

(1923) 04 MAD CK 0065
In the Madras High Court

Ramasami Chetty

APPELLANT

Vs

Palaniappa Chetty and Others

RESPONDENT

Date of Decision : 17-04-1923

Acts Referred:

Citation : 76 Ind. Cas. 798 : (1923) 18 LW 657

Hon'ble Judges : William Ayling, J;Odgers, J

Bench : Division Bench

Judgement

William Ayling, J.—This appeal arises out of a family partition suit between Nattukottai" Chetties, and is confined to properties named in B. and D. Schedules, which were included by the First Court among those to be partitioned but were struck out by the District Judge in first appeal.

2. The case of the D. Schedule properties may be dealt with first. The Subordinate Judge says: "In addition to the properties" mentioned in the plaint, there is a sum of" Rs. 1,500 in deposit in Pegu Firm. The plaintiff did not know of it. It is given out in the deposition of first defendant that it is family money. Therefore, it will be treated as family property which must be divided between all the members of the family. So another Schedule will be attached to the decree and that will be D. Schedule consisting of this money of Rs. 1,500. Of course, plaintiff must pay Court-fee before a final decree is passed and it is only then that he will get his share."

3. The District Judge has excluded this property from partition solely on the technical ground that there has been no amendment of the plaint so as to include" it. We think this is not sufficient ground. It is not denied that the property is joint family property and it is clear that the omission to have the plaint amended at the same time that the D. Schedule was attached to it, was a mere oversight. In fact, the addition of the Schedule implies an amendment of the plaint without which it would be meaningless. We direct that this property be included in the partition, and that the decree be amended accordingly.

4. The question relating to B. Schedule property is of a very different, and much more difficult nature. It consists of money obtained by first defendant, as consideration for giving two sons in adoption, first defendant and his remaining sons (plaintiff and defendants Nos. 2, 3 and 4) make up the joint family concerned in the suit, What we have to decide is, whether money so obtained is the self-acquisition of first defendant or the property of the joint family.

5. Both the lower Courts have treated this question as one of pure Hindu Law; and have come to the opposite conclusions, that of the District Judge being adverse to plaintiff-appellant. The learned Vakil who appeared for the latter, suggested in argument before us that it is a matter which should be determined by caste custom and that an issue should be framed and referred for determination on evidence to be newly recorded. Mr. S. Srinivasa Aiyangar for first respondent (first defendant) objects to this; and we think his objection must be allowed. The plaint contains absolutely no reference to a custom; and from the judgments of both the lower Courts it is clear that nothing of the kind was set up before them. We cannot, therefore, allow this plea to be set up in second appeal. It is possible that a legal custom exists which, when properly pleaded and proved, may render our decision on the question of merely academic interest; but, so far as this case is concerned, We have no alternative but to deal with the question from the only point of view disclosed in the pleadings before us--that of pure Hindu Law. And it is unfortunately one of first impression on which there appears to be no authority either in case-law or text-books. There is only one case so far as appears, which, though not dealing with the question before us, tends to throw some light upon it. It is reported as *Murugappa Chetti v. Nagappa Chetti* 29 Ma. 161 : 16 M.L.J. 22 and arises out of a similar adoption for consideration in a Nattukottai Chetty family. The question for the learned Judge's decision was whether the payment of consideration invalidated the adoption; and they decided that it did not, although the practice of receiving consideration for an adoption was one which could not but be reprobated, and although an agreement to pay consideration was not enforceable. But the leading judgment, which is that of Subramania Iyer, Officiating Chief Judge, contains passages, which I find very instructive in our present difficulty.

6. The learned Judge, who was an undoubted authority in such matters, says that among the Nattukottai Chetty community the payment of consideration for the giving of a boy in adoption is the rule and the absence of payment the exception. He proceeds to trace the reason to the fact that in this very prosperous and enterprising community "every male child is expected to become an earning man" and this expectation is mostly realized. Consequently, when a Chetty gives away his son in adoption, he is virtually contributing to the wealth of the family of the adoptive father. With the commercial instinct implanted in him, a member of this community sees nothing heinous in a practice which prevents the natural father becoming a loser by giving away his son."

7. In other words, the sum paid is the consideration for the transfer of a potential

earning member from one family to another. One family gains just what the other loses; and although at the close of the passage" quoted the learned Judge refers to the "natural father" becoming a loser, this could only be representing the family, for, individually, he would be no more concerned with loss of the son's earnings, than would any other member of the family; and would gain a certain personal benefit by the increase of his own fractional share obtainable on partition.

