

Mariammal Vs. Govindammal

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Court : Chennai

Decided On : Jul-16-1984

Reported in : (1984)2MLJ397

Appellant : Mariammal

Respondent : Govindammal

Advocate for Def. : Mr. B. Kumar

Judgement :

Swamikkannu, J.

1. The second plaintiff Mariamma, in O.S. No. 108 of 1974 on the file of the Subordinate Judge, Mayuram, is the appellant herein. The suit was filed by one Nagammal for partition and separate possession of the plaintiff's 1/6 share in all the suit properties which included both immovables and movables. Her daughter, Mariammal, was the third defendant. She is her only heir. Pending suit Nagammal died and therefore, the third defendant transposed herself as the second plaintiff as per order of the trial Court and has claimed half share in all the suit properties and for partition of the same.

2. The case of the plaintiff as stated in the plaint is as follows: One Chinnathambia Pillai had three wives, of whom first wife had predeceased him and the original plaintiff Nagammal and the first defendant Govindammal are respectively his

second and third wives. Kanagambujam, the second defendant, is the daughter of the first defendant. She died pending the suit and her legal representatives are defendants 4 to 7. The fourth defendant has also made some claim in respect of the suit properties independently and therefore, he has also been impleaded as the fourth defendant and now he also represents as a legal representative of the deceased second defendant. The entire suit properties, both movables and immovables, originally belonged to Chinnathambia Pillai. He died intestate on 23rd January, 1974 and as per law, the deceased first plaintiff Nagammal was entitled to 1/6th share and she demanded defendants 1 to 3 for a peaceful partition but as defendants 1 and 2 did not accede to her demand, she had instituted the suit.

3. The third defendant, who was transposed as the second plaintiff on the death of the first plaintiff filed a separate written statement contending that the plaintiff's case was not true, but however, she would claim partition of her 1/3rd share. She had not paid any court fee thereon. After the death of Nagammal, the third defendant got herself transposed as the second plaintiff and claimed half share in the entire suit properties.

4. The first defendant Govindammal both in her original written statement as well as in the additional written statement inter alia contended that the plaintiff is not entitled to the relief of partition prayed for; that very many particulars have been suppressed in the plaint and the action has been laid falsely. The allegation that Chinnathambia Pillai died intestate is false. On the other hand, he left a 'will' dated 14th December, 1958 bequeathing all his properties to all his heirs and each heir has now been in separate possession and enjoyment of the bequeathed properties. He has also settled some of his properties in favour of his grand-daughters, viz., defendants 5 and 6 and each of them has also been in separate possession and enjoyment of those properties. The fourth defendant Rajendran who is the only grand-son through the second defendant is his adopted son and it is he who has performed his obsequies. He has also been given very many properties under the will as a residuary legatee. In the plaint exaggerated value has been given for all the suit properties and in fact, the plaintiff has given fictitious outstandings running to several thousands of rupees; but the cash on hand on the date of death of Chinnathambia Pillai was not more than Rs. 2,000.

5. The deceased second defendant Kanagambujam in her written statement had stated that the fourth defendant was taken in adoption by her father, deceased Chinnathambia Pillai, that he had executed a settlement deed dated 31st May, 1959 whereby she had been given suit items 43, 44, 63, 64, 65, 84 and 85 in the plaint A schedule, that item No.66 of plaint A schedule had been purchased by her under a sale deed dated 9th July, 1970 and items 1 and 2 had been jointly purchased by her and her father, Chinnathambia Pillai.

6. The fourth defendant Rajendran has inter alia contended in his original and additional written statements that he is the adopted son of the deceased Chinnathambia Pillai, that he has been given properties by his adoptive father by means of a registered Inam settlement deed, dated 14th November, 1959 and the properties are items 18, 36, 37, 38, 46, 47, 50, 67, 69, 70, 71, 72 and 73 of the plaint 'A' Schedule, that he has also purchased separately items 48 and 68 of the plaint 'A' schedule under a sale deed, dated 13th June, 1966 and items 51 and 55 (items 54 and 55 have been repeated as items 81 and 82 in the plaint) of plaint 'A' schedule under a sale deed, dated 9th July, 1970 and these properties have been falsely included as if they are also available for division. The said Chinnathambia Pillai has also left a 'will' bequeathing properties whereby he has given 'properties to him as a persona designata besides, he being an adopted son and the 'Will' has been in force. He has disputed the will as propounded by the second plaintiff as a concoction.

7. The fifth defendant Indira in her written statement would state that she was given R.S. No. 162 measuring 1 acre 45 cents by her grand-father, Chinnathambia Pillai, by means of a settlement deed, dated 10th June, 1970 and since then she has been in possession and enjoyment of this property by paying kist and obtaining patta and therefore, the property is not liable for division.

8. The sixth defendant minor Kalaiselvi in her written statement has stated that she has also been given by her grand-father Chinnathambia Pillai two acres 40 cents in R.S. No. 139/IB and 90 cents in R.S. No. 179/4 under two separate settlement deeds, dated 20th March, 1971 and 1st May, 1972 and since then she has been in separate possession and enjoyment of these properties by paying kist and

obtaining patta and therefore, these properties cannot be included for division.

9. The seventh defendant Natesa Pillai has filed a memo adopting the written statement of the second and fifth defendants.

10. The original plaintiff Nagammal had filed a reply statement traversing all the allegations of defendants 1, 2 and 4 in their respective written statements.

11. On the above pleadings, after hearing both the sides, the trial Court recast the original issues and numbered them as follows:

(1) Whether the fourth defendant is the adopted son of the deceased Chinnathambia Pillai?

(2) Whether the alleged will dated 14th December 1958 is true, valid and executed by Chinnathambia Pillai in a sound disposing state of mind, as his last will?

(3) Whether the second defendant had not derived any title under the alleged two, sale deeds, dated 31st May, 1959 and another sale deed, dated 9th July, 1970?

(4) Whether the 4th defendant has not derived any valid title under the sale deeds dated 13th June, 1966 and 9th July, 1970?

(5) Whether the suit items 58 to 60, 61, 86 and 87 of Plaint 'A' schedule are liable for division?

(6) Whether the suit items 24, 25, 29, 40, 56 and 57 of the plaint 'A' schedule are the absolute properties of the first defendant having been derived from her mother, Chinnathai?

(7) Whether the suit items 20, 21, 43, 44, 63 to 66, 84 and 85 in the plaint 'A' Schedule are the absolute properties of the second defendant or were they acquired from out of the alleged funds of Chinnathambia Pillai?

(8) Whether the suit items 18, 36, 37, 38, 46, 47, 48, 50, 51, 52, 53, 54, 55, 67, 68, 69, 70, 71, 72 and 73 of the Plaint A schedule are the absolute properties of the fourth defendant?

