
(1949) 03 MAD CK 0063

In the Madras High Court

Case No : Appeal No. 55 and C.M.P. No. 4364 of 1946

Gummalapura Tegginamatada Kotturuswami

APPELLANT

Vs

Setra Viravva and Others

RESPONDENT

Date of Decision : 25-03-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35A

Citation : AIR 1952 Mad 609 : (1949) 62 LW 752

Hon'ble Judges : Subba Rao, J;Panchapakesa Aiyar, J

Bench : Division Bench

Advocate : Alladi Krishnaswami Iyer, K. Umamaheswaram and Alladi Kuppaswami, for the Appellant; T.L. Venkatarama Iyer, K. Sheshagiri Rao and S. Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

Panchapakesa Aiyar, J.—This is an appeal against the judgment and decree of the District Judge of Bellary dated 26th November 1945 in O. S. No. 39 of 1943. The suit was filed on behalf of all the reversioners by the appellant, Gummalapura Tegginamatada Kotturuswami head of the Lingayat Teginamutt at Kamppli, claiming to be the nearest reversioner of the estate of his natural brother, Setra Kari Virappa, given away in adoption, for a declaration, that the adoption of Kotrabasayya, the second defendant, on 11th October 1942, by Setra Viravva, the first defendant and widow of Kari Virappa, was invalid, as not being in conformity with the will of Kari Virappa, Ex. P. 2 (a) dated 10th October 1920 and on other grounds and not binding on the plaintiff and the other reversioners. The estate is worth about a lakh of rupees. Setra Kari Virappa was given in adoption to one Virappa Devaru and this was referred to in Verappa Devaru's will," Ex. P. 1, dated 4th February 1899. That adoption also had been contested, but unsuccessfully. Kari Virappa died on 23rd October 1920. He had been a "Pattadhikari" or head of the Lingayat Tegginamutt before the plaintiff. By a curious custom in that "mutt", as well as in many other similar Lingayat "mutts"

in Bellary district, a small boy is made the "Pattadhikari" when he is a minor, and he puts on yellow robes; but when he attains majority, he may decide to marry and then can resign the "pattadhikariship" to his nominee, marry and raise a progeny. The consequence is that his rights of inheritance in his family, whether natural or adopted, do not cease, as in the case of an ordinary Hindu "Sanyasi" who becomes civilly dead, on assuming the yellow robes. The evidence of P. W. 13, a "Pattadhikari" of a similar type, and of other witnesses, and the documentary evidence in the case proved this fully.

2. The important clauses relevant for our purpose in Ex. P. 2(a), Kari Virappa's will, are in Paras. 3 and 14. In Para. 3, Kari Virappa said:

"I have no issue whatever for the purpose of continuation of my family, I have given permission to my wife, Viravva, to adopt a son. I have given her permission to adopt as many times as would be necessary, should the previous adoption be unsuccessful. But Viravva must adopt only a boy approved by the respectable persons appointed by me in paragraph 14. Should Viravva die before making any adoption, the persons becoming trustees should arrange for the adoption of a boy for the continuation of my family in accordance with my "kulachara" (family usage)."

The material portion of paragraph 14 runs as follows:

"For the purpose of duly carrying out after my death the arrangements proposed herein for securing a suitable boy and adopt him according to our religion; then to take charge of the properties and manage them properly during the minority of my adopted son and then make them over to my adopted son as soon as he attains majority, to look after the protection of my wife and my adopted son; for giving effect to the arrangements proposed in regard to the Sanskrit "Patasala" referred to in para 10; for dealings with the properties of the adopted son in future by sale or otherwise, according as circumstances may require; for improving the said properties by the addition or acquisition of other properties; and, in general, for the purpose of working out the terms and conditions contained in this will after my death, I nominate the following gentlemen as Trustees:" He then nominated Holayya, Gundappa, Malkambanna, Gurusanthappa and Huchappa (P. W. 10) as trustees and added: "After me these trustees should carry through everything as directed herein. If any vacancy should occur among these trustees, the remaining trustees are empowered to co-opt any one they please."

