Court No. - 66 **A.F.R.**

Case :- WRIT - A No. - 10300 of 2017

Petitioner :- Bhanu Pratap Singh
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Lal Behari Yadav,Kamla Kant Srivastava,Kshitij Shailendra,Rajesh Kumar Srivastava
Counsel for Respondent :- C.S.C.

Hon'ble J.J. Munir,J.

1. In this writ petition, parties have exchanged affidavits, pending admission. These include a supplementary affidavit filed on behalf of the petitioner.

2. Admit.

3. Heard forthwith.

4. Mr. Kshitij Shailendra, Advocate, appears on behalf of the petitioner, whereas all the three respondents, who are the State and its officers, are represented by Mr. Manvendra Dixit, learned Standing Counsel.

5. The question involved in this petition is :

> *" Whether the words "If he has a wife living" occurring in the proviso to Section 7 of The Hindu Adoptions and Maintenance Act, 1956[1] include an estranged wife living apart from her husband, but not divorced ? "*

6. Rajendra Singh and Raj Narayan Singh were brothers. They were both sons of one Uday Raj Singh. Both brothers were married. Rajendra Singh was married to Smt. Phulmati, whereas Raj Narayan Singh was married to Smt. Kamla Devi. Both the brothers were natives of Village - Mirzapur, Post - Kajha, District - Mau. Rajendra Singh and Smt. Phulmati were an issueless couple, whereas Rajendra Singh's brother, Raj Narayan Singh had a son, Bhanu Pratap Singh. Bhanu Pratap Singh is the petitioner here. Rajendra Singh was a Gardener, in the employment of the

1 **for short "Act of 1956"**

Forest Department. He was posted in the control of respondent no. 3. Rajendra Singh, being issueless, adopted his brother's son, Bhanu Pratap Singh, the petitioner here, on 07.02.2001. The adoption was purportedly made in accordance with Hindu rites, with all ceremonies of giving and taking being observed. A deed of adoption was, however, executed much later, on 14.12.2009. It was admitted to registration on 15.12.2009. The deed of adoption shows that parties to the adoption were Raj Narayan Singh and his wife Smt. Kamla Devi on the one hand, described as the first party, and Rajendra Singh alone on the other, described as the second party. Rajendra Singh represented himself as an unmarried man, according to the recitals carried in the adoption deed. This was done, as it appears, because Rajendra Singh and his wife Smt. Phulmati were an estranged couple. Rajendra Singh, for obvious reasons, could not secure Smt. Phulmati's consent to the adoption. Rajendra Singh died in harness on 03.06.2016, leaving behind him his wife Smt. Phulmati, a fact acknowledged in the writ petition, and the much disputed adopted son of his, Bhanu Pratap Singh, the petitioner. Bhanu Pratap Singh obtained a succession certificate of sorts from a nondescript officer, called an Officer In-Charge (Certificates), acting for the Collector of Mau. This certificate is dated 25.10.2016.

7. It must be remarked that this certificate dated 25.10.2016 is more an expression of hesitation than certification. It says that this certificate is not valid for the purpose of any case relating to inheritance or income tax. Words to this effect are scribed at the head of the document. At the foot of it, there is a note, which says that the certificate is founded on an administrative inquiry alone. It would not apply to a case relating to succession in Court. It would have no effect under the various laws, where a requirement is there to produce a succession certificate from a Judge. It is then mentioned in the note that for claims up to the value of Rs. 5,000/-, the certificate would be valid. The last limitation indicated is that the certificate is not to be used in a foreign country.

8. This Court must make it bold to remark that the document dated 20.10.2016, purporting to be a succession certificate, or whatever it is, is the embodiment of an absolutely unauthorized act by the Collector's office. There is no provision under any law that authorizes the Collector of a district to issue a succession certificate of any kind. The learned Standing Counsel has not been able to show any law, authorizing the Collector to issue a succession certificate of any worth, relating either to movable or immovable property. This Court must deprecate the tendency of citizens to readily rush to authorities administrative, instead of approaching the Judge or Court of ordinary original civil jurisdiction, who commands wide powers in matters affecting civil rights of parties and to determine civil questions. It is well-reputed that succession certificates, letters of administration to estates of deceased and probates of Will are all matters that are specifically entrusted under the Succession Act to Judges, including this Court. The Collectors ought not issue certificates partaking the colour of succession certificates, which have a tendency of confounding rights of parties. No more is required to be said about this matter.

