

(1930) 11 MAD CK 0009
In the Madras High Court

Nagammal and Another

APPELLANT

Vs

Sankarappa Naidu alias Muthalagiri Naidu and Others

RESPONDENT

Date of Decision : 07-11-1930

Acts Referred:

Evidence Act, 1872 — Section 32(7)

Citation : AIR 1931 Mad 264 : (1931) ILR (Mad) 576 : (1931) 33 LW 269 :
(1931) 61 MLJ 19

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—The dispute in the suit, out of which this second appeal has arisen, relates to the succession to the properties of one

Muthukrishna Naidu who died a minor possessed of the suit properties. Defendants 1 and 2 are the sisters. The plaintiff claims to be the nearest

heir to the deceased as he is the adopted son of Pappi Naidu who was the brother of the deceased's paternal grandfather. Both the Courts below

have held that the plaintiff was the adopted son of Pappi Naidu and that the adoption is also legal and valid. If these findings are correct, there is no

doubt that the plaintiff is entitled to succeed to the properties in question in preference to defendants 1 and 2.

2. The only question argued in this second appeal relates to the validity of the plaintiff's adoption. The circumstances in which the plaintiff was

taken in adoption have been set forth in the registered deed of adoption Ex. A, executed by Pappi Naidu. It is recited in that deed that the

adoption was necessitated by reason of his two aurasa sons being lepers from birth. It is stated that, as both the natural born sons were suffering

from leprosy for over 10 or 12 years and as he despaired of having any lineal

descendant even from his sons to perpetuate the lineage, he had recourse to adoption. That deed is attested by both the sons. It is argued that the recital in Ex. A is not legally admissible in evidence in the present case. The fact that the two sons of Pappi Naidu were suffering from a virulent and incurable form of leprosy at the time of the aforesaid adoption is a relevant fact for deciding in this case whether that adoption is valid or not. It seems to me that Section 32, Clause (7) of the Indian Evidence Act may apply. That clause makes a statement contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a) of the Act admissible in evidence. Ex. A relates to the transaction of plaintiff's adoption whereby his alleged right has been created. The statement contained in Ex. A as the basic ground for the adoption is therefore admissible in evidence. Moreover, the two sons of Pappi Naidu having attested that deed, they may be deemed to have acquiesced in the truth of that statement which is against their pecuniary interest. That being so, it may even be admissible under Clause (3) of Section 32. There is, however, other evidence also in proof of the leprosy of the sons of Pappi Naidu. It is clear from Exs. D and E, the extracts from the death register relating to those two sons, that they died of leprosy. P.W. 2 also says that they were suffering from ulcerous leprosy and had no chance of getting any issue. The finding of the Lower Appellate Court that the two sons of Pappi Naidu were suffering from an incurable form of leprosy seems to me to be unassailable and it must be accepted as correct.

3. There is no doubt that these two sons were disqualified for inheritance on account of their having been afflicted with such a virulent form of leprosy. According to the text of Manu, Eunuchs and outcastes, persons born blind or deaf, the dumb and such as have lost the use of a limb, are excluded from heritage.

4. To this enumeration, Yajnavalkya adds:

A person afflicted with an incurable disease"" (vide para. 592 of Mayne's Hindu Law, 9th Edition).

5. It is also thus laid down in the Mitakshara:

An impotent person or outcaste and his sons, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease and

others similarly disqualified, must be maintained, excluding them, however from participation"" (vide Section 10, verse 1 of Mitakshara at page 53

of Hindu Law Books on Inheritance by Setlur).

6. By a man destitute of male issue, that is, by one to whom no son may have been born or whose son may have died an adoption can be made. It

is clear that only in the absence of a son, grandson or great grandson that an adoption can be made. The point that arises for decision in this case

is, whether the existence of the aforesaid two sons of Pappi Naidu who were excluded from inheritance on account of virulent leprosy was a legal

bar to his making an adoption. The question is not : free from difficulty. In support of the contention on behalf of the plaintiff (1st respondent), his

learned advocate Mr. Sampath Aiyangar referred me to several ancient texts of Hindu Law and also to the opinions of the modern text-writers on

Hindu Law.

7. In order to understand the reason for the rule that a sonless man may adopt, we have to see what the real purpose or purposes of adoption are.

