

RESPONDENT

Bench : Division Bench

Srinivas | | (Deft. 1). | | (Deft. 8). Jattappa Budhivant | Vaikuntha (Deft. 9).
 (Deft. 2). (Deft. 3).
 _____ | | | Martu
 Rama Baba Shanbhag = Laxmibai _____ | _____ | (died,
 26-10-1909.) (Deft. 10). | | _____ Narayan
 (died, 1922) Dattatraya (Plff.). | | = Jankibai (Deft. 11). Dasa (Deft. 4) now
 dead. Harihar (Deft. 6) now dead
 _____ | _____ |
 _____ | | | | Ranga Rama Sridhar Dayanand Jagannath Vasant (Deft.
 4A). (Deft. 5). (Deft. 4C). (Deft. 4D). (Deft. 6A). (Deft. 6B).

2. It may be mentioned that Baba Shanbhag, husband of defendant 10 died in 1909, the plaintiff's brother Narayan died in 1922 and defendants 4 and 6 both died pending this litigation and are represented by their sons. Defendant 5 claims to be the adopted son of Baba Shanbhag, adopted by his widow defendant 10 in May 1933. The fact of this adoption is now admitted but its validity is in dispute. The trial Court held it to be a valid adoption and therefore plaintiff's share was found to be one-twelfth (one third of one-fourth) in the family properties and one-third in the self-acquired properties of Rangayya's branch. Plaintiff alleges that the adoption is invalid, and if so, his share would be one-eighth in the family properties and one-half in the self-acquired properties as claimed by him.

3. The validity of this adoption depends on what law applies to the parties. They elected to have the case tried practically without any evidence on the basis of their admissions and arguments only, and that means that the adoption of defendant 5 by defendant 10 must be assumed to have been made without the authority of her husband or the consent of the coparceners. Such an adoption is valid according to the law prevailing in the Mahratta districts of the Bombay Presidency, since the law was settled in AIR 1933 1 (Privy Council), but not valid elsewhere in India. North Kanara where the parties reside was part of the Madras Presidency until it was transferred to Bombay for administrative reasons in 1861 : see *Vyakunta Bapuji v. Government of Bombay* (the Kanara Land Tenure case) (1975) 12 Bom. H.C.R. (O.C.) 1. But this transfer did not affect the *lex loci*. Hindus in North Kanara are presumed to be governed by the Hindu law as prevailing in the Madras Presidency unless the contrary is shown. That is clear from *Somasekhara v. Mahadeva* AIR 1930 Mad. 496 which was affirmed by the Privy Council in AIR 1936 18 (Privy Council). The parties in that case were Lingayats and the question for determination was whether a married man could be adopted. But the ratio decidendi shows that the decision cannot be restricted to any particular class of Hindus or to any particular point in the law of adoption. In the course of the judgment of the Judicial Committee Lord Thankerton said (p. 318):

It is conceded by the appellants, as it rightly must be conceded, that according to the law of the Madras Presidency, which would apply to the residents there, the adoption of a married man would be invalid and that this law applied to North

Kanara while it remained part of the Madras Presidency.

4. And again (p. 318):

It has been suggested that the fact that he was a Lingayat might possibly make some difference, but the ordinary Hindu law is presumed to apply to Lingayats, except in so far as it is shown that they have superseded it by their customs, and in the absence of proof of any special custom among the Lingayats, there can be no ground for a successful argument in that direction.

5. So that their Lordships were not applying a law or custom peculiar to the Lingayats but were applying to Lingayats the ordinary law governing Hindus in the Madras Presidency. It is clear therefore that the burden is on defendant 5 and the other defendants who support the adoption to prove that they are not governed by the law of the Madras Presidency, according to which the adoption would not be valid. The contention of these defendants, which the trial Judge has accepted, is that Goud Saraswats originally resided in Goa and migrated to North Kanara when Goa was taken by the Portuguese in the early part of the sixteenth century, that Goa was part of the Mahratta country and that the Goud Saraswats brought with them a personal law, which is not that of the Madras Presidency but the same as that of the Mahratta country, so that AIR 1933 1 (Privy Council) applies to them. In our view there is no evidence on which a Court of law can hold it established either that the community to which the parties belonged originally came from Goa or that, if it did, it brought with it a personal law by which the adoption in dispute would be valid.

