14 SCOB [2020] AD

Appellate Division

PRESENT

Mr. Justice Muhammad Imman Ali
Mr. Justice Mirza Hussain Haider
Mr. Justice Abu Bakar Siddiquee

CIVIL APPEAL NO. 150 OF 2015

(From the judgement and order dated the 2nd of June, 2014 passed by the High Court Division in Civil Revision No.1134 of 2005)

Palash Chandra Saha **... Appellant**

= Versus =

Shimul Rani Saha and others **... Respondents**

For the Appellant	:	Mr. A.J. Mohammad Ali Senior Advocate, instructed by Mr. Zainul Abedin Advocate-on-Record
For Respondent Nos.1-3	:	Mr. Mahbubey Alam Senior Advocate with Mr. Probir Neogi, Senior Advocate, instructed by Mr. Md. Taufique Hossain Advocate –on-Record
For Respondent No.4	:	None represented
Date of hearing	:	05.11.2019 and 14.01.2020
Date of judgement	**:**	**The 22nd day of January, 2020**

Suit for declaration, Adoption;

The adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.
... (Para -12)

According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet.* Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts. ... (Para -12)

Saha are of the business community and are not of the scheduled caste, therefore not Sudra. ... (Para -17)

Even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste. ... (Para -25)

J U D G E M E N T

MUHAMMAD IMMAN ALI, J:-

1. This civil appeal, by leave, is directed against the judgement and order dated 02.06.2014 passed by a Single Bench of the High Court Division in Civil Revision No.1134 of 2005 making the Rule absolute.

2. The facts of the case, in short, are that Palash Chandra Saha, the petitioner herein as plaintiff filed Title Suit No.31 of 2000 in the Court of the Senior Assistant Judge, Dagonbhuiya, Feni seeking a declaration that he is the adopted son of Khitish Chandra Saha, who was the husband of Gouri Rani Saha (defendant No.4) and the father of Simul Rani Saha (defendant No.1).

3. The plaintiff stated, *inter alia,* that he was born on 3rd Bhadra 1375 B.S. His natural parents were late Nishi Kanta Das and late Charubala Das. His natural mother died when he was six months old. Since late Khitish Chandra Saha and his wife defendant No.4 had no child they decided to adopt the plaintiff. Their offer/proposal to adopt the plaintiff was accepted by his natural father. Accordingly, late Nishi Kanta Das handed over the plaintiff to Gouri Rani Saha (defendant No.4) and her husband Khitish Chandra Saha. On 15th Falgun, 1375 B.S. the adoption ceremony of the plaintiff was held and since then he had been living in his adoptive father's house. After his adoption, the plaintiff had no relationship with his natural father. While he was brought up in his adoptive parents' house, their only daughter Simul Rani Saha, defendant No.1 was born. Khitish Chandra Saha got the plaintiff admitted to school and wrote his own name as the father of the plaintiff in all his school documents. In the S.S.C. and H.S.C. certificates of the plaintiff and also in the voter lists the father's name of the plaintiff has been recorded as Khitish Chandra Saha. On 07.09.1993 Khitish Chandra Saha filed Title Suit No.69 of 1993 and in that suit also he admitted the plaintiff as his adopted son. After the death of Khitish Chandra Saha the plaintiff performed all rituals as his son. Defendant No.4 has been living with the plaintiff and his wife. After the death of Khitish Chandra Saha the plaintiff allowed defendant No.1 and her family to stay with him for a temporary period. Defendant No.1 in order to deprive the plaintiff from the property he inherited from Khitish Chandra Saha, has been declaring that the plaintiff is not the adopted son of late Khitish Chandra Saha. Hence, the plaintiff was constrained to institute the suit.

4. Defendant No.1 and her 2 sons-defendant Nos.2 and 3 contested the suit by filing written statement. They contended, *inter alia*, that the plaintiff is not the adopted son of KhitishChandra Saha. Khitish Chandra Saha never adopted the plaintiff as his son. Khitish Chandra Saha was a rich man having huge property including a sweetmeat shop. The plaintiff was a cashier in that shop. In order to avoid income tax Khitish Chandra Saha purchased some property in the benami of the plaintiff and others. Khitish Chandra Saha having learnt that the plaintiff was trying to dispose of those property purchased by Khitish Chandra Saha in the benami of the plaintiff, filed Title Suit No.69 of 1993 in the Court of Assistant Judge, Dagonbhuiyan against the present plaintiff for declaration that the present plaintiff was a

