CASE NO.:
Appeal (civil) 723 1973

PETITIONER:
CHIRANJILAL SRILAL GOENKA (DEAD), BY LRS.

Vs.

RESPONDENT:
JASJIT SINGH & OTHERS

DATE OF JUDGMENT: 01/12/2000

BENCH:
M.J.Rao, M.B.Shah

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J
J U D G M E N T

Shah, J.

Aforesaid appeal is filed against the judgment and order passed by the High Court of Delhi in Civil Writ Petition No.734 of 1971 filed by the deceased Chiranjilal Srilal Goenka of Bombay challenging the order No.19 of 1971 dated 8th February, 1971 passed by the Gold Control Administrator, New Delhi. Deceased appellant challenged confiscation of gold by the custom authorities under Gold Control orders by filing writ petition which was dismissed by the High Court. Against that order, the aforesaid appeal is filed. Pending appeal, appellant (Chiranjilal Srilal Goenka) died on 24th November, 1985. A dispute aroseas to who is the legal heir of the deceased. Firstly, one of the daughters, Sushila Bai N. Rungta claimed under a Will dated 29th Oct., 1982 and secondly, Radheshyam Goenka claimed as adopted son and thirdly, Smt. Raj Kumai R. Goenka wife of adopted son claimed independently. Keeping the question of right, title and interest in the property open, for continuing the proceedings, all the three were ordered to be brought on record by order dated 7.10.1991. It was also ordered that appeal be listed to consider the possibility of appointing an arbitrator by common consent or by orders of the Court for bringing about a settlement. Thereafter, to settle the dispute as to who would be the legal heirs to the estate of Chiranjilal Srilal Goenka, this Court passed an order on 1.11.1991 appointing Mr. Justice V.S. Deshpande, retired Chief Justice of Bombay High Court, as arbitrator which is reproduced hereunder

By consent of parties Justice V.S. Deshpande, retired Chief Justice of the Bombay High Court is appointed as arbitrator to settle the dispute as to who would be the legal heirs to the estate of late Chiranjilal Srilal Goenka. The question as to statutory action under the Gold Control Act is left open and is made explicitly clear that it is not

a part of the reference. Arbitrator will fix his terms of fees and should function in such a way that the award is made available within four months from now. Parties will be entitled to place the claims before the Arbitrator in regard to trust and other institutions but the same may not be finally dealt with by the arbitrator. Arbitration expenses shall be shared equally by the parties corresponding to the share of interest in the property.

For deciding the dispute, on 10th April, 1992 the Arbitrator framed issues as under

(1) Does claimant No.1 prove execution of the Will dated 29th (28th) October, 1982, and prove the same to be the last and genuine Will of late Shri C.S. Goenka?

(2) If not, does she prove the execution of the Will dated 4.7.1978 and prove the same to be the last and genuine Will of late Shri C.S. Goenka?

(3) Does claimant No.2 prove that the late Shri C.S. Goenka duly adopted him on 26.1.1961?

(4) Is the copy of the document dated 26.1.1961 filed by claimant No.2 admissible in evidence?

(5) Is the said document genuine and brought into existence in the way claimed by claimant no.2?

(6) If yes, then does the said document constitute an agreement between Mangalchand and late Shri C.S. Goenka?

(7) If yes, can the said agreement be said to be the one contemplated by Section-13 of the Hindu Adoption and Maintenance Act?

(8) If yes, then would the said agreement dated 26.1.1961 prevent the late C.S. Goenka from disposing of and dealing with the estate, according to his wishes by a Will?

(9) In view of finding on issues above, who are the legal heirs to the estate of the late Shri C.S. Goneka?

