
(2011) 01 KL CK 0213
In the High Court Of Kerala
Case No : S.A. No. 375 of 1992

Philips Alfred Malvin

APPELLANT

Vs

Gonsalvis

RESPONDENT

Date of Decision : 11-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Evidence Act, 1872 — Section 114

Citation : (2011) 2 KLJ 48 : (2011) 1 KLT 742 : (2011) 2 RCR(Civil) 407 :
(2011) 2 RCR(Civil) 407

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : Siby Mathew, B. Premnath E, Philip J. Vettickattu, Annie Paul and E. Narayanan, for the Appellant; M. Ramesh Chander, M. Vijayakumar and K.A. Sanjeetha, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—Plaintiff in a suit for partition is the Appellant. Preliminary decree passed in the suit upholding his claim for partition and allotting him a share in the suit property was reversed and the suit was dismissed by the lower appellate court in the appeal preferred by the 2nd Defendant. Feeling aggrieved, he has preferred this appeal.

2. Plaint schedule property admittedly belonged to late George Correa and his wife Jane Correa, who pre-deceased her husband. Plaintiff claimed that he is the adopted child of the abovesaid George Correa and Jane Correa. Defendants 1 and 2 and another viz., Marvin Correa, who is no more, are the natural children of the abovesaid George Correa and Jane Correa. Defendants 3 to 8 are the wife and children of the aforesaid late Marvin Correa. Pending the appeal before the court below, the 2nd Defendant, who alone contested the suit, had passed away and her legal representatives brought in are Respondents 9 to 11 in this appeal.

3. According to the Plaintiff he was adopted by George Correa and Jane Correa

on 8.6.1946 at Kannur Holy Trinity Church, and was brought up by them along with their natural children. He being an adopted child, with the natural children he is also a legal heir of Correias, was his case. With the natural children of Correias, he is also entitled to succeed to their estate left behind, the plaint property, and as such, a decree for partition of the property into 4 equal shares and allotting of one such share to him, was applied for in the suit.

4. The 2nd Defendant alone resisted the claim for partition disputing the status of the Plaintiff as an adopted child of her parents. Though he was treated by her parents and also by the members of the family as a close relation and he was given a lot of encouragement and assistance, according to this Defendant, that would not confer on him the status of an adopted child of her parents and thus to claim a share in their estate. There was no valid and legal adoption of the Plaintiff by her parents, and even on the date on which the Plaintiff claimed of his adoption, his natural father viz., Sri. T.J. Netto was alive and so much so, there could not be a legal adoption of the Plaintiff by her parents was the further contention of the above Defendant to resist the suit claim for partition.

5. On the pleadings of the parties, the trial court raised the following issues for adjudication:

(i) Whether the Plaintiff is the adopted son of George Correa?

(ii) Whether the Plaintiff has any right to claim partition of the plaint property?

6. On the materials placed which consisted of Pws. 1 and 2 and Exts.A1 to A8 for the Plaintiff, but with no evidence, oral or documentary for the contesting Defendant, the trial court concluded that the Plaintiff is an adopted son of the Correias and as such he is entitled to a share in their properties with the natural children. Accordingly, a preliminary decree was passed directing division of the suit properties into four equal shares and allotting of one such share to the Plaintiff.

7. In the appeal preferred by the 2nd Defendant, the lower appellate court, after re-appreciating the materials tendered, in the backdrop whether the personal law of the parties, who are admittedly Christians, recognize adoption, expressing the view that it does not, concluded that the claim raised by the Plaintiff for partition as an adopted child of the Correias has not been established in the case. In that view of the matter, reversing the decree passed by the trial court, the Plaintiff was non-suited. Aggrieved by the dismissal of the suit, the appeal was preferred. This Court had earlier set aside the judgment of the lower appellate court and restored the decree of the trial court, allowing the appeal. Ed. Note: Please See judgment reported in Philips Alfred Malvin v. Gonsalvis. 1999 (1) KLT 292 The judgment of this Court was challenged before the Apex Court by the 1st Respondent, one among the legal heirs of the 2nd Defendant. The Apex Court, after setting aside the judgment of this Court, has remitted the appeal, for hearing and disposal, after specifically formulating the questions of law and answering the same, in accordance with law.

8. Substantial questions of law were re-cast as hereunder for hearing of the appeal.

(i) Whether Christianity/Christian law recognizes adoption of children?

(ii) Whether the Appellant as an adopted child is a legal heir of Sri. George Correa and Jane Correa under the Indian Succession Act?