mere 'benamdar' of the said property. The said suit was decreed. Since Khitish Chandra Saha had no son, defendant No.l and her husband stayed in the house of Khitish Chandra Saha even after her marriage. According to Hindu Law, defendant Nos.2 and 3, the sons of defendant No.l, have inherited all the moveable and immovable properties of late Khitish Chandra Saha. Defendant No.4 developed some bitter feelings with her daughter-defendant No.l and taking advantage of this situation the plaintiff has filed this present suit. The plaintiff is neither the foster son nor the adopted son of late Khitish Chandra Saha which he himself stated in the plaint of Title Suit No.69 of 1993. The plaintiff also did not claim himself to be the adopted son of late Khitish Chandra Saha in his written statement filed in Title Suit No.69 of 1993. The plaintiff filed the present suit long after the death of Khitish Chandra Saha on false claim and allegations.

5. Upon hearing the parties and considering the evidence and materials on record the learned Senior Assistant Judge, Dagonbhuiyan, Feni by his judgement and decree dated 22.05.2002 decreed the suit finding that the plaintiff was the legally adopted son of Khitish. Then defendant Nos.1 to 3 preferred Title Appeal No.59 of 2002 before the learned District Judge, Feni. On transfer the appeal was heard by the learned Joint District Judge, First Court, Feni, who by his judgement and order dated 02.11.2004 dismissed the appeal affirming the judgement and order passed by the trial Court. 6. Being aggrieved, the contesting defendants filed Civil Revision No.1134 of 2005 before the High Court Division and obtained Rule, which upon hearing the parties was made absolute. Hence, the plaintiff filed Civil Petition for Leave to Appeal No.2407 of 2014 and leave was granted to consider the following grounds:

> "I. That in this suit the plaintiff adduced sufficient evidence, both-oral and documentary, to prove that he was adopted as son by Khitish Chandra Saha and that both the Courts of facts have examined and considered all these evidence adduced by the plaintiff and came to a concurrent decision that the plaintiff is adopted son of late Khitish Chandra Saha.
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> II. That these concurrent findings and decision of the Court of facts is not at all based on the findings and decision arrived at in earlier Title Suit No.69 of 1993 as to adoption of the plaintiff by Khitish Chandra Saha; the High Court Division without adverting to the concurrent findings and decision of the Courts of facts and without considering the evidence adduced by the plaintiff, most erroneously held that the Courts below decreed the suit of the plaintiff relying on the decision of the earlier Title Suit No.69 of 1993 only.
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> III. That the High Court Division did not at all apply its judicial mind in setting aside the concurrent finding of the Courts of facts and most erroneously set aside the concurrent findings of the Courts below without considering the evidence on record at all.
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> IV. That this impugned judgment of the High Court Division is erroneous and cannot be sustained in law and in the circumstances leave to appeal needs to be granted."

7. Mr. A.J. Mohammad Ali, learned Senior Advocate appearing on behalf of the appellant made submissions in line with the grounds upon which leave was granted. He also submitted that the appellate Court as well as the trial Court concurrently found on evidence, adduced in the present suit, aside from the finding of adoption given in Title Suit No.69 of 1993, that Khitish Chandra Saha adopted the plaintiff-petitioner and brought him up as his son as per the relevant rules of the Hindu Law, but the High Court Division without referring to the evidence and without adverting to the concurrent findings of fact of the courts below set aside their judgements and decrees. As such, the impugned judgement and order cannot be sustained. He further submitted that the High Court Division could not point out any sort of misreading or non-consideration of evidence by the Courts below in arriving at the concurrent finding that the plaintiff-petitioner was validly adopted and brought up as the adopted son by Khitish Chandra Saha. He also submitted that neither the trial Court nor the

appellate Court considered the finding as to adoption given in the judgement of Title Suit No.69 of 1993 to be a *res judicata* and the Courts below did not base their decision on such finding, which was considered as a piece of evidence simply. He submitted that in earlier Title Suit No.69 of 1993, although no issue was framed as to adoption, both the parties chose to join issue upon that point without protest, and impliedly the said issue was dealt with in the suit; so, the decision on the point will operate as *res judicata* between the parties.

