

(1936) 09 BOM CK 0012
In the Bombay High Court
Case No : First Appeal No. 92 of 1931

Neelawa Dundappa Kohalli

APPELLANT

Vs

Gurshiddappa Madiwalappa Patanshetti

RESPONDENT

Date of Decision : 14-09-1936

Acts Referred:

Citation : AIR 1937 Bom 169 : (1937) 39 BOMLR 211

Hon'ble Judges : Tyabji, J; Barlee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Tyabji, J.—The present appeal arises out of the affairs of the family of one Madivalappa, who died of plague on February 7, 1916. He left behind him his widow, Gangawa, (since deceased) and three daughters, Neelawa, Irawa and Sayawa. The first of these is the plaintiff : the second and the third daughters are defendants Nos. 5 and 6. The main object of the suit is to have it declared that an adoption purported to have been made by the widow Gangawa, on July 7, 1919, was invalid and of no effect : so that the inheritance of Madivalappa must lie with his daughters and not with defendant No. 1, who is alleged to have been adopted as his son.

2. The first objection that has been taken to the adoption of a son by Gangawa to her deceased husband, is that she was an unchaste wife, and must therefore be taken as disqualified to adopt. There is a certain amount of evidence, and a good deal of suspicion cast as to the chastity of Gangawa; but the evidence is not sufficient to establish, and the indications are rather contrary to the allegation that Gangawa was unchaste during the lifetime of her husband. The learned trial Judge has not accepted the evidence that Gangawa was unchaste at all. In any case we think there was no satisfactory evidence that she was unchaste during the lifetime of her husband.

3. In these circumstances we have to consider whether she had, as a matter of

fact, made the adoption. There is a good deal of evidence on this allegation. There are two facts however that seem to take the factum of the adoption beyond dispute. At the very time when the adoption is said to have taken place, four deeds, exhibits 53, 47, 49 and 48 were executed. In each of these the adoption is stated as a fact accomplished. The first is the deed of adoption. The others are transfers, one by way of sale and two of gift, in favour of the plaintiff and defendants Nos. 2, 5 and 6. All these documents are registered. The second fact is that exhibit 56, a sale-deed executed by the plaintiff herself, proceeds on the basis of the adoption having taken place, and of defendant No. 1, as an adopted son of his father, having made the gift to her under exhibit 48. So that there are, immediately after the alleged adoption, statements in registered documents to the effect that the adoption had taken place, and subsequent conduct on the same basis. The actual ceremony of adoption is so simple that it cannot be assumed that in spite of a desire to adopt there should have been any difficulty in going through the ceremony. It must, therefore, be accepted that the adoption did take place.

4. Then it has to be considered whether the adoption was invalid, because the father and the alleged adopted son had been outcasted by a document, exhibit 38. It was argued that as the alleged adopted son was an outcaste altogether from the Hindu religion, the case did not come within such authorities as *Shib Deo Misra v. Ram Prasad* ILR (1924) 46 All. 637, which refer to the adoption of a person belonging to a different sub-caste of the same caste, and not to the adoption of a person belonging to a different caste altogether : that admitting that a person who belongs to a different sub-caste may be validly adopted, that principle cannot aid the adoption of one who is entirely out of caste and therefore must be considered as not being a Hindu at all.

5. For the purpose of this argument attention must first be paid to the events that are alleged to have inflicted this entire loss of caste and religion upon the son that was adopted.

6. The excommunication is, as I have said, contained in exhibit 38. That document purports to emanate from the Holy Head-priest "(Charwarya San-nidhi) of the Holy seat of Authority of Jagatguru Hire-Char Pattadhakaya of Shri Mad-veershaiva Lingayat community of Shri Maha Ujaini Saddharma Sinhasana," and to be addressed to "the obedient members of the Veershaiva Mandal, such as Mathasthas (priest-heads), patils and merchants, rich persons, Pujaris and Bhandaris, etc., of the said village of Bijjargi in Taluka Bijapur in the District of Bijapur." It is recited that a complaint had been received from the village priest Gurubalayya father Chanbasayya Mathapathi against four named persons, one of whom was Onkareppa Pattanshetti, the father of the alleged adopted son. The complaint charged the said four persons with the offence of not holding social intercourse with "the said Ayya", (priest)?apparently the village priest who made the complaint?and thereby belittling the cause of religion. It is also narrated that an enquiry had been made on the spot in respect of the complaint, and that the

said four persons made false statements. Then the conclusion is stated that the said four persons had transgressed the religion by disobeying the said Ganaghari, that they were the roots of increasing communal enmity and thus they were disobeying the orders of the Head of religion. The operative part purports to issue "commands"? "such an order of excommunication has been passed since they dishonoured the order of Gurumuni"? in these terms, viz., that,?

(1) Mathastas, Mathapatis and other devotees of the Veershaiva creed should not go to these four persons and perform any ceremony, etc., of theirs;

(2) "this order should be carried out by the Lingayat people;

(3) "persons failing to carry out this order will be excommunicated either from Jungamsthan or from Veershaiva community; and

(4) "until the said point has been cleared up, intercourse with the said persona has been prohibited.

7. It is said that a total excommunication from the Hindu religion resulted, so that not only is the father of defendant No. 1 who is named in the document entirely excommunicated, but defendant No. 1 is subjected to the disqualifications arising from the excommunication of his father to such an extent that he cannot be validly adopted. The position thus taken up is that certain events have taken place, which, it is said, deleteriously affect the civil rights in question before us. Those alleged events consist in the present case of the commission of an offence by the father of the person whose status is in question before us. The offence consisted of not holding social intercourse with the village priest, and of being the roots of increasing communal enmity, and thus disobeying the orders of the head of religion. It was followed by excommunication. No evidence of any religious degradation as such is adduced. The allegation is that the excommunication necessarily gives rise to the civil disabilities in question, that defendant No. 1 who could otherwise have been adopted suffered a loss or change of status by which he became disqualified for adoption.

