

(1943) 02 BOM CK 0008
In the Bombay High Court
Case No : First Appeal No. 49 of 1941

Tirkangauda Mallangauda Kashigaudar	APPELLANT
Vs	
Shivappa Patil.	RESPONDENT

Date of Decision : 12-02-1943

Acts Referred:

Evidence Act, 1872 — Section 112

Citation : AIR 1944 Bom 40 : (1943) 45 BOMLR 992

Hon'ble Judges : Lokur, J;Divatia, J

Bench : Division Bench

Judgement

Lokur, J.—This appeal arises out of a dispute regarding the property of Shidlingappa alias Shidalingangouda Kenchanagauda, the watandar patil of Chelgeri in Dharwar District. In 1921 he adopted the defendant, who is the son of his sister Maralshiddavva, and died on March 17, 1926. But for the adoption his heirs would be his nearest agnates Naganagauda, Ujjanagauda and Chanabasappa. Out of these three, only Naganagauda and Ujjanagauda filed this suit for possession of Shidalingappa's property together with Rs. 900 as past mesne profits, future mesne profits and costs, alleging that the defendant's mother Maralshiddavva had been deserted by her husband Basappa, that she led an unchaste life, that the defendant was born to her of an adulterous intercourse, that his father was unknown, that as he and his mother had been excommunicated from the Lingayat community, he could not be legally adopted, and that his adoption by Shidlingappa was illegal and invalid.

2. The defendant replied that his mother had not been deserted by her husband Basappa and was not unchaste, that he was the legitimate son of Basappa by Maralshiddavva, that he and his mother were never excommunicated, that Maralshiddavva had a right to give him in adoption, that the plaintiffs themselves were present at his adoption and took part in it, that his adoption was legal and valid, that the suit was time-barred under Article 118 of the first schedule to the Indian Limitation Act, 1908, that it was time-barred also under Article 142 or

144, since Shidlingappa had relinquished all his right, title and interest in the property in his favour on April 24, 1922, and since then he was in possession of it as its exclusive owner, that the plaintiffs were estopped from challenging the factum and validity of his adoption and that the plaintiffs were not the heirs of Shidlingappa.

3. Plaintiff No. 1 Naganagauda died after filing this suit, and his heirs, plaintiffs Nos. 1A to ID, were brought on record as his legal representatives. The trial Court held that in the absence of the defendant's adoption the plaintiffs would be Shidlingangauda's heirs to the extent of two-thirds of his property, the third heir being Chanabasappa. It held that the defendant was born to Maralshiddavva by adulterous intercourse, but that as they were not excommunicated, she was competent to give him in adoption. The plaintiffs' claim was held to be in time in respect of certain lands and time-barred in respect of others. But as the defendant's adoption was held proved and valid, the plaintiffs' suit was dismissed with costs.

4. The defendant's mother Maralshiddavva was married to one Basappa, a resident of Harihar in Mysore State. According to her admission in her application made on the 12th day after his death, he died on July 29, 1897, and the defendant was born to her on April 1, 1900. Thus, although Maralshiddavva gave birth to the defendant 970 days after her husband's death, she insists upon asserting that the defendant was conceived by her during her husband's lifetime, but remained in her womb for three periods of nine months, It is said that there are some exceptional instances of such delayed deliveries, but even then, three periods of nine months would be only 810 days. There is no reliable evidence that she was pregnant when her husband died and that her pregnancy continued for a period of 970 days. Such an unusual event would be widely known and better evidence would be forthcoming to prove it. Section 112 of the Indian Evidence Act has recognised 280 days as the normal period of pregnancy. In Mody's Medical Jurisprudence it is stated that the longest period of pregnancy ever known is 352 days. In *John Howe v. Charlotte Howe* ILR (1913) Mad. 466 and *Ma Thein v. Maung Mya Khin* AIR [1937] Ran. 67, children born of mothers who had no access to their husbands for 11 months and 280 days respectively before their births were held to be illegitimate. In this case there is evidence that Maralshiddavva had been long deserted by her husband. But even assuming that he had met her a week before his death, as she alleges, the defendant, born 970 days after his death, must be held to be not born to him. Moreover Maralshiddavva admits that a year after the defendant was born she had criminal intimacy with her sister's husband Chanbasangowda and gave birth to an illegitimate son. But she asserts that she had nothing to do with Chanbasangowda before the defendant was born. It must, therefore, be held that the defendant is her illegitimate child with an undisclosed father.

