
(1990) 02 MAD CK 0011
In the Madras High Court

Visalakshi

APPELLANT

Vs

Saraswathi and Others

RESPONDENT

Date of Decision : 23-02-1990

Acts Referred:

Succession Act, 1925 — Section 213

Citation : (1990) 2 MLJ 360

Hon'ble Judges : Sivasubramaniam, J

Bench : Division Bench

Judgement

Sivasubramaniam, J.—This appeal is directed against the judgment and decree in CS.No.1414 of 1969 on the file of the III Assistant Judge,

City Civil Court, Madras. The plaintiff is the appellant herein and the respondents are the defendants.

2. The appellant/plaintiff filed the suit for partition and separate possession of her one-third share in the suit properties and she has raised the

following contentions in the plaint filed by her. The plaintiff's father V. Nageswara Rao died intestate in or about 1966 leaving behind him his

widow the first defendant, his daughter the plaintiff and the children of his predeceased daughter N.V. Parvathavardini impleaded as defendants 2

to 4. The plaintiff and the first defendant are each entitled to one third share and defendants 2 to 4 are entitled to the balance of one-third share in

the properties of Nageswara Rao.

3. Defendants 2 to 4 resisted the suit and filed a written statement raising the following contentions: Nageswara Rao adopted Krishnamoorthy now

impleaded as the fifth defendant in the suit. The properties were the ancestral properties of Nageswara Rao, and therefore, the fifth defendant had

a half share therein. The first defendant was deaf and dumb and was not living with Nageswara Rao. Defendants 2 to 4 are the children of N.V.

Parvathavardini, the eldest daughter of Nageswara Rao. Late Nageswara Rao did not have any love or affection for the first defendant as she was

not only deaf and dumb but also she remained away from him for over 20 years. As the mother of those defendants were ill-treated by her

husband, late Nageswara Rao had a soft corner for her. Their mother died prematurely at the young age of 30. Even during her life time, these

defendants were wholly dependant on Nageswara Rao for their maintenance. He was anxious to provide for these defendants and, therefore, he

executed a Will dated 1.1.1963. The plaintiff and the second defendant were informed of the terms and dispositions in the Will and they all

expressed their approval for the same. There is a reference to the adoption of the fifth defendant Krishnamoorthy. The plaintiff requested her father

to implement the terms of the Will insofar as she is concerned immediately. Accordingly, Nageswara Rao began paying the plaintiff the refits

accruing from the portion of No.24, Mahalakshmi Street given to her under the Will. The plaintiff has been receiving her portion of the rent from

April 1963. She by her conduct has acted as per the terms of the Will of Nageswara Rao and accepted the bequest made thereunder to her. She

was receiving rents till December 1966 even after the death of Nageswara Rao. She acted as per the terms of the Will in all aspects. At one point

of time, the plaintiff along with her uncle Jagannathan attempted to make arrangements for probating the Will. Having acted as per the terms of the

Will and having derived benefits as per the terms pf the Will, the plaintiff is estopped from questioning the Will. The plaintiff received rents regularly

and she will be entitled only to one-eighth share at the most.

4. The learned Judge raised relevant issues and after considering the evidence let in by the parties, decreed the suit as prayed for holding that

Nageswara Rao died leaving the Will Ex.B-5, that the Will could not be looked into as it was unprobated, that Krishnamoorthy was not the

adopted son for the simple reason that he did not implead himself as a party and that the plaintiff did not act upon the terms of the Will. In

A.S.No.20 of 1974 and C.M.P.No.9074 of 1977 filed by the said Krishnamoorthy on the file of this Court, it was held that Krishnamoorthy

should be impleaded as a party and the judgment of the trial Court was set aside and retrial was ordered on all the issues afresh in the light of the defence raised by Krishnamoorthy.