9. Now, the certificate dated 25.10.2016 mentions that Bhanu Pratap Singh is the adopted son of the late Rajendra Singh. It also mentions that his status is founded on a registered adoption deed. It also certifies that apart from Bhanu Pratap Singh, Rajendra Singh did not leave any other heir entitled. Acting on the certificate dated 25.10.2016, Bhanu Pratap Singh staked his claim before the respondent-Authorities, under the The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974[2], asking to be appointed on compassionate basis, due to death of the late Rajendra Singh, his adoptive father while still in service. This application appears not to have been attended to by respondent no. 3, and remained pending for some time. Bhanu Pratap Singh preferred *Writ - A No. 53860 of 2016*, complaining of inaction on

2 **for short "the Rules, 1974"**

the third respondent's part in the matter. He sought a direction for the consideration of his claim to a compassionate appointment. This Court, by order dated 17.11.2016 made in *Writ - A No. 53860 of 2016*, disposed of the aforesaid writ petition, ordering the Divisional Director, Social Forestry Division, Mau, respondent no. 3 to consider and decide the petitioner's claim in accordance with law, preferably within a month of the date of production of a certified copy of the order.

10. In deference to that direction made by this Court, the Divisional Director, Social Forestry Division, Mau, respondent no. 3, by his order dated 17.12.2016, rejected the petitioner's claim, holding that he was neither the sole heir nor a dependent of Rajendra Singh, within the meaning of the Rules of 1974. It was held that Smt. Phulmati was the deceased's wife and his sole heir-dependent. The petitioner, Bhanu Pratap Singh, was his brother's son, whose father and mother, Raj Narayan Singh and Smt. Kamla Devi, were alive. The adoption was not found valid on facts and in law, for the reasons indicated in the order.

11. Aggrieved, this writ petition has been preferred.

12. Notice, pending admission, was issued to the respondents on 17.03.2017, and they have filed a counter affidavit jointly on behalf of respondent nos. 2 and 3 on 22.08.2017, to which, a rejoinder affidavit has been filed on behalf of the petitioner on 05.08.2017. A supplementary affidavit dated 07.02.2019 has also been filed.

13. A perusal of the impugned order shows that the third respondent, the Divisional Director, Social Forestry Division, Mau, has disbelieved the adoption and held it to be a sham. The third respondent, while considering the petitioner's claim, also had before him, the deceased Rajendra Singh's widow Smt. Phulmati, who objected to the claim founded on adoption. She stated that she was the sole heir and dependent of the deceased. Amongst the many reasons that the third respondent has assigned to reject the petitioner's claim for a compassionate appointment

under the Rules of 1974, is the compromise decree in O.S. No. 145 of 1994, passed by learned Civil Judge (Senior Division), Mau dated 06.08.1994. This decree acknowledges the fact that Smt. Phulmati is Rajendra Singh's wife. It also embodies the fact that Rajendra Singh, who was an employee of the Forest Department, had got a nomination recorded in his Service Book and Group Insurance Scheme (G.I.S.) in favour of Smt. Kamla Devi, owing to strained relations with his wife. It has been covenanted by the terms of the compromise embodied in the decree that now, the name of Smt. Phulmati, Rajendra Singh's wife, be substituted as his legal heir in the service record, in place of Smt. Kamla Devi. There is also a covenant about Smt. Kamla Devi receiving a sum of Rs. 500/- per month towards maintenance, which would be chargeable to his pension and property also.