5. Maralshiddavva admits that she lived with her husband for five or six years after her marriage and then returned to her brother Shidlingappa at Chelgeri.

She never went back to her husband thereafter but lived with Shidlingappa. So out of paternal affection for her he brought up the defendant and took him in adoption though he must have known that he was her illegitimate son. The factum of the adoption is not disputed in this Court. Being the watandar patil of the village, Shidlingangauda must have been wielding some influence and no one then questioned the propriety of his action. The parties are Lingayats and the Lingayat community accepted the defendant as Shidalingangauda's adopted son. There is no substance in the plaintiff's allegation that the defendant and his mother were excommunicated. There is sufficient evidence to show that they are still treated as respectable members of the Lingayat community. The defendant was given diksha by a Lingayat Mathastha, his wife comes of a good Lingayat family and is related to plaintiff No. 2, Lingayat Ayyas and Bankars go to his house for dinner and he is invited on auspicious occasions and given his babs and haks. As stated by the witness Andaniswami, even an illegitimate child can be given diksha and admitted into the Lingayat religion. Thus it is clear that the defendant and his mother are still Lingayats and not outcastes.

6. The question that next arises for decision is whether an illegitimate son can be validly given in adoption by his mother. Our attention has been called to only one reported case of such an adoption among the Lingayats. It is Kallyantai v. Shivappa AIR [1924] Bom. 516 In that case one Maralswami, the head of a Lingayat Math, had an illegitimate son born of his permanently kept mistress. As he was held to be a dasiputra, not entitled to the gadi of the Math, Maralswami took him in adoption and then made a gift of all his property to him as his son "given in adoption to him by the natural mother". It was held that the gift failed, as the adoption was "clearly invalid". The learned trial Judge distinguished this case as follows :-

That adoption was held invalid on the ground that the illegitimate son was incompetent to perform the funeral ceremonies. No such question arises in the case of Lingayats who are also Shudras. The evidence of the defendant and his witnesses proves beyond the shadow of any reasonable doubt that there are no Such ceremonies as shraddhakarma, pind amongst the Lingayats.

7. There is no justification for drawing such a distinction, since the parties in that case also were Lingayats. But in fact the point was not decided there, as it was assumed that the adoption was "clearly invalid". The only question considered was whether in view of the invalidity of the adoption the donee was entitled to the property which had been given to him "as the adopted son capable of inheriting in the same way as a natural born son and capable of perpetuating the line and looking to the performance of religious duties". Hence that case cannot be treated as an authority in support of the invalidity of the adoption of an illegitimate son among Lingayats.

8. The recent case of Apya Shettya v. Rammakka Apya (1940) 43 Bom. L.R. 314 is more in point. It was a case of Mahars or Holers who are governed by the Hindu law as applicable to Shudras. It was held that under Hindu law even

among Shudras a woman is incompetent to give in adoption her son born of adulterous intercourse. One of the reasons on which this decision was based by Wassoodew J. is thus summarised (p. 324):-

...a son entitled, to perform Sraddha in the adoptive family must be capable of performing sraddha to his own father. This a son born in adultery cannot do, for he has no known father. The rituals too do not permit a son to offer sraddha to his mother independently of the father...the adopted son must associate his genitive father when performing the funeral ceremony known as "sapindi-karana"...If, therefore, he has no genitive father to whom he can offer pinda, he will not be able to perform the " sapindi-karana" of the adoptive father.

9. The learned trial Judge has refused to follow this ruling on the ground that it cannot apply to Lingayats who do not believe in religious rites, the offering of funeral cakes and libations of water to deceased ancestors and amongst whom adoptions are made only for secular purposes. An argument somewhat on the same lines was advanced before Wassoodew J. (p. 322), and it was contended that among Shudras the circumstance of birth from illegitimate connection should not be regarded as a defect for conferring spiritual benefit on his adoptive father as Shudras do not observe all the obsequial rituals commonly observed by the regenerate classes. This contention, however, did not prevail, and it was held that even among Mahars an illegitimate son cannot be given in adoption.