(9) Whether the fourth defendant is the residuary legatee under the alleged will dated 14th December, 1958?

(10) Whether the properties comprised in R.S. No. 179/1B and 179/4 and R.S. No. 162 and R.S. No. 127/ 17 are no longer in existence in the family of Chinnathambia Pillai, and that they are not available for partition?

(11) Whether all or any of the movables as set out in the plaint 'B' Schedule are in existence and if so, whether they are available for partition?

(12) Whether the Court-fee paid is correct?

(13) Whether the present plaintiff is entitled to partition and separate possession of half share in all or any of the suit properties?

(14) To what other reliefs the parties are entitled?

12. Under issue No. 1, the trial Court held that the fourth defendant is the adopted son of the deceased Chinnathambia Pillai. Under Issue No.2, the trial Court held that the will is perfectly valid in entirety. Under issue No.9, the trial court held that the will Ex. B-9 contemplates that the fourth defendant is the residuary legatee and that he is entitled to all the remaining items of properties, both movables and immovables, as mentioned therein and belonging to Chinnathambia Pillai and answered the said issue in the affirmative and in favour of the 4th defendant. Under Issue No.3, the trial Court held that the purchase under Exs. B-11 and B-12, though jointly with Chinnathambia Pillai must have been exclusively for the deceased second defendant and in which Chinnathambia Pillai could have no right or possession. The reasons given for Exs.B-11 and B-12 will also hold good to the other purchase under Ex.B-3 and this is in respect of item No. 66 of the Plaint 'A' Schedule. This purchase is solely by the deceased second defendant herself and Chinnathambia Pillai does not come into the picture at all. The deceased second defendant had independent source of income. The purchase under Ex.B-3 must necessarily be exclusively by the second defendant herself out of her separate funds and therefore, she was the absolute owner of the properties under this document also. Thus, Issue No.9 was found in favour of the defendants. Under

Issue No. 4, the trial Court held that the fourth defendant has derived valid title under the transactions. This issue No.4 was found in favour of . the fourth defendant against the plaintiff. Under Issue No. 5, the trial Court held that the will Ex. B-9 is true and valid and the terms of the will have been fully given effect to by all the parties mentioned therein and therefore, the suit items 58 to 60, 86 and 87 of the plaint 'A' Schedule which are set apart for a charitable purpose are not liable for division. Under issue No. 6, the trial Court held that under Ex. B-10, the first defendant Govindammal gets those items as mentioned in this issue No. 6, and that Ex. B-21 is the Chitta entry standing in the name of the first defendant in respect of the properties. Ex.B-45 is the kist receipt issued to the first defendant and paid by her in 1964. There is nothing to show that these properties are the properties of Chinnathambia Pillai. Consequently, issue No. 6 was answered in favour of the first defendant and against the plaintiff. Under issue No. 7, the trial Court held that the deceased second defendant had sufficient income from the settled properties and from out of which the second defendant should have acquired these properties, viz., items 20, 21, 43, 44, 63 to 66, 84 and 85 of the plaint 'A' Schedule and this issue was answered accordingly and in favour of the defendants. Under issue No. 8, the trial Court held that the fourth defendant is the adopted son of the deceased Chinnathambia Pillai and the residuary legatee under the will Ex.B-9 and as such the fourth defendant has become the absolute owner of these items of properties in which the plaintiff could have absolutely no right, title or interest or even possession. Under issue No. 10, the trial Court held that the properties R.S. No. 179/1B, 179/4 and 162 have now ceased to be the properties of Chinnathambia Pillai and the property in R.S. No. 127/17 is not the property of Chinnathambia Pillai, but the property of the first defendant herself and therefore, these properties cannot be made liable for division. Under issue No. 12 the trial Court held that the plaintiff has absolutely no right in the movables as given in the Plaint 'B' schedule. The plaintiff has failed to show the existence of all the movables such as cash, outstandings, etc. This issue was therefore answered accordingly and in favour of the defendants and against the plaintiff. Under issue No. 12, the trial Court held that the plaintiff will have to pay the deficit court-fee under Section 37(l) of the Court-fees Act. The court-fee paid is not correct and the plaintiff has to pay additional court-fee on the market value of the properties on ad

valorem basis. Under issue No. 13, the trial Court held that the plaintiff is not entitled to any partition and separate possession of any share, much less half share in all or any of the suit properties. In the result, under issue No. 14, the suit was dismissed with costs. The plaintiff was directed to pay deficit court-fee under Section 37(1) of the Court Fees Act. Aggrieved by the decision of the trial court the second plaintiff Mariammal has preferred this appeal before this Court.

13. Mr. T.R. Rajagopalan on behalf of the second plaintiff-appellant herein mainly contends that the learned Subordinate Judge erred in holding that the fourth defendant-Rajendran is the adopted son of Chinnathambiah Pillai. It is further contended that non-examination of the first defendant-Govindammal who is the material witness regarding the alleged adoption of the fourth defendant by Chinnathambiah Pillai is fatal to the case put forward regarding adoption. According to the learned Counsel for the appellant, the learned Subordinate Judge erred in accepting the interested evidence of D. Ws. 7 to 9 regarding the alleged adoption. It is further contended that the adoption of a daughter's son is not approvable as the natural mother could not have been married to the adoptive father. It is further pointed out by the learned Counsel for the appellant that the learned Subordinate Judge failed to see that if the adoption alleged by the defendants had taken place in 1956, it is unnatural that Chinnathambiah Pillai would have left a will in respect of all his properties. Such a conduct according to the appellant clearly shows that the adoption as well as the will Ex.B-9 cannot be true.

14. On the other hand, Mr. B. Kumar, learned Counsel for the respondents herein contends that the learned Subordinate Judge is correct when he held that the adoption is valid. The learned Counsel for the respondents further submits that the will Ex. B-19 is perfectly valid in entirety and that the will contemplates that the fourth defendant is the residuary legatee and that he is entitled to all the remaining items of properties both movables and immovables as mentioned therein and belonging to Chinnathambiah Pillai. In other words, the contention of the learned Counsel for the respondents is that even if the adoption is to be held invalid, the will contemplates the fourth defendant only as residuary legatee and as such the fourth defendant is entitled to the properties given to him by the terms of the will. Under these circumstances, the points that arise for consideration in this appeal

are as follows:

(1) Whether the fourth defendant is the adopted son of the deceased Chinnathambia Pillai and whether the said adoption is valid in law?

(2) Whether the alleged will, dated 14th December 1958 is true, valid and executed by Chinnathambia Pillai in a sound disposing state of mind as his last will?

(3) Whether the second plaintiff-appellant herein had not derived any title under the alleged two sale deeds, one dated 31st May, 1959 and another dated 9th July, 1970?