On this subject, Devanda Bhatta in his treatise ""Dattaka Chandrika,"" which is a recognized authority in the Dravida School of Hindu Law, quotes

the texts of Manu and Atri as authorities for stating the reasons for an adoption. Manu says:

A son of any description must be anxiously adopted by a man destitute of male issue, for the sake of funeral cake, water and solemn rites and for

the celebrity of his name.

8. Atri says:

By a man destitute of male issue only must a substitute for a son of some one description always be anxiously made for the sake of funeral cake,

water and solemn rites. (Dattaka Chandrika in Setlur's book, p. 423.)

9. In Dattaka Mimamsa, the same prominence is given to the obsequial ceremonies which would fail if no adoption is made. In Section 1, verse 42,

relying on the text of Manu, it is stated that an adoption is necessary, for otherwise the obsequies would fail. The obsequies are stated to be funeral

rites consisting in presenting oblations of food and water and so forth (vide Dattaka Mimamsa in Setlur's book, page 361 and also verses 54 to 56

at page 362). In the aforesaid treatise, Nanda Panditha says in Section 2, verse 62, that participation in the obsequies and estate has been

declared to be the result of filial relations. As to the presentation of funeral oblations, disqualified heirs like the impotent person and the rest who

merely bear the semblance of being a son would be of no use (page 374 of Setlur's book). The text of Manu, namely,

a given son must never claim the gotra and estate of the natural father; the funeral cake follows the gotra and estate but of him who has given away

Ms son the obsequies fail

is referred to in Section 3, verse 25 of Dattaka Chandrika (page 440 of Setlur's book). In Colebrooke's Digest, Vol. II, p. 417, the following text

of Manu is quoted, namely:

These eleven sons (the son of the wife and the rest is enumerated) are allowed by wise legislators to be substitutes in order for the sons of the

body, for the sake of preventing a failure of obsequies.

10. From these authorities there can be no room to doubt that the main purpose or object of adoption is to secure the due performance of

obsequial ceremonies and oblations of food and water given in sraddhas and such other ceremonies for the benefit of the adopter's soul. The

perpetuation of lineage is also another object for making an adoption.

11. If a son is afflicted with a virulent and loathsome form of ulcerous leprosy and on that account he is unfit to perform the funeral rites and such

other ceremonies for his father, can it be deemed that the existence of such a son is a bar to an adoption? Several texts have been relied on by Mr.

Sampath Aiyangar for the first respondent in support of the position that a leper of the aforesaid type is not qualified to perform the obsequies and

sraddhas, etc. In Yajnavalkya Samhita, verses 222 to 224, of the persons who are censured, that is, considered unqualified to perform the sraddha,

is mentioned a diseased person suffering from leprosy. (Vide page 37 of the Dharma Sastras Translated By Dutt). In Yama Samhita (verses 29 to

31) a person suffering from leprosy is stated to be one of the persons who should be carefully shunned at a sraddha, vide page 280 of the same

book. In Vyavahara Mayukha, relying on Sanka and Likhita, it is stated that the heritable right of him who has been formally degraded and his

competence to offer oblations of food and libations of water are extinct. (Page 116 of Setlur's book.) It is observed"" by Mr. Ghose in his Hindu

Law (3rd Edition) at page 59 that in ancient times the competence to perform

sraddha corresponded with the right to take the inheritance and the rule was that he who takes the inheritance gives the pinda. Among the persons competent to perform the sraddha, a disqualified heir such as one suffering from leprosy is not mentioned. There is no doubt that, so far as the funeral ceremonies and sraddhas are concerned, leprosy of the aforesaid type is a disqualification and therefore the existence of such a son cannot serve one of the main purposes for which an adoption is prescribed under the Hindu Law. If for the sake of those ceremonies adoption is necessary, a son incapable of performing those ceremonies can only bear the semblance of a son whose existence can be ignored and an adoption made. It is argued that such a disqualified son may be eligible for marriage (vide Dr. Jolly's Hindu Law, page 280), but participation in the marriage ceremonies though permissible for such a disqualified heir, his eligibility to perform his father's obsequial ceremonies and sraddhas stands on a different footing and is negated by several texts bearing on ancient Hindu Law.