14. This Court has looked into that decree, annexed to the counter affidavit. The impugned order further shows that the adoption has been disbelieved for other reasons as well. It has been noticed that the extract of the family register filed by the petitioner, along with his application, shows that the name of his father, indicated therein, is Raj Narayan Singh, and that of his mother, Kamla Devi, whereas Smt. Phulmati Devi's husband is shown as Rajendra Singh. It has next been noticed in the order impugned that Rajendra Singh has described himself in the deed of adoption as unmarried, whereas his wife Smt. Phulmati Devi is alive. It has also been recorded by the third respondent that while the date of adoption deed relied upon by the petitioner is 27.11.2009 (in fact, it is 14.11.2009), the petitioner's mark-sheets relating to his B.A. degree for the first year, the second year and the third year, *vis-à-vis* the examinations of 2011, 2012 and 2013, show the name of the petitioner's father as Raj Narayan Singh, and that of his mother, Smt. Kamla Devi. The inference appears to be that in case the petitioner were adopted in terms of the registered adoption deed of 2009 (which, in fact, embodies an adoption of the year 2001), there was no occasion for the petitioner's

father and mother's name to be mentioned in his educational records as Raj Narayan Singh and Smt. Kamla Devi, who are his natural parents. The educational documents would have borne his adoptive father's name. On these grounds, the third respondent has held the adoption to be a sham, and the petitioner not at all the adoptive son of the deceased, entitling him to compassionate appointment.

15. Mr. Kshitij Shailendra, learned counsel for the petitioner, has been at pains to assail the impugned order. He has submitted that there is nothing wrong about the adoption. He asserts that the third respondent has remarked in error that reference to the adoptee in the deed of adoption as *"ek ladke ko god lena chahte hain"*, whereas the adoptee is Rajendra Singh's nephew, raises suspicion. Mr. Shailendra says that the exception taken by the third respondent to a reference about his nephew by Rajendra Singh as a boy, is not at all misplaced, inasmuch as it is permissible in law to take a nephew in adoption. He also submits that remarks by the third respondent that the petitioner's father and mother are alive, also inform the impugned order with irrelevant considerations, for it is no disqualification under the law that the adopted boy has both his natural parents alive. Mr. Kshitij Shailendra has placed reliance upon a decision of this Court in **Vikas Jauhari v. State of U.P. and Others**[3] to support his submission that an adopted son is as much a son as a natural son, for the purposes of the Rules of 1974. He has drawn the attention of this Court towards Paragraph 9 of the report in **Vikas Jauhari** *(Supra)*, where it is held :

> "**9.** In view of the above, I am of the considered view that the adopted son also falls within the definition of family defined under section 2(c) of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 and entitled for the claim of compassionate appointment."

3 **2011 (10) ADJ 729**

16. Mr. Kshitij Shailendra has further submitted that so far as the validity of the adoption is concerned, even in cases where the adoption is not strictly proved with the establishment of a ceremony of giving and taking, the long duration of time during which a person is treated as adopted, has to be given due weight. He submits that in this case, the petitioner was adopted way back in the year 2001, whereas the adoptive father died in the year 2016. The adoption, that was completed in the year 2001, was recorded in the deed of adoption, bearing a specific reference to the date in the year 2001, when the petitioner was adopted. This deed has been duly admitted to registration. It is the learned counsel's submission, therefore, that such long-standing adoption, which is also natural in its choice, given the fact that the adoptee is the adopter's nephew, the third respondent has erred in holding the adoption to be sham. Mr. Shailendra has placed reliance, in support of this part of his contention, upon a decision of the Supreme Court in **Kamla Rani v. Ram Lalit Rai alias Lalak Rai (Dead) through Legal Representatives and Others**[4] where it was held :

> "**6.** We cannot lose sight of the principle that though the factum of adoption and its validity has to be duly proved and formal ceremony of giving and taking is an essential ingredient for a valid adoption, long duration of time during which a person is treated as adopted cannot be ignored and by itself may in the circumstances carry a presumption in favour of adoption. In this regard, we may refer to the observations of this Court in *L. Debi Prasad* v. *Tribeni Devi* [*L. Debi Prasad* v.*Tribeni Devi*, (1970) 1 SCC 677] : (SCC pp. 681-82, para 9)
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> > "*9.* There is no doubt that the burden of proving satisfactorily that he was given by his natural father and received by Gopal Das as his adoptive son is on Shyam Behari Lal. But as observed by the Judicial Committee of the Privy Council