For issue nos.1 and 2, it was pointed out that probate suit is pending in the Bombay High Court, wherein the learned Judge has expressed doubt whether arbitrator has jurisdiction to decide probate suit. Hence, IA No.3 of 1992 was filed before this Court to seek clarification. By judgment and order dated 18th March, 1993 this Court held that arbitrator can not proceed with probate suit and decide issue nos.1 and 2 framed by him and the High Court was requested to proceed with the probate suit No.65 of 1985. Till the decision in the probate suit, the arbitrator was requested not to decide issue nos.1 and 2. The Court observed that it would be open to the arbitrator to proceed with other issues and would conclude his findings on issue nos.1 and 2 on the basis of result in the probate proceedings and make the award according to law.

Thereafter, in the probate suit on 27.10.1999 parties filed Minutes of order stating as under:-

(1) The Caveators/Defendants concede to the execution and genuineness of the Will dated 29th October, 1982 of the deceased Chiranjilal Shrilal Goenka of which probate is sought by the petitioner. Petition allowed accordingly as prayed.

(2) The parties agree that this order/decree will be without prejudice to the rights, claims and contentions of the parties in the arbitration proceedings pending before Justice V.S. Deshpande, Retd. Chief Justice of Bombay High Court.

(3) No Order as to costs.

On the same date, the Court passed order in terms of minutes of order.

Subsequently, after recording the evidence, Arbitrator passed an Award on 16th June, 2000. He arrived at the conclusion that Will in favour of Sushila Bai N. Rungta executed by Chiranjilal was in-operative and Radheshyam was the sole heir as adopted son. It was also held that Sitabai Mangal Chand Kedia and Raj Kumari wife of Radheshyam do not claim to be such heirs.

On the basis of that Award, on behalf of Radheshyam IA No.9 of 2000 is filed for making the award rule of the court and to pass a decree in terms of the award. That award is challenged by Sushilabai N. Rungta by filing objection under Section 33 read with Section 30 of the Arbitration Act, 1940. As against this, Radheshyam has submitted that there is no error of law or facts apparent on the face of record and the Arbitrator has given well reasoned award which does not call for any interference.

At the time of hearing, Mr. Vinod Bobde, learned senior counsel for objector submitted that he was not challenging the finding given by the learned Arbitrator that Radheshyam was adopted son of Chiranjilal. However, he submitted that finding of the arbitrator that there was an agreement between Chiranjilal Goenka and parents of Radheshyam that Radheshyam was given on adoption to Chiranjilal on the conditions mentioned in the so-called photocopy of letter dated 26.1.1961 is, on the face of it, illegal and arbitrary. He further submitted that assuming that the said letter can be considered to be an agreement, it requires registration as it limits the right of absolute owner Chiranjilal to bequeath the property by Will. He further submitted that after codification of Hindu Adoptions & Maintenance Act, 1956 (hereinafter referred to as the Act), Sections 12 and 13 govern the rights of the adopted son and the adoptive parents.

As against this, Mr. Sanghi, learned senior counsel submitted that it cannot be said that the award made by the arbitrator is in any way on the face of it, illegal or arbitrary and that when the reasoned award is passed by the learned arbitrator, even if other view is possible on the interpretation of law, it would not be open to this Court to disturb the finding given by the Arbitrator. For dealing with contentions of the learned counsel, we would first refer to relevant parts of Sections 12 and 13 of the Act, which read as under:-

12. Effects of adoption. An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that

(a) .. (b) .. (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

13. Right of adoptive parents to dispose of their properties:

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

Reading Section 12 proviso (c) and Section 13 together it is apparent that adoption would not divest any person of any estate which is vested in him or her before the adoption. It also does not deprive the adoptive father or mother the power to dispose of his or her property by transfer, inter vivos or by Will. However, this power to dispose of the property would be subject to any agreement between the parties.

Legislature has codified and crystalised the situation prevailing prior to the enactment of the Act that there was no implied contract on the part of the adoptive father or mother in consideration of the gift of his son by a natural father or mother that he or she would not dispose of property by transfer or by Will. However, in case of specific agreement to the contrary between the parties, the power to dispose of the property would be subject to the said agreement.