15. The main point argued by Mr. T.R. Rajagopalan, on behalf of the appellant is that the adoption of the fourth defendant is not valid in law because the adoption of a daughter's son is not valid in Hindu Law. In support of his contention, the decision in *Minakashi v. Ramanada* I.L.R. (1888) Mad. 49, is relied upon by him for the proposition that it is a general rule of Hindu Law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state.

16. Mr. B. Kumar, learned Counsel for the respondents refers to the following passage in Mulla's Hindu Law, 15th edition, pages 596 and 597 which runs as follows:

Who may be adopted: Subject to the following rules any person who is a Hindu, may be taken or given in adoption:

(1) the person to be adopted must be a male;

(2) he must belong to the same caste as his adopting father; thus a Brahman cannot adopt a Kshatriya, a Vaishya or a Shudra; it is not necessary that he should belong to the same sub-division of the caste:

(3) he must not be a boy whose mother the adopting father could not have legally married; but this rule had been restricted in many recent cases to the daughter's son, sister's son and mother's sister's son. This prohibition, however, does not

apply to Shudras. Even as to the three upper classes, it has been held that an adoption though prohibited under this rule, may be valid, if sanctioned by custom.

17. John D. Mayne observes that 'The whole Sanskrit law of adoption is evolved from a few texts and a metaphor'. The metaphor is that of Saunaka, that the boy to be adopted must bear 'the reflection of a son' (Mayne on Hindu Law and usage, 11th edition, page 188). The texts are those of Manu, Vasihhta, Baudhayana, Saunaka and Sakala. Commenting on what Saunaka had said in describing the ritual of adoption that a son should be adopted the Dattaka Chandrika observed at page 14.

Reflection of a son-the resemblance of a son-or, in other words, the capability to have begotten by the adopter, through appointment and so forth. The Dattaka Mimansa adopts this view and introduces the further doctrine of 'Viruddha Sambandha' relationship as a bar to adoption.

A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (Dattaka) son. A son equal in caste, competent to discriminate between merit and demerit, and endowed with filial virtues, who is adopted (by the man himself), is known as the Kritrima son'. (Manu ix 168-169) 'of the man who has an adopted (Dattrima) son possessing all good qualities, that same son shall take the inheritance, though brought from another family'. (Manu ix 141).

An adopted son shall never take the family name and the estate of his natural father, the funeral cake follows the family name and the estate, the funeral offerings of him who gives his son in adoption cease as far as that son is concerned. (Manu ix 142).

Vasishtha says'(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause. (2) Therefore, the father and the mother have power to give, to sell and to abandon their son, (3) But let him not give or receive in adoption as only son (4) For, he must remain to continue the line of the ancestors. (5) Let a woman neither give nor receive a son except with her husband's permission. (6) He who desires to adopt a son, shall assemble his

kinsmen, announce his intention to the King, make burnt offerings in the middle of the house, reciting Vya Hritis, and take as a son a not remote kinsman just the nearest among his relatives.' This is cited by Lord Hobhouse in Sri Bulusu Gurulingaswami v. Sri Balusu Ramalakshamma, .

18. Nanda Pandita and his followers maintain that certain relations such as a brother or an uncle, or the son of a daughter, or of a sister, or the mother's sister, or the like, should not be adopted by a twice-born person. No such rule is laid down in any earlier commentary. Nanda Pandita deduces the rule from two texts one of which is said to be a text of Saunaka and the other of Sakala. Sarkar Sastri says that these two texts of doubtful import are not noticed by any commentator of note and neither Saunaka nor Sakala has been recognised as a legislator and their names are not found in most of the commentaries on positive law. The texts are as follows:

which means: 'A daughter's son and a sister's son are made sons by Shudras; among the three tribes beginning with the Brahmana, a sister's son is not (made) son somewhere (or anywhere)'. -Saunaka

which means - 'A sonless twice born man shall or should adopt, a son of a Sapinda or also next to him a son of a Sagotra; and in default, of the son of a Sagotra, shall or should adopt one born of a different gotra, except the daughter's son, the sister's son and mother's sister's son' - Sakala.

19. According to the Smritis, every man is by birth a Sudra; it is by learning the sacred literature that a man becomes twice-born. The privilege of studying the sacred literature is, no doubt, denied to the Shudras as well as to the families of the twice-born classes. But the status of being twice-born depends on the acquisition of knowledge of the sacred literature Manu ordains that a twice-born man shall abide with the preceptor and study the Vedas for thirty-six years or a half or a quarter of that period or until knowledge of the same is acquired. The consequence of omitting to do the same is thus declared by Manu.

which means - 'That twice-born man, who without studying the Vedas, applies diligent attention to anything else, so-on falls, even when living, together with his

descendants, to the condition of a Sudra.

Hence, the males of the twice-born classes, who have no knowledge of the sacred literature, are like their families, in the same category as Sudras that is, they remain such as they are by birth.

20. There is a text of Yama, which appears to support the adoption by a twice-born person, of his daughter's son:

which means - 'The Homas or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son, by the verbal gift and acceptance alone, that is accomplished this is declared by the Lord Yama.

This text of Yama cannot be contended to apply to Sudras only and the twice-born classes because, in construing passages of law, the religious disability of the Sudras, to whom the privilege of performing sacrifices was denied, has to be borne in mind.

21. According to Golapchandra Sarkar Sastri, 'Nanda Pandita was neither a lawyer nor a Judge, but merely a Sanaskritist and teacher of the sacred literature and the above prohibition may be fairly taken to be intended by him as directory only, and a rule of the Law of Honour. Nor does he say that an adoption made in contravention of that prohibition is invalid as he has done in respect of another rule: see his Dattaka-Mimansa V 56, (A Treatise on Hindu Law by G. Sarkar Sastri, Fifth Edition, page 218). It should be observed that Nanda Pandita expressly prohibits a brother, an uncle, and a daughter's, a sister's and a mother's sister's sons, of whom the last three only are to be excluded, according to the texts of Sakala and Saunaka : and Sutherland lays down the rule that a boy whose mother is prohibited for marriage to a man by reason of relationship, cannot be adopted by him.

