

(1921) 10 MAD CK 0013
In the Madras High Court

Muthusami Naicken by next friend Naga Naicken	APPELLANT
Vs	
Pulavaratal and Others	RESPONDENT

Date of Decision : 21-10-1921

Acts Referred:

Citation : (1922) 15 LW 40 : (1922) 42 MLJ 101

Hon'ble Judges : Spencer, J; Ramesam, J

Bench : Full Bench

Judgement

Spencer, J.—The plaintiff in this suit seeks for a declaration that he is the adopted son of the deceased Amtnasi Naicken and is entitled to

the properties mentioned in the schedule which belonged to Ammasi Naicken in his lifetime.

2. Ammasi naicken died on the 13th of November 1915 of a carbuncle. It is alleged that, on the morning of the day when he died, he adopted the

minor plaintiff, who is the son of the deceased's second wife's brother, and that he associated the second wife who is 3rd defendant with him in

the act of adoption. It may here be stated that Ammasi Naicken left three wives Pulavarthal, Sellayi and Poovayammal and that the first wife has

been living apart from him for about 25 years. As doubts were thrown upon the said adoption, it is alleged that the 3rd defendant went through the

ceremony of adopting the plaintiff a second time on the 3rd of December 1917. The Subordinate Judge found that the adoption alleged to have

been made by Ammasi Naicken was not true and that the adoption made by the 3rd defendant was true but not valid.

3. Two questions arise for decision, first, whether the first adoption was true in fact, and secondly, whether the second adoption was a valid

adoption. On the first point I am of opinion that sufficient reason has not been shown for disturbing the finding of the Lower Court. [The learned

Judge then considers the evidence on the question of the truth of the alleged adoption.]

4. On the second point which is a question of law, the adoption of the 3rd of December 1917 is attacked on the ground that there was no authority

received by the second wife, either in writing or orally, from her husband to perform this adoption and that, during the lifetime of the senior wife,

the senior wife has a preferential right to make adoptions. This has been established by the decision in *Rajah Venkatappa Nayanim Bahadur v.*

Ranga Rao 29 M.L.J. 18 which followed a decision of *Sankaran Nair, J.* and myself in *akerla ChukkamKma v. Kakerla Punnamma* (1914) 28

M.L.J. 72 and the Bombay and Calcutta High Courts have also held that the senior widow has a preferential right of adoption, See *Rakham Bat v.*

Radha Bai (1868) 5 Bom. H.C.R. 181 , *Dnyanu v. Tanu* I.L.R(1920) . 44 Bom 508 and *Ranjit Lal Karmakar v. Bijoy Krishna Karinakar* ILR

(1912) C. 582. The passage in the *Mitakshara* that treats of this topic has been translated in *Major Basu's Yagnavalkya Smriti* as follows. ""When

a wife of the, same class (as that of the husband) exists, then religious works are not to be performed by a wife who is not of the same class"".

Upon this *Katyayana* comments, ""Let him who has many wives employ one of equal class in the case of the sacrificial fire, and in attendance on

himself; but if there be many such, let him employ the eldest in those duties; provided she be blameless"". Now, it is argued that the eldest wife

Pulavarthal, had been discarded by *Ammasi Naicken* and, therefore, she was not in attendance on her husband and not blameless. An attempt to

prove that she was an adulterous wife entirely failed. We only know that she was living apart from her husband for about 25 years before his

death. The question is whether such separation makes her incompetent to perform the act of adoption, and thus causes the capacity to make an

adoption to devolve upon the second wife. The text of *Katyayana* seems to me to apply to a case of adoption performed during the lifetime of the

adoptive father, when he speaks of a wife being in attendance on himself. It is doubtful whether the word *adhushta* or *blameless* should be

interpreted so as to exclude a woman who voluntarily lives separate from her husband without having been guilty of unchastity or misconduct, so