5. After remand, Krishnamoorthy was impleaded as the fifth defendant in the suit and in effect he adopted the case of defendants 2 to 4 in his

written statement and he raised the following contentions: Nageswara Rao died on 28.12.1966 and bulk of the properties are his ancestral

properties. He executed the Will dated 1.1.1963 appointing the plaintiff as executrix and she did not take steps to probate the same. He was

adopted by Nageswara Rao on 5.7.1953 at No.24, Mahalakshmi Street, T. Nagar. The plaintiff is entitled to one-eighth share and the fifth

defendant will be entitled to 1/8 namely 5/8th share in the suit properties. Nageswara Rao left about 1 acre of land in the village Mallamaru in

Andhra Pradesh and so the suit is bad for partial partition. The first defendant died during the pendency of the suit and, therefore, her share has to

be divided equally among the other sharers.

6. Issues were recast after remand and fresh evidence was also let in. After a careful consideration of the evidence let in by the parties the learned

Judge decreed the suit in part holding that the fifth defendant Krishnamoorthy was validly adopted as the son for Nageswara Rao and that the

plaintiff is entitled to only one-sixth share in the plaint A schedule and one-third share in the plaint B and C schedule properties. As against the said

judgment and decree, the plaintiff has preferred the present appeal.

7. According to the learned Counsel appearing for both the parties, the only point that arises for consideration in this appeal is whether the fifth

defendant Krishnamoorthy was validly adopted by late Nageswara Rao and if so what is the share to which the plaintiff is entitled.

8. The present suit has been filed by the plaintiff for partition and separate possession of her share in the properties left behind by her father

Nageswara Rao who died on 28.12.1966. He left behind him his widow, the first defendant, his daughter the plaintiff herein and defendants 2 to 4,

the children of his predeceased eldest daughter Parvathavardini. The relationship between the parties is not in dispute. The first defendant died

during the pendency of the suit. The case of the fifth defendant is that he is the adopted son of Nageswara Rao. But the said fact is disputed by the

plaintiff. If the fifth defendant is not the adopted son, then the plaintiff would be entitled to a half share in the properties and on the other hand, if the adoption is true, the plaintiff would get a lesser share.

9. Before dealing with the contentions raised on behalf of the appellant, let us look at the evidence available in respect of adoption in this case. The

fifth defendant examined himself as D.W.8 and his father Jegannathan was examined as D.W.1. The brother of the fifth defendant was examined as

D.W.2, while one of the tenants by name Satyanarayana was examined as D.W.4. D.W.5 was the Prohit who had actually officiated the ceremony

of adoption. All these witnesses stated that D.W.1 handed over the fifth defendant in adoption to the plaintiff's father Nageswara Rao and that on

the same day after the adoption ceremony, Nageswara Rao performed Upanayanam ceremony of the fifth defendant. The fifth defendant strongly

relied upon Ex.B-4 the autobiography of the plaintiff's father Nageswara Rao and Ex.B-5 the Will dated 1.1.1963 executed by Nageswara Rao.

Both these documents are in Telugu and in the handwriting of Nageswara Rao. This fact has been admitted by the plaintiff as P.W.1 in the witness

box. She has categorically stated that Ex.B.4 is the autobiography of her father and that Ex.B-5 contains the handwriting of her father. It is

significant to note that Ex.B.4 described the fifth defendant as the adopted son of Nageswara Rao and it says that he shall take possession of the

property after the demise of Nageswara Rao's mother. Similarly, in the Will Ex.B-5 also, the fifth defendant was described as the testator's

adopted son and he was also allotted specific portion in the property. Even though during trial, certain objections were taken for relying on Ex.B-

5, which is an unprobated Will, such a stand was not taken before this Court rightly, since the Will can be relied on for collateral purposes. u/s 213

of the Indian Succession Act, no right as executor or legatee can be claimed unless the Will has been probated. But here, the defendants did not

claim as executors or legatees and their right to the property is not sought to be supported by the Will as executors or legatees of the Will and,

therefore, the bar contained in Section 213 of the Act would not apply to the facts of the present case. It has been well established that an

unprobated Will can be looked into for all collateral purposes, provided the party, who relies on the Will, does not try to establish a right under the

Will. The defendants want to rely upon the recitals in the Will for the collateral purpose of showing that late Nageswara Rao himself has admitted in the Will that the fifth defendant was his adopted son. Apart from the clinching evidence available under Exs.B-4 and B-5, the defendants have relied on Exs.B-6, B-7, B-18, B-8 to B-10, B-13, B-24, B-26 and B-29 etc. wherein there is a reference to the Will. It is unnecessary to consider the evidence in detail regarding the Will since the validity of the Will Ex.B-5 is not questioned in the suit.