One of the five persons thus appointed trustees declined to accept the job; the other four accepted; but died, one by one, leaving only P.W. 10, alive now.

* * * * * 3. On 18th September 1942, the first defendant entered into an ageeement, Ex. D-25, with the natural father of the second defendant for the adoption of the second defendant by her, On 11th October 1942 she took the boy in adoption. But the adoption deed Ex. D-26 was executed only on 23rd June 1943. No invitation card was issued for the second adoption or a photograph

taken on the occasion. The reason given by the first defendant's counsel in the lower Court was that, as the first boy, taken in adoption after the invitation card and photo, died prematurely, it was not considered proper to invite another stroke of fate by following a similar procedure regarding the second boy; the lower Court accepted that argument, in view of the superstitions prevalent in the country side regarding such matters. D.Ws. 1 to 5 and 7 swore that the prior approval of P. W. 10 the only surviving original trustee was taken for this adoption also, and that P. W. 10 attended the adoption with his wife, as on the previous occasion. P. W, 10, of course, denied this also; but the lower Court disbelieved his statement on oath and held that he must have approved the adoption and attended the ceremony with his wife as before.

4. The plaintiff, of course, contended that the adoption was without the consent or approval of P. W. 10, the surviving original trustee, and was invalid on that account, that it was invalid also because there was not the joint approval of all the five original trustees as required under the will of Kari Virappa.

He urged that if, for whatever reason, one of the original trustees did not join in the approval, the adoption would be invalid in law. He contended that P. "W. 10 did not attend the adoption ceremony. He contended further that the approval of the three co-opted trustees was also required to make the adoption valid. He urged that the boy adopted was not of the same family, and was not even fit and suitable otherwise, and that the adoption was invalid for that reason too. He relied on the genealogy in Ex. P-11, a copy of a genealogical table filed in 1860, for proving that he was a reversioner of Kari Virappa and urged that all [he nearer reversioners were dead, and, so, he was the nearest reversioner alive. The learned District Judge disbelieved him and holding that he was not even a relative or remote reversioner of Kari Virappa, being a man belonging to the Gundada family, and not to the Setra family of Kari Virappa. The first defendant had urged that the plaintiff was simply claiming to be a reversioner and relative because of the adoption of his natural brother, Kari Virappa, by the Setra family, and because of his natural father, Senapurappa, having migrated along with his son, Kari Virappa, to the richer Setra family after the adoption and described himself as Setra Sanapurappa by virtue of his new surroundings. The learned District Judge also held that even if the plaintiff was really related to Kari Virappa, the evidence proved that there were nearer reversioners alive, and that the plaintiff was not really suing on behalf of all the reversioners as he pretended, but only in his own selfish interests, and that the Court's discretion should not be exercised in his favour; and he allowed to maintain it as per the ruling in *Velu Sethurayar and Another Vs. Karuppayammal and Others*, , since the circumstances for deviating from that rule laid down in "*Lakshmiammal v. Anantharama Iyengar*". AIR 1937 Mad 699, were different from those in the present suit.

5. Defendants 1 and 2 had, of course, vigorously contested the plaintiff's suit, and alleged that the plaintiff was neither a relative nor a reversioner; but an

utter stranger not interested in Kari Virappa's properties. They also stated that the plaintiff was civilly dead, and was disentitled, as a "sanyasi", from claiming any reversionary rights, even if he had any. They asserted that the adoption of the second defendant was perfectly valid and binding, as it was performed in pursuance of the imperative and insistent wishes of Kari Virappa, who wanted to provide for his spiritual and worldly welfare after his death, and was also approved of by P. W. 10, the only surviving original trustee, who alone was required to be consulted and whose approval was quite enough. Of course, they denied the truth and validity of the alleged co-option of three trustees. Defendants 6 and 7 were only persons who got some bequests under the will of Kari Virappa. Defendants 3 and 4 were two of the three co-opted trustees (the third one being the plaintiff him self.) & defendant 5 was the surviving original trustee (P. W. 10). Defendants 3 to 5 had vigorously supported the plaintiff's case. * * *

(Their Lordships then reviewed the evidence and held that the plaintiff was an agnate and was entitled to maintain the action.)