10. In view of the tenets of the Lingayat religion, the question whether Lingayats are or are not Hindus is highly debatable. In Thurston's Castes and Tribes of Southern India, Vol. IV, p. 236, it is stated as follows :-

The Lingayats have been aptly described as a peaceable race of Hindu puritans. Their religion is a simple one. They acknowledge only one God, Siva, and reject the other two persons of the Hindu Triad. They reverence the Vedas, but disregard the later commentaries on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticism.

11. Professor M.R. Sakhare, a Lingayat scholar, has recently published Nandikeshwara's Lingadharanachandrika with an erudite introduction called "History and Philosophy of Lingayat Religion", and after a lengthy discussion of Hinduism and Lingayatism he has come to the following conclusion (p. 670) :

Image worship is the religion of the Hindus, if religion can be so defined. But herein also Lingayats are not Hindus in religion because they are no image worshippers. Only in one respect they are Hindus in religion, namely in respect of worshipping one of the (now) Hindu Gods, Shiva. But mere worship of a God is no religion, if it should have philosophy and practice forming its differentia. And because Lingayat religion has its own philosophy and practice distinct to itself, it cannot be a sub-religion of Hinduism.

12. But Dr. Sir Radhakrishnan, a scholar of international repute, in his foreword to the same book has doubted the correctness of this view. He says :

The author takes great pains to make out that the Lingayat faith is altogether independent of the Hindu religion which is primarily based on the authoritativeness of the Vedas and the Varnashramadharma. As the Lingavat religion accepts the authoritativeness of the aganws and repudiates the distinctions of caste, it is said to be non-Hindu. I am afraid that this is taking a somewhat narrow view of the spirit of Hinduism.

13. Whether the Lingayats are Hindus or not, we are concerned to see what is the law by which they are governed, and ever since the ruling in *Gopal Narhar Safray v. Hanmanl Ganesh Safray* ILR (1879) 3 Bom. 273 they have been subject to Hindu law as applied to Shudras. There is no other special law applicable to them. It appears from the judgment in that case (p. 283) that during the last century some of the more wealthy and educated members of the Lingayat community were manifesting a desire to elevate it to the status of Vaishyas. Professor Sakhare at p. 200 of his notes on *Lingadharanachandrika* refers to the ambition of a section of Lingayats to prove that Lingayats are a kind or variety of Brahmins. At p. 662 he says that the Lingayats of Maharashtra perform shraddha ceremony in honour of the dead and are somewhat Brahmanised in religious life and customs and have their own prejudices. The Lingayats of Mysore State and Telugu Districts take pride in being called Lingi Brahmins and "perform all ceremonies, with Vedic hymns chanted in accompaniment." He adds, however, (p. 603) that the Lingayats of Bombay Karnatak are different from those of Maharashtra or Mysore.

14. The ruling of *Gopal Narhar Safray v. Hanmant Ganesh Safray* does not, however, make any distinction between the Lingayats of one locality and those of another. It lays down that all Lingayats are governed by the Hindu law as applicable to Shudras. If the Lingayats are governed by the Hindu law and do not belong to the three regenerate classes" of Hindus, then the law applicable to the residuary class-Shudras-must govern them. The decision in *Apya Shettya v. Ramakka Apya* applies to all those who are governed by Hindu law. If, as held there, even among Shudras the adoption of an illegitimate son is not permissible under Hindu law, much less is it permissible among the three higher classes. In that case the learned Chief Justice observed at p. 325 that if the mother of an illegitimate child desires to part with it in favour of some one anxious to take it, the arrangement is not one which the law should discourage. Yet he agreed, though, reluctantly, to hold such an adoption invalid since adoption under Hindu law cannot be regarded solely from the standpoint of social expediency, or abstract justice. The system is based on the religious sentiments of the people and the belief that the soul of the deceased man will derive benefit from the performance of religious ceremonies by his surviving son, natural or adopted, and as an illegitimate son is not qualified to perform the religious ceremonies for his adoptive father, the basis on which a valid adoption must rest is absent. Mr. Coyajee relies upon these observations and contends that the decision should not be extended to cases where this reasoning is inapplicable : *cessante ratione legis cessat ipsa lex*. But the Privy Council has held in a series of cases that the very

