

A RAJGOPAL (DEAD) BY LRS.  
v.  
KISHAN GOPAL AND ANR.

SEPTEMBER 16, 2003

B [Y.K. SABHARWAL AND B.N. AGRAWAL, JJ.]

*Hindu Adoptions and Maintenance Act, 1956—Adoption prior to the coming of the Act—‘Dwyamushyayana’ form of adoption taking place—Suit for declaration of title and recovery of possession claiming right of inheritance—Trial Court decreeing the suit—First appellate court holding that there was no adoption in the said from—High Court holding that the question of adoption has attained finality in earlier round of litigation—Correctness of the—Held, on facts, the High Court, in earlier round, did not decide the question of adoption but had remanded back to first appellate court to decide the appeal afresh—No specific averment in the pleadings on the question of adoption—Appellate court coming to a finding that no proof of agreement between natural father and adoptive father as required in ‘Dwyamushyayana’ form of adoption—Hence, interference with the said finding of fact by High Court in second appeal is not justified—Civil Procedure Code, 1908, Section 100.*

E One M had two wives. M Had two sons K and G from the first and second wife respectively. M and his brother U belonged to Mantri family. Since U had no issue, he adopted G in ‘Dwyamushyayana’ form as per the contention of the respondents. As per the custom, this form prescribes that there must be an agreement between the natural father and adoptive father to the effect that the person given in adoption shall be the son of both and thus entitled to inherit the properties of both the fathers. G married C and had two sons, who are the respondents. Appellant no. 3 was the wife of K from whom she had two sons - appellant nos. 1 and 2. G and the respondents were in joint possession of the properties of U and M along with K and the appellants. After the death of K and G, the appellants denied joint family property rights to U and the respondents.

H The respondent-plaintiffs filed a suit for declaration of title recovery of possession of suit properties from appellant-defendants

before trial court contending that appellant no. 3 was not the legally wedded wife and appellant nos. 1 and 2 are not the legitimate children of K. The appellants objected to the suit contending that G was given in adoption in ordinary form and not in 'Dwyamushyayana' form and so G had ceased to have a right of inheritance in the estate of his natural father M; and that on the death of K, the entire property devolved on the appellants as they were the only legal heirs. The trial court dismissed the suit of the respondents on the ground of limitation. The trial court held that G was given in adoption by his father M and not by his brother K and upheld the other contentions of the appellants. The first appellate court confirmed the judgment of the trial court and dismissed the appeal of the respondents. On the question of adoption, the appellate court observed that the adoption was invalid since G was given in adoption by his brother K and not by his father M. The respondents filed a second appeal before High Court. The appellants also filed cross objections before the High Court on the finding on adoption. The High Court remanded the matter back to the first appellate court for deciding the appeal afresh on merits since the question of limitation was not correctly decided. In view of the remand, the High Court did not consider the cross objections of the appellants on merits. Before the first appellate court, a petition under Order 41 Rule 27 CPC was made by the parties for production of additional evidence. The first appellate court remanded the matter back to the trial court since witnesses were required to be examined before admitting the additional evidence.

The trial Court, upon remand, partly decreed the suit with respect to half share of the respondent-plaintiffs besides holding that the suit was filed in time; that the adoption was in 'Dwyamushyayana' form; that the adoption of G was given by K and not by his father M; and that appellant no. 3 is the legally wedded wife of K and appellant nos. 2 and 3 are thus the legitimate children of K. The appellants filed an appeal before the first appellate court. The respondents also filed an appeal before the appellate court questioning the legitimacy of the marriage of appellant no. 3 with K. The first appellate court dismissed the appeal of the respondents and allowed the appeal of the appellants. The suit was dismissed on the ground of limitation besides holding that the adoption was not in 'Dwyamushyayana' form and further estopped

**A** the respondents from claiming right of inheritance by saying that there was no valid adoption since G was not given in adoption by his father M. High Court allowed the second appeal of the respondents by holding that the first appellate court had no jurisdiction to go into the question of adoption since in the earlier round, the High Court had held in favour of the respondents by dismissal of cross objections of the appellants, which has attained finality. Hence these appeals.