6. The next contention was that even if the factum of the adoption of the second defendant was proved, and that P. W. 10, the only original surviving trustee, approved of that adoption and attended the ceremony, the adoption would still be invalid under the will Ex. P-2(a), of Kari Virappa, since the will stipulated that the first defendant should adopt only a boy approved by the respectable persons appointed by him in paragraph 14 and so all the five persons named in paragraph 14 should give a joint approval, and that if anyone of those five persons did not accept the trusteeship, or died before the adoption, or refused to give their approval, the adoption would be invalid. Mr, Alladi Krishnaswami Aiyar, who urged this point as the strongest thing in favour of the appellant, relied on paragraph 955 of Halsbury's Laws of England, Volume 25, and some passages on pages 159 to 162 of Farwell on "Powers" and several Privy Council and Bombay and Madras rulings. Farwell remarks thus at p. 159:

"The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power."

At pages 161 and 162, he remarks, "If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others dies, the power is gone."

Paragraph 935 of the Halsbury's Laws of England, volume 25 is only to the very same effect. Of course, this represents the law in England as well as in India in all cases where the consent of any person entrusted with a power is required, and where "naked power" is given to such persons. At page 512 Farwell has remarked:

"Mere powers, as distinguished from trusts, are strictly construed, and can only be exercised by the persons who are either expressly or by reference, designated

as donees of the power."

He goes on to add that such powers cannot be exercised after the death of the persons designated, and that a bare power given to two or more cannot be executed by the survivor. But he and Hailsham and all others agree that where a power is annexed to an "office", like executors, trustees, etc., all persons who fill that office can exercise that power.

7. The learned advocate for defendants 1 and 2 urged that in the present case no "power" at all was given to the persons appointed as trustees in paragraph 14 by the testator, but only their approval as trustees of the boy adopted by the widow was required. It was urged further by the learned advocate for defendants 1 and 2 that paragraph 3 of the will already extracted, showed beyond all possibility of doubt that the testator was very keen on adopting a son for his temporal and spiritual benefit to continue his line and to conform with his "kulachara", and that this so obsessed him that he even made a provision for the trustees to adopt a boy for him if the first defendant should die without making any adoption--an illegal thing, as held in "Amrito Lal v. Surnomoyee Dasi", 27 Cal 996 and showing by the very illegality of the provision his terrible anxiety that a child should be adopted for him to continue his line and fulfil the "kulachara".

8. Mayne has remarked at page 215 of his Hindu Law & Usage "the rules of construction of authorities to adopt have been laid down by the Judicial Committee in "Venkatanarasimha Apparao v. Parthasarathi Apparao", 37 Mad 199 and in "Rajendra Prasad v. Gopal Prasad", 57 Ind App 296. Apparently the construction will be more liberal whenever the paramount intention to be gathered from the language of the will or the authority is religious than when it is secular ("Venkata Narasimha Apparao v. Parthasarathi Apparao", 41 Ind App 51 and "Rajendra Prasad v. Gopal Prasad", 57 Ind App 296). But both the objects viz. to secure spiritual benefit to a man & to continue his line are meritorious in the view of the Hindu law and both are in consonance with the feelings known to prevail throughout the Hindu Community (Suryanarayana v. Venkathamana", 33 Ind App 145). Where an authority to adopt is given by a husband, the presumption is strong that he desires to be represented by an adopted son. The Courts would not be astute to defeat an adoption not clearly in excess of the power given by placing a narrow construction of the words of the authority "Bhagvan Koer v. Dhanukdhari Prasad Singh", 46 Ind App 259; "Mutsaddilal v. Kandanlal", 33 Ind App 55: 28 Allahabad 377. The learned advocate for defendants 1 and 2 urged that a liberal construction should be given to the words of para 3 of the will and paramount intention of the testator, to have an adopted son, carried out and the adoption upheld. He pointed out that an absolute and unlimited power was given to the widow to adopt as many times as would be necessary, should the previous adoption be unsuccessful; and that the direction that she must adopt only a boy approved by the respectable person appointed by him in paragraph! 14 should be taken to be merely "recommendatory" and not mandatory, that failure to go by that direction would not make the adoption in-:

