

(1941) 11 MAD CK 0014
In the Madras High Court

Kalitheerta Pillai

APPELLANT

Vs

Chellathammal alias Ammamuthammal and Others

RESPONDENT

Date of Decision : 07-11-1941

Acts Referred:

Citation : (1942) 55 LW 104 : (1942) 1 MLJ 28

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—This case raises a very important question whether the widow of a deceased member of a Hindu joint family can make a valid

adoption to her husband with the consent of the divided sapindas when there is only one coparcener alive who by reason of mental infirmity is not

in a position to give or withhold his consent. Plaintiff had a brother Sethuramalingam Pillai who died on 6th January, 1926 leaving two widows,

defendants 1 and 2 and a daughter the third defendant. At that time the father of the plaintiff and Sethuramalingam Pillai was alive and he died in

July, 1926 leaving a widow the sixth defendant in the suit. Defendants 1 and 2 adopted the fourth defendant with the consent of certain divided

sapindas of their husband on the 11th December, 1930. At that time, it is common ground that the plaintiff was suffering from some mental

infirmity. Paragraph 8 of the plaint states that from the beginning of the year, 1926, the plaintiff was not in a sound state of mind and paragraph 10

states that since the beginning of the year 1931 the plaintiff completely recovered from the unsound state of mind from which he had been suffering

for about five years. The trial Court (the Subordinate Judge of Tinnevely) held that the plaintiff was from January, 1926 to January, 1931 so totally

devoid of his Senses as to disqualify him from inheriting his father's properties. On appeal the District Judge confirmed the finding of the trial Court

that the appellant was insane at the time of the adoption. The plaintiff being the only coparcener and his state of mind being such as has been found

by both the lower Courts, the question is whether the adoption made by the defendants 1 and 2 with the consent of divided sapindas is valid in

law. There were six divided sapindas and two of them gave their consent and the remaining four wrote refusing to give their consent. The six

agnatic relations were of equal degree of relationship being the sons of the plaintiff's grandfather's brothers. The main reason given by the four

reversioners for withholding their consent is, as stated in the replies, that the plaintiff was in proper senses and that therefore there was no necessity

for an adoption. This has been found by both the lower Courts to be false and that at the time when their assent was sought, the plaintiff was

actually insane. For this reason, both the lower Courts have held that the refusal by the four dissenting sapindas was actuated by improper motives.

I have gone through the several replies and I agree with the lower Courts that the reasons given for withholding their consent are wholly improper.

Thus, we are left with the consent of two persons whose consent is beyond any attack. On the authority of the decisions of this Court in

"Venhatakrishnamma v. Annapnramma (1899) 10 M.L.J. 73 : ILR Mad. 486 and Subrahmanyam Vs. Venkamma and Others, the adoption

would be valid notwithstanding four out of the six sapindas of equal grade withholding their consent because their refusal was actuated by improper

motives. In a case of this kind it is not a question of majority or minority. If the majority of the sapindas consent, then there will be a presumption in

favour of the consent being bona fide. But where the majority refuse, it cannot be said that it is not open to the widow to prove that the refusal was

actuated by improper motives. In Venkatakrishnamma v. Anna-purnanima (1899) 10. M.L.J. 73 : ILR Mad. 486 Subrahmania Aiyar, J., says this:

It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine

the question. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on bona fide grounds.

If, however, it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be of no-avail to

the party relying on it.

In *Subrahmanyam Vs. Venkamma and Others, Benson and Bhashyam Aiyangar, JJ.*, referred to the above observations with approval.

2. It is urged by the learned advocate for the appellant that a widow can make an adoption only if she gets the consent of the majority of the sapindas and where, as in this case, she has not been able to get the consent of the majority, the adoption is not valid. I do not agree with the contention. No decision has been brought to my notice which says that the consent of the majority of the sapindas is always essential for the validity of an adoption. I therefore hold that the adoption is not invalid on this ground.