6. Practically the only foundation for the first proposition is the description of the Shenvis or Saraswats in Vol. 15 of the Bombay Gazetteer dealing with Kanara. The passage relied upon is "They are said to have fled to Kanara early in the sixteenth century when the Portuguese took Goa. Their origin is doubtful." This is not a statement of a historical fact. It is a reference to a tradition of some kind which may or may not apply to these particular Saraswats with whom we are concerned. According to the description in the Gazetteer they speak Konkani, but that does not necessarily prove anything, and some of their favourite shrines are in Goa, but they have such shrines in other parts of India also. It is important to note that the author of this article mentions another tradition that the Saraswats came originally from Bengal. There is no reason to suppose therefore that Goa was their original home, even if they came to North Kanara from Goa. But we cannot regard the Gazetteer as sufficient authority for holding that these particular Saraswats at any rate did come from Goa.

7. The learned trial Judge seems to have relied to some extent on some of the averments in the plaint. He mentions para. 11, but it seems he must really have referred to para. 21, in which the plaintiff laid stress upon the fact that according to him the family had been divided before the date of the adoption and the right of defendant 10 to make an adoption had therefore become extinguished. The learned Judge thought that this showed that in the plaintiff's opinion AIR 1933 1

(Privy Council) applied. However, the plaint also contains the averment that Baba Shanbhag had never authorised his wife to adopt and also the averment that defendant 10 was not legally competent to make an adoption "under any circumstances." If any importance is to be attached to the pleadings at all in this connection it seems to be more material to note that defendant 5 in his written statement alleged that defendant 10 had the express authority of her husband to take him in adoption, and a statement to that effect was also contained in the adoption deed. But in our view there is nothing in this point at all nor in the point that the plaintiff did not in his plaint refer to the Madras law as governing the case.

8. As for the proposition that Goa before the conquest by the Portuguese formed part of the Mahratta country, the learned trial Judge cites no authority and none was cited before us. The geographical position of the Goa territory seems to us to be a very unsafe and insufficient guide. We must hold therefore that defendant 5 and the other defendants concerned have failed to prove that their family is governed by any other law except the *lex loci*, i. e., the Madras law. The adoption is therefore invalid and the plaintiff's share in the estate is as claimed by him. First Appeal No. 134 also raised the question of the amount of maintenance awarded to defendant 11, but I propose to deal with that in discussing the other appeal, First Appeal No. 108. The facts are that defendant 11 was married in 1920 when she was 11 years old. She lost her husband in 1922. She then left the family house and went to live with her parents in South Kanara. That this was not improper conduct on her part and that her leaving the family house in no way affected her right to maintenance is clear from the decision of the Privy Council in *Ekradeshwari Bahuasin v. Homeshwar Singh* AIR 1929 P.C. 128. The learned trial Judge has found on the meagre evidence offered by the parties that the family income was Rs. 6200 a year. Defendant 11's husband, if he had lived, would have been entitled to one-twenty-fourth of this, that is to say, on the trial Judge's view that the adoption of defendant 5 was valid. He awarded future maintenance at the rate of Rs. 12 per month and arrears for three years at the rate of Rs. 5 per month. Mr. Murdeshwar who appears for the appellant in this appeal claims Rs. 20 per month for the future and arrears at the rate of Rs. 10 per month for 12 years.

9. We think there is justification for the increase in the amount of future maintenance. The estimate of the income is based on accounts kept by a receiver appointed by the Court who was in possession of the estate and on a statement prepared by him at the request of the Court. The accounts show that rent fallen in arrears is sometimes recovered in subsequent years. It does not appear that the income shown in the statement takes account of this. Rs. 6200 is therefore probably an understatement, or at any rate a very conservative estimate, as Mr. Murdeshwar says. Moreover, in the view we take about the adoption, the share of plaintiff's husband which is the maximum subject to which defendants maintenance is to be fixed, should be one-sixteenth and not one-twenty-fourth. Having regard to the fact that the parties are Saraswat

Brahmins and to the income of the family we think Rs. 20 a month is a reasonable amount of maintenance. The learned trial Judge is wrong in thinking that the fact that defendant 11 has so far lived with her parents is any ground for reducing the amount of her future maintenance. The observations to which he refers in *Gurushiddappa v. Parwatewwa* AIR 1937 Bom. 135 were in connexion with the claim for arrears of maintenance.