valid, that, in any event, the direction was intended only to operate regarding the five persons appointed by the testator himself as trustees in paragraph 14, and only the trustees alive at the time of the adoption need be approached by the widow for approving the adoption, and that as the approval of P. W. 10, the sole surviving trustee, to this adoption had been asked for and given, the adoption was perfectly valid in any event. We agree. There is no doubt whatever in our minds that the testator was very anxious to have a boy adopted for him in order to continue his line for both temporal and spiritual purposes, the word "kulachara" indicating the spiritual motive, which is also further reinforced by the testator's having been a "Pattadhikari" of a "mutt", and having been deeply interested in the maintenance of a Sanskrit "Patasala", named expressly in the will as a thing to be looked after carefully. Indeed, the very provision in the will for the trustees to adopt a boy for him I in case his widow died without adopting one shows his anxiety to have an adopted son at all costs.

9. No doubt, as per the rulings of the Privy Council in "Venkata Narasimha v. Parthasarathi", 37 Mad 199 and "Rajendra Prasad v. Gopal Prasad", 10 Pat 187 and the rulings of the Bombay High Court in "Rangubai v. BHAGIBATIBAI", 2 Bom 377 and of the Madras High Court in "Janakiramayya v. Venkatalakshmamma", 1931 M.W. N. 473, a power to adopt must be exercised strictly in accordance with the terms, and the rules prevailing in England as to the construction of powers applicable thereto, though in construing a document, whether in English or the vernacular, the fundamental rule is to ascertain the intention from the words used and the circumstances are to be regarded only to show the intended meaning of the words used, We are satisfied from, a reading of the will of Kari Virappa that he intended his widow to adopt as many times as was necessary, out of her own free choice, without restricting the choice to relatives etc., and without delegating the selection of the boy to the trustees or compelling her to select the boy in consultation with them. His intention was undoubtedly to enable her to select the boy she liked, but only to get the approval of that boy by the original trustees who happened to be alive and holding that office at that time.

10. It is not a case here as in the case of "Venkata Narasimha v. Parthasarathi", 37 Mad 199, where the two widows of the testator were jointly given a power to adopt, and it was held, therefore, that one widow could not adopt by herself as she had not been given the sole power to adopt a boy, as in this case. Nor is this a case like "Rangubai v. Bhagirathi Bai", 2 Bom 377, where the previous consent of the Government to the adoption was made a condition precedent. In this case, there is no condition precedent at all to the widow's adopting any boy she liked. She was only asked to adopt a boy who had the approval of the original trustees appointed under paragraph 14, meaning thereby the trustees in their "official capacity" and enabling therefore a surviving trustee, like P. W. 10. to give the consent. Nor is it a case as in "amrito Lal v. Surnomoyee Dasi", 27 Cal 996, where a widow was authorised to adopt only in conjunction with two other executors, or as in Rajendra Prasad Bose v. Gopal Prasad", 10 Pat 187, where

the widow was allowed to adopt only with the previous permission of the testator's father or as in the case of "Janakiramayya v. Venkatalakshamma", 1931 Mad WN 473, where the widow" was given the power to adopt only acting in conjunction with the testator's mother.

11. We are satisfied that none of the rulings relied on by Mr. Alladi Krishnaswami Aiyar for holding the adoption invalid would apply to the circumstances of this case.

