



**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE**

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 1st OF APRIL, 2025

SECOND APPEAL No. 322 of 2020

PRAVEEN TIWARI

Versus

SMT. ANITA UPADHYAY AND OTHERS

Appearance:

Shri P.C. Chandil and Shri Dinesh Baghel- Advocates for appellant.

Shri Prashant Sharma and Shri Upendra Yadav- Advocates for respondent

No.1.

JUDGMENT

This Second Appeal, under Section 100 of CPC has been filed against the judgment and decree dated 19.11.2019 passed by I Additional District Judge, Dabra, District Gwalior (M.P.) in RCA No.15/2017, thereby affirming the judgment and decree dated 27.02.2017 passed by I Civil Judge Class II, Bhitwarwar, District Gwalior (M.P.) in Civil Suit No.04A/13.

2. Appellant is plaintiff who has lost from both the courts below.

3. It is the case of appellant that land bearing Survey Nos.711, 528, 529, 530 Min-2, 1679, 1680, 1683, 1684, 1690, 1829 Min-2, 2012 Min-3, 2089, 2382 Min-1, 2516 Min-3, 2540, 2544, 236, 237, 262 and 2515/1 situated in village Sankhni,



Tahsil Bhitwar, District Gwalior (M.P.) and Survey No.72 Min-2, 109, 110 situated in village Jhau, Tahsil Bhitwar, District Gwalior (M.P.) is the ancestral property of plaintiff and defendant No.1. After death of father of plaintiff and defendant No.1 namely late Vasudev Tiwari, it is alleged that plaintiff and defendant No.1 got 1/2 share each. However, defendant No.1 got her name mutated in the revenue records by claiming herself to be the sole legal representative, whereas plaintiff has 1/2 share in the property. It is the case of plaintiff that late Vasudev Tiwari was posted in Ujjain and was working in Postal Department. Mother of plaintiff, namely, Kamla @ Manorama who had already obtained divorce from her first husband was residing with her father. Vasudev Tiwari had projected himself to be a bachelor and offered to marry the mother of plaintiff which was accepted by her and accordingly, marriage of mother of plaintiff and late Vasudev Tiwari was performed in Mahakal Temple. Appellant was born out of the relationship of his mother Kamla @ Manorama and late Vasudev Tiwari. In his educational documents, name of father of appellant is mentioned as late Vasudev Tiwari. It was further claimed that late Vasudev Tiwari had never informed that defendant No.1 is his daughter and Kamla d/o Mayaram R/o Kankar is his wife. On 12.06.2011 when defendant No.1 came to attend the funeral of late Vasudev Tiwari, then plaintiff came to know about the said fact. It was further claimed that defendant No.1 and her mother had never resided with late Vasudev Tiwari, therefore, there was an undeclared severance of marital ties. However, it was admitted by plaintiff that Vasudev Tiwari is succeeded by plaintiff and defendant No.1 as his legal representatives. After death of Vasudev Tiwari, defendant No.1 as well as plaintiff and his mother filed an application for mutation of their names in respect of House No.439 FH situated in Indore and accordingly Indore Development Authority directed both the parties to obtain succession certificate. Accordingly, defendant No.1 without impleading plaintiff



and his mother filed an application for grant of succession certificate which was registered as Case No.34/11. It was further stated that *ex parte* succession certificate obtained by defendant No.1 is of no use for her because it was the plaintiff who had performed all the last rites of Vasudev Tiwari. Plaintiff was appointed in the Postal Department in the Assistant Postal Cadre and in his appointment order the name of his father has been mentioned as late Vasudev Tiwari. Even in the marriage invitation card of plaintiff, name of father of plaintiff has been mentioned as late Vasudev Tiwari. Furthermore, late Vasudev Tiwari had also executed an affidavit on 20.01.2009 thereby declaring plaintiff to be his son. Even otherwise, plaintiff was carrying out the agricultural activities on the disputed property during the lifetime of his father late Vasudev Tiwari. Since defendant No.1 had got her name mutated in a clandestine manner, therefore, when plaintiff filed an appeal before SDO Bhitwar, it was dismissed, against which further appeal is pending in the Court of Additional Commissioner, Gwalior Division Gwalior. It was further alleged that defendant No.1 by taking advantage of mutation of her name in the revenue records is trying to alienate the property whereas plaintiff is in physical possession of the land in dispute. It was further claimed that plaintiff has 1/2 share in the land in dispute.