22. In Raghavendra Rao v. Jayarama Rao : (1897)7MLJ134 , the Madras High Court treated it as the settled law, except where there is usage to the contrary, that the natural mother of the boy to be adopted, should be a person who, in her maiden state, might lawfully have been married to the man for whom the adoption

is made. *Bhagwan Singh v. Bhagwan Singh* . reversing I.L.R. (1895) All. 294 : (1895) A.W.C.N. 167. *Lali v. Murlidhar Ishwari Prasad v. Rai Hari Prashad* I.L.R. (1927) Pat. 506. See also *Pattu Lal v. Parbati* . *Fai Singh v. Bijai Pall* I.L.R. (1905) All. 417, is the case wherein the Judicial Committee reversing a Full Bench of the Allahabad High Court has finally laid down and established the invalidity of adoptions contravening this rule in all cases to which the general Hindu Law applies, in the absence of custom to the contrary. On the same ground, it is unlawful to adopt a brother, a step-brother or an' uncle, whether paternal or maternal. (*Dattaka Mimansa* V. 17) *Sriramulu v. Ramayya* I.L.R. (1880) Mad. 15, *Minakshi v. Ramanada* I.L.R. (1888) Mad. 49.

23. The Bombay High Court has confined the restrictive rule to the three specific instances of the daughter's son, sister's son and mother's sister's son *Ramachandra v. Gopal* I.L.R. (1908) 32 Bom. 619. *Walbai v. Heerbai* I.L.R. (1911) 34 Bom. 491. *Yamnavi v. Laxman* I.L.R. (1912) 36 Bom. 533. *Subrao v. Radha* I.L.R. (1928) 52 Bom. 497. It has accordingly treated the adoption of a mother's brother's son, a father's sister's son, a half-brother, a father's brother's son, a daughter's husband or of the husband's brother as good in law. It makes no difference that the adopter has himself been removed from his natural family by adoption; for adoption does not remove the bar of consanguinity which would operate to prevent inter-marriage within the prohibited degrees. (*Moothia v. Uppen* (1858) Mad. D. 117, *Lal Harihar v. Thakur Bajrang* . This rule must of course, be understood as excluding only the sons of a woman whose original relationship to the adopter was such as to render her unfit to be his wife. A wife's brother, or his son, may be adopted and so is a grand nephew. A wife's brother or his son, may be adopted, and so may the son of a wife's sister or of a maternal aunt's daughter. (*Mayne on Hindu Law and Usage*, Eleventh Edition, Page 232).

24. The Calcutta High Court has after a full examination of all the authorities, dissenting from the Bombay High Court and agreeing with the Madras High Court affirmed in *Haridas Chatterjee v. Manmathanath Mukherji*, I.L.R. (1937) Cal. 265, dissenting from *Naran Chunder v. Harroo Mohan Chuckerbutty* I.L.R. (1881) Cal. 41, the rule that a Hindu of the regenerate classes cannot adopt a person whose mother the adopter could not have legally married and held that the adoption of a

brother's daughter's son is invalid under the Bengal school also.

25. The restrictive rule applies to the three higher castes but not to the Sudras. *Rah Koomar v. Bissessur* I.L.R. (1884) Cal. 688. *Subrao v. Radha* : AIR1928 Bom295 , *Kalappa v. Shivappa*, : AIR1938 Bom132 . *Bhagwan Singh v. Bhagwan Singh* I.L.R. (1899) IndAp 153 : I.L.R. 21 All. 412 (P.C.), *Maharajah of Kolhapur v. Sundaram* : AIR1925 Mad497 , *Iswari Prasad v. Rai Hari Prasad* I.L.R. (1927) Pat. 506, *Hanumi v. Guthya* (1947) 52 Mys. H.C.R. 407 The Sudras may adopt a daughter's or sister's son. According to the Mayukha they are the most proper to be adopted. (V Mayukha IV.)

26. In *Chinna Nagayya v. Pedda Nagayya* I.L.R. (1878) Mad. 62, it was held that a mother's sister's son may also be adopted among Sudras. In the Punjab such adoptions are common among the Jats, and this laxity has spread even to Brahmins, and to the orthodox Hindu inhabitants of towns, such as Delhi and to the Borah Brahmins in the United Provinces (Mayne's Hindu Law Eleventh Edition p.233). They are also permitted among the Jains. In Southern India, even among the Brahmins including Nambudri Brahmins of Malabar, such adoptions are undoubtedly common and are valid by custom *Vayidinada v. Appu* I.L.R. (1866) Mad. 44, *Vishnu v. Krishnan* I.L.R. (1884) Mad. 3, *Appayya v. Vengu* : (1905)15MLJ211 , *Sooratha Singa v. Kanaka Singa* I.L.R. (1920) Mad. 867 : 12 L.W. 245, *Visvasundara Row v. Somasundara Row* I.L.R. (1920) Mad. 876, *Simhadri v. Satyanarayana* : AIR1945 Mad487 , *Navaneethammal v. Kamalammal* : AIR1947 Mad131 . In the United Provinces the adoption of a step brother is allowed; among the Borah Brahmins even a sister's son may be adopted. *Phundo v. Jangi Nath* I.L.R. (1893) All. 327, *Chin Sukh Ram v. Parapati* I.L.R. (1893) All. 53. In Western India also such adoptions are permitted. It is also said that in the Deccan a younger brother may be adopted, and though the adoptions of uncles is forbidden, a different reason is alleged for the prohibition *Mallapa v. Gangava* I.L.R. (1919) 43 Bom. 209. Amongst Purbia Kurmis who have adopted the ceremony of the investiture with the sacred thread and declared themselves to be Chattris, an adoption within the prohibited degrees of relationship is valid. *Jivan Lal v. Kallumal* I.L.R. (1906) All. 170. There is also a custom recognising the validity of the adoption of a daughter's son among the Khattris of the town of

Amritsar and among the Deshastha Smarta Brahmins in Dharwar District of the Bombay province *Paramanund v. Shiv Charan* I.L.R. (1921) Lah. 69, *Roshan Lal v. Samar Nath*, I.L.R. (1938) Lah. 173, *Sundara Bai v. Hanumant* I.L.R. (1932) 56 Bom. 298, *Daso Venkatesh v. Ramachandra*, I.L.R. (1938) Bom. 810.

27. A singular extension was given to this rule by Nanda Pandita. According to him, a widow could adopt only the son of a person whom she could have legally married and therefore she could not adopt her brother's son. (*Dattaka Miamansa* 11, 33, 34). This view has been finally pronounced against by the Privy Council in *Puttu Lal v. Parabati Kunwar*, , as an unwarranted extension not based on the authority of any of the Smritis, for, the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband. The test of eligibility for adoption in such a case is the test which would have applied had the adoption been made by the husband himself in his lifetime (*Mayne's Hindu Law*, 11th Edition p. 234).

28. In. *Raghavendra Rao v. Jayarama Rao*, 7 M.L.J. 134 : I.L.R. (1897) Mad. 283, (see also *Ramakrishna Row v. Subbamma Row*, 39 M.L.J. 183 : 12 L.W. 155 : I.L.R. (1920) Mad. 830, it was held that as there can be valid marriage in cases where the relationship, arises from mere affinity as distinguished from consanguinity, though it be *Virudha Sambandha* or contrary relationship, so a man can validly adopt the son or the daughter's son of his wife's sister.