8. In such cases the parties whose civil rights are alleged to be deleteriously affected are entitled to fuller particulars of the alleged events and actions, and the civil Court cannot recognise such alleged legal consequences unless it is established that the law or custom by which the party in question is governed, recognizes that his original status was capable of being subjected to such "diminution of status" (cf. Dig. 49, 15, sq.) by an act that is called excommunication, emanating from some third persons. It is not unreasonable to presume that where such authority is recognized at all, it must be exercised by some person occupying some special status or dignity : that the authority must be exercised on the happening of certain specified events, or misconduct of a specified class and gravity : and that the existence of such misconduct must be proved in the course of proceedings not entirely opposed to natural justice. There is no reliable evidence to show the exact meaning and effect of excommunication

in the law governing the parties. It is not shown that any dignitary having the power to inflict such a loss of status by purporting to excommunicate, is recognized by the law governing defendant No. 1 and his father. No materials that we can accept have been adduced to show whether if any dignitary was recognized as having such authority, then the acts relied upon were the acts of the person entitled to hold that dignity : nor whether the preliminary conditions existed which were necessary for the exercise of the authority to excommunicate (assuming any person had such authority) : nor whether the proper procedure laid down for exercising that authority was followed. It seems to have been considered by the plaintiff that the responsibility of proving all these facts and of establishing the legal position involved was discharged by proving exhibit 38.

9. In this connection the following observations in Golapchandra Sarkar Shastri's Hindu Law of Adoption, 2nd edn. (1916), p. 203, seem pertinent :?

According to the sages, commission of certain offences involves degradation which is of three degrees in proportion to the gravity or enormity of the misconduct, namely, maha pataka or worst degradation, anu-pataka or lesser degradation, and upa-pataka or slight degradation. Maha-pataka or worst degradation is punishable by expulsion from caste; and the offender is considered to be dead, and Hindu Law directs the performance of exequial ceremonies for him, as if he were naturally so.

10. A little later the learned author proceeds to say :?"As regular excommunication is not found at the present day, and as persons who might be outcasted, are not liable to be deprived of their civil rights, the question of their capacity to adopt is not expected to arise. Nor can there be any valid objection to their adopting sons : the exclusion from the communion of the Hindu religion cannot incapacitate them, any more than the Jainas, for affiliating sons.

11. From this it would appear that "according to the sages" degradation depends for its degree upon the gravity of the offence by reason of which it is brought about. It is only the most heinous form of degradation that is stated to be punishable by expulsion from caste. When degradation of such a degree has been incurred, the person may be expelled from the caste, and if so expelled he is considered to be dead. Accepting this statement for the present,?and we have nothing to show that it is not sufficiently accurate for the present purposes,?the argument on behalf of the appellant cannot succeed unless we hold that there has been in the first place a degradation in the most heinous form, secondly, an expulsion from the caste, thirdly, that not only are the four named persons so expelled, but that defendant No. 1 must also be considered to be degraded and expelled from the caste, and to be placed on the same footing as his father, because his father's name is included in the document.

12. In any case, and taking the least favourable view that is possible to take, the document by which excommunication is said to be brought about must, in view of the considerations to which I alluded at the start, be strictly scrutinized and

construed. Turning to it, it is sufficient for the present purposes to advert to two circumstances that appear from the terms of exhibit 38 itself. In the first place only the four named persons are subjected to the terms of the document : and assuming that its terms must be deemed to make the persons named out-castes, it cannot be assumed that the excommunication must affect the capacity of the sons of the persons named, in respect of being given in adoption. The decision in *Shamsing v. Santabai* ILR (1901) 25 Bom. 551 : 3 Bom. L.R. 89. 1 seems directly applicable. There a Hindu father had adopted Islam. There cannot be a more emphatic way of becoming a non-Hindu?of the ties with Hinduism being severed?than the adoption of another religion like Islam. Consequently the father in that case had certainly by his own act brought about as unequivocal an excommunication of himself from the Hindu religion as can be considered to have happened in the case of a person excommunicated by such a document as exhibit 38; and yet the son of that father was considered eligible for being adopted.

13. Secondly, the excommunication itself is not in such terms as to fall within the higher grade of excommunication. In terms it is only an excommunication "until the said point has been cleared up." So that apparently by a mere resumption of social intercourse with the Ayya referred to in the document, the excommunication could be put an end to. It may therefore be taken that it cannot have the grave effect, in regard to civil rights, of preventing the son of the person excommunicated from being given in adoption.

14. In these circumstances there was no such obstruction to the adoption of defendant No. 1 as the civil Courts can recognize, and the decision arrived at by the learned Judge cannot be disturbed. I would dismiss the appeal with costs.

Barlee, J.

15. I agree. The document, exhibit 38, is no doubt a sentence of excommunication. Whilst conceding this, I do not think that it would be fair to extend it beyond the persons actually named, in view of the extreme disproportion between the offence and the punishment. I agree, therefore, that, though the father was excommunicated, the son still remained within the caste. There was, therefore, no objection to his being adopted, and since an adoption involves no religious ceremony, I cannot say that there was any objection to the validity of his adoption on the ground that his father was not capable of giving him in adoption. Possibly the adopting mother made herself liable in her turn to be "excommunicated, since she had disobeyed the order of the Head-priest by having any dealings with the father. But this is another matter with which we are not now concerned.

16. In my opinion, the decision of the Subordinate Judge is correct, and the appeal must be dismissed with costs.