4. Defendant No.1 filed her written statement and claimed that late Vasudev Sharma was married to Kamla Sharma and out of the said wedlock defendant No.1 was born. Only defendant No.1 is the legal representative of Vasudev Sharma. No divorce had taken place between Vasudev Sharma and Kamla Sharma. No second marriage was ever performed by Vasudev Sharma. Plaintiff has no connection with the property of Vasudev Tiwari. In fact, mother of plaintiff was married to one Ratanlal who is resident of village Digthan, District Dhar. Name of father of plaintiff is Ratanlal S/o Babulal Soni and name of his mother is Manorama Soni. Even in the service record of Vasudev Sharma, name of Kamla



Sharma is mentioned as his wife and even joint photo of Vasudev Sharma and Kamla Sharma (mother of defendant No.1) is affixed. Succession certificate has been issued in favour of defendant No.1 and defendant No.1 has got her name mutated in the revenue records. Plaintiff had never carried out any cultivation work. He is not the owner or in possession of the land in dispute.

5. The Trial Court, after framing issues and recording the evidence, dismissed the suit.

6. Being aggrieved by the judgment and decree passed by the Trial Court, appellant preferred an appeal. During pendency of appeal, appellant filed an application under Order XLI Rule 27 of CPC as well as an application for conducting DNA test of appellant with defendant No.1 or elder brother of late Vasudev Sharma. Along with application filed under Order XLI Rule 27 CPC, appellant had annexed copy of Scholar Register to show that right from very beginning name of father of appellant has been mentioned as Vasudev Sharma. It was further mentioned that since elder brother of Vasudev Tiwari (Sharma) is still alive, therefore, his DNA test may be conducted. However, both the applications were rejected by the Appellate Court by impugned judgment and decree dated 19.11.2019 and the appeal was also dismissed on merits.

7. On 27.03.2025, this Second Appeal has been admitted on the following substantial questions of law:

1. Whether First Appellate Court committed an illegality by rejecting the application under Order 41 Rule 27 of CPC specifically when copy of scholar register which was filed alongwith application has some relevance for adjudication of paternity of appellant.

2. Whether First Appellate Court committed an illegality by rejecting the application for conducting DNA test of appellant with respondent No.1 who admittedly is the daughter of Late Shri Vasudev Sharma.

Third substantial question of law is also required to be framed.



Accordingly, in exercise of power u/s 100(5) of CPC, the following additional substantial question of law is framed:-

3. Whether the Courts below failed to see that once the defendant No.1 had relied upon adoption deed (Ex.D/2), then appellant is even otherwise entitled for 1/2 share in the property in dispute ?

8. Challenging the judgment and decree passed by the Courts below, it is submitted by counsel for appellant that in a case of dispute with regard to paternity, DNA test is an authentic and scientific evidence. It is submitted that if elder brother of Vasudev Sharma is not alive, then DNA test of appellant, as well as, defendant No.1 can be conducted in order to find out as to whether appellant is biological son of Vasudev Tiwari (Sharma) or not. It is further submitted that suit of plaintiff was dismissed on the ground that he has not filed necessary school record to show that name of his father was mentioned as Vasudev Sharma. It is submitted that by filing an application under Order 41 Rule 27, CPC, appellant had filed the scholar register of Kendriva Vidyalaya to show that at the time of his admission, name of his father was mentioned as Vasudev Sharma. It is submitted that if the scholar register which has been filed along with application under Order 41 Rule 27, CPC is considered, then it is clear that appellant was admitted in the school in the year 1976 and even then name of father of appellant was mentioned as Vasudev Sharma. It is submitted that in view of Order 41 Rule 27(4) (b) of CPC, it is clear that appellate Court can take the document on record if it deems it necessary for just decision of the case. Counsel for appellant, in support of his contention, has relied upon judgment passed by the Supreme Court in the case of **Narayan Dutt Tiwari v. Rohit Shekhar** reported in (2012) 12 SCC 554 and **Wadi vs Amilal And Ors.** reported in 2015 (1) SCC 677.

