AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
(Judgment Delivered on 01/03/2023)

FA No. 520 of 2018

- Mishrilal S/o S/o Lunkaran Bafna Aged About 62 Years R/o Ganj Line, In Front Of Mazar, Rajnandgaon, District Rajnandgaon, Chhattisgarh. .....Plaintiff

---- Appellant

Versus

1. Mohanlal S/o Lunkaran Bafna Aged About 54 Years Adopted S/o Heeralal Bafna R/o Gataparkala, Post Gataparakala, Tahsil Khairagarh, District Rajnandgaon, Chhattisgarh. .....Defendants
2. Deleted (Lunkaran) As Per Honble Court Order Dated 14-01-2022
3. Rajendra S/o Lunkaran Bafna Aged About 43 Years R/o Kailash Nagar, District Rajnandgaon, Chhattisgarh
4. Bhurmal S/o Lunkaran Bafna Aged About 47 Years R/o Vasnik Bhawan, Bharka Para, Behind Ambedkar Murty, District Rajnandgaon, Chhattisgarh
5. Dhyanchand S/o Lunkaran Bafna Aged About 46 Years R/o Gataparkala, Post Gataparkala Tahsil Khairagarh, District Rajnandgaon, Chhattisgarh
6. Smt. Ushma Devi W/o Late Indarchand Bafna Aged About 45 Years R/o Ganj Line In Front Of Mazar, Rajnandgaon, District Rajnandgaon, Chhattisgarh
7. Sonu S/o Late Indarchand Bafna Aged About 10 Years Through His Natural Guardian Mother Namely Smt. Ushma Devi, W/o Late Indarchand Bafna, Aged About 45 Years. R/o Ganj Line In Front Of Mazar, Rajnandgaon, District Rajnandgaon, Chhattisgarh

---- Respondents

For Appellant : Shri Manoj Paranjpe, Advocate

For Respondents Nos. 1, 2 & 4 to 6: Shri Vinod Kumar Sharma Advocate

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Hon'ble Shri Justice Goutam Bhaduri
& Hon’ble Shri Justice NK Chandravanshi
CAV JUDGMENT

Per Goutam Bhaduri, J

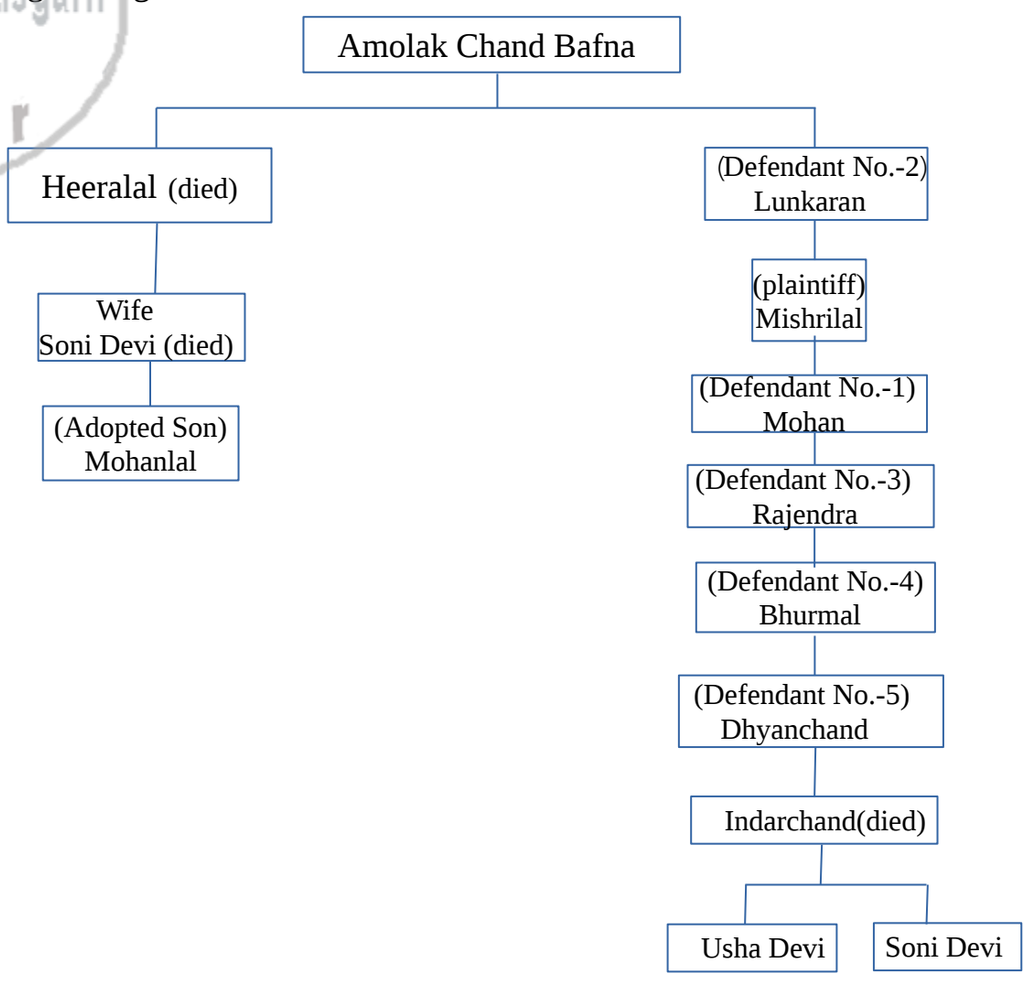
Heard.