4 **(2018) 9 SCC 663**

in *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* [*Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*, 1871 SCC OnLine PC 11 : (1871-72) 14 Moo IA 67] ; that although the person who pleads that he had been adopted is bound to prove his title as adopted son, as a fact yet from the long period during which he had been received as an adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; that in the case of a Hindu, long recognition as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In *Rup Narain* v. *Gopal Devi* [*Rup Narain* v. *Gopal Devi*, 1909 SCC OnLine PC 3 : (1908-09) 36 IA 103] the Judicial Committee observed that in the absence of direct evidence much value has to be attached to the fact that the alleged adopted son had without controversy succeeded to his adoptive father's estate and enjoyed till his death and that documents during his life and after his death were framed upon the basis of the adoption. A Division Bench of the Orissa High Court in *Balinki Padhano* v. *Gopakrishna Padhano* [*Balinki Padhano* v. *Gopakrishna Padhano*, 1963 SCC OnLine Ori 33 : AIR 1964 Ori 117] ; held that in the case of an ancient adoption evidence showing that the boy was treated for a long time as the adopted son at a

> time when there was no controversy is sufficient to prove the adoption although evidence of actual giving and taking is not forthcoming. We are in agreement with the views expressed in the decisions referred to above."

17. Mr. Dixit, on the other hand, submits that the adoption in this case is sham to its face. He has emphasized that post adoption, which is said to have taken place in the year 2001, the petitioner's name has nowhere figured, in any records, as the Late Rajendra Singh's son. In the family register also, there is nothing to show that the adoption was ever given effect to. In the mark-sheets relating to the three-year B.A. course pursued by the petitioner, names of the petitioner's parents mentioned are those of his natural parents, Raj Narayan Singh and Smt. Kamla Devi. These do not mention Rajendra Singh or his wife, Smt. Phulmati. Mr. Dixit, therefore, says that there is no evidence at all here to conclude that over a long period of time, the petitioner has been treated as Rajendra Singh's son. He also emphasized the fact that deed of adoption was executed and registered in the year 2009 about an antecedent adoption that took place eight years ago. In his submission , this also raises suspicions about it. All the aforesaid contentions aside, Mr. Dixit says that the fact that consent of Smt. Phulmati was not taken before the petitioner was adopted, renders the adoption bad in law, in view of the proviso to Section 7 of the Act of 1956. To the last contention advanced by Mr. Dixit, the Court asked Mr. Shailendra if there was still doubt about Smt. Phulmati being the Late Rajendra Singh's wife. Mr. Shailendra has urged that for a fact it cannot be denied that Rajendra Singh was married, and that Smt. Phulmati was his wife. He further submits that so far as the issue about the proviso to Section 7 of the Act of 1956 is concerned, the same ought not be applied in a case where the husband and wife are separated and living apart, so much so, that the two have turned strangers, though not formally divorced. He submits that the proviso to Section 7 must be read in a purposive manner and an estranged wife, who has no connection with the

affairs of her husband, ought not be regarded as a wife obliging the man as a married Hindu, to secure his wife's consent before he adopts.