29. The following passage in *Mulla's Hindu Law*, 15th edition at page 696 regarding Shudras may usefully be referred to, which runs as follows:

The Hindus are divided into two main divisions, namely, (1) the regenerate castes, and (2) the Shudras. Legally Shudras merely denotes one of the two main genres among Hindus. The Smritis divided Hindus into two large classes, viz., the twice-born or the regenerate and the Shudras. According to the Smritis, every person is by birth a Shudra and only becomes regenerate (twice born) by studying the sacred literature. In *Subbarao v. Radha* I.L.R. (1928) 52 Bom. 497, *Madgavkar, J.*, observed: The Sanskrit texts which lay down certain functions and duties of the four main castes in Hindu society as it might have existed many centuries ago, are not applicable at the present day when function and legal caste do not coincide.

The origin of caste is like-wise not very relevant. It is generally agreed that castes arose, partly from the division of classes and functions and partly from the contest between the fairer Aryan with the darker Dravidian, as is sufficiently proved by the Sanskrit word Varna or colour for caste. But colour, no more than function, is a test of caste, the Shudra of the North being often fairer than the Brahmin of the South. The tendency of occupations to be hereditary in society which ceased to progress and the crystalization of the idea of caste and its abnormal growth over a large area such as India are matters of sociological interest but throw little legal light on the question in issue. Even at the present day, the principle that caste springs from birth and cannot be changed is not unchallenged by ethnologists, who point out that misgeneration and the absorption of the aboriginal inhabitants into Hinduism have existed for centuries and have not stopped. This process has also been recognised by the Courts. It suffices to cite cases such as *Sahdeo Narain Deo v. Kusum Kumari*, 14 M.L.J. 476 : 18 L.W. 597 : I.L.R. 2 Pat. 230 : (1932) 50 I.A. 58 : 71 I.C. 769 : A.I.R. 1923 P.C. 21, where such a process of absorption including the custom of adoption barely a century old was recognised by their Lordships of the Privy Council.

30. In *Minakshi v. Ramanadha* I.L.R. (1888) Mad. 49, the Madras High Court held that in the case of marriage, there are three prohibitions, namely, the couple between whom the marriage is proposed should not be sapindas; they should not be sagotras; and there should be no Viruddha Sambandha or contrary relationship as would render sexual connection between them incestuous. The question that was before the Full Bench was whether there can be valid adoption under the Hindu Law if a legal marriage is not possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. In the case before the Full Bench, the adoptee's mother was a sagotra of the adoptive father, and so, there could be no legal marriage between them. It was not necessary therefore for the learned Judges in *Minakshi's* case to consider whether the Viruddha Sambandha rule against marriage was mandatory or not.

31. In *Abhiraj Kuer v. Debenbra Singh* : [1962]3SCR627 , it is observed as follows:

We are not aware of any decision of any of the High Courts where Nanda Pandita's rule against Viruddha Sambanda adoption has been considered to be a mandatory prohibition. For the reasons discussed above, we are of opinion that this rule introduced by Nanda Pandita is only a recommendation and consequently it is of no avail to the appellant to show that the adoption of wife's sister's daughter's son is invalid.

32. It was held in *Abhiraj Kuer v. Debendra Singh* : [1962]3SCR627 , that a marriage of a Hindu with his wife's sister's daughter is not invalid in law even though it may not be liked by certain people. The Madras High Court in *Simhadri v. Satyanarayana* : AIR1945 Mad487 , has held that the rule that no boy Can be validly adopted whose natural mother in her maiden state could not be married by the adoptive father had been overridden by custom and that an adoption of a boy whose natural mother was born in the gotra of the adoptive father was perfectly valid in the Madras Presidency. In this regard reference can be made to the decisions in *Chandi Charan v. Nabgopal* : AIR1957 Pat365 , *Gopalachariar v. Krishnamachariar* : AIR1955 Mad559 . But in the absence of any such custom the adoption amongst the twice born classes of a daughter's son, the sister's son, or the mother's sister's son is certainly not valid. *Ado Rai v. Huro Rai* : AIR1958 Pat233 and *Deoki Nandan v. Madanlal* (1957) An W.R. 358. In *Vayidinada v. Appu*, I.L.R. (1886) Mad. 44, it was held that in Southern India, the custom which exists among Brahmins of adopting a sister's or daughter's son is valid.

33. In *Minakashi v. Ramanada* I.L.R. (1888) Mad. 49, which we have already referred to, the suit was brought by one Appa Sastri to set aside an adoption. Appa Sastri had two sons. Kachappa Sastri was the elder and Krishna Sastri was younger. On the 19th September, 1876, Krishna Sastri died, leaving a widow named Minakshi Ammal and Kachappa Sastri died in June, 1877, leaving a minor son. In August, 1877, Minakshi Ammal adopted defendant No.2 Chinnappien. It is admitted that his mother was a sagotra of Krishna Sastri and it is found by the Courts below that Krishna Sastri authorised his wife to adopt, that the plaintiff gave his sanction to the adoption and that the second defendant was accordingly adopted by the first defendant. The plaintiff's case was that as no legal marriage was possible between Krishna Sastri and the mother of the second defendant in

her maiden state, the adoption was invalid. The District Munsif held that the Hindu Law contains no such prohibition as is mentioned above and upheld the adoption, but, on appeal, the District Judge set aside the adoption on the ground that the plaintiff's contention was well founded. The Judgment of the learned District Judge was confirmed by the High Court. The law laid down in this decision is still good law. It was observed in this case at pages 54 and 55 as follows:

Marriage, niyoga and adoption were alike ordained from a religious point of view by ancient writers on Hindu Law for the production of a son competent to offer annual and funeral oblations with efficacy, and Sutherland referred to the law of marriage as to what is and is not incestuous connection, probably because it is the law now in force, whilst the commentators, referred to the law of appointment and explained it by reference to the law of marriage because the object common to marriage and niyoga was alike to prevent incest. It does not seem to us that in substance there is any error whether the rule of prohibited connection which is taken as a guide is taken from the one or the other, provided special cases of deviation from the rule referable to other ancient practices are recognised as exceptions to the general rule when they are proved by usage. As to the argument that the expression 'Virudha Sambandha' or contrary relationship or prohibited connection is applied by writers on Hindu marriage to relationship other than sapinda or sagotra relationship, it is perfectly true; but it does not follow that sapinda and sagotra relationship does not render the connection equally incestuous. It would be monstrous to say and there is no authority for the statement, that a brother might be appointed to beget a child upon his sister for her husband; and marriage is prohibited among Brahmans in Southern India between a girl and a boy who are of the same gotra, because they stand to one another in the relation of brother and sister as being descended from the same paternal ancestor.

Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of Putrika Putra; and in the case of a brother, if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother

as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration as a general rule. The case before us is not one referable to any authorised ancient practice or text; nor was there any plea or evidence of a special usage.

34. In *Chinna Nagayya v. Pedda Nagayya*, I.L.R. (1878) Mad. 62, it was held that adoption of the mother's sister's son is valid among Sudras. The rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally inter-married, is not binding on Sudras. In *Subba Rao v. Radha*, : AIR1928 Bom295 , it was held that adoption of a sister's son amongst the three twice born castes is prohibited and invalid, whilst among Sudras it is valid. In *Bhagwan Singh v. Bhagwan Singh* I.L.R. (1899) All. 412 : L.R. (1899) 26 IndAp 153, it was held that the adoption of a mother's sister's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya and Vaisiya, equally with the adoption of a daughter's son or a sister's son, is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is now not competent to a Court to treat them as open to question in this respect.

35. On a careful reading of the decisions on the point, we find that as a general rule, a daughter's son cannot be adopted and it is invalid in law unless the custom of adopting a daughter's son is proved satisfactorily among the community to which the parties belong. When once a custom is pleaded, the said custom must be established by satisfactory evidence and this burden cannot be discharged by contending that the persons claiming the custom can be classified only as Shudras. Even if a rule of ancient Hindu Law is only recommendatory in nature, yet when once custom is pleaded against the said rule, it is but necessary in order to uphold the said custom, the said custom should be established by satisfactory evidence as prevalent in the community for a long time without any interruption. It is of the essence of special usages modifying the ordinary law of adoption that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they

possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. For the sake of completion, it should be mentioned that in the instant case before us, the adoption is said to have taken place on 11th June, 1956, that is, prior to the coming into existence of the Hindu Adoptions and Maintenance Act, 1956, which came into operation on 21st December, 1956. This is not retrospective in its operation.

36. In the instant case before us, the parties belong to Vellala community of Thanjavur District. D.W.8 is the natural father of the fourth defendant, Rajendran. He deposed that he gave his only son Rajendran in adoption to Chinnathambia Pillai. D.W.8 had married Kanakambujam, daughter of the said Chinnathambia Pillai. The ceremony relating to the adoption took place at about 10 A.M., on 11th June, 1956 in the house of the said Chinnathambia Pillai at Poongudimoolai village, Nannilam Taluk, Thanjavur District. According to him, sacred fire was lit and mantras were chanted at the time of the ceremony. D.W.8 and his wife Kanakambujam were asked to say as follows:

Accordingly, himself and his wife gave their son Rajendran in adoption, asking Chinnathambia Pillai, to accept Rajendran as his adopted son. D.W.8 further deposed that during the ceremony Chinnathambia Pillai, his eldest wife Nagammal and his younger wife Govindammal took Rajendran as their adopted son saying that they have accepted him as their adopted son. Rajendran was about six years at that time. The prohibitor who officiated during the ceremony, is dead. D.W.8 in his deposition stated as follows:

37. The Smritis undoubtedly prohibit the adoption of an only son, Vasishta and Baudhayana say 'Let no man give or accept an only son, as he must remain for the obsequies of his ancestor. Saunaka says 'By no man having an only son is the gift of a son to be ever made'. From these Nanda Pandita infers a prohibition against accepting also, and says that the offence of extinction of lineage, denounced by Vasishta, is incurred by both giver and receiver. The Mitakshara, while quoting the above text of Vasishta expresses its opinion that an only son must not be given in adoption (vide Mayne on Hindu Law and Usage 11th Edn. page 228) *Bulusu Gurulingaswami v. Balusu Ramalakshamma* 9 M.L.J. 67 :

38. D.W.7 Govindasamy, aged about 53 years belonging to the same Vellala caste deposes that he attended the ceremony. He corroborates the evidence of D.W.8 regarding the adoption ceremony. D.W.7 Govindasamy does not say about any custom prevailing in Vellala community taking a daughter's son as an adopted son. The evidence of the fourth defendant as D.W.9 relating to the ceremony said to have taken place at the time of his adoption cannot be given much credence because admittedly he was about six years of age at the time of adoption. He was aged 27 in 1977 when he deposed before the lower Court and when he gave the details about the ceremony such as his natural father and mother taking him physically and handing him over to Chinnathambia Pillai, his evidence cannot be given much weight. Chinnathambia Pillai died in 1974. D.W.9 states that he was with Chinnathambia Pillai till Chinnathambia Pillai died. The learned Subordinate Judge himself observed in paragraph 18 of his judgment that there is some artificiality in the evidence of D.W.7 with regard to the very minute particulars of the ceremony he was said to have observed at the time of the adoption such as the actual words used by Chinnathambia Pillai at the time of receiving the boy from the natural parents and the handing over the boy to his two wives, the adoptive mothers, the mantram uttered by 'Prohit' and such other things. In our view, much importance cannot be given to the evidence of D.W.8 Natesa Pillai who is no other than the natural father of the fourth defendant Rajendran. We are of the opinion that in the instant case the evidence of D. Ws. 7 and 8 is not adequate and satisfactory so as to hold that in Vellala Community of Thanjavur district, there is a custom that a daughter's son can be adopted and the same is also the practice in that part of the country. We also hold that the evidence of D. Ws. 7 and 8 is not adequate and satisfactory to hold that an only son among the Vellala community of Thanjavur district can be given in adoption. Merely on the ground that there is no contra evidence, we are unable to accept the unnatural evidence of both D. Ws. 7 and 8 regarding the alleged adoption of the fourth defendant Rajendran. Even if it is to be held that the ceremonies were actually performed during the alleged adoption, yet inasmuch as the custom claimed to be prevalent in the community viz., the adoption of a daughter's son and the custom of giving the only son in adoption not having been proved we have no hesitation to

set aside the finding of the learned Subordinate Judge that the adoption of the fourth defendant . by Chinnathambiah Pillai is valid. In arriving at this decision, we have also taken into consideration the relevant documents in this respect in chronological order, viz., Ex.B-9, dt. 14th December, 1958, Ex.B-1 (13th June, 1966), Ex.B-2 (9th June, 1970), Ex.B-64 (23rd December, 1970), Ex.B-28 (8th April, 1972), Ex.B-31 (26th August, 1972), Exs.B-32 to B-37 (photos of the year 1972 when the fourth defendant's marriage had taken place). Ex.B-38 (28th August, 1972) and Ex.B-30 (28th January, 1974).