10. In allowing past maintenance for three years only the trial Court relied on *Karbasappa Goolappa Naregal Vs. Kallava Goolappa Naregal*, where it was held that the Courts dealing with claims for arrears of maintenance have a very large discretion to grant or withhold those arrears with special reference to the urgent need and necessities of the widow. The Subordinate Judge in that case had awarded arrears of maintenance for six years and the High Court allowed it for three years only. The appellant's claim to arrears of maintenance for the whole period since she left the family house is really based on the case to which I have already referred: *Ekradeshwari Bahuasin v. Homeshwar Singh* AIR 1929 P.C. 128 The head-note, which we think correctly represents the effect of the judgment, is as follows:

A Hindu widow who has left the residence of her deceased husband, not for unchaste purposes, and resides with her father is entitled to maintenance, also to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence.

11. Relying upon this case the Madras High Court in (*Godavarti*) *Sobhanadramma Vs. (Godavarti) Varaha Lakshmi Narasimhaswami and Another*, held that the Court has no discretion, irrespective of proof of circumstances which might prove abandonment, waiver or estoppel, to limit the period for which arrears of maintenance could be awarded. Both these cases were considered in *Gurushiddappa v. Parwatewwa* AIR 1937 Bom. 135 and we held that *Karbasappa Goolappa Naregal Vs. Kallava Goolappa Naregal*, has not been overruled. It is true that in my judgment I expressed a doubt as to whether the Court's discretion extends to limiting the period for which arrears can be claimed, apart from the question of disqualification or waiver. But if the Court has a wide discretion as to the amount, this is really rather a matter of form than of substance. The Madras High Court, which has gone farthest in favour of the widow, has conceded that silence for a long period and omission to demand maintenance may justify an inference that the claim has been waived or abandoned. It has also held that conduct on the part of the widow, such as to lead the person in charge of the estate to believe that he would not be called upon to meet suddenly a claim for a large sum of money which he would not reasonably be able to pay and which ordinarily he ought to have found from the current income, is a matter to be considered in deciding whether a claim for arrears of maintenance ought to be allowed in whole or part : see the judgment in (*Godavarti*) *Sobhanadramma Vs. (Godavarti) Varaha Lakshmi Narasimhaswami*

and Another, .

12. We think that in the circumstances of this case, so far as the parties have chosen to let them appear, a sudden demand for over Rs. 1000 by way of arrears of maintenance would be inequitable and embarrassing to the estate. On the other hand, considering the resources of the family and the amount which we have now determined to be reasonable for future maintenance, we consider that a lump sum of Rs. 500 for arrears would be reasonable. In accordance with our findings in these two appeals the decree of the trial Court must be modified as follows:

In para. 1 of the decretal order the shares of the parties will be : Plaintiff one-eighth, defendants 1, 2 and 3 each one-twelfth, defendants 4A, 4C and 4D and defendant 5 together one-sixteenth, defendants 6A and 6B together one-sixteenth, defendant 7 one-fourth, defendant 8 one-eighth, defendant 9 one-eighth. In para. 2 the shares of the parties will be : plaintiff one-half, defendants 4A, 4C and 4D and defendant 5 together one-fourth, defendants 6A and 6B together one-fourth. In para. 4 the amount of future maintenance will be Rs. 240 instead of Rs. 144 and the amount of arrears Rs. 500 instead of Rs. 180. In other respects the decree will be confirmed. In First Appeal No. 108 of 1939 the appellant will get her costs from plaintiff-respondent 1. In First Appeal No. 134 of 1939 the appellant will get his own costs from respondents 4 to 7 but will pay the costs of respondent 14. Respondent 2 will pay his own.