12. The ruling in "Venkatanakasimha v. Parthasarathi", 37 Mad 199, will not apply. There is no question of "joint power" given to two widows here and the consequent necessity for both the widows to act jointly before adopting a person as in that case. It is because of the two widows jointly empowered that their Lordships held that to hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for and would be making an addition to his testamentary dispositions which no Court, construing a will, was entitled to do. Here, however, there are no two widows, but only a single widow. Nothing need be added to the testamentary dispositions of this testator for holding this adoption to be valid. Indeed, it will only be carrying out the testamentary dispositions of the testator and construing the will in the way he wanted. Nor was any power given to the five trustees appointed by the testator in paragraph 14 of his will to select a boy for adoption, much less to force that boy on the widow and disentitle her to adopt any boy other than the boy they selected. The so-called "power" given to the trustees under the testator's will was simply a power to "approve"; in other words, it is "no real power" at all. The Canarese word used is "oppida", or approval, and not "anumathi" or permission, much less "hakku" or right.

13. In "RAJENDRA PRASAD BOSE v. GOPALA PRASAD", 10 Pat 187, also, an adoption by the widow was expressly made subject to a condition precedent, namely, the approval of the testator's father and could not have been made by the widow herself acting alone. It was not a case of "mere approval" as here. Their Lordships of the Privy Council remarked in that case,

"It is important to bear in mind that Rama Prasad could not have married many years before the "anumathpatra" was executed, and his wife was then only 13 or 14 years of age. It is unlikely that he could have ever wished that his girl-wife should have an unrestricted choice in the selection of his adopted son to the extent of allowing her to bring a stranger to inherit his property. In their Lordships* opinion, the words "with the permission of my father" created a "condition precedent" to the exercise of the power of adoption certainly during the lifetime of the father, and there is no reason for holding that the words are to have a different effect after the death of Golak (the father)."

Here, the widow was not a young girl, when the testator died, as in that case, but was 31 years old at the time of the will and had lived with her husband, the testator, for many years, and had infused such confidence in him that he had

asked her not to make one adoption but as many adoptions as necessary in order to carry out his paramount intention of having an adopted son to continue his line and fulfil the "kulachara".

14. So too, in "JANAKIRAMAYYA v. VENKATALAKSHMAMMA", 1931 W N 473, one of the important reasons given for holding the adoption invalid, on construing the will, was that the will provided for the devolution of the properties in the contingency of no adoption by the widow, showing thereby that the testator had no paramount intention of having an adopted son in any event; whereas, here, the will does not provide for the contingency of no adoption by the widow except by asking the executors to adopt in case the widow did not adopt.

15. It has been held in "In Re Smith Estick v. Smith". (1904) 1 Ch 139, that when a testator appointed his wife, Mary Ann Smith, his brother, Charles Smith, and his friend, Robert Bell, executors and trustees for selling his estate, it must be presumed that the power was given to them "ex officio". as an incident to their office, in spite of there having been ample indications of personal confidence in them, and that the power given to the trustees passed to the office of the holder or holders thereof for the time being. Here, therefore, even if the five trustees appointed under paragraph 14 of the will are held to have a power to approve of the adoption, that power must be held to be given to the trustees "officially", and to have devolved on the surviving trustee, P. W. 10, whose approval will be quite sufficient. We agree with the lower Court in holding that no trustees had been "really" "co-opted" in 1934, as pretended, and that the evidence regarding such co-option is worthless and was rightly disbelieved, being unfit to be acted upon, these trustees having not joined in Ex. P-16, issued shortly after their appointment, and having done nothing after their supposed appointment, and even the resolution regarding their appointment being highly suspicious.