1. This appeal is directed against the judgment and decree dated 28/07/2018 passed by the Additional District Judge (FTC),

Rajnandgaon, District Rajnandgaon (C.G.) in Civil Suit No.10-A/2010 whereby the suit preferred by the plaintiff was dismissed.

2. The admitted facts are that:-

- the plaintiff and defendants are related to each other. The defendant No.2 Lunkaran (since deceased) Son of Amolak Chand Bafna was the father of plaintiff, whereas Mohanlal (Defendant No.1), Rajendra (Defendant No.3), Bhurmal (Defendant No.4), Dhyanchand (Defendant No.5) are sons of Lunkaran and Smt. Ushma Devi (Defendant No.6) is the daughter-in-law of Lunkaran Bafna (the other son of Lunkaran) and Sonu (Defendant No.7) is the son of Inderchand. The genealogical tree is shown hereunder:-



- the plaintiff filed a suit claiming declaration that he is the co-owner of suit property valued @ Rs.29 Lakhs and further declaration was prayed for that a decree dated 26/08/2007 obtained in Civil Suit No.8-A/2007 in between Mohanlal and Lunkaran before Lok Adalat is not binding on plaintiff and would not affect the right of brothers and the plaintiff and permanent injunction was claimed for;

- the plaintiff averred that his grandfather Amolak Chand Bafna came from Jodhpur (Rajasthan) and started his business at Gatapar Kala in name of Amolak Chand Heera Lal. In the year 1971 late Amolak Chand purchased the suit house in name of Heera Lal and Lunkaran from the joint income of the family business. It was further stated that Amolak Chand had two sons namely Heeralal Bafna and Lunkaran and Heeralal did not have any child. Lunkaran had 5 sons out of them Inderchand Bafna has died whose wife and son were made parties;

- the plaintiff further claimed that since Heeralal Bafna had no son, as such he kept Mohanlal (Defendant No.1) S/o Lunkaran with him. The plaintiff further stated that in the year 1989 he started living at Mudiyamohara and started his business. The plaintiff further averred that the suit house which was at Rajnandgaon a suggestion came for partition in between Heeralal Bafna and Lunkaran in the year 2006, wherein the house was valued at Rs.29 Lakhs;

- the plaintiff averred that it was agreed that the house would be kept by Heeralal and Rs.1 Lakh of loan of late Inderchand Bafna the other brother would be paid by Heeralal and the rest of the amount would be paid which would be distributed amongst the legal heirs of Lunkaran. He stated that though agreement was executed but was never acted upon;

- the plaintiff further stated that in the month of January, 2009 he came to know that the suit house was recorded in name of Mohanlal (Defendant No.1) and when he made an enquiry it was revealed that in a Lok Adalat the suit filed between Mohanlal and his father Lunkaran creating pressure on defendant No.2, the father, a fake decree has been executed and by virtue of such decree right of Defendant Nos.3 to 7 were eliminated;

