Privy Council Appeal No. 61 *of* 1947

Muthuswami Thevar – – – – – – – – *Appellant*

v.

Chidambara Thevar – – – – – – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1948

Present at the Hearing :

LORD NORMAND
LORD OAKSEY
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated the 12th January, 1945, reversing a judgment and decree of the Subordinate Judge of Ramnad dated the 11th August, 1943.

By an Order in Council dated 19th February, 1946 the appellant was granted special leave to appeal to His Majesty in Council, leave to appeal having been refused by the High Court on the ground that the case did not fulfil the requirements of the Code of Civil Procedure as to value. On the hearing of this appeal the respondent took the preliminary objection that the value of the subject matter in dispute on appeal did not amount to Rs.10,000 and that leave to appeal should not have been given. The respondent had appeared on the petition for leave to appeal when the question of value was fully debated. The Order in Council did not reserve liberty to the respondent to raise this matter again at the hearing, and in their Lordships' opinion the preliminary objection is not now open.

The substantive question raised in the appeal is whether the respondent was validly adopted by one Chinnamadappa. The matter involves two questions. The first whether there was an adoption in fact, and the second, if there was an adoption, whether it was rendered invalid by the circumstance, alleged by the appellant but denied by the respondent, that the respondent at the time of the adoption was a married man. The Subordinate Judge answered these questions in favour of the appellant; the High Court answered them in favour of the respondent.

The material facts are these:—

Chinnamadappa and his elder brother Muthirulappa, and the appellant, who is the only son of Muthirulappa, were members of a joint Hindu family. Chinnamadappa had a daughter, the second defendant in this suit, who has since died, but no son. The respondent is the son of Arunachala who had married a sister of Chinnamadappa. The parties are Sudras. It is alleged by the respondent, but denied by the appellant, that on the 19th October, 1934, a ceremony took place at which the respondent was validly adopted by Chinnamadappa. At this time the

respondent was a grown up man; he himself put his age at about twenty-three or twenty-four, and the learned Subordinate Judge thought that he was somewhat older. On the 3rd November, 1934, Chinnamadappa executed a deed of adoption (*ex D*-1) before the Sub-Registrar. The deed recites that the respondent, the younger son of Arunachala was taken in adoption by Chinnamadappa on the 19th October, 1934, with the consent of Chellamuthu the elder uterine brother of the respondent according to law and according to Shastras. The deed was signed by Chinnamadappa, and there were six witnesses, including Muthirulappa and Chellamuthu, but not including Arunachala. The deed was duly registered on the 6th November, 1944. Chinnamadappa died in December, 1934.

On July 20th, 1936, the respondent presented a petition to the Tahsildar of Kamudhi alleging his adoption by Chinnamadappa, and that he and Muthirulappa were enjoying the family properties as a joint family, and praying that the name of the petitioner might be included as a joint pattadar of the properties mentioned and that the patta might be issued in his name and the name of Muthirulappa. In answer to this petition Arunachala made a statement (*ex. P7(c)*) before the Tahsildar in which he said that he had not given the respondent in adoption to Chinnamadappa, that the respondent and Chellamuthu were living in his family alone, that he did not know anything about the adoption deed, and that he and his two sons were living together though separated, and that the respondent was then thirty-five years old.

On the 18th April, 1938, Arunachala filed two petitions (*exs. P3 and P3 (a)*), one before the Tahsildar of Kamudhi, Ramnad Estate, and the other before the Revenue Officer, Southern Circle, Ramnad Estate. In both the petitions, which are in similar terms, Arunachala stated that he did not give the respondent in adoption to anybody; that the respondent would be bound to do the funeral ceremony to himself and that the respondent had been residing on the petitioner's property since childhood up to that date. On the 11th July, 1938, the Estate Manager of Ramnad passed an order to the effect that a joint patta would be issued unless a suit was filed for adjudication of the dispute as to the adoption by a civil court. On the 19th September, 1938, the appellant brought the suit from which this appeal arises in the court of the Subordinate Judge of Ramnad for a declaration that the alleged adoption of the respondent by Chinnamadappa never in fact took place, and that if it did, it was invalid. Arunachala had died before the hearing of the suit, but his statements (*exs. P7 (c), P3* and *P3 (a)*), which were against his pecuniary and proprietary interest were proved.

It is well settled under Hindu law that the only persons who can give a son in adoption are the father and the mother, and in the lifetime of the father the mother cannot act without his permission. The main question in this appeal is whether a valid adoption of the respondent is proved in view of the denial by the father that he ever gave the respondent in adoption. The burden of proving an adoption rests on him who asserts it, and the burden is a heavy one. In *Bahadur Singh* v. *Bijai Bahadur Singh* 57 I.A. 14 at p. 19, Lord Buckmaster in delivering the opinion of their Lordships referred to the very grave and serious onus that rests upon any person who seeks to displace the natural succession of property by alleging an adoption.