8. Mr. Mahbubey Alam, learned Senior Advocate appearing for respondent Nos.1-3, made submissions in support of the impugned judgement and order of the High Court Division. He also submitted that the High Court Division rightly set aside the judgement and decree of both Courts of facts holding that the findings and decision arrived at in earlier Title Suit No.69 of 1993 as to adoption of the plaintiff by Khitish Chandra Saha will not operate as *res-judicata* in the present suit and that both the courts below failed to appreciate this vital legal aspect, and thus the Courts committed wrong in decreeing the suit in relying on the incidental findings made in the judgement of the previous Title Suit No.69 of 1993. He further submitted that the appellate Court failed to consider that the limitation for filing the present suit started from the date of filing Civil Suit No.69 of 1993 by late Khitish Chandra Saha who claimed in his plaint that the plaintiff is not his adopted son and as such the appellate Court committed an error of law resulting in an error in the decision occasioning failure of justice in not holding that the suit in question was barred by limitation having been filed long after six years of accrual of cause of action under clause 119 of Limitation Act, 1908 and as such, the appeal is liable to be dismissed. He submitted that the appellate Court committed an error of law resulting in an error in the decision occasioning failure of justice in dismissing the appeal in mis-appreciating the evidence of late Khitish Chandra Saha in Civil Suit No.69 of 1993 denying the present plaintiff as his adopted son, and in taking into consideration the evidence of witnesses in Civil Suit No.31 of 2000 in that the witnesses and both the courts below confused a foster son with an adopted son, the former having no legal status of a son. He lastly submitted that both the Courts below failed to appreciate the distinction between fostering and adoption and in not considering the evidence of plaintiff's witnesses in the light of the assertion of late Khitish Chandra Saha that the plaintiff was not his adopted son but foster son and thus committed error of law resulting in an error in the decision occasioning failure of justice in decreeing the suit and dismissing the appeal and as such the appeal is liable to be dismissed.

9. We have considered the submissions of the learned Advocates appearing for the parties concerned, perused the impugned judgement and order of the High Court Division and other connected papers on record.

The moot question in this appeal concerns the validity of the adoption of the appellant Polash Chandra Saha by Khitish Chandra Saha, husband of Gouri Rani Saha-respondent No.4, father of respondent No.1 Shimul Rani Saha and grandfather of Chayan Chandra Saha and Dahan Chandra Saha (minor).

10. Polash Chandra Saha as plaintiff claims that he was adopted by Khitish Chandra Saha and his wife Gouri Rani Saha under Hindu Law. In support of his claim he relied upon the findings in an earlier judgement in Title Suit No.69 of 1993 where it was found that he was legally adopted. The earlier Title Suit No.69 of 1993 was filed by Khitish Chandra Saha against Krishna Chandra Das @ Polash Chandra Saha with a claim that certain property purchased in the name of Polash was his *benami* property.

11. When delivering the judgement in Title Suit No.69 of 1993 the trial Court, while decreeing the suit, observed that Polash had been taken into the family of Khitish Chandra Saha at the age of 6(six) months, his name had been changed in all the records, the business established by Khitish was named "Polash Cabin" and the purchase of the property in that suit in the name of Polash was evidence of his adoption. It was further observed that in Bangladesh apart from 'Duttohom' if the formalities are observed the adoption will be lawful according to the principle of factum valet. The trial Court in that suit concluded that defendant No.1 of that suit Polash Chandra Saha was indeed the adopted son of the plaintiff of that suit, Khitish Chandra Saha.

12. According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet.* Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts.

So far as adoption under Hindu Law is concerned, we may refer to Molla's Principles of Hindu Law (18th Edition) wherein article 480 provides as follows:

"480. WHO MAY BE ADOPTED

Subject to the following rules, any person who is a Hindu, may be taken or given in adoption:

(1) the person to be adopted must be a male;

(2) he must belong to the same caste as his adopting father; thus, a Brahman cannot adopt a Kshatriya, a Vaisya or Sudra; it is not necessary that he should belong to the same sub-division of the caste;

(3) he must not be a boy, whose mother the adopting father could not have legally married; but this rule had been restricted in many cases to the daughter's son, sister's son, and mother's sister's son. This prohibition, however, does not apply to Sudras. Even as to the three upper classes, it has been held that an adoption, though prohibited under this rule, may be valid, if sanctioned by custom."

Thus it is quite clear according to article 480(2) that the adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.

13. There are 4(four) primary castes in the Hindu religion namely, Brahman, Kshatriya, Vaisya and Sudra.

The claim of the appellant before us is that Saha is a sub-caste of Sudra and for that reason the ritual after his death was done after 30 days which is the customary period in case of a person belonging to the Sudra caste. The learned Advocate for the appellant empathetically argued that Saha is a sub-caste of Sudra and hence the adoption was legal.

14. In support of his argument Mr. A.J. Mohammad Ali, produced before us information obtain from the internet (Quora) where it has been opined that "although most Saha may be of trading community/Baisya but there are some Saha mostly from West Bengal are bootleggers by profession, they are Shudra/ Scheduled Caste. So a Saha can either be Baishya or Sudra community. So for practical purpose some use the term Sunri (bootleger) Saha to avoid this confusion."