- the plaintiff stated that the suit property was purchased by Amolak Chand the grandfather of plaintiff and the plaintiff along with other defendants are co-parcener of the said property. It was further pleaded that concealing all those facts, by valuing the property to Rs.29 Lakhs, the decree was obtained by fraud, which is not binding on the plaintiff and other defendants. The plaintiff stated that if it is found that Mohanlal was adopted by Heeralal then in such case Mohanlal would be entitled to the share of Heeralal and the other defendants would be entitled to claim half of the share of the suit house. The prayer was made that Defendant Nos.1 to 7 are the co-owners of the suit property

and the decree obtained from the Court of II Civil Judge Class-I on 26/08/2007 before Lok Adalat would not be binding. The prayer was also made that Mohanlal may be restrained to interfere with the peaceful possession of the property of Defendant Nos.3 to 7 and also to restrain him to take steps for ejectment;

- Mohanlal (Defendant No.1), who was claimed to be adopted son of Heeralal denied the plaint allegation and stated that he is the adopted son of Heeralal. It was stated that since Heeralal did not have any son, as such on 28/06/1974 a declaration was made to show that he is the adopted son and after death of Heeralal he is entitled to the share to the property. He further stated that he is in possession of the suit property and further stated that the suit property was never purchased by Amolak Chand from the income of the firm and the house in question was purchased by Heeralal and Lunkaran from Smt. Itchru Bai by registered sale deed on 25/09/1971;

- it was further stated that in the year 1991 by virtue of mutual partition the property came into exclusive share of Heeralal and after death of Heeralal, Mohanlal became absolute owner having inherited the property. It was further stated that the said facts were never objected by the father of plaintiff namely Lunkaran (defendant No.2) at any point of time and in Civil Suit No.8 A/2007 the father Lunkaran (defendant No.2) affirmed the

oral partition and consequently a compromise was arrived at and on the basis of that a decree was drawn in the Lok Adalat, which is binding on all the legal heirs of Lunkaran i.e. the plaintiffs and the defendants. It was further stated that after that decree, the entire possession of the suit house was given to the defendant No.1 Mohanlal by Lunkaran;

- Mohanlal (Defendant No.1) further stated that as per the terms of arrangement/agreement the defendant has discharged bank loan of Rs.7 Lakhs and paid an amount of Rs.7 Lakhs 10/06/2007 and Rs.7 Lakhs on 10/12/2007 i.e. total Rs.14 Lakhs was paid to Defendant No.2 and therefore, the said family arrangement would be binding on all the parties. Mohanlal (Defendant No.1) further stated that defendant Nos. 3 to 7 did not have any right in respect of the said property and prayed for dismissal of suit;

- Lunkaran (Defendant No.2) supported the case of his son Mohanlal. It was stated that the property was purchased by Lunkaran and Heeralal from their self earning and because of the fact that Heeralal did not have any issue, he adopted Mohanlal as his son. Lunkaran, the father, further stated that a partition was effected in between Mohanlal and Heeralal and the entire suit property fell into the share of Heeralal. He further averred that Heeralal died on 31/03/2003 and his wife also died on 13/02/2003, therefore, over the property no right exist that of other son and daughters;

- he further stated that possession of the property was handed over to Mohanlal and he has received an amount of Rs.20,000/-. The defendant No.2 also averred that after death of Heeralal, in 2006 an agreement was drawn before the Panch and it was admitted by the defendant Mohanlal that the bank loan of Rs.7 Lakhs and payment of Rs.14 Lakh was made. He stated that the said agreement was binding upon the parties and this cannot be challenged;

- the other sons i.e. Rajendra (Defendant No.3), Dhyanchand (Defendant No.5) and the legal heirs of Inderchand Bafna i.e. Smt. Ushma Devi (Defendant No. 6) & minor Sonu (Defendant No.7) supported the case of Defendant Mohanlal and stated that the suit property was purchased by Heeralal and Mohanlal from their self earning and therefore, Lunkaran do not have any right to claim share of it. Bhurmal (Defendant No.4) admitted the plaint averments and claimed his part of share over the property, however, no counter claim was filed; and

- on the basis of the pleadings, learned trial Court framed 5 issues and the primary issues were issue no. 1 whether the property was a joint property of plaintiff and defendants. The Court gave a finding in negative and with respect to the finding of obtaining a decree in Civil Suit No.8A/2007 on 26/08/2007, the Court gave a finding that the plaintiff has failed to prove that the decree was obtained on the basis of fraud and eventually dismissed the suit.