Allowing the appeals, the Court

**C** HELD : 1.1. The High Court in the second appeal, on earlier occasion, has remanded back to the first appellate court for deciding the entire matter afresh as in its opinion, the question of limitation was decided by the first appellate court without taking into consideration certain factual matrix. As it was not a case of limited remand but an open remand, the High Court did not go into the merit of findings recorded by the first appellate court on other questions including adoption and after setting aside the judgment and decree of the first appellate court, remanded the matter to the appellate court for deciding the appeal afresh, meaning thereby on all the points. So far as the cross objection is concerned, as the judgment and decree of the first appellate court was set aside, the same was rendered infructuous and accordingly dismissed. The High Court has committed an error of law in observing that the findings on the question of adoption recorded in favour of the respondent-plaintiffs by the first appellate court on the earlier occasion before remand by the High Court had been confirmed by it while passing the remand order for which there is absolutely no foundation and the same is contrary to the materials on record. [739-D-G]

**G** 1.2. Since G was given in adoption much before the coming into force of the Hindu Adoptions and Maintenance Act, 1956, the parties will be governed by the law which was in force at the time of adoption. From the pleadings, it is clear that the respondent-plaintiffs had nowhere averred in the plaint that G was not given in adoption by his father M but brother K. In the absence of any pleading whatsoever on the question as to whether G was given in adoption by his father M or brother K, there was no lis between the parties on this question, as

such courts could not have gone into the same even if some evidence was adduced and the lower appellate court rightly decided the question against the respondent-plaintiffs. [740-C-G] A

*Bhagat Singh & Ors. v. Jaswant Singh*, AIR (1966) SC 1861, referred to. B

*Siddik Mahomed Shah v. Mt. Saran*, AIR (1930) PC 57 referred to.

*Mulla's Hindu Law* 18th Edition, referred to.

1.3. In every case of absolute 'Dwyamushyayana' form of adoption, there must be an agreement to the effect that the person given in adoption shall be the son of both i.e. the natural father as well as adoptive father and such an agreement must be proved like any other fact by the party alleging the same. The first appellate court, after taking into consideration and discussing the oral and documentary evidence threadbare, recorded a finding that the respondent-plaintiffs failed to prove that there was an agreement between the natural and adoptive fathers to the effect that the adopted son shall be treated to be the son of both of them and entitled to inherit their properties. Hence, the adoption of G was in ordinary form. The finding on this point recorded by the first appellate court, which was final court of fact, was a pure finding of fact and could not have been interfered with by the High Court in exercise of powers conferred upon it under Section 100 of the Code of Civil Procedure, 1908 more so when no question of law, much less substantial one, was involved. There is no ground whatsoever to interfere with the said finding recorded by the final court of fact. [744-A, B, G-H, 745-A, B] C  
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*M.Ct. Muthiah & Anr. v. Controller of Estate Duty, Madras*, AIR (1986) SC 1863, referred to. G

*Nilmadhub Doss v. Bishumber Doss & Ors.*, (1869) 13 Moore's Indian Appeals 85; *Wooma Dae v. Gokoolanund Dass*, ILR (1878) 3 Calcutta 587; *Laxmipatirao Shrinivas Deshpande v. Venkatesh Tirmal Deshpande*, AIR (1916) Bombay 68 and *Mohan Mal v. Mula Mal & Ors.*, (1925) 89 Indian cases 688, referred to. H

**A** *Stokes' Hindu Law* pages 65, 610, 641 and 646; *Mayne's treatise on Hindu Law & Usage* 14th Edition; *Mulla on Principles of Hindu Law* 18th Edition and *Raghavachariar on Hindu Law* 9th Edition, referred to.

**B** CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3829-3830 of 2000.

From the Judgment and Order dated 20.7.98 of the Karnataka High Court in R.S.A. No. 714 and 789 of 1992.

S.S. Javali, P.R.Ramasesh and Ms. Vandana Jalan for the Appellants.

**C** V.A. Mohta, Manoj Prasad, K.K. Srivastava and Nilakanta Nayak for the Respondents.

The Judgment of the Court was delivered by

**D** **B.N. AGRAWAL, J. :** These appeals by special leave have been filed by the heirs of defendant No. 1-Rajgopal (since deceased) against the judgment rendered by Karnataka High Court whereby judgment and decree passed by the first appellate court dismissing the suit have been set aside and those of the trial court decreeing the suit restored.

