

(1983) 03 MAD CK 0037
In the Madras High Court
Case No : C.R.P. No. 2606 of 1982

Moulvi Mohammed and Others

APPELLANT

Vs

S. Mohaboob Begum

RESPONDENT

Date of Decision : 25-03-1983

Acts Referred:

Muslim Personal Law (Shariat) Application Act, 1937 — Section 2, 3, 3(1)
Tamil Nadu Civil Courts Act, 1873 — Section 16

Citation : AIR 1984 Mad 7 : (1983) 96 LW 450 : (1983) 2 MLJ 357

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : S.M. Amjad Nainar, for the Appellant; M.S. Subramaniam, for the Respondent

Judgement

1. This revision was earlier disposed of by me on 21-12-1982. At that time, the respondent was not represented. Subsequently, pursuant to order

in C. M. P, No. 2461 of 1983, the order dated 21-12-1982 was, set aside because, the respondent offered convincing explanation for non-

appearance at the time when the revision was heard earlier and I felt that it is better that the matter is disposed of after hearing all the parties. The

petitioners herein and one Zaina Bi (since deceased) were granted ryotwari patta under Tamil Nadu Act 30 of 1963 by the Assitant Settlement

Officer, Chingleput, by order-dated 28-4-1979. Zaina Bi preferred, an appeal C. M. A. 57 of 1979 before the Minor Inams tribunal (Additional

Subordinate Judge 11) Chingleput and while the said appeal wits pending, she died on 21-7-1980. The petitioners herein are the respondents in

the said appeal. The respondent herein is the daughter of one Chotima Bi, a sister of Zaina Bi and Chotima Bi predeceased Zaina Bi. As such,. it is

admitted that the respondent herein cannot, on the aforesaid basis, claim herself to be an heir of Zaina Bi to come on record to prosecute the appeal before the Tribunal, However, putting forth a plea that she was taken in adoption by late Zaina Bi, she filed I. A. 462 of 1980 to bring herself on record as the legal representative of the deceased appellant, Zaina Bi, and to prosecute the appeal. In spite of contest by the petitioners herein, who are respondents in, the appeal before the Tribunal that application has been allowed, and the present revision is directed against the orders of the Tribunal.

2. Mr. S. N. Amjad Nainar learned counsel for the petitioners; contends that Muslim Personal Law recognize does not adoption as a mode of filiations and the Court below in law in recognising, custom as enabling the respondent, herein, to plead and prove such a custom to substantiate her claim as the adopted daughter of the deceased appellant, Zaina:16,1AR, against this, Mr. M. S Subramaniam, learned counsel for the respondent, submits that though the Muslim Personal Law does not recognise adoption as a mode of filiation, there is a custom the locate to which the parties belong and amongst the parties concerned, recognising adoption a mode of filiation and that custom stands preserved in spite of the Muslim Personal Law (Shariat) Application Act 26 of 1937, hereinafter referred to as the Shariat Act. Learned counsel for- the respondent drew my attention to Section 2, as amended by the Madras Shariat (Amendment) Act 18 of 1949 and Section 3 (1) of the Shariat Act, and they run as follows-.

2. Notwithstanding any custom or usage to the contrary, in all questions regarding in testate succession, special property of females including personal property inherited or obtained under contract or gift or any other, provision of personal law, marriage, dissolution of marriage, including talak, ila, zihar, liah, khula and mubara "at, maintenance, dower , guardianship, gifts, trust and trust properties, and wakfs. (other than charities - and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims-shall be the Muslim Personal Law (Shariat).

3 (I). Any person who satisfies the proscribed authority-
(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of Section 11 of the Contract Act 1872; and

(c) that he is a resident of India, may by declaration in the prescribed form and filed before, the prescribed authority declare that he desires to

obtain the benefit of the provisions of this section and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children

and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

3. Learned counsel also drew my attention to a judgment of, a Bench of this Court, "consisting of Rajamannar C.J and Panchapakesa Ayyar J. in

Puthiya Purayil Abdurahiman v.T. K. Avoomma, AIR 1956 Mad 244, in support of his statement, that the provisions of the Shariat Act did not in

terms totally abrogate custom and usage in respect of matters other than these enumerated in Sections, 2 and 3 (1) thereof. I must at this juncture,

point out that my attention was not drawn to the judgment of the Bench of "this Court referred to above as well as Section 3 (1) of the Shariat Act

,when the revision ,was disposed of by me earlier These aspects if considered, definitely bring about new approach to the question and lead to

different result altogether, A reading of Sections,2 and 3 (1) of the Shariat Act clearly brings- out the following propositions: (i) Notwithstanding

any custom or usage to the contrary, in all questions regarding matters enumerated in Section 2 of the Shariat Act, the rule of decision in cases

where the parties -are Muslims shall be the Muslim Personal- Law (Shariat), Hence, in respect of these enumerated matters, custom or usage to

the contrary shall stand abrogated-, (ii) Section 3 (1) of the Shariat Act states that a person who satisfies the prescribed authority -about, the three

ingredients set out in Cls (a) .(b) and (c) thereof may make a declaration as enjoined by the said provision and thereafter the provisions of Section

2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and

legacies, were also specified. This conveys the meaning that only when the declaration is made, custom or usage relating to the three matters

namely, adoption, wills and legacies will stand excluded. The Shariat Act has ruled out custom or usage with reference to the enumerated subjects

in Section 2 thereof and enables, the Muslim to rule out custom or usage with regard to three more subjects referred to in Section 3 (1). Adoption

as is not one of the enumerated subjects in Section 2. Adoption is not necessarily inheritance or succession, although it may lead to inheritance or

succession it is not the case of the petitioners that any declaration u/s 3 (1) was made by any one concerned in the instant case so as to rule out

custom or usage on the question of adoption. Hence it cannot be stated that there could not be plea and proof of a custom relating to adoption at

all in the instant case, if in fact there was and is such a custom prevailing as claimed by the respondent .In the said circumstances it is possible to

proceed on the basis that there can be a custom or usage having the force of law with regard to adoption .

