

(1957) 09 BOM CK 0003

In the Bombay High Court

Case No : Letters Patent Appeal No. 54 of 1953

Vishwasrao Vithoba

APPELLANT

Vs

Sahebrao Yeshwantrao and Others

RESPONDENT

Date of Decision : 25-09-1957

Acts Referred:

Citation : AIR 1958 Bom 375 : (1958) 60 BOMLR 413 : (1958) ILR (Bom) 531

Hon'ble Judges : Vyas, J;Kotwal, J

Bench : Division Bench

Advocate : D.T. Mangalmurti, for the Appellant; M.R. Bobde, for the Respondent

Judgement

Vyas, J.—This is a Letters Patent appeal from a decision of Mr. Justice Mudholkar, affirming the decree passed by the learned First Additional District Judge, East Berar Division, Amravati, in Civil Appeal No. 57-A of 1944. Civil Appeal No. 57-A of 1944 arose out of Civil Suit No. 111-A of 1940 which was heard and decided by the learned Additional Subordinate Judge, Second Class, Chandur. It was a suit for partition of joint family property, plaintiff No. 3 claiming partition as the adopted son of defendant No. 2. The trial Court held that the adoption of plaintiff No. 3 was a valid adoption and decreed the suit. On defendant No. 1 appealing from the decision of the trial Court, the first appellate Court confirmed the decree and dismissed the appeal.

2. One Balaji had three sons, Vithoba, Sheoram and Harba. Sheoram separated from the family, taking away his share in the joint family property. Thereafter, there remained Vithoba and Harba who continued to be Joint. Vithoba died on 2-12-1897, leaving behind him surviving three sons, Maroti, Ramrao and Vishwasrao. Vishwasrao is defendant No. 1. Ramrao's grandson Anandrao died, leaving behind him surviving his widow Geeta, who is defendant No. 3. Harba died on 24-9-1927, leaving behind him surviving his widow Annapurna, who is defendant No. 2. It is this Annapurna, defendant No. 2, who adopted Mahadeo, the present plaintiff No. 3, as a son to her deceased husband on 23-12-1939. Plaintiffs Nos. 1 and 2 are the transferees from plaintiff No. 3. The family of

plaintiff No. 3 and defendants Nos. 1, 2 and 3 is a Maratha Kunbi family of Berar, and it may be noted that plaintiff No. 3 was a married person, at the date of his adoption by defendant No. 2. As I have just said, the plaintiffs have based the suit on the adoption of plaintiff No. 3 by defendant No. 2. The adoption has been held valid by the trial Court and also by the first appellate Court, and the said finding has been confirmed by Mr. Justice Mudholkar. It is that finding which is challenged in this Letters Patent Appeal.

3. Thus, this appeal raises an interesting point of law, and the point is whether amongst the Sudra community of Berar a married person can be validly adopted as a son. It is beyond controversy that the *lex loci* in Berar is the Mitakshara as interpreted in the Bombay Presidency. This position is not disputed and indeed it could not be disputed, in *Ramprasad y. Mt. Sububai* 4 Nag LR 31, decided on 4-1-1908, it was held that the *lex loci* in Berar was the Mitakshara as interpreted in the Bombay Presidency. It was a case from East Berar and the school of law which was applied was the Mitakshara as interpreted in the Bombay Presidency. In the case of AIR 1925 127 (Privy Council), the Privy Council also took the view that except so far as the particular customs of the community to which the parties belonged applied, the parties were governed by the usual law as to Hindus, which in Berar was the same as the Hindu law in the Presidency of Bombay. It is apposite to remember that in making these observations, the Judicial Committee followed their own decision in the case of *Balwant Rao v. Baji Rao* 16 Nag LR 187: AIR 1921 PC 59. In *Girjabai v. Vyankatesh* 2 B LJ 135, the learned Judicial Commissioner stated it as the practice of the Judicial Commissioner's Court of Berar that the Hindu law compounded of Mitab-shara, Mayukha and custom which obtained in the Bombay Presidency was applicable to Marathas in Berar.