Keeping these in background, we would consider the facts of the present case. It is the case of both the parties that Mr. Chiranjilal Goenka had two daughters namely Sitabai, born on 29.10.1938 and another Sushilabai born on 3.9.1950. Sitabai was married to Mangal Chand Kedia of Kanpur and gave birth to Radheshyam on 8.9.1954 and to another son Govind on 3.8.1956. On 26.1.1961 Chiranjilal adopted Radheshyam. It is the contention of the learned counsel for Radheshyam that on the said date prior to adoption, a writing recording the terms of earlier arrived oral agreement was dictated by Chiranjilal in the form of an offer letter from the natural parents, which was recorded by relative Mr. Hanuman Prasad Poddar. Photocopy of the said letter is produced on record, which is in Hindi and its translation is to the following effect: -

Salutations from Mangalchand Kedia to the respected Shri Chiranjilal Goenka. I am giving you in adoption with much pleasure my son Chi. Radheshyam. From now he is alone your son. And he alone will inherit your entire moveable and immovable property. During your life time you shall be entitled to your entire moveable and immovable property. In case if you die, your wife Smt. Bhagwandevi shall have

absolute right. Similarly, if she dies earlier you will have absolute right. After the death of both of you, Chiranjeev Radheshyam alone shall have full right on total moveable and immovable property. I am writing this letter with pleasure. 26.1.1961.Magh Shukla 10 Samvat 2017 Thursday.

Questions which would require consideration in these proceedings would be (1) Whether the writing dated 26.1.1961 can be considered to be an agreement between Chiranjilal and the parents of Rahdeshyam? (2) Whether it is an agreement as contemplated by Section 13 of the Act limiting the rights of adoptive parents to dispose of the property by will? And if so, (3) Whether it requires registration?

It has been contended by the learned senior counsel Mr. Bobde that the aforesaid letter cannot be considered to be any agreement between Chiranjilal and Mangal Chand Kedia, father of Radheshyam. He further submitted that there is nothing on record to prove that the aforesaid unilateral offer of Kedia was accepted by Chiranjilal. He further pointed out that this letter nowhere provides that rights of Chiranjilal to dispose of his property by transfer or by Will is any way restricted. It is his contention that even this letter specifically provides that during the life time of Chiranjilal, he would be absolute owner of the property meaning thereby that he would have right to transfer the property or bequeath the same.

As against this, learned senior counsel Mr. Sanghi submitted that the aforesaid writing specifically provides that Shri Radheshyam shall be the sole heir to the properties of Chiranjilal after his death and death of his wife. The said writing was signed by Mangal Chand Kedia, his wife Sita Bai and witnessed by Hanuman Prasad Poddar and eight other eminent people of the community. After this letter, Chiranjilal took Radheshyam on adoption and therefore, it should be held that terms of the said letter were accepted by Chiranjilal. On the basis of these facts, if finding is given by the arbitrator, it cannot be said that award is, on the face of it, illegal. It is submitted that only after marriage of Sushilabai with Rungta of Jaipur, disputes arose in 1975 between Chiranjilal and Radheshyam. May be that, more than 38 proceedings were initiated between Chiranjilal and Radheshyam and in proceedings Chiranjilal resiled from his agreement and the factum of adoption in subsequent affidavit filed by him, but that would not nullify the agreement or the adoption. It is, therefore, submitted that because of adoption agreement Radhey Shyam would be the sole and exclusive heir of the assets of late Chiranjilal after his death. Therefore, the Will dated 29th October, 1982 executed by him would be inoperative and of no effect. The learned counsel further submitted that parties can enter into a binding oral agreement unless there is any extra requirement by statute to record the same in writing. Section 13 of the Act does not require the agreement to be in writing. For this purpose, he relied upon the decision in Tarsem Singh v. Sukhminder Singh [1998 (3) SCC 471]. In any case, after taking advantage by adopting Radheshyam, Chiranjilal is bound by the said letter. For this purpose, he has relied upon Mohaomed Musa & Others v. Aghore Kumar Ganguli (AIR 1914 PC 27), Venkayaamm v. Apparao (AIR 1916 PC 9) and Re Basham (1987 (1) All ER 405). He also submitted that the