Hence this appeal by the plaintiff.

3. Learned counsel for the appellant would submit that:-

- according to the evidence the property was purchased by Amolak Chand from the earning of the firm vide Ex. P/3 in the year 1971. Referring to the alleged *Iqrarnama* (Ex. D/28) he would submit that the contents of it would go to show that it was not exclusive property of Heeralal and Lunkaran;

- the suit was valued at Rs.29 Lakhs and a loan of Rs.1 Lakh was to be paid meaning thereby Rs.28 Lakhs was for divide in between Heeralal and Lunkaran but such agreement/arrangement could not be acted upon. It is further submitted that according to the defence, if the mutual partition was effected in the year 1991 and property fell into share of Heeralal then what was the necessity to file the suit to claim the ownership;

- if Mohanlal was adoptive son there was no further necessity for such suit. Attacking the adoption deed dated 28/06/1974, he would submit that on that date of adoption deed Mohanlal was aged about 18-19 years. Referring to the statement of Mohanlal (DW-2) at para 56 he stated that it is admitted that on the date of registration, his age was 18-19 years. Referring to Section 10 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the Act, 1956) Section 10 (iv), it is

submitted that in order to create a valid adoption, the adoptive person should not be more than 15 years unless custom permits;

- in the instant case, the custom has not been stated or proved by the defendant. Consequently, by mere registration under Section 16 of the Act, 1956, the adoption cannot be accepted unless it is proved. So he would submit that only mere by registration it will not cure the defect. Learned counsel further placed his reliance in the case of ***M. Vanaja Vs. M. Sarla Devi (Dead) {(2020) 5 SCC 307}*** and would submit that adoption cannot be said to be valid unless the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption are proved;

- when the property according to Ex. D/28 which is of the year 2006 purport to divide the property which is admittedly more than 100 Rs. of value and if having not been registered it would hit by Section 17 of the Indian Registration Act. He further stated that no whisper has been made in the said document Ex. D/28 that mutual partition has taken place;

- if the property was owned by Heeralal and Lunkaran and the partition was effected in the year 1991 why the signature of Mishrilal was obtained in such document and it only goes to show that no partition have ever taken place between Heeralal

and Lunkaran. It is further stated that original of Ex. D/28 was never produced. The learned trial Court has wrongly allowed the prayer to lead secondary evidence as the statement of DW-2 had stated that he has received back the original, consequently, D/28 cannot be acted upon which the trial Court has failed to appreciate; and

- further placed reliance in the case of ***J. Yashoda Vs. K. Shobha Rani {(2007) 5 SCC 730}*** to submit that by mark of exhibit when the original was not produced document itself would not be admissible, then secondary evidence could not be allowed. He would further submit that learned trial Court has failed to appreciate those facts and thereby came to a wrong finding.

4. Per contra, learned counsel for the respondents/defendants would submit that:-

- as per the plaint allegations, the suit property was an ancestral property but it has been denied to say that it was an self acquired property of Heeralal and Lunkaran and not of Amolak Chand;

- he refers to Ex. P-3 which is equivalent to Ex. D/5 the sale deed to submit that the property in question was purchased by Heeralal and Lunkaran in their exclusive rights. Further reference is made to the Khasra Panchshala vide Ex. P/9 from 2004 to 2007 and in respect of certain property and the

house property Ex. P/10 to show the mutation orders were in name of Heeralal and Lunkaran;

- the reference is also made to Ex. D/15, D/16 & D/17 the maintenance Khasra to submit that the subject land was recorded in the name of Heeralal and Lunkaran;

