
(1982) 03 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No. 3298 of 1976

Laxminarayan Fattalal Rathi and another	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 05-03-1982

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 10
Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Section 12(1)

Citation : (1983) MhLj 811

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : B.N. Mohta, for the Appellant; M.P. Badar, Asst. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—On the return filed by petitioner No. 1 u/s 12(1) of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961, hereinafter referred to as the "Ceiling Act" for the purpose of brevity, a Ceiling Case No. 21/2/Paturda/210/75-76 was registered before the Surplus Land Determination Tribunal, Jalgaon (Jamod). On enquiry, the Surplus Land Determination Tribunal held that petitioner No. 1 was holding surplus land to the extent of 6 acres and 17 gunthas. The petitioner No. 1 had contended before the Surplus Land Determination Tribunal that petitioner No. 2 Durgadas is his adopted son and that he being a major he is entitled to a share on notional partition and the same should be excluded from the holdings of the petitioner No. 1. This contention of the petitioner No. 1 was negated by the Surplus Land Determination Tribunal.

2. The petitioner No. 1 thereafter preferred Ceiling Appeal No. A/c-A-977/76 before the Maharashtra Revenue Tribunal. It was again urged before the Maharashtra Revenue Tribunal that the petitioner's adopted son was entitled to a share on notional partition and his share should be excluded. It was further urged that Laxminarayan had adopted Durgadas as per the custom prevalent in

the Maheshwari community to which the petitioner belonged and as such even if petitioner No. 2 was above the age of 15 years on the date of his adoption, yet the said adoption is valid according to the custom prevalent in the Maheshwari Community.

3. The learned Member of the Maharashtra Revenue Tribunal negated the contention on the ground that there was no evidence led by the petitioner No. 1 before the Lower Tribunal to show that there is a custom in the Maheshwari community that a person who is above 15 years of age can also be adopted. He, therefore, held that the adoption of Durgadas by petitioner No. 1 was not legal and confirmed the findings of the Surplus Land Determination Tribunal.

4. Shri B. N. Mohta, the counsel for the petitioner restricted his submission only on this point. He contended that our High Court has in earlier decisions held that amongst Maheshwari community, there is a well established custom to adopt a person of any age and also a married person with children can be adopted validly. He also referred to a decision of the Division Bench of this Court in Vallabhadas v. Madanlal First Appeal No. 191/56 decided on 25-6-1962. He also relied upon other rulings regarding the Agrawal Maheshwaris decided by the Privy Council. Some of these rulings have been referred to in the judgment of the Division Bench cited supra.

5. Shri M. P. Badar, the learned Asstt. Government Pleader for the respondent State supported the impugned order of the Maharashtra Revenue Tribunal. He submitted that even though section 10 of the Hindu Adoption and Maintenance Act prescribes that the age of the adopted son should not exceed 15 years, yet a person of an age higher than 15 years could also be adopted if there is a custom prevalent in the community to which the parties belonged. He, therefore, submitted that the petitioner No. 1 has pleaded and established the factum of adoption. But it is found that the age of Durgadas at the time of adoption was above 15 years. To be precise he was 16 years of age. The petitioner No. 1 has not established the custom that in his community known as "Maheshwari community" a person above the age of 15 years could be adopted validly. In the absence of such evidence the finding of the Maharashtra Revenue Tribunal is proper and no inference is called for. He, however, fairly submitted that he would have no objection to remand the case and afford opportunity to the petitioner for adducing evidence in that regard.

6. On the submissions of both the counsel, following two questions need to be answered:

(i) Whether there is a custom prevalent in the Maheshwari community to adopt a son above the age of 15 years.

(ii) Whether the petitioner No. 1 is required to adduce evidence to establish the said custom.

7. It is an established principle of law that if a custom has been followed by a

particular community for years together, the same in essence becomes special usage modifying the ordinary law of succession. The only condition being that it should be ancient and prevailing custom of the said community. The custom of adoption of a married person or of a person without any age limit has been accepted in the Marwari community or Maneshwari community as it is called. In a judgment from Assam High Court in the matter of Mt. Gigi v. Mt. Panna A I R 1956 Ass 100 , it was a case of adoption amongst Jains, but the terms "Jains" and "Marwari" were used in the same judgment as if they are interchangeable and after referring to a decision of Their Lordships of the Privy Council in AIR 1948 60 (Privy Council) , it was observed:

But they (Their Lordships) held that it was equally beyond doubt that a custom which had been recognised and affirmed in a series of decisions, each of them based on evidence adduced in the particular case may become incorporated in the general law, with the result that the onus of proof no longer lay on those who assert it but upon those who assert an exception to it.

