

Before D. S. Tewatia & Surinder Singh, JJ.

MOHAMMAD SHAFFI,—Appellant.

versus

TALLAI RAM AND OTHERS,—Respondents.

Regular Second Appeal No. 2119 of 1980.

September 11, 1984.

*Mohammadan Law—Adoption made by a Mohammadan by a deed of adoption—Such deed also setting on adopted child all property of the adoptive father—Adoption deed held invalid as a Mohammadan not entitled to take in adoption—Deed of adoption—Whether can be treated as a Will in favour of the adopted child.*

Held, that the question as to whether the deed of adoption can be treated as a will is to be verified from the document as to whether the executor of the document merely intended it to be an adoption deed, in other words, merely intended to give effect to his desire to adopt a son or he also intended to settle the property upon the child after the death of the adoptive father. Once it is held that by the deed of adoption the adoptive father intended that the property should devolve on the son then such deed of adoption can be treated as a Will.

(Paras 5 & 6).

Modan Singh vs. Sham Kaur, 1972 Cur. L.J. 210. Overruled.

*Regular Second Appeal from the decree of the Court of the Additional District Judge, Patiala, dated the 14th day of May, 1980, affirming that of the sub Judge Ist Class, Patiala, dated the 1st day of January, 1979, dismissing the suit of the plaintiffs without any order as to costs.*

Ujagar Singh, Senior Advocate. (K. S. Sidhu & G. S. Punia, Advocates with him),—for the appellants.

Gurcharan Singh Advocate, G. S. Tir, Advocate,—for respondent No. 6.

D. S. Tewatia, J. (Oral)

(1) The admitting Judge admitted this Regular Second Appeal to the Division Bench as according to him a single bench decision of

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this Court reported as *Modan Singh v. Sham Kaur* (1), on which reliance has been placed by the Courts below, needed reconsideration. That is how this second appeal is before us.

(2) The short question that falls for consideration is as to whether a purported deed of adoption failing as such deed could be given effect to as a will. Before proceeding to notice the rival contentions advanced at the bar, it would be necessary to know the contents of the document which when rendered in English, reads as under :—

“I, Rehmat Ali, son of Nawaz Ali, Caste Shekh Kureshi, am resident of Village Sahal Tehsil Rajpura. I am all alone in this old age having no issues neither a son nor a daughter and I have no wife also. Rather I am unmarried. About 20 years back I had taken in my lap as my adopted son Shafi son of Nathu Caste Teli, resident of Village Lochawa Tehsil Rajpura when he was a child of 10 years with the consent of his parents and he is being maintained and living with me from that day, as my adopted son and has been rendering service to me. Rather about 9 years back I had performed marriage of Shafi and said Shafi and his wife are rendering service to me from the date of marriage as a son and daughter in law. In view of the above said circumstances said Shaffi is my heir and successor as my adopted son. As adoption was not formally reduced to writing and keeping in view the uncertainty of time, I want to pronounce the above said adoption, openly in order to compensate for the services rendered, having in view that after my death above said Shafi may not be confronted with any difficulty in securing my property I am in all my senses and without any pressure or influence of my own free will through this adoption, agree in writing that said Shaffi is rendering services to me for the last 20 years as my adopted son. He has been living with me and having been maintained by me and his marriage was also performed by me about nine years back. From the date of marriage along with his wife has been rendering services to me. He is my adopted son and has as adopted son, the same rights as a natural son said Shaffi will perform all ceremonies after my death

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(1) 1972 Cur. L.J. 210.

and will succeed me as a natural son i.e. said Shaffi my adopted son will be my sole successor therefore, I am executing the adoption deed so that it may be useful at the proper time. I have heard and understood this deed and it is acceptable to me. As I did not migrate to Pakistan at the time of partition of the country nor I have any intention to migrate rather I am continuously in cultivating possession of my cultivable land and residential house situated in village Sahal, therefore, I have a right to make an adoption. dated : 10.9.1958.

Thumb marked by Rehmat Ali.

Adoptive father.

Shafi adopted son Thumb marked."

(3) Both the Courts below came to the conclusion that in view of *Modan Singh's case* (supra), the document in question could not be given effect to as a will. The law on the point is enunciated by a Division Bench of Lahore High Court in *Sant Singh v. Sada* (2), observing that as to whether a given document which purports to be a document of adoption when failing as such could be given effect to as a will would depend on what is stated therein and the attending circumstances. To the same effect is another bench judgment of the Lahore High Court in *Shib Singh v. Suba Singh* (3). A Full Bench decision of this Court in *Ranjit Singh v. Garja Singh* (4), has put a seal of authority on the above view and the following observations of Mehar Singh, C.J. as he then was, can be noticed with advantage :

"If the adoption is not proved as a fact, it depends upon the facts and circumstances of a particular case whether the language of the adoption deed and the surrounding circumstances lead to the conclusion that it operates as a gift or a testamentary disposition, if such a conclusion, is available, the alleged adopted son takes the property."

(4) Koshal, J. in *Modan Singh's case* (supra) distinguished Privy Council decision reported as *Krishna Rao v. Sundara Siva Rao and others*, (5) by observing that :

"The executant of deed Exhibit D. 1 was an illiterate Jat who presumably never knew what the legal requirements of

(2) 1912 P.L.R. 63.