- the plaintiff himself admitted that the suit property was purchased by Lunkaran and Heeralal but volunteered subsequently and stated to be have purchased by Amolak Chand. He refers to para 33 of PW-1 and would submit that the plaintiff is not in possession of the suit house and submits that he admitted the fact that during the lifetime of Lunkaran his sons would not have any right in respect of the property;

- according to the plaintiff if the property was acquired by his grandfather Amolak Chand then why his daughter was not made a party as the plaintiff admitted that one Bidam Bai was not made a party to the suit. With respect to the adoption, referring to the statement of Lunkaran, referring to question No.48 he would submit that the father has categorically stated that Heeralal has taken Mohanlal on adoption and Khemchand Jain (DW-3) stated that he had executed a deed on 28/06/1974 as per instructions of Heeralal, Soni Bai, Lunkaran and Ganga Bai and all had

scribed his signature;

- referring to the adoption deed, he would submit that the deed categorically spells out that when Mohanlal was 8 years old according to the custom he was taken on adoption, which cannot be disputed. Referring to Section 15 of the Act, 1956 submission is made that no adoption which has been validly made can be cancelled. Consequently, no adoption which has been validly made can be cancelled by the adoptive father or mother or any other person and Section 16 of the Act, 1956 draws a presumption. He further submits that the family arrangement arrived at in between the parties and as per Ex. D/1 and D/2 Rs. 1 Lakh was paid to discharge the loan of late Inderchand Bafna, one of the son, and Rs.14 Lakhs was further paid according to the evaluation, therefore, oral arrangement was arrived at between the parties; and

- as per Article 57 of the Limitation Act to challenge the adoption limitation is 3 years so suit filed thereafter would be barred by law of limitation. He would further submit that the plaintiff having admitted the fact of adoption of the family arrangement cannot go back to say that no adoption was carried out. He placed his reliance in the case of ***{2002 (3) SCC 634}.***

5. We have heard learned counsel for the parties and perused the

record.

6. According to the plaint averments, the property was purchased during the lifetime of Amolak Chand. As against it in the sale deed, Ex. P/3 the purchasers are shown as Heeralal and Lunkaran, both are sons of Amolak Chand, and they purchased the same in their exclusive name. They purchased the property from Smt. Itchru Bai. Ex. P/3 & Ex. D/5 which is sale deed is same. The Nazul/maintenance Khasra (Ex. P/9 & P/10) show that the property is recorded in the name of Heeralal and Lunkaran both. Further the maintenance Khasra marked as D/15, D/16 & D/17 shows name of Heeralal and Lunkaran alone and name of Amolak Chand is not shown.

7. Para 31 of the cross-examination of plaintiff Mishrilal (PW-1) shows that he admits the fact that the suit property was purchased by Lunkaran and Heeralal. Thereafter, subsequently volunteered that it was purchased by Amolak Chand. While the suit was filed Lunkaran, the father of plaintiff in whose name property was purchased, was alive. So if on by sale deed and entry in revenue records it shows the suit property was purchased and was mutated in name of Heeralal & Lunkaran then no occasion arises to hold it otherwise. Further Mishrilal (PW-1) at para 33 admits the fact that he do not reside in the suit house i.e. Ganjpara. The plaintiff further admitted the fact that during lifetime of Lunkaran he could not have claimed any declaration. Therefore, there is no

document on record to show that the suit property was purchased from the earning of the firm by Amolak Chand, neither any statement of account to support those facts have been placed nor any other evidence is on record, except the oral statement. Therefore, it would be proper to hold that the suit property was purchased by Heeralal and Lunkaran jointly from their own income. Consequently, it cannot be said that the property was an ancestral property of the plaintiff.

8. The another point which falls for consideration as to whether Mohanlal (Defendant No.1) was adoptive son of Heeralal Bafna. In the description of the plaint Mohanlal has been shown as son of Lunkaran and thereafter has been shown as adoptive son of Heeralal. In the plaint averments it is stated that Amolak Chand had two sons namely Heeralal and Lunkaran and Heeralal had no son and Lunkaran had 5 sons out of which Inderchand has died. Plaint averments further show that since Heeralal did not have any son, therefore, he had kept Mohanlal (Defendant No.1) as his son. At para 10 of the plaint, contradictory averments have been made that if it is found that Mohanlal is adoptive son of Heeralal, the suit property would be divided into half in between Mohanlal and Lunkaran. Meaning thereby half of the share in suit property would go to Monahlal (Defendant No.1) and half of the share would fall to Lunkaran.