10. Strong reliance was placed on Ex.B-30 dated 2.7.1953 which is a letter written by Nageswara Rao to D.W.1 asking him to go over to his place for attending the functions. It is significant to note that Nageswara Rao wanted D.W.1 to bring various materials for the religious function and that the actual adoption took place three days thereafter on 5-7-1953 in the house of Nageswara Rao. After the said adoption, we find that there was exchange of letters between Nageswara Rao and the fifth defendant wherein the fifth defendant was described as the adopted son of Nageswara Rao and the fifth defendant addressed Nageswara Rao as his father. Exs.B-37, B-38, B-31, B-39, B-40, B-41, B-42, B-33 and B-43 are some of such letters. Ex.B-32 is a letter sent by D.W.I to Nageswara Rao wherein a draft wedding invitation for the marriage of the fifth defendant was referred to and there is also a reference to the fifth defendant as the adopted son of Nageswara Rao. Ex.B-3 is the marriage invitation card issued for the marriage of the fifth defendant wherein he is shown as the adopted son of Nageswara Rao. Ex.B-17 is a dinner card sent by Nageswara Rao wherein the fifth defendant is referred to as his son. The genuineness of all these documents is not in dispute and, therefore, the only question is whether actually the fifth defendant was validly adopted. The stand taken on behalf of the appellant is that all these documents cannot prove a valid adoption and at the most they can establish that the fifth defendant was treated as an adopted son.

11. Mr. T.R. Rajagopalan, learned Counsel appearing for the plaintiff/appellant strenuously contended that the trial Court committed an error in relying upon the above said documentary evidence as proof of valid adoption. According to him, the burden is on the fifth defendant to prove that he was validly adopted. He commented that Ex.B-30 is not of much significance because there is no reference to adoption specifically, but it refers

only to "Upanayanam" of the fifth defendant. He submitted that there is a significant omission of the word "adoption" and, therefore, Ex.B-30 is of no assistance to the defendants.

12. Mr. T.R. Rajagopalan further submitted that the onus of proof regarding adoption lies on the fifth defendant who seeks to displace the natural succession to the property by alleging an adoption. The burden is on him to prove the factum of adoption and its validity. He relied on the decision of the Supreme Court in *Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others*, and submitted that the evidence in proof of adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. As far as the question of burden is concerned, there cannot be any doubt as the onus always lies on the person who claims to be the adopted son to prove the said fact. It has been well established that the factum of adoption must be proved in the same way as any other fact I have already referred to the evidence of D.W.1, the father of the fifth defendant, D.W.2, the brother of the fifth defendant, D.W.4 a tenant in the house and D.W.5, the Prohit who had actually officiated the ceremony of adoption. They had given a cogent version about the adoption and their evidence appears to be natural and acceptable. The evidence of D.W.5, the Prohit is very important in this case. His evidence was attacked on the ground that he could not have been present at the time of adoption. Learned Counsel for the appellant relied on certain recitals in Ex.B-30 wherein Nageswara Rao wrote to D.W.1 that one Avadhanam Narasimha Sastry had come there and said that he could bring a Prohit for performing the ceremony according to Rigveda. From this, it was contended that some other Prohit was thought of and not D.W.5 as Nageswara Rao could not have contacted D.W.5. Simply because there was such a reference in Ex.B.30, it is not possible to hold that Nageswara Rao could not have contacted D.W.5. Further comments were made that though relatives were present at the time of adoption, none of them have been examined. In this case, the evidence of the tenant and the Prohit is totally disinterested and their evidence coupled with the evidence of D.W. 1, D.W.2 and D.W.8 would prove the factum of adoption beyond any doubt.