8. Of course, every such transfer of a member of one joint family to that of another increases or reduces the number of members entitled to a share on partition so that the individual members of the family from which the adopted son comes will primarily benefit, and those of the family to which he goes, will primarily lose by the transaction. But the latter family, as a family, will gain and the former will lose, by the adoption; since the custom of payment proceeds on the assumption that a male Nattukottai Chetty, to put it tersely, earns more than he eats.

9. This view of the matter I am quite prepared to accept on the authority of the learned Judge quoted, as well as because it seems a reasonable explanation for the existence of the custom in this caste, and in few, if any, other castes. As I shall show, it is of considerable importance when one comes to consider the text dealing with self acquisition to which I shall refer, a task which I need not say I undertake with, considerable diffidence.

10. The materials are found in Ghose's Principles of Hindu law, Volume II, pp. 101-103.

11. The main principle laid down by Yagnavalkya is "whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend or a gift at Nuptials does not appertain to the co-heirs".

12. The term "father's estate" seems to indicate merely that the patrimony or the body or joint family property, Vide Mitakshara, Chapter I, Section IV (1--7) set out in Ghose, as above quoted and Smriti Chaudrika, VII, Section 28, quoted, in Mayne's Hindu Law, Section 281.

13. The test appears to be whether the acquisition was made at the expense of, or to the detriment of the joint family property if it was, it cannot be self-acquisition.

14. Applying" tins to the present case, the transfer of the boys, by-adoption, was as much to the detriment of their natural family as it was to the advantage of their adoptive family, (in consideration of which, detriment and advantage these payments were made); and property so acquired cannot be self-acquisition.

15. This conclusion is strengthened by the somewhat analogous case of the bride price under the Asura form of marriage.

16. The Mtakshara says; "What is received at a marriage concluded in the form

termed Asura or the like...must be shared with the whole of the brethren and with the father" (Ghose, Hindu Law, Volume II, page 103). As shown by Mayne (Section 81) this payment springs from the fact that an unmarried girl was a valuable commodity and the case stands on much the same footing as the adoption of a Nattukottai Chetty boy.

17. Mr. Srinivasa Aiyangar for the respondent has sought to support the decision of the lower Appellate Court by reference to the doctrine of *patria pot est* as and to the fact that under Hindu Law power of giving a boy in adoption is confined to the father or mother. But the power of disposition does not necessarily carry with it the rights to appropriate the proceeds of the disposition; and it seems to me we are on safer ground in looking to the general principle governing Self-acquisition, and the condition of the caste, with which we are concerned. I am inclined to think that, in the absence of a custom to the contrary, which must be alleged and proved, sums paid to a Nattukottai Chetty in consideration of giving a son in adoption are not his self-acquisition.

18. It follows that the property in Schedule B must be added to the partible property and the decree amended accordingly.

19. I would allow the appellants their costs in this and in the lower Appellate Court.

Odgers, J.

20. The suit was for partition, of family property, the co-parceners being Nattukottai Chetties. There are two points raised on this second appeal (1). The properties in D. Schedule were excluded by the District Judge on the ground that, though clearly family properties, the plaint had not been amended so as to include them, though additional Court-fee had been paid. The point is purely technical and the District Judge should, in my opinion, have allowed the plaint to be amended so as to include these properties.

(2) Certain moneys were obtained by first defendant from the persons to whom in 1913 he gave two of his sons in adoption. Are these moneys to be treated as self acquisition of first defendant or as family property and, therefore, divisible? The question is interesting and practically *res Integra*. The Subordinate Judge held that these moneys belonged to the family; the District Judge *contra* held they belonged to the father. Mr. a. Krislnaswamy Aiyar for appellants contended that it should be established by evidence whether in this community there is a custom for the natural father to treat payments of this character as his own or as belonging to the family; it not being disputed that in this caste such payments are usual. Mr. S. Srinivasa Iyengar for the respondents contended and rightly that no custom had been set up and as it must be specially pleaded we were precluded from going into the question of its existence in second appeal. It follows, therefore, that if hereafter the question of a custom is agitated in a properly constituted suit what I am about to say will very possibly be found to be beside the mark. My remarks are based on consideration, apart from any