18. This Court has given a thoughtful consideration to the submissions variably made on both sides. So far as the objection to the impugned order based on the fact that an adopted son may not be regarded as a son within the meaning of Section 2 (c) of the Rules of 1974, this Court does not think that there is any other issue about it. The impugned order does not decline the petitioner's claim, because the petitioner is an adopted son, and not a natural son. Rather, the adoption has been held invalid. Therefore, in the opinion of this Court, that a part of Mr. Kshitij Shailendra's submissions, where he has emphasized that the adopted son is also entitled to be treated as the deceased's son, is not a point that arises for consideration at all. The impugned order, read as a whole, disbelieves the factum of adoption, mostly on relevant grounds. The fact that the adoption is shown to have been made with the necessary ceremonies done way back on 07.02.2001, but the deed of adoption executed as late as 14.12.2009, has justifiably raised suspicion with the third respondent. There is no ostensible reason why the petitioner's adoptive father or his natural parents should have waited all this while in executing a deed and seeking its registration, if they had to execute one. In the opinion of this Court, it does show that the deed is a document brought up for the purpose of creating evidence about the adoption, which may not be there at all. The impugned order does not show that the third respondent has jumped to a conclusion against the validity of the adoption, for the reason alone of this time lag between the claimed adoption and execution of the deed. He has carefully looked into evidence about the family register of parties, who are close kindred, as also the educational documents of the petitioner, post adoption, to record his conclusions. The family register and the petitioner's mark-sheets during the three years of his graduate studies, show that these carried names of his natural parents - both father and mother, which find record. There is no mention of the adoptive

father's name anywhere. Putting all these pieces of evidence together, the third respondent has drawn a plausible conclusion, declining to accept the adoption.

19. There is one very relevant fact also, which the third respondent has noticed in the order impugned, that is, that in the deed of adoption, Rajendra Singh has described himself as an unmarried man, whereas he is admittedly married to Smt. Phulmati. This mis-description about his marital status by the petitioner's claimed adoptive father, Rajendra Singh, appears to have been designedly made in order to get around the proviso to Section 7 of the Act of 1956. If Rajendra Singh had disclosed that he was a married man, the adoption would require his wife's consent, which is not there in this case. In fact, he excluded the requirement of consent by introducing a false recital in the deed of adoption, describing his status as an unmarried man. This mis-description seriously hits the petitioner's case of a valid adoption. In the opinion of this Court, the third respondent has rightly taken this brazenly false statement in the deed of adoption into account as a factor to discard the petitioner's case.

20. This takes us to the last and the purely legal submission that Mr. Kshitij Shailendra has advanced. He has submitted that the proviso to Section 7 would not be attracted at all in the case of a wife so estranged that she has ceased to be a wife, for all practical purposes. Section 7 of the Act of 1956 is extracted *infra* :

> "**7. Capacity of a male Hindu to take in adoption.**—Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption :
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> Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
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> Explanation.— If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of

> any one of them is unnecessary for any of the reasons specified in the preceding proviso."

21. To the understanding of this Court, the language of the proviso to Section 7 is plain, and there is no such compelling reason to read something else into it. The proviso makes it imperative for a Hindu male to secure his wife's consent to an adoption that he makes, unless she has completely and finally renounced the world, or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind. There is nothing in any of these three exceptions, which may prompt the Court to read into the statute, a fourth exception of an estranged wife. A wife living apart from the husband, utterly estranged, is still a wife, until the marital bond between the parties is severed by a decree of divorce or nullity of marriage. It is hard to read into the plain words of the Statute, something like a virtual or constructive divorce, to relieve the male Hindu adopter of his obligations under the proviso. Even otherwise, a virtual or constructive divorce, as if it were, are concepts not accepted generally in matrimonial laws. To this Court's understanding, even a judicial separation would not put an end to the husband's obligation under the proviso to Section 7. This Court may further hasten to add that the remark about judicial separation is one made in the passing, as it does not arise on facts here. It is a matter that may be considered in an appropriate case, where it arises.

22. This Court must notice, in this connection, the decision of the Supreme Court in **Brajendra Singh v. State of Madhya Pradesh and Another**[5] which is about a Hindu female's rights to take in adoption. The case arose in the context of the pre-amended provisions of Section 8 of the Act of 1956. It arose in the background of facts that one Mishri Bai had married, in namesake, one Padam Singh. She had taken in adoption one Brajendra Singh as her son, and in answer to a notice under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 pleaded that