13. Mr. T.R. Rajagopalan, strenuously contended that whatever might be the

evidence on the factum of adoption, it cannot be valid unless there is proof that "Datta Homan" was performed as per shastras. He referred to certain passages from Mulla's Hindu Law (Section 488) and from N.R. Raghavachariar's Hindu Law (paragraph 145 page 125 of Eighth Edition). For a valid adoption, the physical act of giving and taking is an essential requisite and that is a ceremony which is imperative in all adoptions whatever might be the caste to which the parties to the adoption belong. The only question is whether "Datta homan" is absolutely necessary to validate such an adoption and whether in the absence of the performance of "DATTA HOMAN", the adoption can be said to be invalid. As far as this question is concerned, the opinion is divided both in the Shastric Law as well as the Case Law. "Dattaka Chandrika" and "Dattaka Mimamsa" are works of great and unquestionable authority on Hindu Law in matters relating to adoption and that both of them clearly laid down that "DATTA HOMA" is essential among the twice-born classes to the establishment of the filial relationship of the person adopted and that the exception based on a text of Yama in the case of brother's sons's adoption has been recognised in decided cases, as observed by a Bench of this Court in *Saminatha Aiyar (died) and Another Vs. Vageesan, by guardian Sivakami Ammal*, . In *Govindayyar v. Dorasami* I.L.R.11 Mad.5 a Full Bench of this Court laid down as follows:

Both Manu and Caunakha declare that one who is eligible for adoption should be the reflection or have the resemblance of a son, and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform those obsequies with efficacy.

This decision was followed by a later decision in *Saminatha v. Vageesan* I.L.R.1940 Mad.98 above referred to wherein it was held as follows:

But, however that may be, as the Full Bench decision holding that no DATTA HOMA is necessary where the adopter and the person adopted belong to the same gotra seems to proceed upon the view that the HOMA would be necessary only to ensure the ceremonial competence of the person adopted, it would not be unreasonable to hold that such ceremony is not necessary in the case of the adoption of a daughter's son who

according to the Hindu Dharma Sastras is already endowed with such ceremonial competence. On this ground also, the respondent's adoption can be upheld.

Therefore, if the object of the homa is to bring about an effective transfer of the person from his own GOTRA prior to the adoption to the GOTRA

of the adopter so as to clothe him with ceremonial competency, it would be seen that a ceremony is not necessary when the adoptive father and

the son belonged to the same GOTRA. Therefore, it is unnecessary to decide the question as far as the adoption in other cases is concerned.

14. Mr. T.R. Rajagopalan submitted that D.W.1 the natural father of D.W.5 was given in adoption to another family and, therefore, he had taken

the Gotra of that family. According to him, if that is so, the Datta Homan cannot be dispensed with when D.W.5 was adopted by Nageswara Rao.

Further, the Prohit D.W.5 was not aware of this fact when he performed the adoption ceremony and, therefore, he proceeded on the basis that no

Datta Homan was necessary. In answer to the said contention, learned Counsel appearing for the respondents referred to Ex. B-4 where it is

categorically stated that D.W.1 Jegannathan was given in adoption to another Dayathi and, therefore, it was submitted that D.W.1 must belong to

the same Gotra as that of Nageswara Rao, the adoptive father of D.W.5. The recitals in Ex.B-4 are found in Terugu and, therefore, a Court

Translator was asked to translate the specific recitals to this effect. All the counsel have accepted the correctness of the same. Therefore, there

cannot be any doubt as to the Gotra to which D.W.1 belongs. Applying the above said principles, I find that D.W.5, being the son of D.W.1 who

belongs to the same Gotra as that of the adoptive father; the performance of Datta Homan is not essential and the absence of which does not

invalidate the adoption which is otherwise valid. Hence it follows that the plaintiff is entitled only to one-sixth share in the plaintiff A schedule

properties and one-third share in the plaintiff B and C schedules properties as decreed by the trial court.

15. In the result, this appeal fails and is accordingly dismissed. In the peculiar circumstances of the present case, the parties will bear their own

costs in this appeal.