foundation of the system of adoption is the need of a son for the performance of religious ceremonies, and if that is not acceptable to Lingayats, all those cases like *Balu Sakharam v. Lahu* (1936) 39 Bom. L.R. 382 which lay down that a Hindu widow's right to adopt is based on religious considerations and is not affected by any consideration as to the vesting or divesting of property, ought not to apply to Lingayats. But a contrary view has been taken by this Court in *Lingappa Rayappa Desai Vs. Kadappa Bapurao Desai*, , to which my learned brother was a party. There also the parties were Lingayats and a similar contention was urged, but was disallowed.

15. N.J. Wadia J. pointed out that although the parties were Lingayats, the adoption deed itself showed that the spiritual motive was not absent in the case of the plaintiff's adoption. The adopting widow said in the deed (p. 839) :-

Knowing that without issue there is no deliverance for acquisition of merit in the other world, and for the prosperous continuation of my husband's line, I asked your natural father to give you in adoption.

16. A similar adoption deed executed by a Lingayat is produced in this case as exhibit 192, which recites that if there is no son, the hell called "Put" cannot be avoided. It thus appears that even the Lingayats do attach importance to the necessity of a son for the spiritual benefit of the father.

17. Moreover the decision in *Apya Shettya v. Rammakka Apya* is not based merely on the incapacity of an illegitimate son to confer spiritual benefit on the adoptive father, but also upon his mother's incapacity to give him in adoption as not being "a son recognised by the Hindu law." Wassoodew J. observed (p. 318) :

The right of a mother to give her son in adoption independently of the father is however founded upon the existence of special circumstances such as those enumerated in the texts. The conditions governing that right are that the child to be given is the son of her husband and that the latter is incapable of giving his assent. Prima facie these two conditions are impossible of fulfilment in the case of a bastard child.

18. In *Dhanraj Joharmal v. Soni Bai* (1925) L.R. 52 IndAp 231 the Privy Council held that even though Agarwallas repudiated the Brahmanical doctrines relating to obsequial ceremonies, the performance of shraddha and the offering of oblations for the salvation of the soul of the deceased, and did not believe that a son, either by birth or by adaption, conferred spiritual benefit on the father, they were governed by the Hindu law of adoption, and that it was essential to the validity of an adoption that the "child" should be "given" to the adopter by the father or, if he be dead, by the mother. These remarks and the remarks of Wassoodew J. quoted above apply equally to Lingayats.

19. It has been held by the Privy Council in *Somasekhara Royal v. Sugutur Mahadeva Royal* (1935) 38 Bom. L.R. 317 that the ordinary Hindu law is presumed to apply to Lingayats, except in so far as it is shown that they had

superseded it by their customs. No custom recognising the validity of the adoption of an illegitimate child as set up or proved. The defence being that the defendant was a legitimate son of Basappa and Maralshiddavva, the alternative plea of custom was not taken. It is now urged by Mr. Coyajee that it should be allowed to be taken and the suit remanded for a finding whether such a custom exists among Lingayats. We do not think that such a plea which involves a pure question of fact should be allowed to be taken at this stage for the first time in appeal.

20. In the absence of a contrary custom the ordinary Hindu law as laid down in *Apya Shettya v. Rammakka Apya* must be held to apply to Lingayats. We, therefore, hold that the defendant being an illegitimate son of Maralshiddavva born of adulterous intercourse, his adoption by Shidalingappa is illegal and invalid.

