senior counsel appearing for the appellant vehemently submitted that once the two defences of the original defendant were held to be not sustainable by the learned Single Judge of the High Court his appeal should have been allowed and could not have been dismissed by the High Court by interfering with a pure finding of fact reached by the final court of facts on the question of adoption as such as such as exercise was not permissible under Section 100, CPC. In this connection he invited our attention to two decisions of this Court in the case of Madamanchi Ramappa & Anr. v. Muthaluru Bojjappa AIR 1963 SC 1633 and in the case of Bholaram v. Ameerchand (1981) 2 SCC 414 It is now well settled that on a question of fact the decision rendered by the lower Appellate Court is final and the High Court in exercise of its jurisdiction under Section 100, CPC cannot interfere with the findings of fact unless these findings are found to be vitiated in law. It is of course true that the Second Appeal of the plaintiff was filed in 1969 and it had to be decided according to the provisions of Section 100, CPC as applicable prior to their substitution by the new Section 100 as brought on the Statute Book by Civil Procedure Code Amendment Act, 1976 meaning thereby that the appellant in Second Appeal had not to show that the findings reached by the lower Appellate Court involved any substantial question of law. Still however it had to be shown that the findings reached by the lower Appellate Court involved any errors of law as laid down by Section 100(1)(a), (b) and (c) as were applicable prior to 1976. The said provisions as applicable prior to 1976 read as under:

"100(1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court on Any of the following grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or

defect in the decision of the case upon the merits."

It is also true that Section 103, CPC as then applicable to the facts of the present case prior to 1976 permitted the High Court to determine an issue of fact under circumstances laid down under the then existing Section 103 which read as under:

"103. In any second appeal, the High Court may, if the evidence on the record fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100."

However before the High Court could exercise its jurisdiction under Section 100 read with Section 103, CPC applicable at the relevant time in 1969 it had to be shown that the lower Appellate Court had wrongly determined any question of fact by reason of any illegal omission, error or defect as were referred to in Section 100, CPC. Therefore, it had to be demonstrated that the finding of fact reached by the First Appellate Court was affected by any of the errors as contemplated by provisions of Section 100 sub-section (1)(a), (b) and (c), CPC. So far as the facts of the present case are concerned it has to be noted that the First Appellate Court had considered all the relevant evidence on record and reached a conclusion that the defendant had failed to establish his defence that the plaintiff was adopted by Ram Charan prior to re-marriage of his mother with Ram Charan after his natural father's death. Detailed analysis of evidence was made by the First Appellate Court on point no. 1 for determination to the effect whether the appellant is the adopted son of Ram Charan. In paragraphs 8 to 12 of the judgment of the First Appellate Court all the relevant evidence was examined. The First Appellate Court disbelieved defence witness Kaluram who was examined by original defendant to prove his case about the adoption of plaintiff by Ram Charan. The First Appellate Court also noted that the remaining witness Babu Lal who is said to have remained present at the time of adoption by Ram Charan was not reliable. On the other hand versions in plaintiff's evidence as P.W.3 and his witness Devidin P.W.2 were held reliable. The First Appellate Court also considered that non-examination of plaintiff's mother would not result in drawing any adverse inference against the plaintiff's case. The circumstance relied upon by the defendant to prove plaintiff's adoption by Ram Charan, namely, that in primary school at Nagpur name of plaintiff's father was shown as Ram Charan, was found to be not a clinching one as it was an admitted position that after his natural father's death plaintiff was staying with his step-father at Nagpur as he was a minor staying with his mother who had remarried Ram Charan. Thus relevant evidence was reappreciated by the First Appellate Court and a clear finding of fact was reached that plaintiff was not adopted by Ram Charan, his step-father, prior to latter's re-marriage with his mother and plaintiff was merely staying with him as his step-son. This pure finding of fact is interfered with by the learned Single Judge in Second Appeal while exercising jurisdiction under Section 100, CPC. In our view such a finding of fact based on relevant evidence as arrived at by the First