9. The plaintiff Mishrilal is son of Lunkaran. Plaintiff in his statement at para 33 admits the fact that Lunkaran is alive and hence during his lifetime, the children would not have any right in the suit property. Thereby the plaintiff was in know of the fact that the right which is conferred to him and would lead to show that on the date of filing of the suit, the plaintiff was in know of the fact that what right would accrue to him. Apart from this, Mohanlal (Defendant No.1) stated that he was adopted by Heeralal. The plaint averments show that since Heeralal did not have any son, as such Mohanlal was kept with him as a son. Mishrilal (PW-1) at para 31 further admitted that he was not in know of the fact that whether Heeralal had adopted Mohanlal and simultaneously shows his inability about any Godnama. From the statement of the family members, it would be difficult to draw an inference that family member would be unaware of the fact about adoption in the family. So prima facie the muffled statement of plaintiff goes to show that he was aware of fact of adoption of Mohan Lal by his uncle Heeralal. It would also be difficult to believe that one brother would not know about adoption in the family. Therefore, the averments made by Plaintiff that his one brother Monahlal was kept by his uncle would show that plaintiff was in know of fact that Mohanlal was adopted by his uncle.

10. Further the father of Mohanlal i.e. Lunkaran, who was arrayed as Defendant No.2 on a specific question No.48, when he was asked as to how many sons he has, he stated that he has six

sons and one had died and one son Mohanlal was adopted by Heeralal. Khemchand Jain (DW-3), who drafted the adoption deed had stated that he prepared the deed on direction of Heeralal, Sonibai, Lunkaran and Gangabai and Godnama was prepared which is marked as Ex. D/10. Perusal of Godnama (Ex. D/10) shows that it was written that since Heeralal and Sonibai did not have any son, as such in order to continue their family Mohanlal was adopted on 26/01/1963. The deed purports that the request was made by Heeralal & Soni Bai to Lunkaran and his wife Gangabai to adopt their son, which was accepted by them and the son was given to their lap. The deed further suggests that the adoption was done as per Shwetamber Jain customs and rituals at Gataparkala, Tehsil Khairagarh, when his age was 8 years and after that he was being looked after and was brought up by them. In the school register also it was stated that the name of father was shown as Heeralal.

11. The adoption deed is registered. The Hindu Adoptions and Maintenance Act, 1956 purports that no person shall be capable of being taken in adoption and clause (iv) says that he or she should not complete the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

12. It has been contended by appellant that at the time of registration of adoption deed, the age of Mohanlal was 18-19

years. However, when the deed is examined, it records the fact that on earlier point of time when Mohanlal was 8 years of age, the adoption was made. The father of the appellant Lunkaran and father of the boy who was given in adoption categorically deposed that he had given his son Mohanlal to Heeralal on adoption. Khemchand Jain (DW-3), who prepared the Godnama affirms the fact of earlier adoption which was done was recorded by a deed of adoption was got registered.

13. Perusal of the adoption deed show that it bears the signature of Heeralal and his wife Soni Bai and the persons who have given the children i.e. Lunkaran and his wife Ganga Bai were also signatories to such deed. Lunkaran had stated that his brother Heeralal died on 31/03/2003 and his wife also died on 13/02/2003. Section 7 of the Act, 1956 makes it clear that any male Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption. Provided that if he has a wife living, he shall not adopt except with the consent of his wife. Section 11 (i) of the Act, 1956 makes it clear that if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, living at the time of adoption. It further says that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth and performance of *datta homam* shall not be essential to the validity of adoption.