9. *Per contra*, counsel for respondents, by referring to the adoption deed (Ex.D/2) claimed that in the aforesaid adoption deed, it is specifically mentioned



that appellant is biological son of Rambabu Katare. Rambabu Katare (PW3) was examined by appellant himself, who has admitted that the adoption deed (Ex.D/2) was executed by him. It is submitted that once there is sufficient material available on record to show that appellant was not the biological son of Vasudev Tiwari, then it is clear that he could not claim any share in the property as legal heir of Vasudev Tiwari.

10. In reply, it is submitted by counsel for appellant that Ex.D/2 is the adoption deed relied upon by defendant herself. Even assuming that appellant was adopted by Vasudev Sharma, still he would become the legal representative of Vasudev Sharma.

11. Faced with such a situation, counsel for defendant tried to wriggle out of the adoption deed by submitting that consent of first wife of Vasudev Sharma was not obtained, therefore, the adoption deed is not valid.

12. Heard, learned counsel for the parties.

Whether appellate Court committed a mistake by rejecting the application filed under Order 41 Rule 27, CPC for taking additional evidence on record ?

13. The Supreme Court in the case of **Wadi (Supra)** has held as under:-

4. It cannot be disputed that the correct date of death of Rupa Ram would clinch the issue and enable the Court to pronounce a satisfactory judgment in the suit. A perusal of Mutation No. 49, if proved, would throw considerable light on the issue. On the question of admission of that document by the appellate court, it would be necessary to notice the relevant provision of Order 41 Rule 27 of the Code of Civil Procedure:

“27. Production of additional evidence in appellate court.

—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if—

(a)-(aa) ***



(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined.”

5. Now it is clear that Rule 27 deals with production of additional evidence in the appellate court. The general principle incorporated in sub-rule (1) is that the parties to an appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions to that principle are enumerated thereunder in clauses (a), (aa) and (b). We are concerned here with clause (b) which is an enabling provision. It says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective decision and to pronounce an effective judgment admission of such evidence is necessary, clause (b) enables it to adopt that course. Invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of the material or record it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case.

14. If the facts of present case are considered, then it is clear that defendant No.1 herself had relied upon adoption deed (Ex.D/2) and, according, to this adoption deed (Ex.D/2), appellant was adopted by Vasudev Sharma. If that is so, then by virtue of that adoption deed, appellant would become the legal representative of Vasudev Sharma. However, that is not the end of matter. The adoption deed was executed on 27/4/1981. Appellant has filed the scholar register along with his application under Order 41 Rule 27 CPC to show that at the time of admission of appellant in Kendriya Vidyalaya, i.e. in the year 1976, name of his father was mentioned as Vaudev Sharma. If appellant was adopted by Vasudev



Sharma in the year 1981, then how name of Vasudev Sharma came in the scholar register of Kendriya Vidyalaya according to which appellant was admitted on 22/9/1976.

15. Be that whatever it may be.

16. The controversy in the present case is with regard to paternity of appellant. Appellant has based his case claiming to be biological son of Vasudev Tiwari (Sharma). In view of scholar register, which was filed by appellant along with his application under Order 41 Rule 27, CPC, this Court is of considered opinion that although appellant should have filed this document at the stage of trial, but in view of Order 41 Rule 27(1)(b) of the CPC which provides that if the appellate Court requires any document to be produced or any witness to be examined to pronounce the judgment for any other substantial cause then the application can be allowed and additional evidence can be taken on record, coupled with the effect of adoption deed (Ex.D/2), this Court is of considered opinion that the appellate Court committed material illegality by rejecting the application under Order 41 Rule, 27, CPC by which the appellant wanted to bring the scholar register on record. Accordingly, substantial question of law No.1 is answered in the affirmative.

Whether the appellate Court committed material illegality by rejecting the application for performing DNA test ?

17. Appellant had filed an application under Order 41 Rule 27 CPC, for conducting the DNA test along with defendant No.1 or elder brother of Vasudev Sharma.

