

(1921) 10 MAD CK 0020

Madras High Court

Case No: None

Muthusami Naicken,
Minor, By Next Friend
Naga Naicken

APPELLANT

Vs

Pulavarattal and Others

RESPONDENT

Date of Decision: Oct. 21, 1921

Citation: 66 Ind. Cas. 504

Hon'ble Judges: Spencer, J; Ramesam, J

Bench: Division Bench

Judgement

Spencer, J.

The plaintiff in this suit seeks for a declaration that he is the adopted son of the deceased Ammasi Naicken and is entitled to the properties mentioned in the schedule which belonged to Ammasi Naicken in his lifetime.

2. Ammasi Naicken died on the 13th November 1915 of a carbuncle. It is alleged that, on the morning of the day when he died, he adopted the minor plaintiff, who is the son of the deceased's second wife's brother, and that he associated the second wife, who is third defendant, with him in the act of adoption. It may here be stated that Ammasi Naicken left three wives, Pulvarthal, Sellayi and Poovayammal, and that the first wife has been living apart from him for about 25 years. As doubts were thrown upon the said adoption, it is alleged that the third defendant went through the ceremony of adopting the plaintiff a second time on the 3rd December 1917. The Subordinate Judge found that the adoption alleged to have been made by Ammasi Naicken was not true, and that the adoption made by the third defendant was true but not valid.

3. Two questions arise for decision; first, whether the first adoption was true in fact, and, secondly, whether the second adoption was a valid adoption. On the first point I am of opinion that sufficient reason has not been shown for disturbing the finding of the lower Court. The Subordinate Judge heard the witnesses deposing and he has good reasons

for thinking that the deceased Ammasi Naicken did not adopt the plaintiff and that the evidence in favour of the adoption was unsatisfactory. There are several circumstances which throw suspicion upon the truth of the alleged adoption. One is, that the deceased was very ill on the morning of the 10th November and he died at 5 p. m. His third wife, the second defendant, says that he lost consciousness on Saturday morning and that he had no control over his tongue. The act of adoption is alleged to have been made at or about the time when the prayaschittam ceremony was performed and at that time it is apparent that he was in extreme. The statement of the 2nd witness for the plaintiff that the deceased was sitting up leaning against the wall and that he embraced the plaintiff and delivered him into his wife's hands is very improbable. Then, although the adoption is alleged to have been made on the 13th of November 1915, the puthivaras statement was sent in on the 1st February 1916. This is feigned by the Kurnam who was not present at the alleged adoption but not by the Village Munsif who says he was present. It contains a statement that the obsequies of the deceased were performed by Chenga Naicken, the deceased's elder brother's son, as the agent of the adopted son. This Chenga Naicken has not been examined as a witness to prove that he acted as an agent for the minor; nor has Karuppa Naicken who, according to P. W. No. 2, had come for the adoption and is the eldest surviving Sapinda of Ammasi Naicken, been examined as witness. Then, the effect of the adoption was to disinherit all the three widows and a daughter and to make a relation of his second wife succeed to the whole of the deceased's property, when we find the second wife, third defendant, propounding this adoption, it suggests that she does so because he is interested in getting the property for her family.

4. On the second point, which is a question of law, the adoption on the 3rd December 1917 is attacked on the ground that there was no authority received by the second wife, either in writing or orally, from her husband to perform this adoption and that during the lifetime of the senior wife, the senior wife has a preferential right to make adoptions. This has been established by the decision in *Damara Kumara Venkatappa Nayanam Bahadur v. Damara Ranga Rao* 30 Ind. Cas. 106, which followed a decision of *Sankaran Nair, J.*, and myself in *Kaherla Chukkamma v. Kaherla Punnamma* 2 L. W. 24 : (1915) M. W. N. 19, and the Bombay and Calcutta High Courts have also held that the senior widow has a preferential right of adoption. See *Rahmabai v. Radhabai* 5 B H. C. R. 181; *Dnyanu Pandu v. Tanu Balaram* 22 Bom. L. R. 890 and *Ranjit Lal v. Bijoy Krishna* 14 Ind. Cas. 17. The passage in the *Mitakshara* that treats of this topic has been translated in *Major Basu's Yajnavalkya Smriti* as follows: "When a wife of the same class (as that of the husband) exists, then religious works are not to be performed by a wife who is not of the same class." Upon this *Katyayana* comments, "Let him who has many wives employ one of equal class in the case of the sacrificial fire, and in attendance on himself; but if there be many such, let him employ the eldest in those duties; provided she be blameless." Now, it is argued that the eldest wife, *Pulavarthal*, had been discarded by *Ammas* Naicken and, therefore, she was not in attendance on her husband and not blameless. An attempt to prove that she was an adulterous wife entirely failed. We only know that she was living apart from her husband for about 25 years, before his death. The question is,