Appellate Court was final. It was neither contrary to law nor to some usage having force of law. Nor had the First Appellate Court failed to determine any material issue of law or usage having the force of law. Nor was there any substantial error or defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force which might possibly have produced error or defect in the decision on this question. In short none of the grounds contemplated by Section 100(1)(a), (b) and (c) existed on the record of the case to entitle learned Single Judge of the High Court to interfere with the finding on adoption of plaintiff while resolving the matter under Section 100, CPC, even on the basis that simpliciter error of law also could be interfered with in those days prior to 1976. However our attention was invited to one observation of the learned Single Judge of the High Court in paragraph 16 of the impugned judgment wherein the learned Judge has noted that the lower Appellate Court omitted to take into account the circumstance that the marriage of the sister of the plaintiff was performed not by the defendant but by Ram Charan and that there was nothing to show that it was defendant who spent for her marriage and that the plaintiff was required to accept a job of Rs. 10 p.m. So far as this latter aspect is concerned a mere look at the decision of the First Appellate Court shows that the learned Judge as a final court of facts while deciding the plaintiff's first appeal had already considered the circumstance that the appellant had admitted in his evidence that he was saving for about 10 to 12 years in different concerns at Nagpur and that there was his admission that he passed a receipt regarding his salary to the Dutton Printing Press. However the First Appellate Court had not placed reliance on this circumstance for accepting the defendant's version that from this circumstance alone it could be inferred that the plaintiff must have been adopted by Ram Charan. Thus it is not correct to say that this circumstance was omitted to be considered by the First Appellate Court. However the first aspect, namely, expenses on the occasion of marriage of the plaintiff's sister were incurred by their step-father Ram Charan, was a circumstance which was not considered by the First Appellate Court. But in our view this circumstance is totally irrelevant for deciding the question whether the plaintiff was the adopted son of Ram Charan. It is well established on record and there was no dispute about the same that plaintiff's mother re-married Ram Charan and at the time of her re-marriage plaintiff and his sister Tulsabai were the children from her first husband; plaintiff's father. On re-marriage plaintiff's mother along with these two children went and stayed with Ram Charan. Thereafter if Ram Charan spent money on their upkeep and upbringing as step-children and even if he might have spent on the occasion of marriage of his step-daughter Tulsabai it would not mean that the plaintiff would, therefore, be treated to have been adopted by his step-father. Therefore, the aforesaid circumstance of marriage expenses being incurred by Ram Charan so far as his step-daughter Tulsabai was concerned, was totally an irrelevant circumstance which had no impact on the finding of plaintiff's adoption by Ram Charan. It, therefore, cannot be said that any material evidence having a direct impact on the decision of the case on merits was ignored by the First Appellate Court as the final court of facts while arriving at the finding that the plaintiff was not adopted by Ram Charan. Consequently it must be held that the learned Single Judge of the High Court was not legally justified in interfering with the clear

finding of fact arrived at by the First Appellate Court in favour of the plaintiff on the issue of adoption and the First Appellate Court's finding that the plaintiff was not adopted by Ram Charan must be treated to have been finally established on record. Once that conclusion is reached, result automatically follows. The other two defences raised by the original defendant are not accepted by the High Court. Consequently there remains no impediment in the way of the plaintiff in getting his suit decreed. In fact once the finding of adoption as arrived at by the High Court goes out of the way of the plaintiff, and as on both the remaining defences the learned Single Judge has held in favour of the plaintiff his second appeal was required to be allowed instead of being dismissed. We have, therefore, to pass an appropriate order in this connection.

In the result this appeal is allowed. The judgment and decree of dismissal of plaintiff's suit as passed by the Trial Court and as confirmed by the First Appellate Court as well as by the High Court are set aside. The plaintiff's suit for partition and separation of his one half share in the suit properties as described in the Schedule attached to the plaint is decreed. A preliminary decree for partition as per the provisions of Order 20 Rule 18, CPC is ordered to be passed in favour of the plaintiff-appellant. In the facts and circumstances of the case there will be no order as to costs.