5 **(2008) 13 SCC 161**

adoption, so that she could retain 54 acres of agricultural land that was given to her by her father. The Ceiling Authorities had disbelieved the claimed adoption. Mishri Bai instituted a suit, seeking a declaration that Brajendra Singh is her adopted son. Pending suit, she executed a registered deed bequeathing all her properties to Brajendra Singh, who prosecuted the suit against the State, until its culmination in an appeal before the Supreme Court. The facts are set out in the decision of their Lordships in some detail, which read thus :

> "**3.** Background facts sans unnecessary details are as follows:
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> Sometime in 1948, one Mishri Bai, a crippled lady having practically no legs was given in marriage to one Padam Singh. The aforesaid marriage appears to have been solemnised because under the village custom, it was imperative for a virgin girl to get married. Evidence on record shows that Padam Singh had left Mishri Bai soon after the marriage and since then she was living with her parents at Village Kolinja. Seeing her plight, her parents had given her a piece of land measuring 32 acres out of their agricultural holdings for her maintenance.
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> **4.** In 1970, Mishri Bai claims to have adopted appellant Brajendra Singh. Padam Singh died in the year 1974. The Sub-Divisional Officer, Vidisha served a notice on Mishri Bai under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 indicating that her holding of agricultural land was more than the prescribed limit. Mishri Bai filed a reply contending that Brajendra Singh is her adopted son and both of them constituted a joint family and therefore are entitled to retain 54 acres of land.
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> **5.** On 28-12-1981, the Sub-Divisional Officer by order dated 27-12-1981 disbelieved the claim of adoption on the ground inter alia that in the entries in educational institutions adoptive father's name was not recorded.
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> **6.** On 10-1-1982, Mishri Bai filed Civil Suit No. SA/82 seeking a declaration that Brajendra Singh is her adopted son. On 19-7-1989, she executed a registered will bequeathing all her properties in favour of Brajendra Singh. Shortly thereafter, she breathed her last on 8-11-1989.

> **7.** The trial court by judgment and order dated 3-9-1993 decreed the suit of Mishri Bai. The same was challenged by the State. The first appellate court dismissed the appeal and affirmed the judgment and decree of the trial court. It was held concurring with the view of the trial court that Mishri Bai had taken Brajendra Singh in adoption and in the will executed by Mishri Bai the factum of adoption has been mentioned.
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> **8.** The respondents filed Second Appeal No. 482 of 1996 before the High Court. A point was raised that the adoption was not valid in the absence of the consent of Mishri Bai's husband. The High Court allowed the appeal holding that in view of Section 8(*c*) of the Hindu Adoptions and Maintenance Act, 1956 (in short "the Act") stipulated that so far as a female Hindu is concerned, only those falling within the enumerated categories can adopt a son.
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> **9.** The High Court noted that there was a great deal of difference between a female Hindu who is divorced and one who is leading life like a divorced woman. Accordingly the High Court held that the claimed adoption is not an adoption and had no sanctity in law. The suit filed by Mishri Bai was to be dismissed."

23. Their Lordships considered the pre-amended provisions of the Act of 1956, where a Hindu female had no right to take in adoption so long as the husband was alive, or her marriage was not dissolved by divorce or annulment. She could not adopt even by her husband's consent. As the facts would show that the husband had never lived with Mishri Bai, and the marriage was but ceremonial and one solemnized to gratify a village custom. It was further mooted before Their Lordships that for the purpose of Section 8 of the Act of 1956, as it then stood, Mishri Bai was living like a divorced woman. As such, she could not be regarded as disabled for taking in adoption, Brajendra Singh. The provisions of pre-amended Section 8 of the Act of 1956 that were amended *vide* Act 30 of 2010 w.e.f. 31.08.2010 are extracted in their Lordships' judgment in **Brajendra Singh** *(supra),* and, as such, are not being quoted. The contention about Mishri Bai living virtually like a divorced woman, in the peculiar facts of

the case, and, therefore, not disabled from taking in adoption, was answered in **Brajendra Singh** thus :