(iii) When the Respondent admit that the Appellant was treated as a family member of Sri. George Correa and Jane Correa and also as their relation and as the Appellant continued as a member of the Correa family for a considerable period of time, will it not raise a presumption u/s 114 of the Evidence Act that the Appellant is the adopted child of Sri. George Correa and Jane Correa?

(iv) When Ext.A2, A3 and A8 show the Appellant as the son of Sri. George Correa and Jane Correa has not the lower Appellate Court committed an illegality in finding that the Appellant was not the adopted child of Sri. George Correa and Jain Correa?

9. The pivotal question that has to be examined first is whether the personal law governing the parties in the matter of succession recognizes adoption. If there is no such recognition under the Civil Law, still, whether the Canon Law and also the developments that have taken place in modern law governing the relationship of parents and children in general, and also awareness over the rights of the children universally recognised, demand a new look and an answer to the question of adoption irrespective of caste or religion of the parties, viewing it as a social therapeutic problem. Indisputably there is no personal law applicable to the Christians recognising adoption. However, relying on Canon Law, Canon 111, 110 and 1094, the learned Counsel for the Appellant submitted that the Christian Church does not as such abjure adoption, and, in fact, it has been sanctioned. Canons 111 and 1094 read thus:

111-1. Though the reception of baptism, the child of parents who belong to the Latin Church is enrolled in it, or, if one or the other does not belong to it, both parents have chosen by mutual agreement to have the offspring baptized in the Latin Church. If there is no mutual agreement, however, the child is enrolled in the ritual Church to which the father belongs.

2. Anyone to be baptized who has completed the fourteenth year of age can freely choose to be baptized in the Latin Church or in another ritual Church sui juris; in that case, the person belongs to the Church which he or she has chosen.

1094. Those who are related in the direct line or in the second degree of the collateral line by a legal relationship arising from adoption cannot contract marriage together validly.

10. The canon law referred to above by the counsel as such does not give any insight that adoption is recognised under the Christian Law. The former deals with the reception of baptism and the latter is only a prohibition as regards

marriage from a relationship arising from adoption.

11. Canon 110, reads as follows:

110. Children, who have been adopted according to the norm of civil law are considered the children of the person or persons who have adopted them.

12. The Canon Laws recognise adoption and to consider the adopted child as the child of the adoptive parents, provided the adoption has been made "in accordance with the Civil Law". So much so, there are some canons expressing views over adoption as such would not in any way render any assistance to the Appellant to contend that under the Canon Law adoption is recognised, and the absence of personal law, recognised by custom or as framed under the statute, is not of consequence. A valid adoption made in accordance with the civil law as applicable to the child adopted and to the adopted parents, is alone recognised by the Canon Law, and not otherwise.

13. Highlighting the constitutional guarantees enshrined under Articles 14 and 21 of the Constitution, the learned Counsel for the Appellant submitted that excluding and denying the Christians as if no right to adoption for the reason that though they have no personal law governing the same cannot be recognised by a court of law. A new innovative outlook over adoption, irrespective of the personal law of the parties concerned, taking into consideration the new vistas opened up recognising the rights available to a child even from the womb, and, more particularly with due respect to the "Convention on the Right of the Child" adopted by the United Nations Organisation which has been approved by our nation as well to bring in new enactments in tune with the Charter, like, Juvenile Justice Act, is called for in the case, to decide the question whether the Plaintiff had been treated as the adopted child by the adoptive parents - Correas, according to the counsel. The view taken by the trial court on the materials placed with the outlook as aforesaid and which is fully supported by the materials tendered in the case, according to the counsel, has to be preferred over the view taken by that of the lower appellate court, which, according to the counsel, scrutinised the materials tendered with a distorted view that adoption is not recognised under the personal law of the parties and, thus, the Plaintiff is not entitled to seek partition of the property, as an adopted child. Ext.A2 Baptism certificate contains entries as to the adoption of the Plaintiff by the Correas and it had been proved through PW.2, the priest presently in charge of the church maintaining the Baptism Register containing the original of Ext.A2. Ext.A3 extract of the admission register of the Plaintiff wherein Mrs. Jane Correa has been shown as the parent or guardian, and Ext.A8 the ration card showing the Plaintiff as the son of Mr. George Correa coupled with the categorical admissions even in the written statement of the 2nd Defendant that the Plaintiff has all along been treated as a member of the family which have been duly taken note of by the trial court to sustain his case, according to the counsel, clearly demonstrate that he is the adopted child of Correas, and he is entitled to an equal share with their natural children, in the suit property.

