

(1962) 01 MP CK 0010

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 2 of 1959

Sitabai Nabya Kulmi

APPELLANT

Vs

Tuljabai Trimbak Kulmi and Another

RESPONDENT

Date of Decision : 30-01-1962

Acts Referred:

Citation : AIR 1963 MP 322 : (1963) ILR (MP) 75 : (1963) JLJ 329 : (1963) MPLJ 589

Hon'ble Judges : P.V. Dixit, C.J;K.L. Pandey, J

Bench : Division Bench

Advocate : J.N. Nagrath, for the Appellant; G.M. Chaphekar, for the Respondent

Final Decision : Dismissed

Judgement

Dixit C.J.

This Letters Patent appeal from a decision of Newaskar, J., arises out of a suit filed by the appellant Sitabai for a declaration that the adoption of the respondent Sitaram by her mother Gangabai was invalid and that, therefore, she was entitled to succeed to and get possession of the entire property left by her deceased father Sukhlal. Sukhlal had two wives, namely, Gangabai and Dayabai. Sitaram is the grandson of Sukhlal being a son of his daughter Tuljabai born of Dayabai. Sitabai assailed the validity of adoption on various grounds, one of them being that the parties were governed by the Banaras School of Hindu law and accordingly it was necessary for the validity of the adoption of Sitaram by Gangabai that she should have been given express authority by the deceased Sukhlal and that she had not any stick authority.

The trial Court held that the parties were governed by the Banaras School of Hindu law and that Gangabai had not obtained any authority from Sukhlal for the adoption made by her. Accordingly, Sitabai's claim was decreed. The decision of the trial Court was upheld in appeal by the first appellate Court. The defendants then preferred a second appeal to this Court. The learned Single Judge-held that

the parties were governed by the Bombay School of Hindu law as they were Leva Patidar Kulmees, which community migrated from Gujarat where the Bombay School prevailed, and there was no evidence to show that the family had adopted the law and usages of the Malwa tract where the Banaras School held the field. He accordingly held that it was not necessary for Gangabai to have obtained any authority from Sukhlal for making the adoption and that it was valid. On this view, the decisions of the original Court and the first appellate Court were set aside and the appellant's suit was dismissed.

On the finding of fact that Gangabai was not given any express authority by the deceased Sukhlal to make the adoption, the sole question that arises for determination in this appeal is whether Sukhlal was governed by the Banaras School or by the Bombay School. If he was governed by the Bombay School, then clearly no authority for adoption was necessary. The question raised does not present any difficulty, and on the evidence on record there can be no doubt that Sukhlal was governed by the Bombay school. It is firmly settled by numerous authorities that where a Hindu family migrates from one State to another, the presumption is that it carries with it its personal law, that is to say, the law and customs as to succession and family relations prevailing in the State from which it migrated. This is no doubt a rebuttable presumption which can be rebutted by showing that the family has adopted the law and usages of the province to which it has migrated.

Learned counsel appearing for the appellant before the learned Single Judge did not dispute that the overwhelming evidence on record led to the conclusion that the Leva Patidar Kulmees of Nimar migrated from Gujarat. The appellant's contention before the learned Single Judge, was that there was no evidence to show that Sukhlal's family migrated after Vyavahar Mayukh was written. Reliance was placed on Bhaskar v. Laxmibai AIR 1953 Nag 326 in support of this contention. The learned Single Judge took the view that it was not necessary to show that the family migrated subsequent to the date when Vyavahar Mayukh was written by Nilkantha Bhattat He observed:

"..... it cannot be stated with certainty that what Nilkantha Bhatta stated in his commentary represented his personal view put forward for the first time..... it represented the view prevalent in those parts to which Mayukh came to be applied and his commentary was more a compilation than an original theoretical treatise intended to change the then accepted course of law....."

In regard to the question whether after the migration the family had adopted the law and usages of Malwa, he observed that the evidence was too vague and uncertain to justify an inference of adoption of the law and usages of Malwa.

In our judgment, the view taken by the learned Single Judge is right. The mainstay of the appellant is the decision in AIR 1953 Nag 326 (Supra) in which it has been held that there is no presumption that all the Kunbis of the Central Provinces migrated from Maharashtra and so unless it is established that the

Kunbi family concerned migrated to the Central Provinces from Maharashtra after the Vyavahar Mayukh was written it cannot be held that the family is governed by the Vyavahar Mayukh. This case has no applicability here as the evidence on record amply shows that the Leva Patidar Kulmees, the community to which the parties belong migrated from Gujarat. The migration of this community from Gujarat was recognised by various decisions of the High Court of the former Indore State and by the Madhya-Bharat High Court, which were the highest Courts in the Malwa territory before the formation of the State of Madhya Pradesh. This is, therefore, not a case in which it can be held that there is no justification for saying that the Leva Patidar Kulmees migrated from Gujarat.

If this community migrated from Gujarat, then in the absence of any evidence to show that Sukhlal's family had adopted the law and usages of the Malwa region, it must be held that his family carried with it the law of the place from where it migrated. Once it is established that the community of Leva Patidar Kulmees migrated, from Gujarat to Malwa, then for the purpose of determining the school by which a particular family of the community is governed it is not necessary to establish that the particular family migrated or that the migration was at a particular time. The decisions in *Motisingh v. Mt. Durgabai* AIR 1929 Bom 57 and *Venkanna Narasinha Vs. Laxmi Sannappa*, are instances where evidence of the migration of a community was regarded as sufficient to prove the migration of a family of that community. In *Venkanna Narasinha Vs. Laxmi Sannappa*, the conclusion that the Hindu residents of North Kanara district were governed by the Bombay school and not by the Madras school was also rested on the principle of *stare decisis* and it was observed that the migration of the Hindus of North Kanara and the applicability to them of the Bombay school had been recognised in numerous judicial decisions of the courts of co-ordinate jurisdiction as also by the courts whose decisions had only a conditional authority as precedents.

The view expressed in AIR 1953 Nag 326 (Supra) that the law, as expounded in Vyavahar Mayukh, does not apply to a family migrating from Bombay before that commentary was written is not in accord with the Privy Council's decision in *Balwant Rao v. Baji Rao* AIR 1921 PC 59. The learned Judges found support for their view in the following observations of the Privy Council in AIR 1921 P C 59 (Supra):

"It was argued by Sir E. Richards that this would entail the consequence that the law of the emigrated family would be subject to every change brought about by the decisions of the Courts of the Province where they no longer were. This is not so. The law must be the family law as it was when they left. A judgment declaratory of law as having always been would bind; it would be a different thing if subsequent custom became incorporated in the law."

It has been correctly pointed out by a Division Bench of this Court in *Mst. Anjubai Vs. Hemchandraro and Others*, that the observation of the Privy Council that "The law must be the family law as it was when they left" was meant only to exclude customs which came into existence subsequent to the migration.

Commentaries are only declaratory of the law as it has existed; they do not lay down or enact new law but only explain and interpret the law (see Keshao Rao v. Sadasheo Rao AIR 1938 Nag 163 and AIR 1921 PC 59 (Supra)). It is erroneous to treat Vyavahar Mayukh as a work laying down new law, and on that basis to say that it cannot apply to a family which migrated before the commentary was written.

For the foregoing reasons, we are of the opinion that the learned Single Judge rightly held that the parties were governed by the Bombay school and no authority for adoption was necessary. The result is that this appeal falls and is dismissed with costs.