4. In the context of the *lex loci* of Berar, it may be useful to remember the observations of the Additional Judicial Commissioner, Central Provinces in *Dawlatrao v. Govindrao* 5 Nag LR 13. Mr. Skinner, the learned Additional Judicial Commissioner, said in that case that in the interpretation of the Mitakshara in the Bombay Presidency, great weight was given to the Mayukha, and daughters inheriting from either parent had been given an absolute estate not only in the Island of Bombay where the Mayukha was considered the overruling authority, but throughout the Presidency. It would appear that nearly half a century ago in 1908, considerable respect was shown and weight was attached to the Mayukha even upon the point of interpretation of the Mitakshara throughout the Bombay Presidency. Clearly, in this manner, the Mayukha played not an unimportant part in establishing the *lex loci* of Berar. Then, as to the influence of the Mayukha on the *lex loci* of Berar, it may be convenient to refer to the case of *Shriram v. Rajaram* 19 Nag LR 193: AIR 1924 Nag 83. It was a case from Amravati, and the question arose whether the Mitakshara or the Mayukha applied. The learned Additional Judicial Commissioner, Mr. Kotval, observed:

"But whatever may be said about the application of the Mayukha as regards the

Bombay Presidency, so far as Berar is concerned we find it accepted in a number of rulings that the Mayukha applies in Berar in preference to the Mitakshara when the two differ."

Mr. Kotval then referred to the case of 2 B LJ 135, where it was held that the law compounded of Mitakshara, Mayukha and custom which obtained in the Bombay Presidency was applicable to the Marathas in Berar.

5. Now, the question which we have to consider in this case is this: Although the *lex loci* of Berar is the Mitakshara as interpreted in the Bombay Presidency, what is the position regarding the validity or otherwise of the adoption of a married person amongst the Sudras of Berar, since the Mitakshara is silent on the point? The answer to this question lies in the answer to another question and that is: How has the silence of the Mitakshara on this point been construed from time to time since as far back as 1887 in cases arising out of those parts of the Bombay Presidency where the Mitakshara ranks first and paramount? If the Mitakshara's silence on the point of adoption of a married person in a Sudra family has been construed in favour of holding the adoption as valid in those parts of the Bombay Presidency where the Mitakshara is the ruling authority, then upon the well settled position that the *lex loci* in Berar is the Mitakshara as interpreted in the Bombay Presidency, the answer must inevitably be in favour of holding the adoption of plaintiff No. 3 as a valid adoption. The cases where the question of the validity or otherwise of the adoption of a married Sudra was considered in relation to these parts of the Bombay Presidency where the Mitakshara prevails are *Nathan v. Krishnaji* 8 Bom HC 67 and *Lakshmappa v. Rarnaya* 12 Bom HC 364. *Nathan's* case (G), was a case from the district of Satara, a part of Maharashtra where the Mitakshara is the paramount authority, Mr. Justice Melvill who decided that case in 1871 made an exhaustive review of the authorities and held that the adoption of a Hindu who was a married Sudra at the time of his adoption was not invalid. *Lakshmappa's* case (H), was a case from the district of Belgaum. It was also a case of adoption of a married Sudra. It was contended in that case that marriage disqualified a Sudra for adoption. Chief Justice Westropp and Justice Nanabhai Haridas observed that marriage was not mentioned as a disqualifying cause either by Manu, Kulluka Bhatta Yajnavalkya, or Vijnaneshvara, or by any authority of weight in the Bombay Presidency. Then, they referred to the Dharmasindhu, the Sansara Kaustubha and the Vyavahara Mayukha, and pointed out that these authorities distinctly recognised the adoption of a married man. It was then contended before the learned Judges in that case that though a married Sudra might be adopted, still the adoption would be bad if the adopted person was an asagotra relation of the adopter. In this suit also, it may be mentioned that plaintiff No. 3 was before his adoption, an asagotra relation of the adopter. The learned Judges in *Lakshmappa's* case (H), upon the abovementioned contention being raised before them, said that they were not referred to any Bombay authority in support of that contention, and then they observed:

"On the contrary, Nilakantha, whose authority, especially when not opposed to Vijnan-eshvara's is supreme in this Presidency, broadly lays it down, as already observed, that "a married man, who has even had a son born, may become an adopted son". This also, he (meaning thereby Nilakantha) says, "is reasonable, for it is not in opposition (to other maxims,)"

It is clear that the learned Judges in Lakshmappa's case (H), construed the Mitakshara's silence on the point of adoption of a married Sudra to mean that the Mitakshara was not opposed to such an adoption and they followed the Mayukha, an authority of great eminence.