whether such separation makes her incompetent to perform the act of adoption, and thus causes the capacity to make an adoption to devolve upon the second wife. The text of Katyayana seems to me to apply to a case of adoption performed during the lifetime of the adoptive father, when he speaks of a wife being in attendance on himself. It is doubtful whether the word *adushta* or blameless should be interpreted so as to exclude a woman who voluntarily lives separate from her husband without having been guilty of unchastity or misconduct. So far as the facts of the separation in this case are known, there is nothing to attribute blameworthiness to the elder wife. An adoption made by a widow without consulting the sapindas would be invalid for want of authorisation from them as it has been held that the consent of the sapindas supplies the want of the husband's authority. The other wives are sapindas and it was necessary for third defendant to obtain their consent before any adoption could be made. In this case the third defendant sent a notice, Exhibit IV, to the senior wife in which she expressed her intention of confirming the adoption made by her husband and asked for an expression of her views in respect of the permission given by the next reversion to her to adopt the plaintiff. When the senior wife has a preferential right of adoption, the proper course for a junior wife who wishes adoption to be made, would be to ask the senior wife to get the consent of the male sapindas to perform the adoption, and to perform it herself. If she was unwilling to perform it herself, it would then be soon enough to ask her to agree to the adoption ceremony being performed by the junior wife. Exhibit IV is not couched in such terms. It implies that Poovayamal was determined to carry out the ceremony of adoption without giving a chance to the senior wife to adopt a son to their husband. Under the circumstances of the present case, the absence of any relinquishment by the senior wife of her prior right of adoption invalidates the act performed by the junior wife. For these reasons, the second adoption cannot be supported as valid.

5. The result is, that the appeal is dismissed with costs. The memorandum of objections is not pressed and is dismissed.

Ramesam, J.

6. I agree. But I wish to add a few words. The first occasion on which the adoption of the plaintiff by the deceased Ammasi Naicken was asserted was in Exhibit A, dated the 31st of January 1916, a petition by the second wife, the third defendant. The petition was filed nearly two months after the third wife sent Exhibit V and 17 days after the senior wife sent Exhibit G and was practically in reply to them. It seems to me that the delay was really due to the fact that the present adoption was concocted, in reply to the claims made by the other two widows, with the help of the Village Munsif and the Kurnam and the other male relations of the third defendant. It must be remembered in this connection, that the third defendant is the sister's daughter or niece of the fourth defendant who gives the consent. It is also significant that Vaidyanatha Iyer, the family purohit, who is said to have been present at the adoption, does not support the plaintiff's case. I need not repeat the other reasons given by my learned brother and the Subordinate Judge with which I agree.

7. Coming to the question of law, the, appellant's Vakil argues that the safe in Damara Kumara Venkatappa Nayanim Bahadur v. Damara Runga Rao 30 Ind. Cas. 106 ought to be reconsidered. For the reasons given by my learned brother and also for the reasons given by the learned Judges who decided the case in Dnyanu Pandu v, Tanu Balaram 57 Ind. Cas. 113 , where their Lordships say that an adoption with the content of sapindas in Madras is not on the same footing as an adoption in an undivided family with the consent of the manager, I do not think it necessary to doubt the correctness of the former decisions of this Court.

8. Then it is said that, assuming that the senior widow has a preferential right to adopt, the principle does not apply to Sudras, because no religious ceremonies are essential for an adoption in the case of Sudras and Puddo Kumaree Debra v. Juggut Kishore Acharjee 2 S L. R. 229 , in relied on. In the first place it may be mentioned that the decision in Damara Kumara Venkatappa Naynim Bahadur v. Damara Ranga Rao 30 Ind. Cas. 106, was a case of Sudras, but the point was not expressly argued. It may be that, for the validity of an adoption among Sudras datta homam is not necessary, but this does not mean that an adoption is not a religious act. Apart from this, as was pointed out by my learned brother and Sankaram Nair, J., in the case in Kakerla Chukkamma v. Kakerla Punnamma 27 Ind. Cas. 775, the senior wife is the wife whom acts of duty concern" that is "who officiates in acts of religion and so forth." Cole-brooks Digest of Hindu Law, Book IV, Ch, i, Sloka 51. This shows that the acts of duty in which a senior wife has got a preferential right need not necessarily be all religious duties. I, therefore, think that the principle is equally applicable to Sudras as well as the Other classes.