The learned Advocate for the respondent submitted that Saha is of the Vaisya caste and the appellant whose name at birth was Krishna Chandra Das was of the Sudra caste and, therefore, the adoption was unlawful under provisions of Hindu Law as the adoptive father and the adopted son were of two different castes.

15. Mr. Probir Neogi, learned Advocate who appeared for the respondent placed before us certain information obtained from the internet (Wikipedia) where it has been stated that **Baishya Saha** is a Bengali Hindu trading caste traditionally known to have the occupation of grocers, shopkeepers, and dealers of various goods. Some are money lenders and farmers. Some use *Saha* as their surname, but others use Bhowmik, Chowdhury, Das, Majumder, Mallick, Poddar, Roy Chowdhury, Sarker and Sikder, Roy, among others.

16. We find from the case of **Pankaj Kumar Saha Vs. Sub-Divisional Officers, Islampur and Ors.(1996) 8SCC 264** that in the State of West Bengal Sunri excluding Saha has been declared to be Scheduled caste. It was observed as follows: "Sunri (excluding Saha) is a Scheduled Caste for the purpose of State of West Bengal. The petitioner admittedly bears the name Saha. The authorities found as a fact that for over a century the petitioner's family are Saha by caste. The President after consultation with the Governor, has excluded 'Saha', a liquor business community as Scheduled Caste. Though some Scheduled Castes by name Sunri adopted tapping as profession, they suffer from untouchability while Sahas, liquor business community like Sethi balija, Edigal or Gowda in Andhra Pradesh are not Scheduled Castes."

17. In view of the above, we conclude that Saha are of the business community and are not of the scheduled caste, therefore not Sudra. Hence, Khitish Chandra Saha being a Baishya could not adopt a child from the Sudra caste.

18. Both the trial Court and the appellate Court found that the plaintiff was able to prove that he was the lawfully adopted son of Khitish Chandra Saha. We note that the trial Court, in particular relied upon the evidence of defendant No.4 who is the adoptive mother of the plaintiff, who deposed in support of the adoption in spite of the fact that the evidence would deprive her of her life interest in the property as well as the interest of her own biological daughter (defendant No.1). However, this conclusion is only partly correct in law because Gouri Rani (defendant No.4) would benefit from having life interest in her late husband's property whether or not the plaintiff is the lawfully adopted son of her late husband. It is true that her biological daughter and the sons from that daughter (defendant Nos.2 and 3) would be totally deprived if the plaintiff inherited the property as the adopted son of Khitish. In fact Gouri Rani Saha did not depose to the detriment of her own interest.

19. We also see in the record papers relating to Miscellaneous Case No.62 of 1996 wherein Gouri Rani prayed for a succession certificate claiming herself to be the only heir of late Khtish Chandra Saha. This was admitted by defendant No.4 and the plaintiff in their respective cross examinations.

20. The trial Court also considered the evidence to the effect that the "Shradha" ritual after death takes place after 15 days in case of Baishya and after 30 days in case of Sudra and, therefore, Khitish was Sudra by caste. However, it appears that the trial Court did not consider the evidence of P.W.2 who deposed that he is Purohit for Polash's biological father who was Sudra and he did not attend any rituals of the Saha gutra, thereby confirming that they are a different caste. In his cross examination P.W.2 categorically stated that he conducts the Puja of the Namasudras and does not attend "Shradha" of Sahas. He also explained that he only attended the adoption ceremony of Polash because he was his follower. It is, therefore, clear from the evidence of P.W.2 that Saha and Sudra are two separate castes. We do not find any evidence from the deposition of the witnesses to the effect that Polash and Khtish are of two sub-castes of Sudra caste.

21. In decreeing the suit the trial Court took into consideration the finding of another Court in the earlier Title Suit No.69 of 1993. In that suit, Khitish as plaintiff had claimed that property purchased in the name of Polash was 'benami' property which he (Khitish) had purchased with his own money. That suit was decreed holding that the property was purchased by Khitish and that Polash was his benamder. However, although there was no issue with regard to Polash being adopted by Khitish, that Court found that there was a legal adoption. In the instant suit the trial Court took the finding of adoption in the earlier suit as res-judicata observing that Khitish did not challenge the finding that Polash was legally adopted.

22. However, we cannot ignore the fact that the finding in Title Suit No.69 of 1993 with respect to adoption of Polash by Khitish was a mere obiter. It was not an issue in the suit and since the suit was decreed in favour of Khitish he was not required to appeal against an observation which was not the subject matter of that suit.