12. That one who is suffering from a virulent form of leprosy is disqualified for performing even the ceremonies of adoption has been held in judicial decisions. That is the dictum of the Privy Council in the decision reported in (1895) L.R. 22 I.A. 94 (Privy Council) (vide also the decision in Sukuniari Beiva v. Ananta Media ILR (1900) C. 168). If the disease of leprosy is virulent and inextinguishable, it undoubtedly disqualifies him from participating in the adoption ceremonies. In the case of a Sudra, as no religious ceremonies are necessary for making an adoption, it has been held that even a leper may adopt.

13. The opinions of almost all the modern text-writers on Hindu Law appear to be that the father of a disqualified heir can make an adoption. In the Hindu Law of Adoption by Sarkar (2nd Edition) at page 196, the learned author, after referring to a text of Yajñavalkya, relies on the opinion of Nanda Panditha in respect of that passage. It is as follows:

it declares that the capacity to present oblations and to participate in heritage constitutes sonship; for if that be wanting, the mere existence of filial relationship as of an impotent or the like disqualified son does not constitute it.

14. The author says that the disqualified sons can neither render spiritual service nor inherit the estate; in fact they do not possess the legal

character of a son. Therefore a man having such a son is deemed in contemplation of law to be sonless for the purpose of adoption. In the opinion of the said author, the existence of a disqualified son is no bar to an adoption by the father. In his treatise on Hindu Law (5th Edition), the same author reiterates that opinion at page 182. He says that the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit and a child who is destitute of these capacities has not the status of a son in the eye of the Hindu Law and the existence of such a son is no bar to an adoption. It is observed by Sir Thomas Strange in his Hindu Law, Vol. I, at page 77 thus:

The right of inheriting and that of performing for the ancestor his funeral obsequies being correlative, if by any of the legal disabilities, as by degradation from caste, by insanity, by incurable disease or otherwise, living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.

15. According to the opinion of Mr. Ghose in his book on Hindu Law. (3rd Edition), Vol. I, at page 669, a man having a disqualified son or a son who is a patita. on account of heinous offence or change of religion can adopt and as long as a man has no son capable of inheriting his property, there is no reason why he should not be able to adopt. The learned author refers to the observations in Dattaka Mimamsa, Section 2, verse 62 as supporting this view. The following passage is found at p. 104 in Trevelyan's book on Hindu Law (2nd Edition):

If the son be permanently incapable of performing religious rites by reason "of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy, or from any other reason which involves an incapacity to inherit, he may be treated for this purpose as non-existent.

16. In his Hindu Code (3rd Edition) Sir H. S. Gour has expressed his opinion at page 357 as follows:

Since the primary purpose of adoption as now understood is to provide for the adopter's spiritual advancement by having some one legally qualified to perform his obsequies, and since such qualification must be judged by Hindu Law which disqualifies the son who is impotent, an idiot

or insane, blind, deaf, dumb, lame, congenitally suffering from leprosy or from any infirmity or disease which disqualifies him for inheritance or one

who has become a convert to an alien faith or has turned a hermit, sanyasi, or fakir, and thereby snapped the natural tie by which he was bound to

his father, the latter may make an adoption as such disqualified son is as good as civilly dead to him.

17. In West and Buhler's Hindu Law, 3rd Edition, Vols. I and II, reference is made to Sir Thomas Strange's opinion that in such cases adoption

was competent to the father who could not derive spiritual benefit from the incapable son. But so far as Bombay is concerned, it is stated that by

the customary law prevailing in the Presidency, the insanity of a son by birth is not generally a valid cause for an adoption. The learned authors

further say that it is consistent with this that the blindness or dumbness of a son should not justify an adoption (see pp. 907 and 908). That being

so, it is only so far as Bombay is concerned, we must take it that the customary law overrides the general rule of Hindu Law, which, however,

should apply to the other parts of India. In Bhattacharya's Hindu Law. (3rd Edition), Vol. I, at page 342, it is stated that the criterion of sonship as

given by Nanda Panditha in one place may throw some light on this subject. The learned author quotes the opinions- of Nanda Panditha and of Sir

Thomas Strange and leaves the matter there, without expressing"" any opinion of his own, after stating that the question whether the father of a

disqualified son can adopt or not is one about which there is no decision one way or the other. Some reliance is placed by the learned advocate for

the appellants on one of the special rules relating to construction of texts mentioned in this book. Rule 10 is:

A clause in a text which seems like a reason for the rule of law enjoined by it, has, generally speaking, no significance whatever"" (vide p. 135).