39. Mr. B. Kumar, learned Counsel for the respondents herein refers to the following passage in Mulla's Hindu Law, 15th edition, at page 127 regarding the daughter's son which runs as follows:

(v) The daughter's son occupies a peculiar position in Hindu Law. He is a bhinnagotra sapinda or bandhu, but he comes in before parents and other more remote gotraja sapindas. The reason is that according to the old practice it was competent to a Hindu, who had no son to appoint a daughter to raise up issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called putrika putra became the son of her father. Such a son was equal to an aurasa or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. Although the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically next after the male issue, the widow and the daughters being simply interposed during their respective lives. Also see cases in Karupai v. Sankaranarayanan 13 M.L.J.398 : I.L.R. (1904) Mad. 300, Babui Rita v. Mal Puren (1916) 1 PL.J.581 : 38 I.C. 44, Ghanta China v. Moparthy , 'In regard to the obsequies of ancestors,' says the Mitakshara, 'daughter's sons are considered as son's sons.

40. In the instant case, as already mentioned by us the custom pleaded, namely that the adoption of a daughter's son as well as the giving of an only son in adoption by the natural parents is recognised in the Vellala community of Thanjavur district, in our view, has not been established by the evidence of D. Ws.

7 and 8. The mere description of the fourth defendant as the adopted son of Chinnathambia Pillai in the documents relied on by the defendants cannot afford as evidence to the custom pleaded by the defendants because as already observed by us it is essential that the custom pleaded should be established to be so, by clear and unambiguous evidence, for, it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which its legal title to recognition depends. Where the evidence shows that the custom alleged was not followed in numerous instances, the custom could not be held to be proved. In the instant case we are of the opinion that the evidence let in by the defendants to prove the alleged custom of adoption of a daughter's son in the community is not satisfactory and adequate. A custom derives its force from the fact that it has, from long usage, obtained the force of law. In the instant case, no similar instances of taking a daughter's son in adoption in the Vellala's community is spoken to either by D.W.7 or D.W.8. The evidence of D.W.7 is not corroborated by any other evidence on record in this case so as to uphold the claim that such a custom of taking a daughter's son in adoption is prevalent in the Vellala community. The solitary evidence of this witness cannot be taken as corroboration for the interested testimony of D.W.8 who is no other than the natural father of the fourth defendant Rajendran. We have also no hesitation to reject the evidence of D.W.9 who claims to be the adopted son because during the alleged ceremony of adoption he would have been only six years of age. In Ex.B-9 will dated 14th December, 1958, Chinnathambia Pillai has described Rajendran, the fourth defendant, as his adopted son. Rajendran is the only son of D.W.8, Natesa Pillai and Kanakambujam. Rajendran has been directed to do all obsequies both to Chinnathambia Pillai as well as to his wives, Nagammal and Govindammal. About 16 years after the will, Chinnathambia Pillai died in 1974. The writer of Ex.B-9, Viswanatha Iyer as D.W.4, states that it was Chinnathambia Pillai who had furnished all necessary particulars for the document and it was he who had stated that Rajendran was his adopted son and hence it was so written. In Ex.B-1 dated 13th June, 1966, Rajendran is represented by his mother and guardian Kanakambujam. In this document, Rajendran has been described as the adopted son of Chinnathambia Pillai. D.W.-I who is the scribe of this document, states that the description of Rajendran in this document as

adopted son was given by Chinnathambia Pillai himself. D.W.-1 also stated that it was Rajendran as the adopted son performed the obsequies to Chinnathambia Pillai. In the marriage invitation, Ex.B-31, Rajendran has been described as the adopted son of Chinnathambia Pillai and the natural son of D.W.-8 Natesa Pillai. In Ex.B-30, Uthirakiriyai Pathirigai, Chinnathambia Pillai is described as the adoptive father of Rajendran. In Ex.B-2, dated 9th July, 1970 and the registration copy of which is Ex.B-67 sale deed executed by a stranger to the fourth defendant Rajendran, the vendee Rajendran has been described as the adopted son of Chinnathambia Pillai. The evidence of Rajendran as D.W.9 is that in the school records he had signed as 'N. Rajendran' and he continued to do so even after the adoption. In Ex.B-64, dated 23rd December, 1970 which is a carbon copy of notice issued by the Agricultural Income tax Officer to Chinnathambia Pillai, the fourth defendant Rajendran has been described as the son of Chinnathambia Pillai, In Ex.B-31, the marriage invitation, Rajendran has been described as the adopted son of Chinnathambia Pillai and natural son of D.W.8 Natesa Pillai. Ex.B-65, dated 12th September, 1974 is a postcard sent by Lakshmana Iyer to the fourth defendant informing him the Thidhi date of the fourth defendant's adoptive father, Chinnathambia Pillai. The author of this letter Ex. B-65 is stated to be no more and this is evident from the postcard Ex.B-66, dated 6th January, 1975 stated to have been written by the brother-in-law of Lakshmana Iyer, namely Subramania Iyer and addressed to the fourth defendant. D.W.-6 Thangarasu, the karnam of Paravakkarai village has deposed that the fourth defendant Rajendran is the son of Chinnathambia Pillai and that Chinnathambia Pillai had told him so. After the death of Chinnathambia Pillai, it is Rajendran who has submitted the concerned Estate Duty Returns. Ex.B-69, dated 28th April, 1975 is the assessment order passed by the Assistant Controller of Estate Duty for the estate of Chinnathambia Pillai wherein under column 6 relating to 'Name and address of the accountable person', it has been stated as 'C. Rajendran, son of late Chinnathambia Pillai'. We have already expressed our opinion that the evidence relating to adoption ceremony is unnatural, inadequate and unsatisfactory. The mere description of the fourth defendant in the above documents as the adopted son of Chinnathambia Pillai does not in our view, enhance the merit of the case of the defendants that there had been a valid adoption of the fourth defendant by Chinnathambia Pillai.

We are unable to give credence to the evidence of D. Ws. 7 and 8 who state that a daughter's son can be adopted and that the only son can be given in adoption by the natural parents in their Vellala community. As we find that the custom pleaded, viz., the adoption of a daughter's son and the giving in adoption of an only son by his parents are not proved in the instant case, we have no hesitation to hold that the alleged adoption of the fourth defendant Rajendran by Chinnathambia Pillai is not valid in law.