3. The next and the most important question is whether defendants 1 and 2 were entitled to get the consent of the divided agnates for the reason

that the plaintiff was at the time of the adoption mentally defective and not in a position to give or withhold his consent. It is urged for the appellant

that the Judicial Committee has definitely laid down that in the case of joint families, the widow of a deceased coparcener must seek the requisite

authority within that family. If the husband himself gave his authority, she might adopt. But if the husband did not give his " authority and the widow

has to get the consent of the sapindas, it is urged that it is only within the joint family that she must seek the requisite assent. Mr. Viswanatha Sastri

urges that as the joint family continues even when one male member exists, a widow cannot make an adoption unless she gets the consent of that

person and that if that person refuses his consent even though for improper reasons, she cannot travel, outside the joint family and seek the

authority of divided sapindas." His next proposition is that even where the sole male member of the joint family is a lunatic or a minor, she has no

right to travel outside the joint family and make an adoption with the consent of the divided sapindas. *Collector of Madura v. Moottoo Ramalinga*

Sethupathi (1868) 12 M.I.A. 397 was a case of a divided family but the Judicial Committee stated the law as to the case of a joint family in the

following terms:

The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself.

Where the husband's family is in the normal condition of a Hindu family . i.e.,

undivided--that question is of comparatively easy solution. In such a case, the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will.

4. The case of a joint family came up for decision before the Judicial Committee in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta*

Deo (1876) 3 I.A. 154 : ILR 1 Mad. 69 (P.C.). There the widow of the holder of an impartible estate ignored the husband's coparcener and got

the consent of a divided sapinda. She also set up the written authority of the husband. The Judicial Committee held in favour of the written authority

and upheld the adoption. But they laid down the law on the subject having regard to the way in which *Holloway J.*, treated the question in the High

Court. At page 81 they say this:

Positive authority, then, does not do more than establish that, according to the law of Madras, which in this respect is something intermediate

between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly

authorised by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from

the principle recognised by the Travancore ease, viz., that the requisite authority is, in the case of an undivided family, to be sought within that

family. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but

in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and

observances must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation.

The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for

maintenance. It is in that family that, in the strict contemplation of law, She ought to reside. It is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her. .. There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family and obtain the authorisation required from a separated and remote kinsman of her husband.

5. In (1918) L.R. 45 I.A. 265 (Privy Council) Mr. Ameer Ali delivering the judgment of the Judicial Committee referring to the Ramnad case 12

M.I.A. 397 says this at page 1009:

That the requisite authority in the case of an undivided family is to be sought by the widow within that family; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorisation required from separate and remote kinsmen of her husband.

Dealing with a case of joint family in Bombay where a widow has inherent power to make, an adoption, after referring to the ease of Collector of

Madura v. Moottoo Ramalinga Sethupathy (1868) 12 M.I.A.. 397 and the decisions in Madras, the Judicial Committee said this in Bhimabai v.

Gurunathgouda Khandappagouda (1932) 64 M.L.J. 34 : 1932 L.R 60 IndAp 25 : ILR 57 Bom. 157 at 172 (P.C.):

The Board held that the consent to be obtained, when the family was undivided, must be the consent not of a separated kinsman who had no

interest in the property, but of his (the husband's) coparceners to whom his interest had passed on his death by survivorship and it was in this

connection that the observations of the Board quoted above were made.

6. The learned advocate for the respondents does not dispute the general proposition that ordinarily in the case of a joint family, the authority must

be sought within that family. He urges, however, that where the sole surviving male member is a lunatic and therefore incapable of giving his

consent, his very existence must be ignored and that she can in that case go outside the family and get the consent of the divided sapindas. He

relies upon certain observations of the Judicial Committee in 24 CWN 905 (Privy Council) After referring to the case of (1918) L.R. 45 I.A. 265

(Privy Council) they said this:

This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either

sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his

dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country, and it is impossible

without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. The consent required is that of a

substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter.

7. These remarks were made with reference to a divided family and hence they are of no assistance to a case where in a joint family the male

members are either minors or persons who by reason of their defective mental capacity are unable to form an intelligent opinion on the question

whether a new coparcener should be introduced by the widow making an adoption.