**E** The plaintiffs/respondents filed a suit for declaration of title in relation to the properties described in schedule appended to the plaint and for recovery of possession thereof. Their case, *inter alia*, was that one Moti Lal had two wives. From the first wife, he had a son kishan Lal and from the second, son Goverdhan Das and the properties in question belonged to their joint family. Moti Lal and his brother Uday Ram belonged to Mantri family. In their community, there was a custom of adoption in 'Dwyamushyayana' form, according to which the person adopted would not sever his interest in the estate of natural parents and, at the same time, would acquire interest in the properties of adoptive father upon his adoption, provided there was an agreement between the natural father and the adoptive father to the effect that he will be considered to be son of both of them. As Uday Ram had no male issue, he adopted Goverdhan Das in 'Dwyamushyayana' form. One chandra Bai was the wife of Goverdhan Das and Kishan Gopal-plaintiff No. 1 and Srinivas-plaintiff No. 2 were their sons. Sundra Bai-defendant No. 3 was the keep of kishan Lal from

**H**

whom he had two sons, namely, Rajgopal -defendant No. 1 and Ramgopal-defendant No. 2 and as Sundra Bai was not legally married wife of Kishan Lal, defendant Nos. 1 and 2 were illegitimate children of Kishan Lal from her. Goverdhan Das and his sons were in joint possession of the properties of Uday Ram with him as well as those of Moti Lal with Kishan Lal and his children. Kishan Lal died in the year 1939 and Goverdhan Das in 1945. Thereafter as the sons of Kishan Lal denied right of the plaintiff Nos. 1 and 2 and their father in the properties which belonged to the joint families of Kishan Lal and Goverdhan Das, the same necessitated filing of the present suit.

In the suit, defendants entered appearance denying claim of the plaintiffs that the adoption was in 'Dwyamushyayana' form and according to them, the same was in ordinary form, as such Goverdhan Das upon his adoption ceased to have any right in the estate of natural father-Moti Lal and upon the death of Kishan Lal, entire property devolved upon his two sons who were legitimate ones as Sundra Bai was legally married wife of Kishan Lal, accordingly plaintiffs had no right to file the present suit.

In support of their respective cases, both the parties adduced oral and documentary evidence and the trial court dismissed the suit on grounds that the same was barred by limitation, adoption of Goverdhan Das was not in 'Dwyamushyayana' form but in ordinary form as such Goverdhan Das after adoption ceased to have any right in the estate of natural father, Goverdhan Das was given in adoption by his father Moti Lal and not by his brother Kishan Lal, Sundra Bai was legally married wife of Kishan Lal and defendant Nos. 1 and 2 were their legitimate sons as such upon the death of Kishan Lal, the entire property devolved upon his sons and his widow. Against the said judgment, when an appeal was preferred, the first appellate court upholding order of dismissal of suit on the ground of limitation dismissed the appeal. While so dismissing the appeal, the findings of the trial court on the question of marriage of Sundra Bai with Kishan Lal and legitimacy of their children were confirmed but on the question of adoption, the court observed that in whichever form the adoption might have taken place, the same was invalid as Goverdhan Das was given in adoption by his brother kishan Lal and not by his father Moti Lal, who, according to the law prevalent at that time, was competent to give in adoption.

**A** Against decision of the first appellate court, matter was taken by the plaintiffs, to the High Court of Karnataka in a second appeal wherein the defendants filed cross objection to the finding on the question of adoption. The High Court allowed the second appeal as in its opinion the question of limitation was not correctly decided by the lower appellate court, accordingly without considering correctness or otherwise of findings on other points recorded by the first appellate court, the Judgment and decree passed by the first appellate court were set aside and the matter was remanded to that court for deciding the appeal afresh on merits. In view of this, as it was not necessary for the High Court to consider the cross objection on merits, the same was dismissed. After remand, a petition under **C** Order 41 Rule 27 of the Code of Civil Procedure, for taking certain documents into additional evidence, was filed before the first appellate court which having felt that it was a fit case for granting the prayer but as for admitting the same into evidence, witnesses were required to be examined, remanded the matter to the trial court after setting aside the **D** judgment and decree of the trial court.