(3) A.I.R. 1935 Lahore 658.

(4) 1967 C.L.J. (Pb. & Hary.) 628.

(5) A.I.R. 1931 P.C. 109.

a valid adoption were and who contended himself with just writing out a deed of adoption in the belief that it was good enough to clothe Modan Singh defendant No. 1 with the status of an adopted son which, however, has not turned out to be the case."

In *Modan Singh's case* (supra), the relevant recital in the deed is in the following terms :—

"I, therefore, in possession of my full senses by written adoption deed adopt my nephew Modan Singh son of Jangir Singh as a son and from today Modan Singh has been recognised as my natural son. He would perform all religious rites after my death, would be owner of my property of every kind from generation to generation and none will have any objection to this. Jangir Singh consents to the making of adoption by me."

Since the Courts below were of the view that the relevant recital in the adoption deed before them was somewhat identical to the one above reproduced from *Modan Singh's case* (supra), *Modan Singh's case* (supra) squarely covered that case.

(5) With respect to the learned Judge, we are of the view that *Modan Singh's case* (supra) does not lay down the correct law. The intention that is to be gathered from a document of the kind is as to whether the executor of the document merely intended it to be an adoption deed, in other words, merely intended to give effect to his desire to adopt a son or he also intended to settle his property upon him after his death.

(6) If in an adoption deed the executor of the deed rest contended by merely saying that so and so is being adopted by him as his son and shall be his son and after his death shall perform Kirya ceremony like a son and shall also succeed to him like a son, then such a deed cannot be construed to be a deed whereby executor intended to make a testamentary disposition of the property in favour of the adopted son after his death by mentioning that after his death he shall succeed like a natural son, he merely spells out one of the consequences of adoption that he was making but if, on the other hand, the executor of the deed specifically mentions that the said adopted

son shall inherit his property, then such a document where adoption fails has to be construed as a document effecting testamentary disposition of the property in favour of the alleged adopted son. In the present case, a perusal of the document would show that the executor has expressed his intention of bestowing his property on his son with greater surety. This fact is made evident when he got stated in that said deed :

“As adoption was not formally reduced to writing and keeping in view the uncertainty of time, I want to pronounce the above said adoption openly in order to compensate for the services rendered, having in view that after my death above said Shaffi may not be confronted with any difficulty in securing my property.”

In this case, we are clearly of the view that the executor of the document in question clearly intended that after his death his entire property should go to Mohammad Shaffi.

(7) Rehmat Ali, executor of the deed, was a Muslim. Under Mohammadan law, adoption is not permitted and therefore, Rehmat Ali must be knowing that he could not in law adopt a son and therefore, he must have intended to convey his property to Mohamad Shaffi through that document by clearly expressing himself in the manner he had done. Since a will executed by a Mohammadan does not require any formality in law as there can be an oral will, so no particular form was required to be complied with by Rehmat Ali while making a will of his property. *Krishna Rao's case (supra)* is almost on all fours with the present case. In that case the relevant recital reads as under :—

“As I have had no issue I have brought you up while you were young and have adopted you and celebrated your Upanayanam, etc. and have chosen you as a son; so I have communicated this fact to the revenue authorities and got your name registered for the office of the karnam held by me. Further, you shall be my son and you shall be entitled to my entire property as a son.”

Their Lordships referred to underlined portion of that recital and observed that the last sentence of the document clearly referred to succession to the writer's entire property on his death, and has testamentary effect in favour of the person alluded to in the document.

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(8) For the reasons aforementioned, this Regular Second Appeal is allowed and the judgments and the decrees of the Courts below are set aside, and the suit of the appellant stands decreed as prayed. The parties to bear their own costs throughout.

Surinder Singh, J.—I agree.

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H.S.B.

Before M. M. Punchhi, J.

STATE OF PUNJAB,—Petitioner.

versus

PIARA SINGH,—Respondent.

Criminal Revision No. 1292 of 1984

September 21, 1984

*Terrorist Affected Areas (Special Courts) Ordinance, 1984—Sections 2(h), 3, 7, 8, 10, 15 and 16—Code of Criminal Procedure (II of 1974)—Sections 438, 439 and 439-A—Person accused of an offence specified in the schedule to the Ordinance—Such person not falling within the ambit of a 'terrorist' as defined in section 2(h)—Court of Sessions—Whether has jurisdiction to release such a person on bail—Jurisdiction of such Court—Whether barred by the Ordinance—Special Courts alone—Whether to try scheduled offences committed by terrorists or non-terrorists.*

*Held*, that though the word 'terrorist' has been defined in section 2(h), the word, in plural terms, has been employed only once in the Terrorist Affected Areas (Special Courts) Ordinance, 1984 and that too in section 3 and not thereafter, for the term outlives its utility thereafter. Section 3(1) operates when the Central Government holds the opinion that the offences of the nature specified in the Schedule are being committed in any area by people who can be termed as terrorists. Further such commission is on such a scale and in such a manner that it becomes expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of the Ordinance and to achieve the object it may by notification (a) declare such area to be terrorist affected area; and (b) constitute such area into a single judicial zone or into as many judicial zones as it may deem fit. It is obvious from the language of this provision that when activities of criminals are of such kind and result-oriented in a particular area so as to term them as terrorists