18. I fail to see how this rule of construction has any application in the present case, nor has he shown with any definiteness the applicability of this

rule to any particular text relied on by the other side.

19. Much reliance has been placed by the learned advocate for the appellants on the decision in Bharmappa v. Ujjangauda ILR (1921) B. 455,

wherein a similar question arose for determination. It was a case of dumbness, congenital and incurable. A person affected by such dumbness was

held to be disqualified for inheritance according to the Hindu Law prevailing in the Bombay Presidency. On the further question as to the validity of

an adoption made during the existence of such a dumb grandson, it has been held that the adopter cannot be deemed to be sonless so as to make

the adoption made by him during the lifetime of such a grandson valid. At page 458, Mr. Justice Shah observes as follows

But it is urged that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided

case on this point, and so far as I have been able to see, there is nothing in the Mitakshara or the Vyavahara Mayukha to lend support to this

view. The basic principle of adoption, as I understand it to have been laid by the Smriti writers, does not support the contention. The opinions

expressed by writers on Hindu Law are conflicting; and treating it as a point of first impression, at least so far as this Presidency is concerned, I

have come to the conclusion that the fact of the grandson suffering from dumbness by birth does not render the adoption valid which would be

otherwise invalid on account of its having been made during his lifetime.

20. The learned Judge refers to the hardship and obsolete nature of some of the grounds of exclusion from inheritance and says that each defect

must be considered on its merits. Following the decision in Vallabhram Shivnarayan v. Bai Hariganga (1867) 4 Bom. H.C.R. 135 he held that a

person born dumb was incapable of inheriting according to the Hindu Law prevailing in Bombay. Referring to Vyavahara Mayukha, the learned

judge says that there is no indication in the chapter relating to adoptions that a son subject to any defect which excludes him from inheritance was

no son at all. The learned Judge further says that the Dattaka Mimamsa does not in his opinion afford any indication to the contrary. As to the

passage in Section 2, verse 62, in the Dattaka Mimamsa, which I have already referred to, the learned Judge does not accept the interpretation

placed upon it by some writers on Hindu Law. That is one of the passages found in the chapter relating to the subject "Who is to be adopted". It

seems to me that the qualification or eligibility of the boy for adoption is a pertinent matter for consideration in that chapter. If in the aforesaid verse

it is stated that impotent persons and the rest merely bear the semblance of being a son and would be of no use, it amounts to saying that such a

person does not fulfil the capacity of sonship. Such a person is not only ineligible for adoption but his father can be deemed to be sonless for the purpose of making an adoption. With great respect, I would state that the opinion of Nanda Panditha so expressed does not lose its value by the statement of it in the chapter on the subject "Who is to be adopted" instead of in the first section where he deals with the question as to who can adopt. Moreover, the main purpose of adoption according to authoritative texts on Hindu Law being the due performance of obsequial ceremonies and the oblations of food and water given in sraddhas and such other rites for the benefit of the adopter's soul and the perpetuation of his lineage, if the existence of a son incompetent to perform such religious ceremonies and sacrifices is treated as a bar to an adoption, one of the aforesaid main purposes which necessitate an adoption becomes frustrated. This aspect does not seem to have been "given due weight in the reasoning adopted by the learned judge in that decision. There is almost a consensus of opinion among the modern text-writers on this question, as I have already pointed out. Some of the persons who are excluded from inheritance as disqualified heirs may be competent to perform obsequial and other ceremonies. Perhaps the existence of such a son may be held to be a bar to an adoption; but I am clear that the existence of a son who is not only disqualified for inheritance but also incompetent to perform the aforesaid ceremonies should be deemed to bear only the semblance of a son, and his father can be very well treated as sonless for the purpose of enabling him to make an adoption. With due deference, I am unable to follow the decision of the Bombay High Court and apply it to the present case.

21. For all the foregoing reasons, I hold that the plaintiff's adoption is legal and valid.

22. In the result, the second appeal fails and is dismissed with costs. The Court-fee payable to Government on the Memorandum of Appeal should be paid by the appellants.