8. This question is not covered by direct authority but it has been held that a widow has no inherent power to make an adoption and that therefore

where there are no sapindas, either agnates or cognates to give the requisite authority or where the only sapinda in existence refuses to give his

consent though improperly, she cannot make a valid adoption at all. This has been decided by a Bench of this Court in *Vajjula alias*

Hanumanthavajjula Suryanarayanamurthy Vs. Hanumanthavajjula Gopalakrishnamma and Another, and in so doing the learned Judges relied upon

the observations of the Judicial Committee in *Balasubrahmanya v. Subbayya* (1938) M.L.J. 426 : L.R. 65 IndAp 193 : (1938) ILR Mad. 651

(P.C.) The Judicial Committee there say:

Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates, nor is there

any evidence as to what sapindas of *Irrudalaya* were in existence at the date of the *Hani's* adoption. Their Lordships think, moreover that it would

be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of

sapindas but the contention was so clearly abandoned in India that it is not

necessary to consider it further.

9. There the contention had been abandoned in the lower Courts and therefore the Judicial Committee after making the above observation did not

make a definite pronouncement. The question, however, directly arose for decision in Vajjula alias Hanumanthavajjula Suryanarayanamurthy Vs.

Hanumanthavajjula Gopalakrishnamma and Another, . There, there was only one sapinda and he refused to give his consent and his refusal was

found to be improper and yet the adoption was held to be invalid. Thus, a widow has no inherent power to make an adoption in a case where the

only sapinda improperly refuses to give his consent. In the case of a joint family, if the only surviving coparcener is an adult free from any mental

defect and refuses to give his consent though improperly, it seems to me, that a widow of a deceased coparcener cannot ignore that refusal though

improper, and act upon the consent of a divided kinsman. This is the view expressed in Mayne's Hindu law (10th edition) at page 219:

There is however the distinction that in the case of a joint family, adoption would mean the introduction of a new coparcener into the joint family.

On principle it would seem she can adopt with the assent of a substantial majority of the coparceners in the family. But it is fairly clear that even

where the coparceners improperly refuse their assent, she will not be entitled to adopt with the assent of her husband's divided kinsmen, as it

would be introducing into the joint family a coparcener against their will.

10. There are grave reasons why a widow ought not to allowed to travel outside the joint family even when the surviving members are minors or

persons incapable of giving their consent by reason of mental defect. As in this case, the person who is mentally defective may recover. In fact, in

this case he recovered within a few months after the adoption." In the case where the sole coparcener is a minor, his rights ought not to be affected

by the action of a divided kinsman. If, as the Judicial Committee stated, the fact that their right in the joint family property is affected by the

introduction of a stranger into the family is the reason for directing a widow to seek the requisite assent within the joint family, then, it stands to

reason that where, for instance, the sole surviving member is a minor, his rights ought not to be affected by the consent given by a divided kinsman.

So also in the case where the sole member is mentally defective. Inherent power

in a widow being ruled out, the position of defendants 1, and 2 in

this Case is no better and no worse than that of the widow in the case of Vajjula alias Hanumanthavajjula Suryanarayanamurthy Vs.

Hanumanthavajjula Gopalakrishnamma and Another, .

11. I therefore hold that the adoption of the fourth defendant by defendants 1 and 2 is invalid for want of requisite authority. The decisions of the

lower Courts are reversed and a decree is given in favour of the plaintiff. Under the circumstances of this case, each party will bear his or her own

costs throughout.

(Leave to appeal is granted).

12. At the time when I delivered the judgment, it was not noticed that there are other issues in the suit which have to be tried before a decree is

given as prayed for. Therefore, the proper order to pass is to reverse the decrees of the lower Courts and to send the case back to the trial Court

for trying the other issues and to pass an appropriate decree.

13. Court-fee paid on the second appeal will be refunded. As directed already each party will bear its own costs upto date. Costs of further

proceedings, will be provided for by the lower Court.