21. It is next urged that the plaintiffs are estopped from challenging the validity of the defendant's adoption by reason of their conduct both at and subsequent to the adoption. It is proved that the deceased plaintiff No. 1 attended the adoption ceremony, procured the stamp for the adoption deed, himself attested it and brought the Sub-Registrar to Shidlingappa's house for its registration. It is also proved that ever since the adoption the plaintiffs looked upon the defendant as Shidlingappa's validly adopted son and allowed him to enjoy all the rights of such a son including the right to have his name entered in the patilki watan register. In the words of the Privy Council in *Gopee Lall v. Mussamut Sree Chundraolee Buhoojee* (1872) 19 W.R. 12 all this comes to no more than this that the plaintiffs had arrived at the conclusion that the defendant's adoption which is admitted in fact was valid in law, a conclusion which is found to be erroneous ; but that creates no estoppel between the parties. The plaintiffs' presence at the adoption or their subsequent acquiescence in the adoption cannot estop them from challenging its validity [*Ramchandra v. Murlidhar* (1936) 39 Bom. L.R. 599. It is not alleged that the plaintiffs made any representation to the defendant that he could be legally or validly adopted or that the defendant acted on such representation and allowed himself to be given in adoption. The defendant does not say that the plaintiffs' presence at his adoption led him to consent to be given in adoption. As held by the Privy Council in *Dhanraj Joharmal v. Sonibai* cited above, even if it be assumed that the plaintiffs represented that the defendant could be validly given in adoption there was no representation of a fact to constitute an estoppel u/s 115 of the Indian Evidence Act, 1872. Similarly their subsequent conduct in recognising the defendant as Shidlingappa's adopted son for a number of years, though giving rise to an inference that the conditions necessary for an adoption are duly fulfilled, does not operate as an estoppel. They cannot on that account dispute the fact of the adoption, but its legality cannot be established by mere estoppel.

22. Mr. Coyajee has touchingly pressed upon our attention the facts that the defendant was adopted by Shidlingappa with open eyes and that during the last

twenty years he has acquired a high social standing, has married a respectable lady and has a number of children, and urges that this is a fit case for applying the principle of *factum valet* and upholding the adoption as a settled fact. But the rule of *factum valet* has its own limitations and cannot be influenced by considerations of sympathy. In the case of *Lakshmappa v. Ramava* (1875) 12 B.H.C.R. 364 the principle on, and the extent to which, it is permitted to operate in cases of adoption were fully considered, and it was said of that rule that (p. 398) :

its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the shastra is merely directory, or only points out particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded.

It was held there that the incapability in the alleged adopted son to be given in adoption by a widow without the previous assent or direction of her husband would be fatal to the adoption and could not be aided by the maxim *factum valet*. On the same analogy, since an illegitimate child is incapable of being adopted and in the absence of a known father his mother is incapable of giving him in adoption, the principle of *factum valet* cannot validate his adoption.

23. In view of the ruling of the Privy Council in *Kalyamdappa v. Chanbasappa* ILR (1924) 48 Bom. 411 : L.R. 51 IndAp 220 s.c. it is not urged in this Court that the plaintiffs' suit is barred either under Article 118 or under Article 122 of the first schedule to the Indian Limitation Act. The plaintiffs' right for possession accrued to them on the death of Shidlingappa on March 17, 1926, and this suit brought within twelve years thereafter is in time.

24. It is still open to the defendant to prove that he has acquired a title to the property in suit by his adverse possession for more than twelve years. The trial Court has held that he has been in such adverse possession of eight survey numbers since April 24, 1922. It is true that those eight lands have been in his possession since that date, but it cannot be said that his possession was adverse either against Shidlingappa or against Shidlingappa's heirs. All the oral evidence on the point merely proves his possession. But the Mutation Register, exhibit 88, shows that on April 24, 1922, all the fourteen lands of Shidlingappa were given into his possession and his name was entered as the *kabjedar* or occupant in column 9. But the entry in column 10 shows that after taking him in adoption Shidlingappa gave a *vardi* to the village officers that "the name of the adopted son should be entered as making *vahiwat* accordingly." Thus the lands were not given to him as of his exclusive ownership, but only for making *vahiwat* or management. On November 9, 1922, six of those lands were handed over to Shidlingappa for his maintenance, and it was noted in column 10 that there was an agreement that those eight lands should revert to the defendant afterwards. These entries clearly show that the defendant's possession during Shidlingappa's lifetime was not adverse to him, but with his consent and