14. Per contra, the learned Counsel for the contesting Respondent pointed out that adoption not being recognised under the personal law of the parties, and also the Plaintiff having no case in the plaint that it is so recognised by any custom, his claim for partition as the adopted child, which was sought to be established by the materials referred to above, Exts.A2, A3 and A8, is unworthy of any merit and it was rightly found so by the lower appellate court, to negative his claim reversing the decision of the trial court and dismissing the suit. Merely because he has been treated as a member of the family by the Correas and also their natural children, the Plaintiff would not get the status of an adopted child, and he cannot succeed to the estate of the Correas as a legal heir with their natural children, according to the counsel. Even in his marriage certificate and also in the plaint, his name was shown as Malvin and not as a Correa is also highlighted by the counsel to contend that the claim of the Plaintiff as the adopted child of Correa is baseless. According to the counsel, though the marriage certificate of the Plaintiff is not produced, the definite contention of the contesting Defendant that he has not shown George Correa as his father in his marriage certificate had been admitted by him in his evidence when examined as PW.1. All the above aspects, have been taken note of by the lower appellate court to conclude that the claim of the Plaintiff as the adopted child of the Correas has not been proved in the case, and there is no error or infirmity in the finding so entered by the lower appellate court warranting interference by this Court, is the further submission of the counsel.

15. The present suit was instituted in 1987 when the Plaintiff was aged 42 years. At this stage, after its long chequered career, about a quarter of a century later, it may be quite improper and out of place to examine his claim as the "adopted child" of the Correas, which was founded on the case that such adoption took place when he was an infant of 12 days, as per the entries in Ext.A1 baptism certificate, with reference to the change of societal outlook over the rights of children which has undergone a sea-change during the last few years. In fact, an examination of his claim as an adopted child in the broader outlook canvassed by his counsel need be looked into, if only there is at least some material inspiring confidence to show that he had been treated as an adopted child by the Correas. Other than his interested testimony as PW.1, as rightly pointed out by the lower appellate court, his claim was sought to be sustained on Exts.A1, A2 and A8. Ext.A1 is only a copy of the baptism certificate wherein the Correas have been shown as his God Father and God Mother. In that certificate, there is an entry that he is the illegitimate child of Anna and was adopted by the God parents with the consent of his mother is the sheet anchor of the case on which the Plaintiff has built up his status as the child of Correas. Mere entry as above in the baptism certificate produced by him or even the baptism register could not be treated as sufficient to confer him the status of an adopted child of the Correas where the personal law applicable to them does not recognise such adoption and he has no case that it is so recognised by any custom followed by the Christians. Similarly Ext.A2 admission extract of the Plaintiff also does not assist him to

prove his adoption by the Correas. The name of Mrs. Jane Correa had been shown in the column relating to the address of the parent and guardian by no stretch of imagination is indicative that he is her adopted child. Ext.A8 is the ration card where one Alphred Correa is stated as the son with George Correa, who is shown as the head of the family. What is in dispute is the adoption of the Plaintiff as the child of Correas at a time when he was an infant by the Correas. That cannot be decided on the basis of some entries in the admission extract or ration card styling the Plaintiff as the son of one or the other Correa. Plaintiff had been taken care of even from infancy by the Correas and he was treated as a member of their family along with their natural children is not sufficient to confer status on the Plaintiff as an adopted child of the Correas when the Christian law as such does not recognise adoption.

16. May be, by virtue of the provisions covered by the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Guardians and Wards Act, 1890, which is applicable to all Christians and also taking a cue from the directions issued for inter country adoptions by the Apex Court in a number of cases commencing from Lakshmi Kant Pandey Vs. Union of India (UOI), , which, of course, were formulated to streamline the adoption of abandoned children, followed by the "Guidelines to Regulate Matter Relating to Adoption of Indian Children (1984), by the Government of India, it may be possible for a Christian, now, to adopt a child under the civil law of land. Adoption of Child Bill, 1988 introduced in the Lok Sabha on 16th November, 1988 as Bill No. 208 of 1988 which would have remedied the situation to a larger extent providing a uniform application of law in the case of adoption to all parties irrespective of religion, caste, tribe etc., remain as a lapsed bill. There is not even a flicker of a spark that any rethinking is on the anvil to reintroduce the bill, and remedy the long felt need and necessity to have a uniform Code over the laws of adoption applicable to all. Be that as it may, so far as the present case is concerned, the Plaintiff having miserably failed to plead and prove his claim as an adopted child of the Correas, with the personal law applicable to the parties not recognising any such adoption, unless it is sanctioned by the Civil Law, the conclusion formed by the lower appellate court to non-suit him does not suffer from any infirmity whatsoever.

Appeal is devoid of any merit and it is dismissed, directing both sides to suffer their respective costs.