said letter does not require any registration. He finally submitted that the award passed by the arbitrator can not be said to be illegal which would call for any interference. Hence, it should be made rule of the Court. In our view, the photocopy of the letter, presuming that such letter was written by Mangal Das Kedia to Chiranjilal at the time of giving Radheyshyam in adoption, there can be no doubt that it does not reflect any agreement between the parties. At the most it was only a unilateral offer giving child in adoption on certain expectations. The letter appears to be signed by number of persons and if really Chiranjilal had accepted it, then he would have placed his signatures on the said letter. There is nothing on record that he accepted the same as it was. Secondly, the letter at the most indicates that from that day, RadhesShyam would be the adopted son of Chiranjilal and would inherit his property. However, it was made clear in that very letter that during the life time of Chiranjilal and his wife, they were the absolute owners of their properties. There is nothing to indicate in the said letter that it was a covenant or a contract restricting the powers of Chiranjilal or his wife to dispose of the property either by transfer or by Will. Nowhere, it is stated that during his life time, Chiranjilal will not be entitled to dispose of his property either by transfer or by Will. Hence, there is no positive or negative agreement limiting the rights of Chiranjilal to dispose of the property by executing the Will. Presuming that the aforesaid letter is an agreement, at the most it can be stated that from the said date Radheshyam would be son of Chiranjilal and would be entitled to inherit his properties. This also would not mean that there is any agreement that adoptive father has no right to dispose of his property.

However, learned Senior counsel Mr. Sanghi submitted that in the letter, it is mentioned that after the death of Chiranjilal and his wife, Radheshyam alone would have full right on the moveable and immovable property belonging to them. He, therefore, submitted that the aforesaid offer implies that right of Chiranjilal was restricted and he could not execute the Will. In our view, this submission has no force. The aforesaid term of the letter only indicates that Radheshyam alone would be the heir and would have full right on the moveable and immovable property as heir. That is to say, it would mean if any property is left by deceased Chiranjilal which is not transferred or bequeathed, then Radheshyam would be the heir and entitled to receive the same. This would not mean that there was any restraint on the part of Chiranjilal to execute the will. In support of his contention, learned counsel Mr. Sanghi referred to the following passage from Theobald on Wills (At Page 93), [Fourteenth Editionby J.B. Clark):

Contract to leave residue. But a covenant to leave the covenantee all the property or a share of the property of the covenantor does not create a debt.

The effect of such a covenant is to leave the covenantor free to dispose of his property in his lifetime by gift or otherwise as he thinks fit, so long as he does not dispose of it in fraud of the covenant. The covenantee is entitled to have the covenant specifically enforced, and he will take subject to payment of the funeral and testamentary expenses and debts of the covenantor.

Evasion of contract not permitted. If the covenant is limited to the personal property of the covenantor and he buys real estate, the real estate is, in the hands of the heir or a devisee, charged with the purchase-money. And though the covenantor can dispose of the property in his lifetime, he cannot defeat the covenant by a disposition by will, nor by any disposition which has the same effect as a testamentary disposition, for instance, a voluntary settlement whereby he settles property on himself for life with remainders over.