14. The reading of adoption deed shows that both the adoptive husband & wife namely Heeralal and Soni Bai and the likewise persons who gave their child on adoption i.e. Lunkaran and Ganga Bai consented to such adoption. It records that when the child was of 8 years actual performance of giving and taking was performed. Learned counsel for the appellant has relied on the judgment rendered by the Supreme Court in the matter of ***M. Vanaja Vs. M. Sarla Devi (Dead) {(2020) 5 SCC 307}*** wherein the adoptive mother stated that she had never adopted and apart from the fact the admission of proof of ceremony of giving and taking in adoption was not proved. Whereas in the instant case the Ex. D/10 adoption deed shows that original parents consented to such adoption.

15. Taking into the contents of Ex. D/10 which records fact of performance of ceremony, when is read along with the averments of plaint, wherein plaintiff has stated that Mohanlal (Defendant No.1) was kept as a son along with evidence that Heeralal did not have child and para 35 when suggestion was given he admits that adoptive son of Heeralal is Mohanlal would lead to establish that valid adoption was done and this Court cannot sit as an appellate authority over the evidence of the adoptive parents and the parents of the child who gave the child in adoption to say no adoption had ever taken place.

16. Section 15 of the Act, 1956 also puts a rider that no adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can be adopted child renounce his or her status as such and return to the family of his or her birth. Likewise this Court after evaluating the existing evidence before it has no hesitation to hold that the adoption of Mohanlal by Heeralal was validly made and the same cannot be put into question.

17. Another submission of the appellant is that the arrangement entered in between Lunkaran and Heeralal, the father & uncle which is marked as Ex. D/28 would not be admissible in evidence as it do not record a past transaction. It is not in doubt that a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The Supreme Court in the matter of ***Roshan Singh and others Vs. Zile Singh and others {(2018) 14 SCC 814, decided on February 24, 1988}*** observed that a past transaction do not require registration the Court at para 9 & 10 has held thus:-

> 9. It is well settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under Section 17 (1) *(b)* of

the Act, a writing which merely recites that there has *in time past* been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)*(b)* lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: *(1)* A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, Section 49 of the Stamp Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a

previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition: *See* Mulla's Registration Act, 8th edn., pp. 54-57.

10. The tests for determining whether a document is an instrument of partition or a mere list of properties, have been laid down in a long catena of decisions of the Privy Council, this Court and the High Courts. The question was dealt with by Vivian Bose, J. in Narayan Sakharam Patil v. Coop. Central Bank, . Speaking for himself and Puranik, J. the learned Judge relied upon the decisions of the Privy Council in Bageshwar Charan Singh v. Jagarnath Kuari(1931-32 59 IA 130) and Subramonian v. Lutchman{(1922-23) 50 IA 77} and expressed as follows (Narayan Sakharam case, SCC OnLine MP para 10)

604. Speaking for himself and Sir Gilbert Stone, CJ. the learned Judge relied upon the decisions of the Privy Council in Bageshwari Charan Singh v. Jagarnath Kuari LR (1932) 59 IA 130 and Subramanian v. Lutchman LR (1923) 15 IA 77 and expressed as follows:

> "It can be accepted at once that mere lists of property do not form an instrument of partition and so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to 'create, declare, assign, limit of extinguish ..... any right, title or interest' in the property which is admittedly over Rs. 100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated."

Sir Gilbert Stone, CJ speaking for himself and Vivian Bose, J. in

Ganpat Gangaji Patil v. Namdeo Bhagwanji Patil & Ors., ILR (1942) Nag. 73 reiterated the same principle. See also: order cases in Mulla's Registration Act at pp. 56-57.

18. The aforesaid proposition is not in dispute. Ex. D/28 which contains the partition of the property in between Lunkaran & Heeralal was executed on 10/12/2006. In our opinion/view the said issue at this stage may not be required to be deliberated upon as the filing of the suit itself appears to be defective. When the suit was filed Lunkaran, the father of the plaintiff, was alive. He died in the year 2022. When the plaintiff claimed that the property was ancestral one, the sisters were not made a party, which would be evident from para 34 of the statement of Mishrilal (PW-1) wherein name of Bimla Bai, Mohani Bai and Maina Bai being the sisters have been admitted. At para 33 of the cross-examination, the plaintiff further admitted that he is not in possession of the suit property.