far as the facts of the separation in this case are known, there is nothing to attribute blameworthiness to the elder wife. An adoption made by a widow without consulting the sapindas would be invalid for want of authorization from them, as it has been held that the consent of the sapindas supplies the want of the husband's authority. The other wives are sapindas, and it was necessary for 3rd defendant to obtain their consent before any adoption could be made. In this case the 3rd defendant sent a notice, Ex. IV, to the senior wife in which she expressed her intention of confirming the adoption made by her husband and asked for an expression of her views in respect of the permission given by the next reversioner to her to adopt the plaintiff. When the senior wife has a preferential right of adoption, the proper course for a junior wife, who wishes adoption to be made, would be to ask the senior wife to get the consent of the male sapindas to perform the adoption, and to perform it herself. If she was unwilling to perform it herself, it would then be soon enough to ask her to agree to the adoption ceremony being performed by the junior wife. Ex. IV is not couched in such terms. It implies that Poovayammal was determined to carry out the ceremony of adoption without giving a chance to the senior wife to adopt a son to their husband. Under the circumstances of the present case, the absence of any relinquishment by the senior wife of her prior right of adoption invalidates the act performed by the junior wife. For these reasons, the second adoption cannot be supported as valid.

5. The result is that the appeal is dismissed with costs. The memorandum of objections is not pressed and is dismissed.

Ramesam, J.

6. I agree. But I wish to add a few words. [The learned Judge then considers the evidence on the question of the truth of the alleged adoption.]

7. Coming to the question of law, the appellant's vakil argues that the case in *Rajah Venkatappa Nayanam Bahadur v. Ranga Rao* 29 M.L.J. 18

ought to be reconsidered. For the reasons given by my learned brother and also for the reasons given by the learned Judge who decided the case

in *Dnyanu v. Tanu* ILR (1920) B 508 where their Lordships say that an adoption with the consent of the sapindas in Madras is not on the same

footing as an adoption in an undivided family with the consent of the manager. I do not think it necessary to doubt the correctness of the former

decisions of this Court.

8. Then it is said that, assuming that the senior widow has a preferential right to adopt, the principle does not apply to Sudras, because no religious

ceremonies are essential for an adoption in the case of Sudras, and *Puddo Kumaree Debee v. Juggut Kishore Acharjee* ILR (1879) C. 615 is

relied on. In the first place it may be mentioned that the decision in *Rajah Venkatappa Nayanim Bahadur v. Ranga Raol* was a case of Sudras, but

the point was not expressly argued. It may be that for the validity of an adoption among Sudras Datta Homam is not necessary, but this does not

mean that adoption is not a religious act. Apart from this, as was pointed out by my learned brother and Sankaran Nair, J. in the case in *Kakerla*

Chukkamma v. Kakerla Punnamma (1914) 28 M.L.J.74 the senior wife is the wife "whom acts of duty concern" that is "who officiates in acts of

religion and so forth." Colebrooke's Digest of Hindu Law, Book IV, Ch. I, Sloka 51. This shows that the acts of duty, in which a senior wife has

got a preferential right need not necessarily be all religious duties. I, therefore, think that the principle is equally applicable to Sudras as well as to

the other classes.

9. The next ground on which it is said that *Rajah Venkatappa Nayanim Bahadur v. Ranga Rao* 29 M.L.J. 18 does not apply to the present case is

that in this case the senior wife is a discarded widow. Verse 88 of *Acharya Adhyaya of Yagnavalkya* was relied on in *Rajah Venkatappa Nayanim*

*Bahadur v. Ranga Rao*¹ as one of the reasons on which the preferential right of the senior widow is based. The translation of that verse as given in

Rajah Venkatappa Nayanim Bahadur v. Ranga Rao ILR (1915) M. 772 runs thus : "When there is a wife of an equal class present," etc., Some

stress is laid by Mr. Ranga Chariar, the learned Vakil for the appellant, on the word. "present" in this translation. The original Sanskrit is "Satyam";

the meaning of "Satyam" "is being in existence" as opposed to death. The translation of this verse in Mandlik's Hindu Law at page 173, in Major

Basu's edition of *Mitakshara* referred to by my learned brother and the translation of Sir P.S. Sivaswami Iyer in 1 M.L.J. 282 all show that what is

meant by "Satyam" is "existing" and not "being present near" (as opposed to being absent elsewhere). The fact, therefore, that the senior wife in

this case had been living elsewhere does not make the text of *Yagnavalkya*

inapplicable. Again, the text of Yagnavalkya, the commentary of

Mitakshara on it, the verse of Katyayana and the text of Vishnu cited by Balambhatta in the gloss on the Mitakshara and also in Colebrooke's

Digest Book IV--the two latter Smritis use the word "'Adushta '"--all these are merely injunctions addressed to the husband as to what he should

do during his life-time. It may be that the husband is at liberty to disobey those injunctions. Vide Annapurni Nachiar v. Forbes I.L.R.(1899) Mad.