The direct evidence as to the holding of the alleged adoption ceremony consists of six witnesses called by the appellant who say that no such ceremony took place, and that if there had been such a ceremony they themselves would have been invited to it; and five witnesses called by the respondent, who say that they were present at the ceremony and that Arunachala gave the respondent in adoption. All the witnesses seem to have been friends or relations of the parties and there is no corroboration of their testimony such as is often found in cases of disputed adoption. No priest or local official who might be regarded as disinterested was called; no cards of invitation to the ceremony were produced, and there was no photograph of the ceremony. The direct evidence in support of the

ceremony was therefore weak and it is not surprising that it did not impress the trial Judge. Mr. Justice King who delivered the judgment of the High Court based his view that the adoption was proved mainly on the adoption deed, but the judgment is to a large extent vitiated by the Court having placed the burden of proof on the wrong shoulders. Towards the close of his judgment Mr. Justice King said " We are of the opinion that the plaintiff in this suit has entirely failed to prove that the adoption of the first defendant, which has been solemnly recited in a registered deed, never took place." There is no doubt force in the argument that it is unlikely that Chinnamadappa would have executed a formal deed of adoption before the Sub-Registrar, if he knew that no adoption had in fact taken place. This argument however does not carry the respondent far enough. It may be that a ceremony did take place as alleged, and that Chinnamadappa believed the adoption to be valid. He may have been told that Arunachala approved the adoption, as would be natural, since it was to the benefit of himself and his family, and that he had asked his eldest son Chellamuthu to deputise for him in the physical act of handing the respondent over in adoption. But the fact that Chinnamadappa supposed the adoption to be valid would not help, if in fact Arunachala did not consent to it. The statement of Arunachala that he did not give the respondent in adoption is corroborated by the terms of the adoption deed which refers only to the consent of the respondent's brother, whilst his statement that he knew nothing about the adoption deed is corroborated by the omission of his name as an attesting witness. The reason given in evidence for this omission was that Arunachala was unable to write, but as the learned Subordinate Judge observed he could have affixed his thumb impression.

Other matters on which the Judges of the High Court relied as indirect evidence in support of the adoption can be disposed of shortly. Great importance was attached to the fact that Muthirullappa had agreed to the adoption although it introduced a new member into his family, and reduced his share in the family property. The appellant says that his father was hostile to him and that this explains his support of the adoption. But, apart from this, a Hindu, in relation to adoption, has to consider matters other than financial benefit, and Muthirulappa may have thought that it was proper that his brother, who had no son, should be encouraged to adopt a nephew, and so derive spiritual benefit. The High Court further considered that the documents produced in evidence showed that both the appellant and the respondent had taken part in the management of this estate, whilst it was conceded that all the most important documents belonging to the family, including more than sixty title deeds, were in the possession of the respondent. But as the discussion of the evidence by the learned Subordinate Judge shows the muchilikas relating to the estate were executed after the death of Chinnamadappa by Muthirulappa, and after his death by the appellant and not by the respondent; and the bulk of the receipts for dues paid to the estate were in the name of the appellant. The respondent produced two such receipts D8 and D8 (*a*) which were for small sums and given on the same day and their Lordships think no great significance can be attached to them. The possession by the respondent of family documents can be explained on the footing that he received them from Muthirulappa who always supported the adoption. In the result their Lordships see no reason for rejecting the statement of Arunachala and agree with the learned Subordinate Judge in thinking that a valid adoption of the respondent by Chinnamadappa has not been proved.

On this view of the matter the question whether the respondent was married, and if so what effect that had on the validity of the adoption, does not arise. As, however, the question led to a difference of opinion in the courts in India, their Lordships would observe that they think the evidence establishes that the respondent was married some years ago. There is evidence that he had divorced his wife before the date of the adoption ceremony, but according to the Dattaka Chandrika, which is regarded as

authoritative in the Province of Madras, marriage concludes the period within which a Sudra may be adopted (*Vythilinga* v. *Vijayathammal* I.L.R. 6 Mad., 43 and *Lingayya Chetti* v. *Chengalammal* (1925) I.L.R. 48 Mad., 407. If their Lordships had thought the fact of adoption proved, they would have held the adoption invalid on the ground of the marriage of the respondent.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Madras dated 12th January, 1945, be set aside and that the decree dated 11th August, 1943, of the Subordinate Judge of Ramnad be restored. The respondent must pay the costs of the appeal to the High Court and of this appeal.

(60419) Wt. 8062—31 180 8/48 D.L.

In the Privy Council

MUTHUSWAMI THEVAR

v.

CHIDAMBARA THEVAR

DELIVERED BY SIR JOHN BEAUMONT

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