19. The plaint would show that suit was filed only for seeking declaration. The first declaration was sought for that defendant Nos. 1 to 7 are co-owners of the suit property; second declaration is sought for that the decree dated 26/08/2007 obtained in Civil Suit No.8-A/2007 in between Mohanlal and Lunkaran before Lok Adalat is out come of fraud; further declaration was sought for that the defendant No.1 be restrained to interfere in the possession of plaintiff and defendants No.3 to 7.

20. During the pendency of the appeal, Lunkaran, the father

died. Plaintiff though claimed himself to be the co-owner had not claimed for other relief. Therefore, whether the suit would be maintainable when plaintiff has only asked for a bare declaration though he was in a position to ask for other relief? As per the evidence, the plaintiff is not in possession of the suit property. As per Section 34 of the Specific Relief Act when the plaintiff is out of possession of the suit property seeks to have his title declared, as such that mere declaration will not lie without the relief of possession, the said proposition is laid down in the case of ***Ram Saran v. Ganga Devi*** {***AIR 1972 SC 2685}*** and the Supreme Court further held in the case of ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs. Chandran and others*** ***{(2017) 3 SCC 702}*** that when the plaintiff is not in possession and having only sought for declaratory reliefs, the suit was not maintainable.

21. The Supreme Court in the case of **Venkataraja and others Vs. Vidyane Doureradiaperumal (Dead) through LRs and others** reported in **(2014) 14 SCC 502**, has reiterated the law laid down in the case of **Muni Lal Vs. Oriental Fire and General Insurance Co. Ltd.** Reported in **(1996) 1 SCC 90** and **Shakuntla Devi Vs. Kamla** reported in **(2005) 5 SCC 390** and has held in para 24, 25 and 26 as under :-

"24**.** A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from

seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide *Parkash Chand Khurana* v. *Harnam Singh* [(1973) 2 SCC 484] and *State of M.P.* v. *Mangilal Sharma* [(1998) 2 SCC 510)

25. In ***Muni Lal* v. *Oriental Fire & General Insurance Co. Ltd.*** [(1996) 1 SCC 90] this Court dealt with declaratory decree, and observed that : (SCC p. 93, para 4)

> "*4.* … mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief."

26. In ***Shakuntla Devi* v. *Kamla*** [(2005) 5 SCC 390] , this Court while dealing with the issue held : (SCC p. 399, para 21)

> "*21*. … a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree."

22. Likewise, in the case of **Executive Officer, Arulmigu Chokkanatha Swami Koil Trust, Virudhunagar (supra)**, the Supreme Court relying on the case of **Ram Saran Vs. Ganga Devi** reported in **(1973) 2 SCC 60**, has held in para 34 as under :-

"34. In the present case, the plaintiff having been found not to be in possession and having only sought for declaratory reliefs, the suit was clearly not maintainable and has rightly been dismissed by the trial court. In this context the reference is made to the judgment of this Court in ***Ram Saran* v. *Ganga Devi*** [*Ram Saran* v. *Ganga Devi*, (1973) 2 SCC 60], wherein in paras 1 and 4 following was stated: (SCC pp. 60-61)

"*1*. This is a plaintiffs' appeal by special leave. Ram Saran and Raghubir Saran, the plaintiffs are brothers. They jointly owned suit property with Chhabili Kuer, widow of Lalita Prasad. After the death of Chhabili Kuer on 8-2-1971, Ganga Devi, the defendant in the suit came forward as the legal representative of Chhabili Kuer and got the mutation effected in her name in the place of the deceased Chhabili Kuer. In 1958, the plaintiffs brought this suit for a declaration that they are the sole owners of the suit properties. They did not claim possession of either the entire or even any portion of the suit properties.

4. We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties.

Hence the suit is not maintainable."

23. In view of the aforesaid principles of law, the suit itself per se, considering the relief claimed and the pleading, was not tenable. Accordingly, the plaintiff is not entitled to any relief. Therefore, the judgment and decree passed by the Court below is affirmed.

24. Accordingly, the appeal is dismissed.

25. A decree be drawn accordingly.

SD/- SD/-

(Goutam Bhaduri) (NK Chandravanshi)

Judge Judge

Ashu