Upon remand, the trial court decreed the suit in part only with respect to half share of the plaintiffs after recording findings that adoption was in 'Dwyamushyayana' form and not in ordinary form, Goverdhan Das was given in adoption by his brother Kishan Lal and not father Moti Lal, Sundra Bai was legally married wife of Kishan Lal and defendant Nos. 1 and 2 were his legitimate children from Sundra Bai and the suit was filed within time. Thereafter, two appeals were filed before the first appellate court, one by the defendants challenging decision of the trial court whereby the suit was decreed and the other by the plaintiffs challenging the findings of the trial court on the question of marriage of Kishan Lal with Sundra Bai and legitimacy of defendant Nos. 1 and 2. Appeal filed by the plaintiffs was dismissed but that filed by the defendants was allowed and suit was dismissed on the grounds that the same was barred by limitation, the adoption was not in 'Dwyamushyayana' form but in ordinary form and plaintiffs were estopped from saying that there was no valid adoption on account of the fact that Goverdhan Das was not given in adoption by his father Moti Lal. Challenging decision of the appellate Court, two second appeals were filed before the High Court by the plaintiffs which have been allowed, judgment and decree passed by the first appellate court dismissing **H** plaintiffs' suit set aside and those of the trial court decreeing the suit

restored as according to the High Court, the first appellate court had no jurisdiction to go into the question of adoption and recording any finding thereon as while passing the order of remand in the second appeal, cross objection filed against the findings on the question of adoption which was recorded in favour of the plaintiffs by the first appellate court on the earlier occasion, was dismissed, as such the same findings attained finality. Hence, these appeals.

Mr. S.S. Javali, learned Senior Advocate appearing in support of the appeals had raised three points. Firstly, it has been submitted that the High Court was not justified in observing that findings on the question of adoption recorded in favour of the plaintiffs by the first appellate court before the order of remand by the High Court, was confirmed by that Court by dismissal of the cross objection filed by the defendants against the same. We have been taken through judgment of the High Court passed in the second appeal on the earlier occasion whereby the matter was remanded to the first appellate court which clearly shows that as in the opinion of the High Court, the question of limitation was decided by the first appellate court without taking into consideration certain factual matrix, it was a fit case for remitting the matter to it for deciding the entire matter afresh. As it was not a case of limited remand but an open remand, the High Court did not go into the merit of findings recorded by the first appellate court on other questions, including adoption, and, after setting aside the judgment and decree of the first appellate court, remanded the matter to it for deciding the appeal afresh, meaning thereby on all the points. So far as the cross objection is concerned, as the judgment and decree of the first appellate court were set aside, the same was rendered infructuous and accordingly dismissed. In this view of the matter, we are of the opinion that the High Court committed an error of law in observing that the findings on the question of adoption recorded in favour of the plaintiffs by the first appellate court on the earlier occasion before remand by the High Court had been confirmed by it while passing the remand order for which there is absolutely no foundation and the same is contrary to the materials on the record.

The other two points which fall for consideration of this Court are whether findings recorded by the first appellate court to the effect that (i) Goverdhan Das was given in adoption by natural father Moti Lal and (ii)

- A** the adoption was not in 'Dwyamushyayana' form but in ordinary form, are vitiated in law. Legality or otherwise of the aforesaid findings has not been taken into consideration by the High Court for the reasons enumerated above. Ordinarily, we would have remanded the matter to the High Court for considering the same, but we do not propose to adopt that course for
- B** two reasons, firstly, the suit was filed 47 years ago, i.e., in year 1956 and, secondly, the remand would be an exercise in futility in view of the fact that the second appeal before the High Court was concluded by findings of facts on the question of adoption recorded by the first appellate court, which was final court of fact.
- C** Thus, we proceed to consider the question whether the finding recorded by the first appellate court that Goverdhan Das was given in adoption by his natural father Moti Lal suffered from any legal infirmity. At this stage, it may be relevant to state that as Goverdhan Das was given in adoption much before the coming into force of Hindu Adoptions and
- D** Maintenance Act, 1956, the parties will be governed by the law which was in force at the time of adoption. According to Paragraph 474 of *Mulla's Hindu Law*, 18th Edition, "the only person who can lawfully give a boy in adoption are his father and his mother." This shows that Goverdhan Das could have been given in adoption by his father Moti Lal and not
- E** brother Kishan Lal. From the pleadings, it becomes clear that the plaintiffs had nowhere averred in the plaint that Goverdhan Das was not given in adoption by his father Moti Lal but brother Kishan Lal. It was simply pleaded that the adoption was in 'Dwyamushyayana' form. As never such a case was pleaded in the plaint, there was no occasion for the defendants to plead in the written statement as to who gave Goverdhan Das in adoption and accordingly defendants in the written statement, only denied that
- F** adoption was in 'Dwyamushyayana' form and according to them, the same was in ordinary form. In the absence of any pleading whatsoever on the question as to whether Goverdhan Das was given in adoption by his father Moti Lal or brother Kishan Lal there was no lis between the parties on this
- G** question, as such courts could not have gone into the same even if some evidence was adduced and the lower appellate court rightly decided this question against the plaintiffs. Reference in this connection may be made to a decision of the Privy Council in the case of *Siddik Mahomed Shah v. Mt. Saran*, AIR (1930) PC 57, in which it was held that "Where a claim
- H** has been never made in the defence presented, no amount of evidence can