6. It was held both by the Bombay High Court and the Privy Council in *Bai Kesarbai v. Hunsraj Morarji* 33 Ind App 176, that the Mitakshara and the Mayukha should be so construed as to harmonise them with each other so far as was reasonably possible. Now, if the Mitakshara had given any direction upon the point of adoption of a married Sudra which was in direct contradiction with the Mayukha, it would have been Impossible to harmonise the two authorities. But where the Mitakshara is silent, harmonization would not be difficult, and it would be reasonable to construe the silence of the Mitakshara as meaning that it is not opposed to such an adoption, and therefore, the Mayukha should be followed. The Mayukha is paramount in several parts of the Bombay Presidency, for instance, Gujerat, the Island of Bombay and the North Konkan. In several other parts of the Presidency, for instance Poona, Ahmednagar and Khandesh, it ranks equal with the Mitakshara. Such being the position of repute and eminence enjoyed by the Mayukha, it would be perfectly reasonable to reconcile the Mitakshara and the Mayukha by construing the Mitakshara's silence on the point of adoption of a married Sudra as meaning that it is not opposed to such an adoption and applying the Mayukha. It was upon these considerations that in the case of *Narayan v. Tulsiram* 22 Nag LR 183: AIR 1925 Nag 329, a Full Bench of the Judicial Commissioners held that in Berar, following the Bombay Deccan, the Mitakshara was paramount and the Mayukha was of secondary consideration, being only relied upon when the Mitakshara was silent or doubtful.

7. In *Vyankatrav Anandrav Nimbalkar v. Jayavantrao* 4 Bom Hc 191, it was held that the adoption by a Hindu widow of an only son, if valid in every other respect, could not be set aside by reason of the adopted son being an only son of an advanced age. It was a case from Ahmednagar where, no doubt, the Mayukha is the paramount authority; but as I have pointed out above, it has been held upon authority that when the Mitakshara is silent, the Mayukha could be turned to for guidance and help and could be followed.

8. The next case to which we may usefully refer is the case of *Dharma Dagu v. Ramkrishna Chimnaji* ILR 10 Bom 80 . The Judgment of the Division Bench in that case was delivered by Mr. Justice Bird wood and the learned Judge observed at page 84, that it had become necessary in that case to decide whether a Brahman, who was married, and was, therefore, already regenerate, could be translated by adoption Into a new gotra, In which he could perform ceremonies

which would have the effect of annulling those performed in his natural family. The learned Judge said that the answer to this question must depend upon the construction to be put on the passage in the Mayukha referred to in the judgments of the Bombay High Court- in the cases of Nathaji Krishnaji v. Hari Jagoji (G), and Lakshmappa v. Ramaya (H). The learned Judge then, referring to the authority of Nilkantha, said that the said authority was supreme in the Bombay Presidency when not opposed to Vijnaneshwara's. In other words, Mr. Justice Birdwood in Dharma Dagu's case (L), adopted the same view, as to the weight to be attached to the authority of Nilkantha even in those parts of the Bombay Presidency where the Mitakshara was paramount, namely the view which was taken by the learned Judges in Nathaji's and Lakshmappa's cases (G and H). It was observed by the learned Judges of the Madras High Court in Lingayya Chetty v. Chengalamma, ILR 48 Mad 407 : AIR 1925 Mad 272, that in the Bombay Presidency where the Mayukha was a paramount authority, the Bombay High Court had adopted the view of Nilkantha, the author of Mayukha, and of his father Sankarabhatta and had ruled that in all classes a married man, even if he had children, might be adopted. I may once again point out that even in other parts of the Bombay Presidency where the Mayukha is not the overruling authority and where the Mitakshara is paramount, the cases have laid down that if the Mitakshara is silent, help and guidance could be derived from the Mayukha.

9. From the examination of the above authorities, it is clear that the decision that the adoption of a married Sudra is not invalid has the sanctity of having held the field for over eighty years. It has been followed in several cases, and there is no reason made out to our satisfaction why we should upset such a long standing series- of decisions merely upon the ground that the Mitakshara is silent on the point. The Mitakshara is no doubt silent, but the Mayukha is not; and when the Mitakshara gives no positive guidance, it is reasonable to turn to the Mayukha and apply it, for, that is the only way in which harmonization between the two authorities so often emphasised upon by the Privy Council and this High Court could be brought about.