> "**10.** In support of the appeal learned counsel for the appellant submitted that as the factual position which is almost undisputed goes to show, there was in fact no consummation of marriage as the parties were living separately for a very long period practically from the date of marriage. That being so, an inference that Mishri Bai ceased to be a married woman, has been rightly recorded by the trial court and the first appellate court. It was also pointed out that the question of law framed proceeded on a wrong footing as if the consent of husband was necessary. There was no such stipulation in law. It is contended that the question as was considered by the High Court was not specifically dealt with by the trial court or the first appellate court. Strong reliance has been placed on a decision of this Court in *Jolly Das* v. *Tapan Ranjan Das* [(1994) 4 SCC 363] to highlight the concept of "sham marriage".
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> **11.** It was also submitted that the case of invalid adoption was specifically urged and taken note of by the trial court. **Nevertheless the trial court analysed the material and evidence on record and came to the conclusion that Mishri Bai was living like a divorced woman.**
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> **12.** Learned counsel for the respondents on the other hand submitted that admittedly Mishri Bai did not fall into any of the enumerated categories contained in Section 8 of the Act and, therefore, she could not have validly taken Brajendra Singh in adoption.
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> **13.** It is to be noted that in the suit there was no declaration sought for by Mishri Bai either to the effect that she was not married or that the marriage was sham or that there was any divorce. The stand was that Mishri Bai and her husband were living separately for a very long period.
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> **14.** Section 8 of the Act reads as follows:
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> "8. *Capacity of a female Hindu to take in adoption.*— Any female Hindu—
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> (*a*) who is of sound mind,
> (*b*) who is not minor, and

(*c*) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has capacity to take a son or daughter in adoption."

15. We are concerned in the present case with clause (*c*) of Section 8. The section brings about a very important and far-reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (*a*) she is not married; (*b*) or is a widow; (*c*) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from clause (*c*) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the section expressly provides for cases in which she can adopt a son or daughter to herself during the lifetime of the husband. She can only make an adoption in the cases indicated in clause (*c*).

16. It is important to note that Section 6(*i*) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as "capacity". Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grandson by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with clauses (*i*) and (*ii*) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance with the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void.

17. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no

dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. **There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for.** Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of the law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of the law. Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

19. A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. **Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.** It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically depicts (*sic*departs) from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossesses the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is

> mandatory and adoption without wife's consent would be void. Both proviso to Sections 7 and 8(*c*) refer to certain circumstances which have effect on the capacity to make an adoption."

(emphasis by Court)

24. The decision of their Lordships in **Brajendra Singh**, though one that is about the rights of a Hindu woman to take in adoption, based on the pre-amended provisions of Section 8 of the Act of 1956, nevertheless clearly spells out the principle that would apply the same way to a married Hindu man post amendment, insofar as the requirement of consent to an adoption by his wife is concerned. The restriction on a married Hindu woman's rights to take in adoption absolutely, so long as her husband was alive or the marriage subsisted, is no longer there. Post amendment of Section 8 by Act No. 30 of 2010, the position of a married Hindu man and a woman is at par. Both can take in adoption, but with the consent of the other, unless the other spouse can be placed in one of the three exceptions postulated by proviso to Section 7 or the proviso to Section 8, as the case may be. There is absolutely no scope to read into those provisions, contrary to the plain words of the Statute, any other kind of exception where a man may take in adoption, so long as his marriage subsists.

25. Here, there is no doubt that Smt. Phulmati was a wife living until the death of the late Rajendra Singh. The two were never divorced, howsoever estranged they might have been. A mere estrangement between the man and wife without disruption of the martial status, in accordance with law, that may either be by a decree for divorce or annulment or by death of the wife, would not take the case out of mischief of the proviso to Section 7, requiring the wife's consent to the adoption.

26. In the circumstances, the question formulated is **answered in the negative**. The other issues raised by the petitioner have already been dealt with, and it is held, that the impugned order does not suffer from any infirmity, so as to call for interference by this Court in the exercise of our

jurisdiction under Article 226 of the Constitution.

27. In the result, this petition fails and stands **dismissed**.

28. Costs shall go easy.

Order Date :- 25.11.2020
BKM/- / I. Batabyal