8. As already stated above, the aforesaid cases refer to the custom of adoption amongst Jains. A reference may also be made to an article by Shri Lala Chiranjilal Agarwal, an Advocate of Jaipur, printed in AIR 1937 Journal portion 80 to 83. In the said Article the author has referred to the various decisions of the Courts in India and Privy Council and has arrived at certain conclusions which are found at page 83. The said article refers to "Adoptions amongst Marwari Agarwals". He has also stated that these Marwari Agrawals have taken their own customary code to the place of their migration and business, and thus have become a puzzle to the jurists and the law Courts. As regards the necessity of the custom in the Marwari community of deviating from the general Hindu Law, the author states that "the chief ground of the community's exemption from rigid Hindu Law is, as mentioned earlier, that the Marwari Agrawals being mostly shopkeepers and traders and uneducated look to adoption as a secular institution rather than a religions one." The author further observes that "there is practically no difference between the Marwari Agrawals and Marwari Maheshwaris." He refers to the decision in Mathura Das v. Shrikrissen A I R 1918 Cal. 98 and states that "the High Court's finding is about Marwaris as a whole." He further states that "the observations of their Lordships of the Privy Council in AIR 1925 118 (Privy Council) are also to the same effect".

9. It is to be noted that the above referred article has received judicial approbation in a decision of the Nagpur High Court. It was referred to in Govindram v. Sheoprasad I L R 1948 Nag. 98 at p. 103. The said article was also referred to and relied upon in a decision of this Court reported in Pralhad v. Damodar 1957 N L J 433. It was held in the said decision after quoting extracts from the above article that "among Marwaris and Marwadi Agarwals there is not much difference between Vaishnawas and Jains in the matter of adoption and that there is no bar of marriage and age for the purpose of adoption".

10. It is needless to add that there is a catena of cases wherein the custom

amongst Maheshwaris regarding adoption of a person above the age of 15 years has been judicially recognised. I have perused the records of the Division Bench judgment of this Court in F. A. No. 191 of 1956 and found that the matter was taken up to the Supreme Court and the findings of this Division Bench have been confirmed.

11. The judgment of this Court by Division Bench in First Appeal No. 191 of 1956 held that in the Maheshwari community the custom of adoption does not restrict to age of the adoptee or his marital status. Thus, it is well established that amongst the Maheshwaris a custom exists for a long number of years whereby they can adopt a person above the age of 15 years and even if he is married.

12. The next question is whether the case should be remanded back to the Surplus Land Determination Tribunal for affording opportunity to the petitioner No. 1 for adducing evidence regarding the custom. As has been observed in the several decisions cited above that once a custom has been established and recognised in respect of a community by judicial decisions, then for each subsequent case no evidence would be necessary. In fact such custom would get incorporated in the General Law of that community and it is only for those who assert the opposite view who will have to discharge the burden of disproving the said custom.

13. In a similar matter regarding established custom, the Supreme Court in the matter of *Kaliamma v. Janardhanan Pillai* 1973 1 SCC 614, held that:

A custom which has been recognised and affirmed in a series of decisions, each of them based on evidence adduced in the particular case, may become incorporated in the general law and without the necessity of proof in each case".

14. What is to be seen is that the earlier decisions in respect of a custom of the community have been decided on evidence adduced in that case. The Supreme Court further observes in the same ruling that:

Though a community may be a very small one found within a small local area and the cases that are likely to arise in that community, which will reach the Courts may not be many, but the Court cannot merely on that ground ignore the well established principle that before a custom can be held as having been proved merely on the basis of earlier decisions, those decisions should have been based on evidence adduced in respect of the cases.

15. With reference to the several reported decisions of the High Courts, Supreme Court and the Privy Council, it is needless to add that there have been judicial recognition of a custom of adoption in the Maheshwari community which is distinct from the general Hindu Law. It has been held that the Maheshwaris can adopt a person irrespective of his age or marital status. In that event of the matter, it would not be necessary now in this case to adduce fresh evidence to establish that custom, if at all it was for the department concerned to adduce evidence to the contrary if they want to challenge the said custom.

16. On this point, therefore, I will have to hold that the petitioner No. 2 Durgadas was a validly adopted son of the petitioner No. 1 prior to 26-9-1970 and was, therefore, a person belonging to the family of the petitioner No. 1. He being major on 26-9-1970, he was entitled to notional share of partition. Thus, in the lands held by the petitioner No. 1, the petitioner No. 2 who is the adopted son and major would get 1/3rd share and the same will have to be excluded from the holdings of the petitioner No. 1 and his wife.

17. In the present case, only 6 acres and 17 gunthas of land was found surplus with the petitioner No. 1, while he was possessing 62 acres and 35 gunthas of land. Excluding 1/3rd share of petitioner No. 2, the adopted son, the petitioner No. 1 would not be a surplus holder at all. Hence the petition succeeds. Both the impugned orders are quashed and set aside. It is declared that after excluding the share on notional partition in respect of petitioner No. 2, the petitioner No. 1 is not a surplus holder at all. The proceedings before the Surplus Land Determination Tribunal are, therefore, liable to be dropped. There shall be no order as to costs.