The aforesaid paragraphs in no way support his contention. On the contrary it specifically mentions the effect of such covenant stating that it leaves the covenantor free to dispose of his property in his lifetime by gift or otherwise as he thinks fit so long as he does not dispose of it in fraud of the covenant. Hence, Chiranjilal was entitled to dispose of the said property either by transfer or by will. Further, in the present case, there is no question of fraud on the part of Chiranjilal. Admittedly, the relations between Chiranjilal and Radheshyam were so much strained that more than 38 litigations were pending between them in various courts. Further, the aforesaid paragraph is to be read in context of previous paragraph which provides for a contract to leave residue. In the present case, there is no such contract to leave residue in favour of Radheshyam. In this view of the matter, it cannot be said that by the said letter, there is any agreement limiting the rights of adoptive parents to dispose of their property by executing a will.

The next question would be whether the said letter, if considered as an agreement, restraining or limiting the rights of adoptive father to bequeath the property requires registration? In support of this contention, learned counsel Mr. Bobde referred to the decision of this Court in Dinaji v. Daddi (1990 (1) SCC 1). In that case Hindu widow adopted a son on April 28, 1963 by executing the deed of adoption. The document was not registered and the trial court admitted the same in evidence in proof of adoption. Subsequently, by registered sale deed dated April 28, 1966, she transferred immovable property including agricultural land and houses in favour of the appellant Dinaji. On the basis of the sale deed, suit for injunction and possession was filed against the adopted son. After considering the provisions of Section 12 (c), this Court held that after the Hindu Succession Act came into force, widow became absolute owner of the property of her husband and, therefore, merely by adopting a child, she could not be deprived of any of her rights in the property. The Court further held the adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the Scheme of S. 12 proviso (c). Thereafter, the Court considered section 13 of the Act and observed that this section enacts that when the parties intend to limit the operation of proviso (c) to S. 12, it is open to them by an agreement and it appears that what she included in the present deed of adoption was an agreement to the contrary as contemplated in S. 13 of the Hindu Adoptions and Maintenance Act. However, the Court held that in view of Section 17(1)(b) of the Registration Act, the said part of the deed which refers to the creation of immediate right in the adopted son and the divesting of the right of the adoptive mother in the property will squarely fall within the ambit of Section 17(1)(b) and, therefore, under Section

49 of the Registration Act.

As against this, learned senior counsel for the respondent Mr. Sanghi submitted that the aforesaid letter is not to be construed as a deed, but is to be taken as an offer letter and by conduct of adopting Radheshyam as son, Chiranjilal could not dispose of the property by will. In our view, this argument is totally devoid of any substance because if reliance is required to be placed on the letter for holding that it restrains Chiranjlal to dispose of the property by will, then it is required to be read as a document which limits the rights of Chiranjilal to deal with his property including the immoveable property. Therefore, it would require registration. In any case, the aforesaid question is not required to be considered in detail because we have already arrived at the conclusion that there is no agreement between the parties before adoption indicating any contrary intention as contended.

Finally, we would deal with the contention of learned counsel Mr. Sanghi that when two views are possible and the arbitrator has taken a plausible view, the award cannot be interfered with. For deciding this contention, we would refer to some parts of the award which would reveal that the award is, on the face of it, illegal and erroneous and contrary to what has been discussed above. The arbitrator has misinterpreted the letter as an adoption agreement between Mangalchand Kedia and late Chiranjilal and thereafter relied upon the part of the said agreement as two terms of the agreement and has held that as per the said terms, Chiranjilal has committed him to have only life interest in the said property for himself and his wife. After their death, Radheshyam would be the successor of their entire property. He, therefore, held that there is an implied prohibition against them to transfer any part of their property. Obviously, either of them is incompetent to transfer any part of the property inter vivos or under any will. In this view of the matter, I hold that the adoption agreement covered by the finding on issue No. 6 is an agreement to the contrary as contemplated under Section 13 of the Act. In this view of the matter, we hold that the award dated 16th June, 2000 passed by the arbitrator holding that the will executed by Chiranjilal is inoperative and requires to be set aside and we so do. It is held that on the basis of the probated Will Sushilabai N. Rungta is legal heir of the deceased Chiranjilal. Ordered accordingly. There shall be no order as to costs.