16. Mr. Alladi Krishnaswami Aiyar's argument that all the five trustees appointed in paragraph 14 should give a "joint consent" is unsustainable in this case, because the so-called "power" has been given to the trustees "officially", and not to each personally, and, so, may be exercised by the holder for the time being, as held in "IN RE SMITH; ESTICK v. SMITH", (1904) 1 Ch 139 and in paragraph 957 of Halsbury's Laws of England, Vol. 25 and also by Farwell. It has been expressly held by the Privy Council in "Bala Gangadhar Tilak v. Srinivasa Pandit", 39 Bom 441, that where a Hindu testator, by his will, appointed five trustees for his property and gave power to his widow to adopt a son with their consent and advice and one of the trustees declined to act, the consent of the declining trustee was not necessary and that the adoption made with the consent of the other four trustees was valid. Their Lordships did not decide the question as to what would have happened if only the majority of the trustees who functioned had agreed to the adoption. Possibly, that decision would have depended on the reasonableness of the refusal. An unreasonable refusal, motivated by corrupt or improper motives, might have been ignored, and the testator's paramount intention to adopt carried out, & the adoption upheld, if it was of suitable boy, as

in this case. Though the plaintiff had urged at first that the boy adopted in this case, namely, defendant 2, was unfit in general and as not belonging to the testator's family group of agnates, this objection was not proved by any evidence and was not even pressed before us. The second defendant is obviously a fit and suitable boy from the same community, eligible for adoption, as spoken to by D. Ws. 1 to 5 and 7, and, as is clear from the approval of P. W. 10, the sole surviving trustee. That he was not the testator's agnate or relative is no ground for disqualification, even if true.

17. In "*RATTANLAL v. BAIJNATH*", ILR (1938) Lah 1, the Privy Council has held that where a Hindu testator appointed four executors and provided, by a clause in his will, that the said executors should be competent to select a boy of good family in the neighbourhood and have him adopted by his wife on his behalf and one of the executors after consultation with the others selected a boy to be adopted, and the widow adopted him, the adoption was valid, even though the other three executors had not asked the widow to adopt that boy, or even expressed to her their approval of the adoption. In that case, the widow was not given the power to adopt a boy, as here, and the executors were asked to select the boy. It follows that in this case the adoption would have been easily held by their Lordships to be valid.

18. In "*Surendra nandan v. Sailaja Kant*", 18 Cal 385, it was held that where a Hindu appointed one K, as manager of his property under his will, and added that his widow "will adopt a son with the good advice and opinion of the manager", and the widow wanted to adopt a boy and intimated her intention to the manager and requested him to come and see the ceremony performed, and he declined to receive the letter, and the widow eventually adopted the boy without his consent, the adoption was not invalid for lack of such consent, as such consent was "not a condition precedent" to the validity of the adoption. But, of course, it is unnecessary to rely on that, as we are satisfied that P. W. 10 did approve of the adoption and did attend the function with his wife, as sworn to by D. Ws. 1 to 5 and 7. In the end, therefore, we have no hesitation in agreeing with the learned District Judge that the adoption of the second defendant by the first defendant was valid and binding on the plaintiff and other reversioners.

19. The last contention was that the learned District Judge erred in awarding compensatory costs to the first defendant by making up his past record of litigation, and relying on it for that purpose, though no compensatory costs could have been awarded in the circumstances of this suit, which involved arguable and complicated questions of fact and law and could not be held to be frivolous and vexatious. We agree. The very fact that this suit had to be argued strenuously on both sides, in the lower Court and here, and that the judgments have had to be elaborate after weighing the contentions on both sides, will show that the suit was not frivolous and vexatious, and that this was not a case fit for awarding "compensatory costs". The past activities of the plaintiff in filing suits, and his propensity to file suits for getting properties, should not, in our opinion,

have been considered for this purpose any more than the bad character of an accused can be considered for convicting him when there is no other evidence. So, we set aside the order regarding compensatory costs.

20. In the end, therefore, we modify the judgment and decree of the lower Court by deleting the award for compensatory costs to defendant 1 and confirm them in all other respects. We dismiss this appeal, except to the extent indicated above, with full costs (one set) of the contesting respondents, defendants 1 and 2.