10. The learned Advocate Mr. Mangalmurti has invited our attention to the case of Himoti Bai v. Manoharsingh ILR 1945 Nag 425: AIR 1945 Nag 71. It is to be remembered, however, that that was not a case of adoption from Berar. It was a case from the Central Provinces, and the learned Judges held that the adoption of a married man by a Sudra in the Central Provinces was not valid except under special custom. Thus, in that case there arose a question whether a particular custom set up by the adopted person was proved. Besides as I have just said it was a case arising out of the Central Provinces, and that being so, a reference to this case cannot assist Mr. Mangalmurti's client.

11. Then Mr. Mangalmurti has referred us to the case of AIR 1935 57 (Privy Council) . It was held in that case that according to the Mitakshara school of Hindu law, samanodakas included only those agnates whose relationship to the deceased extended from the 8th to 14th degree from the common ancestor and

in the absence of any such agnates the estate devolved upon his bandhus. Clearly that was a case which came up for consideration before the Privy Council and in which the devolution of the estate-upon bandhus in the absence of agnates of the-8th to 14th degree was in question. It was not a case on the point of adoption of a married person who is a Sudra. That case also, therefore, cannot be usefully invoked in support of the contention that the adoption of plaintiff No. 3 in. the present case was not a valid adoption.

12. Then Mr. Mangalmurti drew our attention to a decision of the Madras High Court in the case of Pichuvayyan v. Subbayyan ILR 13 Mad 138, where the learned Judges observed at page 129 that the rule that no one is eligible-for adoption after marriage was recognised by the Sadr Adawlut in 1823. It is difficult to understand how this case could possibly be invoked in support of the contention that the adoption, of plaintiff No. 3, a resident of Berar, was invalid. The lex loci in Berar is the Mitakshara as interpreted in the Bombay Presidency. So far as the present case is concerned, we are not concerned with the lex loci of Madras. That being so, whether a particular rule was recognised in Madras or not in 1823 is not a matter of any significance so far as the decision of the present case is concerned. Moreover, I have referred to a later decision of the Madras High Court in ILR 48 Mad 407: AIR 1925 Mad 272, and I have pointed out how it supports the contention that the adoption of a married Sudra is not an invalid adoption in the absence of a specific direction upon the point in the Mitakshara and. in view of the clear cut position under the Mayu-, kha in favour of the validity of such an adoption.

13. Then Mr. Mangalmurti referred us to a decision of the Privy Council in Rup Chand v. Jambu Prasad ILR 32 All 247 (PC). He invited our attention to certain observations at page 252. If we turn to these observations, we find that they related to the existence or otherwise of a certain custom being applicable to the parties. In other words, the decision rested only upon the existence or otherwise of a certain custom. No question arose in that case of construing the Mitakshara's silence on the point of the validity or otherwise of the adoption of a married Sudra.

14. We were next referred by Mr. Mangalmurti to a decision of the Bombay High Court in Martand Jiwaji v. Narayan Krishna ILR 1939 Bom 586 : AIR 1939 Bom 305. It was held in that case by the learned Chief Justice & Messrs Justices Wadia and Lokur that under the Hindu law, a married man who had gone in adoption to another family retained his right of giving away in adoption his son in his natural family born before his adoption. Thus, the question which arose before the Full Bench of the Bombay High Court in that case was a question whether even after the adoption, the person adopted retained his right of giving away in adoption his son in his natural family born before his adoption. It would appear that this decision recognised by implication the adoption of a married man under the Hindu law as a valid adoption.

15. The learned Advocate Mr. Mangalmurti has contended before us that if we

held the adoption of a married Sudra as a valid adoption, it would lead to anomalous results. In support of this contention, Mr. Mangalmurti has referred us to the case of AIR 1944 266 (Nagpur) , where the Full Bench held that after a person went out of his natural family by reason of adoption, he did not retain any right in the natural family of giving away his natural son in adoption. All that we need say about this contention of Mr. Mangalmurti is that we are not called upon in the present case to resolve any such conflict as the one to which Mr. Mangalmurti has drawn our attention. All that we have been called upon to consider is as to the construction to be put upon the silence of the Mitakshara on the point as to the validity or otherwise of an adoption of a married Sudra. On that point, the decision in Sharadchandra v. Shantabai (S), cannot assist Mr. Mangalmurti's client.

16. The net result, therefore, is that, in our view, all the Courts were right in coming to the conclusion that the adoption of plaintiff No. 3, a married Sudra, was a valid adoption. Upon this finding of ours, the Letters Patent appeal must fail and be dismissed with costs.

17. Appeal dismissed.