18. The Supreme Court in the case of **Narayan Dutt Tiwari (Supra)** has held as under:-

“54. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to satiate the need found by the Court. A legal fiction under Section



114 of the Evidence Act, as adverse inference is, is not a reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see *Emperor v. Sibnath Banerjee* [AIR 1943 FC 75] , *Dhanvantrai Balwantrai Desai v. State of Maharashtra* [AIR 1964 SC 575 : (1964) 1 Cri LJ 437] and *Fakir Mohd. v. Sita Ram* [(2002) 1 SCC 741]).

55. A presumption is not in itself evidence but only makes a prima facie case for parties in whose favour it exists (see *Sodhi Transport Co. v. State of U.P.* [(1986) 2 SCC 486 : 1986 SCC (Tax) 208]). As far back as in *Damisetti Ramchendrudu v. Damisetti Janakiramanna* [AIR 1920 PC 84] it was held that presumption cannot displace adequate evidence. The Supreme Court also in *Mohanlal Shamji Soni v. Union of India* [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] held that it is the rule of law in evidence that the best available evidence should be brought before the court to prove a fact or the points in issue and the court ought to take an active role in the proceedings in finding the truth and administering justice.

56. Recently in *Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira* [(2012) 5 SCC 370] it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimised was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak “adverse inference”.

57. The impugned judgment refers extensively to the law in this regard in other countries. We are however of the opinion that once the Supreme Court in the judgments supra has held the civil court entitled to issue such a direction, the law in other jurisdictions pales into insignificance.”

In view of law laid down by Supreme Court in the case of **Narayan Dutt Tiwari (Supra)**, it is clear that presumption is not in itself an evidence, but only makes a *prima facie* case for the party in whose favour it exists and the truth is the guiding star and the quest in the judicial process and the voyage of trial.

19. In the present case, question is with regard to paternity leading to rights in



the property. Under these circumstances, this Court is of considered opinion that the appellate Court should have directed for conducting DNA test of appellant as well as elder brother of late Vasudev Sharma or defendant No.1. However, as already pointed out, none of the parties are in a position to make a statement as to whether elder brother of Vasudev Sharma is still alive or not ? Therefore, it is directed that in case if elder brother of Vasudev Sharma is not alive, then defendant No.1 shall undergo DNA test to find out as to whether appellant is biological son of Vasudev Tiwari (Sharma) or not.

20. Accordingly, substantial question of law No.2 is also answered in affirmative.

Effect of Adoption Deed

21. The Adoption Deed (Ex.D/2), according to which appellant was adopted by Vasudev Sharma was relied upon by the defendant herself. Although counsel for respondent tried to wriggle out of the adoption deed by submitting that consent of the first wife was not taken, therefore, adoption deed was not valid, but this Court is of considered opinion that after having relied upon the adoption deed (Ex.D/2), defendant cannot challenge the authenticity of adoption deed (Ex.D/2). Furthermore, it is the case of appellant that the first wife and daughter from first wife were not residing with Vasudev Sharma. Therefore, it is held that even otherwise by virtue of adoption deed (Ex.D/2), appellant is entitled for 1/2 share in the property. Therefore, substantial question of law No.3 is answered in favour of appellant.

22. Accordingly, judgment and decree dated 19.11.2019 passed by I Additional District Judge, Dabra, District Gwalior (M.P.) in RCA No.15/2017 and judgment and decree dated 27.02.2017 passed by I Civil Judge Class II, Bhitwar, District Gwalior (M.P.) in Civil Suit No.04A/2013 are hereby set aside. Although this Court should have remanded the matter back to the trial Court to take additional



evidence on record and to get the DNA test done of appellant as well as either elder brother of Vasudev Tiwari (Sharma) and if he is no more alive then DNA test of defendant No.1, but in view of adoption deed (Ex.D/2) it is held that appellant has 1/2 share in the property.

Accordingly, the suit filed by appellant is, hereby, decreed. It is hereby declared that appellant has 1/2 share in the property in dispute and he is entitled to maintain his possession over his 1/2 share in the suit property.

Parties are at liberty to file an application under section 178 of the M.P. Land Revenue Code for partition of their holdings.

23. Let the decree be drawn accordingly.
24. Appeal succeeds and is, hereby, allowed.

(G.S.Ahluwalia)
Judge

(and)