question of custom, on the best materials available. It has to be remembered that these Nattukottai Chetties are traders and every male member of the community is at least a potential earner for the family of which he is a member. It is, therefore, not unnatural that when the wage earning capacity of a family is diminished pro tanto by the giving of one or more of the members in adoption, some monetary or other compensation should be paid by the adopting family, whose potential earning capacity is proportionately increased, by the adoption. Such compensation is probably nothing like the capitalized value of the earnings of the member given in adoption; on the other hand, he may earn little or nothing and the shares of those remaining in the family are proportionately individually appreciated by the fact that there are after the adoption fewer sharers." Though not directly in point so as to form a ruling authority in the present case, we have a judgment of Subramania Iyer, J. in *Murugappa Chetti v. Nagappa Chetti* 29 M. 161 : 16 M.L.J. 22. The learned Judge was considering there whether the acceptance of a gift on adoption affected the validity of the latter. He said at page 165: "It is abundantly clear from the evidence that in the community to which the parties belong (Chetties) such payments form the rule and the contrary, the exception, and so long as these men continue to be moved by the desire for the perpetuation of lineage- by recourse to the fiction of adoption, the payments will not cease and the consequences of the stricter rule would only be that the payments would be made in secret and that when any litigation should ensue with reference to the adoption, it would be attended by the production of untrue evidence either on the part of persons denying payments that have really taken place or on the part of those who falsely set up such payments. Why the practice of paying money is prevalent largely among these Chetties and is avowed is perhaps not difficult to understand. Their community is a most thriving and prosperous compact little one in this Presidency. Its members are able, enterprising traders doing business in India, and elsewhere? It is a pride of their community that there is in it none so poor as to depend for his livelihood on the charity of others. Every male child is expected to become an earning man and this expectation is mostly realized. Consequently, when a Chetty gives away his son in adoption he is virtually contributing to the wealth of the family of the adoptive father." This last sentence gives, in my opinion, support to the view that any money so paid would be paid as compensation to the natural family. This view is further attempted to be supported by the analogy of bride price in Asura marriages. The Mitakshara, (Chapter I (Section 4 g. 6) commenting on Yagnavalkya. (ii gg. 118, 119) says..."what is received at a marriage concluded in the form Asura and the like...must be shared with the whole of the brethren, and the father." Ghose's Principles of Hindu Law, Volume II, page 105. For the respondents it is urged that the detriment to the family which was to be provided by the co-parceners is the bride price and that the text does not mean what is to become of the bride price, when received; it refers to the liability of the adoptive family for the amount. It may, be immaterial to discuss it, but in my opinion such is not the meaning of the text in question. It clearly refers to the receiving and not to the

giving of the bride price. It is further said that the reference is only to gifts at Nuptials and not to the bride price at all, but I see nothing to limit the words thus. Two more important points are, however, taken by Mr. S. Srinivasa Aiyangar 29 M. 161 : 16 M.L.J. 22 That the detriment to the family cannot be assessed in money or money's worth and that, consequently, any money paid on adoption cannot be said to be compensation to the family for the loss of an earner especially, as the detriment, if any, to be taken into account must be the present detriment which, owing to the age of the boy given in adoption and his only problematical capacity of earning in the future is practically, nil. I do not think this is an answer to the theory of compensation, to the family for the loss of a possible future earner; it may not be an adequate or mathematical compensation, but it may nevertheless be regarded as in some measure making the loss good to the family; (2) a more serious counter theory to my mind is that the money is to be regarded as a present to the rather of the boy given in adoption to induce him to exercise his paternal rights in favour of the adoptive family. The father has the power to dispose of his son, therefore, he should keep the money. This does not necessarily follow. Vasista says (XV-1-8): "Both parents have power to sell or to desert him (a son)" (page 13) Mayne's Hindu Law, 9th Edition). This is of course antiquated and no rule of the sale of a son as such would now be recognised at law. I think that, having regard to the nature and characteristic of the community involved and to those considerations which I have already set out at length, it is on the whole more consistent to hold against this theory. It is not a personal present but is only paid to the father as the eldest and managing member of the co-parcener, for the benefit of the latter. I have, therefore, come to the conclusion that the property in Schedule B. belongs to the family and should be included in the decree for partition. The appeal succeeds, the decree of the district Judge will be set aside and that of the Subordinate Judge restored. The appellants will have their costs here and in the lower Appellate Court.