be looked into upon a plea which was never put forward". The said case has been referred to by this Court with approval in the case of *Bhagat Singh and Ors. v. Jaswant Singh*, AIR (1966) SC 1861. In that case, some evidence was led but the High Court refused to go into the question observing that where no plea was taken, it cannot be said that there was any lis between the parties thereon. This Court upheld decision of the High Court observing that the same was supported by decision of the Judicial Committee in the case of *Siddik Mahomed Shah* (supra). Thus we do not find any error in finding recorded by the first appellate court on this point.

Next question to be considered is as to whether the first appellate court was justified in holding that the adoption was not in 'Dwyamushyayana' form but in ordinary form. The present case relates to adoption under the custom prevalent in the community to which the parties belong. Undisputedly, there was a custom in the said community to adopt in 'Dwyamushyayana' form. At this stage, a question arises as to what is 'Dwyamushyayana' form of adoption.

The term 'Dwyamushyayana' is applicable to an adopted son retaining his filial relation to his natural father with his acquired relation to his adoptive parents when there is a mutual agreement between the natural father and the adoptive father that the adopted son shall be the son of both. The son so adopted is technically called *dwyamushyayana*. See *Dattaka Chandrika*, section 2, pl. 24 and 40, and *Vyavahara Mayukha*, Chapter IV, section 5, pl. 21 (Stokes' *Hindu Law*, pages 65, 641 and 646).

The *dwyamushyayana*, adopted son is of two kinds (1) absolute, i.e. *nitya dwyamushyayana*, and (2) incomplete, i.e. *anitya dwyamushyayana*. The absolute *dwyamushyayana* son is one who is given in adoption with this stipulation: "This is the son of us two (the natural father and the adopter)." The incomplete *dwyamushyayana* son is one who is initiated by the natural father in the ceremonies ending with tonsure and by the adoptive father in the ceremonies commencing with the investiture of the sacred thread. As he is initiated in the gotras (family names) of both the natural father and the adoptive father, he is considered to be the son of two fathers but incompletely. If a child after being born is adopted so that his initiation under both gotras be wanting, he would partake only of the gotra of the adoptive father. See *Dattaka Mimansa*, Chapter 6, pl. 41 (Stokes' *Hindu Law*, page 610).

A *Mayrte's* treatise on *Hindu Law & Usage*, 14th Edition page 469, described the peculiar form of 'Dwyamushyayana' adoption thus:

B "221. An exception to the rule that adoption severs a son from his natural family exists in the case of what is called a dwyamushyayana or son of two fathers. This term has a two-fold acceptance. Originally it appears to have been applied to a son who was begotten by one man upon the wife of another, but for and on behalf of that other. He was held to be entitled to inherit in both families, and was bound to perform the funeral oblation both of his actual and his fictitious father. This is the meaning in which the term is used in the Mitakshara; but sons of this class are now obsolete. Another meaning is that of a son who has been adopted with an express or an implied understanding that he is to be the son of both fathers. This again seems to take place in different circumstances. One is what is called the anitya, or temporary adoption, where the boy is taken from a different gotra, after the tonsure has been performed in his natural family. He performs the ceremonies of both fathers and inherits in both families but his son returns to his original gotra. This form of adoption is also obsolete.

E The only form of dwyamushyayana adoption that is not obsolete is the nitya or absolute dwyamushyayana in which a son is taken in adoption under an agreement that he should be the son of both the natural and adoptive fathers."

F *Mulla on Principles of Hindu Law*, 18th Edition, page 821, has enumerated the form of 'dwyamushyayana' adoption which runs thus :

G "486. (1) Where a person gives his son to another under an agreement that he should be considered to be the son of both the natural and the adoptive fathers, the son so given in adoption is called *dwyamushyayana*. In this form of adoption, it is essential to prove such an agreement and it should also be proved that there was the ceremony of giving and taking of the adoptive son.