9. The next ground on which it is said that Damara Kumara Venkatappa Nayanim Bahadur v. Damara Ranga Rao 30 Ind. Cas. 106, does not apply to the present case is that in this case the senior wife is a discarded widow. Verse 88 of Achara Adhyaya of Yajnavalkya was relied on in Damara Kumara Venkatappa Nayanim Bahadur v. Damara Ranga Rao 30 Ind. Cas. 106 , as one of the reasons on which the preferential right of the senior widow is based. The translation of that verse as given in Damara Kumara Venkatappa Nayanim Bahadur v. Damara Ranga Rao 30 Ind. Cas. 106 , runs thus: "When there is a wife of an equal class present," etc, some stress is laid by Mr. Rangachariar, the learned Vakil for the appellant, on the word "present" in this translation. The original Sanskrit is "Satyam" the meaning of "Satyam" is "being in existence" as opposed to death. The translation of this verse in Mandlik's Hindu Law, at page 173, in Major Basu's Edition of Mitakshara referred to by my learned brother and the translation of Sir P. S. Sivaswami Iyer in 1 Madras Law Journal (Journal part) 282 all show that what is meant by "Satyam" is "existing" and not " being present near," (as opposed to being absent elsewhere). The fact, therefore, that the senior wife in this case had been living elsewhere does not make the fact of Yajnavalkya inapplicable. Again, the text of Yajnavalkya, the commentary of Mitakshara on it, the verse of Katyayana and the text of Vishnu cited by Balambhatta in the gloss of the Mitakshara and also in Colebrook's Digest, Book IV, the two latter Smritis used the word "Adushta" all these are merely

injunctions addressed to the husband as to what he should do during his lifetime, It may be that the husband is at liberty in disobey those injunctions?, vide *Annapurni Nachiar v. Forbes* 23 M. 1 : 8 Ind. Dec. 395. But those injunctions do not touch the relative rights of the widows after the husband's death. These verses clearly prove the superior position of the senior widow. Once such superior position is established her preferential right to adopt after his death follows as an inference. In this particular case the evidence which merely shows that the senior widow was living apart from her husband for the last 25 years, apparently on account of the second marriage of her husband, does not justify us in calling her a "Dushta" or "Nishiddha". As my learned brother has pointed out, the case of unchastity attempted to be made against her has failed. I think no credence can be given to the evidence of the 6th and 9th witnesses for the plaintiff.

10. The last ground argued by the appellant on this portion of the case is that a prohibition against her adopting must be implied from the facts, of the case. It does not appear from the Subordinate Judge's judgment that any such point was raised in the Court below, but it is now said that the point was argued. Though, no doubt, a prohibition may be implied and need not always be expressed, such prohibition must be a case of a clear and necessary implication, and it is not for the Courts to embark on speculations as to what the husband might have done during his lifetime or might have wished if the point was expressly mentioned to him before his death. One may well say that, on the facts of this case, the husband, if he ever contemplated adopting during his lifetime, would not have associated the senior wife with him in such adoption. One may, perhaps, also say, that if he had left a Will expressly authorising an adoption he would probably have not authorised the senior wife to adopt. But, on the other hand, one may also say that he, not having done either of these things 3 C. W. N. 730 : 26 I. A. 246, was well content to allow the law to take its course as to what would happen after his death, and that, in the absence of any express prohibition against the senior widow, he left her to exercise the right which she has according to the Sastras, on account of her status as the senior widow, I do not think it is proper for Courts to speculate on probabilities of this kind for the purpose of inferring an implied prohibition. If the husband was, however, anxious that the senior widow should never adopt for him, he might have left a Will in which he might have stated that the senior widow should not adopt for him, in case his widows should contemplate adoption for him. In the absence of such an express prohibition from him or some equally clear indication of his intention, an implied prohibition cannot be inferred in this case. It was held in *Lakshmibai v. Sarasvatibai* 1 Bom. L. R. 430, that a prohibition ought not to be inferred from the mere fact that the husband and wife were living apart. In the case relied on by the learned Vakil for the appellant in *Dnyanoba v. Radhabai P. J.* (1894), p. 22, the facts were much stronger; the wife was actually living in adultery with another man.

11. Coming to the third point argued in the case that Exhibit IV is enough to satisfy the requirements of law in connection with the senior widow, I agree with my learned brother in thinking that it does not. We are not here concerned with a question of obtaining her

assent merely as that of a sapinda. On the other hand, until the senior widow clearly gives up her right to adopt, the junior widow has no such right. The letter in which she states that she had obtained the assent of the sapinda and was merely asking the senior widow's views followed by the silence of the latter cannot be construed to mean that the senior widow has waived her preferential right and authorised the junior widow to adopt. Not until she does any act amounting to this, can the right to adopt devolve on the junior widow. The facts in this case fall short of this.

12. One or two points have also been argued before us, namely, that the consent of the sapinda in Exhibit C is not a valid consent. The Subordinate Judge has found it to be so.

13. But we think it unnecessary to express an opinion on this question, in view of our finding with reference to the right of the senior widow not being waived. If it were necessary, I would agree with the appellant's contention, that there was no misrepresentation made to the sapinda merely because the third defendant was asserting a prior adoption by her husband. But I would hold that Exhibit C is not a valid consent, because, instead of giving the authority as one necessary and proper in the circumstances of the family, which is what a sapinda ought to address himself to, he gives it, in order to give effect to the wishes of the husband thus believing in the alleged prior adoption by the husband which we have already found to be not proved.

14. I agree that the appeal should be dismissed with costs. The memorandum of objections is dismissed.