according to his wishes. Moreover, there being no partition between Shidlingappa and the defendant, who claimed to be his adopted son, the defendant must be deemed to have purported to be in possession of the lands on behalf of what he then considered to be the joint family consisting of himself and Shidlingappa. Thus, according to his own ideas, he was a co-sharer with Shidlingappa, and as he does not claim to have disclaimed Shidlingappa's interest in the lands, his possession cannot be regarded as adverse. The plaintiffs' right to possession accrued only after Shidlingappa's death, and till then the defendant's possession of the lands was not adverse against them. They had no right to evict him during Shidlingappa's lifetime, although his adoption was invalid. We, therefore, hold that the defendant has not acquired any title even to the eight lands of which he took possession on April 24, 1922, during Shidlingappa's lifetime, u/s 28 of the Indian Limitation Act. The plaintiffs' claim to those lands also is in time.

25. As already stated, deceased plaintiff No. 1 Naganagauda and plaintiff No. 2 Ujjanagauda have each a third share in Shidlingappa's property. The third sharer is not made a party to this suit. Plaintiffs Nos. 1A to 1D are the legal representatives of plaintiff No. 1. Two of them, plaintiffs Nos. 1B and 1C, have entered into a compromise with the defendant. The share of the other two is, therefore, only one-sixth. Hence plaintiffs Nos. 1A and 1D and plaintiff No. 2 are together entitled to a half of the property in suit. Plaintiffs Nos. 1B and 1C do not want to proceed with the appeal and their claim will, therefore, be dismissed.

26. We, therefore, allow the appeal and pass a preliminary decree in favour of plaintiffs Nos. 1A and 1D and plaintiff No. 2 for a partition of the property in suit and possession of their one-half share together with mesne profits for three years before suit and from the date of suit, to be determined under Order. XX, Rule 12, Sub-rule (1), Civil Procedure Code. The partition of revenue paying lands will be effected by the Collector. The respondent shall pay half the costs of plaintiffs Nos. 1A, 1D and 2 in both the Courts and bear his own.

Divatia, J.

27. I concur and would like to add a few words in view of the importance of the question to the Lingayat community. The main point about the invalidity of the adoption is really concluded by authorities. The Privy Council has held in *Somashekhara Royal v. Sugutur Mahadeva Royal* (1935) 38 Bom. L.R. 317 that subject to proof of custom to the contrary Lingayats are governed by the ordinary Hindu law. In a recent case of our Court, *Apya Shettya v. Rammakka Apya* (1940) 43 Bom. L.R. 314 it is decided that even among Shudras a woman is incompetent to give in adoption her son born of adulterous intercourse, and ever since the decision in *Gopal Narhar Safray v. Hanmant Ganesh Safray* ILR (1879) 3 Bom. 273 Lingayats are considered to be governed by the Hindu law as applicable to Shudras. No custom to the contrary has been set up or sought to be proved in this case. It is clear, therefore, that the adoption of the appellant, who must be held on the evidence to be an illegitimate son, is bad for want of competency of his mother to give him for that purpose. That being so, the

question whether Lingayats are to be considered as Shudras or even as Hindus does not remain.

28. But a few observations may be made as questions about the legal status of Lingayats have frequently arisen. Attempts to prove that their religious faith is outside the recognised tenets of Hindu religion would not, even if successful, necessarily lead to the conclusion that they are not governed by the Hindu law. The Jains claim to be outside the pale of Hinduism but are still mostly governed by Hindu law. Lingayats are really protestant Hindus having renounced image worship, Brahmanical rites and caste distinctions, but they are believers in one of the Hindu Gods, Shiva, whom they worship by means of an emblem if not by an image. There can be no doubt, therefore, that they are subject to Hindu law much more so than the Jains. If they are Hindus, they cannot be worse than Shudras even among whom the adoption of an illegitimate son is now held as invalid. But whether the Lingayats should rest content with their position as Shudras or should agitate for the application of the Hindu law as governing the regenerate classes is a matter for their community to decide. However undesirably frozen the present Hindu law has become with regard to the rigid and unchangeable character of caste distinctions, a progressive community, considered socially inferior in the past, can make out a good case before a modern Legislature for doing away with legal disabilities based on distinctions which have long since ceased to be justifiable.