1. But those injunctions do not touch the. relative rights of the widows after the husband's death. These verses clearly prove the superior position

of the senior widow. Once such superior position is established, her preferential right to adopt after his death follows as an inference. In this

particular case the evidence, which merely shows that the senior widow was living apart from the husband for the last 25 years apparently on

account of the second marriage of her husband, does not justify us in calling her a "'dushta'" or "'nishiddha.'" As my learned brother pointed out, the

case of unchastity attempted, to be made against her has failed. I think no credence can be given to the evidence of the 6th and 9th witnesses for

the plaintiff.

10. The last ground argued by the appellant on this portion of the case is that a prohibition against her adopting must be implied from the facts of

the case. It does not appear from the Subordinate Judge's Judgment that any such point was raised in the Court below, but it is now said that the

point was argued. Though, no doubt, a prohibition may be implied and need not always be expressed, such prohibition must be a case of a clear

and necessary implication, and it is not for the Courts to embark on speculations as to what the husband might have done during his life-time or

might have wished, if the point was expressly mentioned to him before his death. One may well say that, on the facts of this case, the husband, if he

ever-contemplated adopting during his life-time, would not have associated the senior wife with him in such adoption. One may perhaps also say

that, if he had left a will expressly authorising an adoption, he would probably have not authorised the senior wife to adopt. But, on the other hand,

one may also say that he, not having done either of these things, was well content to allow the law to take its course as to what should happen after

his death, and that in the absence of any express prohibition against the senior

widow, he left her to exercise the right which she has according to the Sastras on account of her status as the senior widow. I do not think it is proper for Courts to speculate on probabilities of this kind for the purpose of inferring an implied prohibition. If the husband was, however, anxious that the senior widow should never adopt for him, he might have left a will in which he might have stated that the senior widow should not adopt for him, in case his widows should contemplate adoption for him. In the absence of such an express prohibition from him or some equally clear indication of his intention, an implied prohibition cannot be inferred in this case. It was held in *Lakshmibai v. Sarasvati Bai* 1 Bom. L.R. 420 that a prohibition ought not to be inferred from the mere fact that the husband and wife were living apart. In the case relied on by the learned vakil for the appellant in *Dnyanoba v. Radhabai* 1894 Bom. P.J. 9 the facts were much stronger; the wife was actually living in-adultery with another man.

11. Coming to the third point argued in the case that Ex. iv is enough to satisfy the requirements of law in connection with the senior widow, I agree

with my learned brother in thinking that it does not. We are not here concerned with a question of obtaining her assent merely as that of a sapinda.

On the other hand, until the senior widow clearly gives up her right to adopt, the junior widow has no such right. The letter on which she states that

she had obtained the assent of the sapinda and was merely asking the senior widow's views followed by the silence of the latter cannot be

construed to mean that the senior widow has waived her preferential right and authorised the junior widow to adopt. Not until she does any act

amounting to this can the right to adopt devolve on the junior widow. The facts in this case fall short of this.

12. One or two points have also been argued before us namely, that the consent of the sapinda in Ex. C is not a valid consent. The Subordinate

Judge has found it to be so. But we think it unnecessary to express an opinion on this question in view of our finding with reference to the right of

the senior widow not being waived. If it were necessary, I would agree with the appellate contention, that there was no misrepresentation made to

the sapinda merely because the 3rd defendant was asserting a prior adoption by her husband. But I would! hold that Ex. C is not a valid consent,

because instead of giving the authority as one necessary and proper in the

circumstances of the family, which is what a sapinda ought to address himself to, he gives it in order to give effect to the wishes of the husband thus believing in the alleged prior adoption by the husband which we have already found to be not proved.

13. I agree that the appeal should be dismissed with costs. The memorandum of objections is dismissed.