4. Before parting with this aspect, there is one feature which must be adverted to far a completion of the discussion on this question. Section 16 of

the Madras Civil Courts Act 111 of 1873 reads as follows-

16. Where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance,

marriage, or caste, or any religious usage Or institution

(a) the Muhammadan Law in cases where the parties are Muhammadans and the Hindu Law in cases where the parties are Hindus, or

(b) any custom, (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision, unless

such law or custom has, by legislative enactment; been altered or abolished,

(c) in cases where no specific rule exists, the Court shall act according to justice, equity and good conscience.

We find that Clause (b) of Section" 16 of the Madras-- Act III of 1873 contemplates that any custom having the force of law and governing the

parties or property concerned "shall form the rule of decision in respect of subjects enumerated in the main part of the section unless such custom

has; by legislative enactment, been altered or abolished. We find that adoption is not one of, the matters dealt with in the main part of S. 16 of

Madras Act III of 1873. The non-mention of -other "subjects such as adoption in respect of which a valid custom could govern and be binding on

the parties does not mean that it is not permissible for the parties to rely on such a valid custom, if there be one. Section 6 of the Shariat Act -

repealed S. 16 Of Madras Act III of 1873, in so far as it is inconsistent with the provisions of the Shariat Act. This repeal is of no significance at all

for the purpose of this case firstly because Section 16 of the Madras Act III of 1873 has not specifically referred to adoption, as one of the

subjects, for a decision regarding which custom shall form the rule. Secondly, even "otherwise, in Section 2 of the Shariat Act, adoption is not one

Of the enumerated subjects, regarding which custom or usage is ruled out. " Even if the matter, has been brought within the purview of Section 2 of

the Shariat Act, by virtue of a declaration u/s 3 (1) thereof - in the instant case, there is no such declaration - there will not be any inconsistency

between the provisions. Hence, in the absence of any exclusion or ruling out of custom, relating to adoption under "the Shariat Act, in the

instances, it is possible to plead and prove such a custom or usage having, the, force of law in the locale and amongst the, concerned parties. In

this context I feel obliged to adopt the ratio of the Bench in Puthiya Purayil Abdurahiman v. T.K Avoomma, AIR 1956 Mad 244 that the Shariat

Act did not in terms, totally abrogate custom and usage in respect Of matters Other than those enumerated in Sections 2 and 3 (1) thereof.

5. If this is the basis to be taken for the purpose of deciding the question as to whether the respondent could come on record as the legal

representative of the deceased Zaina Bi on the ground that she is her adopted daughter, then the questions that would arise for consideration are:

(i) whether there is a custom or usage having the force of law, which recognises such adoption in the locale and amongst the parties concerned; (ii)

whether the respondent has proved such a custom or usage and further the factum, of adoption in accordance with custom or usage; (iii) whether,

as the adopted daughter of the deceased Zaina Bi, the respondent could be countenanced as her legal representative in law for purpose of the

present lis. It is needless to point out that custom must be ancient and the burden of proof lies upon the Party who sets up the custom. The custom

to hold good in law must be reasonable and the majority at least of any given class of persons must look upon it as binding and it must be

established by a series of well known, concordant and on the whole continuous instances. It is true that the respondent has placed some evidence

before the Court below on the question of custom and the factum of adoption as per the custom. But, as rightly pointed out by Mr. S. M . Amjad

Nainar , learned counsel for the petitioners, the evidence is far from satisfactory and cannot, by itself, bring any conviction to the mind of this Court

on the question of proof of the custom and the factum of adoption as per the custom. The explanation is obvious because, neither the parties nor the Court below kept in mind the above salient principles when the question was agitated and a decision thereon was rendered. In the interest, of justice, the matter requires reinvestigation in the above light by the Court below permitting the parties to place further adequate materials in, the shape of evidence, oral and documentary, on the questions involved.

6. Mr. M. S. Subramaniam, learned counsel for the respondent submits that even if it is to be held that there is lack Of proof of a valid custom and the factum of adoption as per the said custom, the respondent can wet I prosecute the appeal as the person in possession on the death of Zaina Bi and in this view, she can he brought in within the definition of a "legal representative". In the affidavit filed in support of the application before the Courts "below, the respondent has averred that she is in po6session and enjoyment of the property after the death of Zaina Bi. Of course, this has been de died in the counter filed by the first petitioner. But this aspect has not been examined by the Court below to give a decision one way or the other and the Court below was content to accept the plea of custom relating to adoption and is only on that basis the application by the respondent to come on record as the legal representative of the decease Zaina Bi was allowed. This question also requires investigation and adjudication by the Court below on the basis of the evidence already placed and the parties may further place that. As stated above, on going through the fair order of the Court below, I find that even on the question of proof of custom and the factum of adoption, there has not been a proper adjudication and in my view, all the questions require a proper examination and adjudication by the Court below. Valuable rights are involved in the appeal before the Court below and interests of justice require that the Court below once again considers the matter and gives a proper adjudication over the same. In this view, this revision is allowed and the matter 1. A. No. 462 of 1980 will stand remitted to the file of the Court below for it to consider the same afresh in the light of the directions given and dictums and observations made above. There, will be no order as to costs in this revision.

7. I find that the appeal is of the year, 1979 and it is needless to say that it

deserves expeditious disposal. Keeping this in mind, the Court below will take up the matter 1. A. No. 462 of 1980 and dispose of the same expeditiously and in any event before 31-7-1983.

8. Revision allowed.