H (2) A *dwyamushyayana* inherits both in his natural and adoptive families."

Likewise *Raghavachariar* in his treatise *Hindu Law*, 9th Edition, has referred to 'dwyamushyayana' form of adoption at page 148 thus :

"174. Dwyamushyayana is the name given to a person who is given in adoption under an agreement that he should be considered to be the son both the adoptive father and the natural father. In this form, it is essential to prove such an agreement and also the performance of the ceremony of giving and taking of the adoptive son."

Nitya i.e., absolute dwyamushyayana form of adoption has been recognised by the Judicial Committee in the case of *Nilmadhub Doss v. Bishumber Doss and Ors.*, (1869) 13 Moore's Indian Appeals 85, in which it was held that the effect by the Hindu Law of an adoption in dwyamushyayana (son of two fathers) form is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his natural father's estate.

Another decision of the Judicial Committee is the case of *Wooma Dae v. Gokoolanund Dass*, ILR (1878) 3 Calcutta 587 wherein their Lordships, after referring to certain passages in the *Dattaka Mimansa* and *Dattaka Chandrika*, conceded at page 597 that :

"they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a dwyamushyayana, or son of two fathers."

Further, their Lordships observed at page 598 :

"Again, to constitute a Dwyamushyayana there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William MacNaghten at p.71 of his *Principles and Precedents*."

A In every case of absolute dwyamushyayana form of adoption, there must be an agreement to the effect that the person given in adoption shall be the son of both, i.e. the natural father as well as adoptive father and such an agreement must be proved like any other fact by the party alleging the same. See *Laxmipatirao Shrinivas Deshpande v. Venkatesh Tirmal Deshpande*, AIR (1916) Bombay 68 and *Mohna Mal v. Mula Mal and Ors.*, (1925) 89 Indian Cases 688.

Dwyamushyayana form of adoption was subject matter of consideration before this Court in the case of *M.Ct. Muthiah and Anr. v. Controller of Estate Duty, Madras*, AIR (1986) SC 1863 wherein the decisions of

C Judicial Committee referred to above were noticed with approval. In that case question had arisen in relation to payment of estate duty in the hands of the accountable person upon the death of one M.Chindambaram Chettiar who had given his only son in adoption in dwyamushyanana form and after adoption, another son was born to him. Upon the death of the natural father,

D question had arisen for the payment of estate duty upon the estate of the deceased. On behalf of the Revenue, it was contended that the share of deceased in the joint family property was only half as one son was given in adoption. On behalf of the accountable person, stand was taken that as adoption was in dwyamushyayana form, the adopted son did not sever his

E interest in the estate of the natural father and was entitled to inherit properties of adoptive as well as natural father both, as such share of the natural father in the joint family property was only one third and not half. The High Court of Allahabad held that the share of deceased was one third and not half in view of the fact that adoption being in dwyamushyayana form, the adopted son had also one third share. This Court upheld decision

F of the High Court and dismissed the appeal.

In the case on hand, the first appellate Court, after taking into consideration and discussing the oral and documentary evidence threadbare, recorded a finding that the plaintiffs failed to prove that there was

G an agreement between the natural and the adoptive fathers to the effect that adopted son shall be treated to be the son of both of them and entitled to inherit their properties and consequently, the adoption of Goverdhan Das was in ordinary form. Mr. V.A. Mohta, learned Senior counsel appearing on behalf of the respondents strenuously contended that the finding

H recorded by the first appellate court was unwarranted. The finding on this

point recorded by the first appellate court which was final court of fact was a pure finding of fact and could not have been interfered with by the High Court in the exercise of powers conferred upon it under Section 100 of the Code of Civil Procedure, 1908, more so when no question of law much less substantial one was involved. Apart from that, after giving our anxious consideration, we do not find any ground whatsoever to interfere with the said finding recorded by the final court of fact. This being the position, in our view, the High Court was not justified in allowing the appeals and decreeing the suit by restoring judgment and decree passed by the trial court.

In the result, the appeals are allowed, impugned judgment and decree rendered by the High Court are set aside and those passed by the first appellate court are restored. In the circumstances, there shall be no order as to costs.

B.S.

Appeals allowed. D