23. We note from the judgement in Title Suit No.69 of 1993 that having concluded that the defendant (Polash) was the plaintiff's (Khitish's) benamder the Court then went on to consider the relationship of the parties as an afterthought for the sake of completeness. That was not at all necessary. We also note that the consequent appeal filed by Krishna Chandra Saha (Polash's name at birth) being Civil Appeal No.73 of 1994 was dismissed on 17.08.1998 thereby declaring title in the suit land in favour of Khitish finding Polash as his benamder.

24. Although defendant No.4 Gouri Rani deposed in favour of the plaintiff and also submitted a Solenama in his favour, she categorically stated in her cross examination that she is from the Saha gutra and the plaintiff is from Namasudhra caste and that each caste has different Brahman. However, both the trial Court and the appellate Court appear to have overlooked this admission that they are from two distinct castes. She also admitted that after her husband's death the tax returns for their business was submitted in her name. This tends to support Khitish's claim in Title Suit No.69 of 1993 that Polash was not his adopted son but only taken as a foster son due to the fact that his mother had died when he was a baby and his wife was childless at that time.

25. From the above discussion of facts and evidence it transpires that Polash was certainly taken into the family of Khitish and he adopted the title Saha. However, even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste.

26. Initially Mr. A.J. Mohammad Ali argued that the prohibition of cross-caste adoption had been lifted due to the promulgation of the Caste Disabilities Removal Act, 1850. But he abandoned the argument when Mr. Neogi pointed out that the said law was not applicable in Bangladesh.

27. Mr. Neogi has sought to distinguish between the concept of adoption "`ËK" and fostering "cvjK". He drew our attention to the written statement filed by Polash in Title Suit No.69 of 1993 wherein he stated "...৫-৬ বৎসর বয়স হইতে বাদীর আপন পুত্রের ন্যায় বাদীর সংসারের হাল শক্ত হাতে ধরিয়া বাদীর সংসারের যাবতীয় কার্য সুষ্ঠুরূপে পরিচালনা করিয়া বাদীর সংসারের যথেষ্ট উন্নতি সাধন করিয়াছে এবং করিতেছে। .... এই বাদী বাদীর পালক পুত্র হইলেও কখনো বাদীকে পালক পিতা হিসাবে না জানিয়া জন্মদাতা

পিতার ন্যায় শ্রদ্ধা ভক্তি করিত এবং করিতেছে।" He submitted that Polash never claimed himself to be "adopted son" (`ËK cyÎ) of Khitish Chandra Saha. We find substance in such submission particularly in view of the admission by Gouri Rani in her application for a succession certificate that Khitish did not have any other heir.

28. Moreover, we cannot overlook the fact that there was no evidence to support the contention that Saha is a sub-caste of Sudra. On the contrary the evidence of Gouri Rani and P.W.2 clearly suggest that the two families are from two distinct castes. Furthermore, the case of **Pankaj Kumar Saha** cited above clearly shows that Saha are not of a Schedule Caste. Hence there could not be any adoption by a person of the Saha gutra (not being a schedule caste) of a child from a Sudra gutra (being a schedule caste).

29. We find from the cross examination of the Purohit (P.W.2) that as a Brahmin he conducted the ritual/ceremonies of the Sudra caste. He categorically stated that Khitish was a Saha and he never attended any of their Puja or Shradha ceremony. He only conducted the dattak function for Polash because he was his RRevb-(follower). The question of limitation was not discussed by the High Court Division. However, the learned Advocate for the respondents submitted that the appellate Court erred in not holding that the suit was barred by limitation.

30. The relevant law is found in article 119 of the Schedule to the limitation Act, which provides that in order to obtain a declaration that an adoption is valid the suit must be filed within six years from the date when the rights of the adopted son, as such, are interfered with. Mr. Alam submitted that Khitish in his plaint in Title Suit No.69 of 1993 claimed that Polash was not his adopted son, and therefore, the period of limitation commenced in 1993. Hence the suit filed in the year 2000 was barred. We find substance in the submission of Mr. Alam. We find from the plaint of Title Suit No.69 of 1993 that Khitish categorically stated that the defendant (Polash) had no right in law to lay claim as an adopted son. Such denial by the claimed adoptive father gives rise to the cause of action. Hence, we are of the view that the suit is barred by limitation.

31. In view of the above discussion, we do not find any illegality in the impugned judgement, and accordingly the appeal is dismissed, without, however, any order as to costs.