41. Now let us discuss whether the alleged will Ex.B-9 dated 14th December, 1958 is true, valid and executed by Chinnathambia Pillai in a sound disposing state of mind as his last will and whether the fourth defendant is the residuary legatee under the said will. The case of the defendants is that Chinnathambia Pillai executed Ex.B-9 dated 14th December, 1958 as his last will in sound disposing state of mind. This will has been registered even during the lifetime of Chinnathambia Pillai. It was Chinnathambia Pillai himself who had presented this will before the Sub-Registrar, Thiruvidadaimaruthur at his office and got it registered on 1st November, 1959. Therefore, it is clear that he should have been quite sane and in a sound disposing state of mind. It is also relevant in this connection to note that the will after the testator's demise had been given effect to fully and acted upon. The other two attestators to this document are stated to be dead now excepting the scribe and attestor D.W.4 Viswanatha Iyer, who alone is alive. D.W.4 was the karnam of Paravakkarai Vattam in 1958. It was he who had written this document. He would state that he had written this 'will' and seen the execution of the will by the testator Chinnathambia Pillai. He further stated that Chinnathambia Pillai saw him signing and he also saw the other attestors Govindaswamy Padayachi and Narayanaswamy Iyer attesting the document. He further stated that it was Chinnathambia Pillai who had furnished the particulars for the writing of the document. The trial Court which had the benefit of seeing D.W.4 in the box had believed his evidence as acceptable. D.W.4 has also deposed that at the time of the execution of this document, Chinnathambia Pillai was in a sound disposing state of mind.

42. It is the evidence of P.W.7 that after the summons was issued to D.W.4 on the plaintiff's side, for his examination in Court, he went to his home and enquired him

what he was going to say in Court about the alleged will, and it was in such circumstance, the evidence of P.W.7 is that D.W.4 had given him a statement in writing in his own hand voluntarily stating among other things that Chinnathambia Pillai was not present when the document Ex.B-9 was attested and so on. Ex. A-19, letter said to be written by the karnam D.W.4 does not contain the signature of D.W.4 and it has already been seen that the giving of this document has been totally denied by D.W.-4 in his evidence. The trial court had correctly appreciated the evidence of D.W.4 and we find that the rejection of the evidence of P.W.7 in this regard by the trial Court is correct. The description of the document Ex.A-19 by the trial Court as a useless document and cannot be looked into, under the circumstances, is the correct appreciation of the said document.

43. In order to compare the writings found in Ex.A-19, the plaintiff's son, P.W.7 produced a document Ex.A-18, dated 25th November, 1977 which is an unregistered rent deed said to have been written by the very same D.W.4 for one Gurumurthy, who has been examined as P.W.-6. The trial Court has noted P.W.-6 coming along with the plaintiff's son P.W.-7, to Court in almost every hearing of the trial. A suggestion has been put to him that he is a professional surety. He also admitted that he had stood as surety for one or two persons only. Under the circumstances, the trial Court is correct in observing that there is no evidence on the side of the plaintiff by way of rebuttal to show that the will Ex. B-9 could not have been executed by Chinnathambia Pillai.

44. Regarding the state of mind of Chinnathambia Pillai during the relevant period, we find that the evidence adduced on the side of the defendants, both oral and documentary, would clearly show that he was throughout quite sane and in a sound state of mind. It is also seen that he was reasonable in the matter of distributing the entire wealth in a most charitable and equitable basis to all of his kith and kin, viz., his two wives, two daughters, grand-daughters born through the two wives and the fourth defendant and he had also set apart properties for charities. He had been attending to the Court litigations by himself till his death. The numerous correspondence that transpired between him and his deceased son-in-law, Rethinasabapathy Pillai also shows that he was sane and enjoying sound state of mind. He had also signed the school and college records pertaining

to Rajendran. D.W.4, the scribe to the document Ex. B-9 states in his evidence that Chinnathambia Pillai was in a sound disposing state of mind when the document Ex. B-9 was executed by him. His evidence is also corroborated by the evidence of D.W.1 Ramasamy Deekshithar, who has stated that Chinnathambia Pillai had been keeping sound health till his death. D.W.-I is an independent and disinterested witness. Adding to their evidence, there is also evidence of D. Ws. 8 and 9. It is also relevant to note that Chinnathambia Pillai lived 18 years after the execution of Ex.B-9.

45. The terms of the 'Will' also are quite natural, reasonable and unambiguous and under which a just and equitable disposition has been made and even prior to this will, Chinnathambia Pillai had made several gifts by way of settlements in favour of his daughter, Kanakambujam under Ex.B-5 and Mariammal, the present plaintiff under Ex. B-39 and even after this will similar bequests had been made by Chinnathambia Pillai in favour of his wife Govindammal under Ex. B-6, in favour of his grand-daughter Indira under Ex. B-7 and another grand-daughter Kalaiselvi under Ex. B-8 and so on. These registered documents would be quite consistent with the conduct of Chinnathambia Pillai in the matter of executing a registered will under Ex. B-9 and there is therefore nothing unreasonable or unnatural in this disposition. The distribution of the entire assets under all the these documents is, in all fairness, in equal proportions and as per these bequests the beneficiaries under these documents have also taken possession and have now been in separate possession and enjoyment of the same by getting the pattas transferred, paying kist independently, etc. The relevant documents are Exs. B-14 to B-22 and B-45 to B-47. Ex. B-47 is the concerned kist receipt for the property endowed to Varasakathi Vinayagar temple.

46. It is in evidence that the plaintiff's deceased husband Rethinasabapathi Pillai had taken a copy of this will. This is seen from Ex. B-62. This fact is also admitted by P.W.7 though the plaintiff had pleaded ignorance of it. The trial Court is correct in observing that it cannot be stated that for the first time Ex. B-9 had come into existence for the purpose of this case. This will Ex. B-9 had been noted by the Advocate-Commissioner while taking the inventory from the house of Rajendran. There is no other similar document like Ex. B-9 being left by Chinnathambia Pillai.

Under these circumstances, the trial Court is correct in holding that the will Ex. B-9 is a genuine will having been executed by Chinnathambia Pillai in a sound disposing state of mind.

47. Coming to the question of validity of this will, though we have held that the defendants have not proved the custom in their community regarding the taking a daughter's son in adoption or that the only son can be given in adoption by their natural father and consequently found that the alleged adoption of the fourth defendant Rajendran is invalid, yet inasmuch as the bequest has been made in favour of the said Rajendran as evidenced by the contents of Ex. B-9, we hold that he is entitled to the bequest made in his favour thereunder by Chinnathambia Pillai. The fact remains that the author of the will, Ex. B-9, Chinnathambia Pillai had in fact intended to give the properties by way of bequest in favour of the fourth defendant Rajendran and inasmuch as we have held that the will is a genuine one, we have no hesitation to hold that the fourth defendant is entitled to the benefits given to him under the said will, though he is described as adopted son in the said will. We have already seen that Chinnathambia Pillai even prior to the will Ex. B-9 and thereafter had made several bequests by way of settlements in favour of his kith and kin posing himself as an absolute owner of those properties and in Ex. B-9 also his right and interest as an absolute owner in all the properties mentioned therein is clearly seen. The trial Court is correct in having held that the entire suit properties conveyed under the settlements properties mentioned in Ex. B-9 as well as those which have been referred to above, are undoubtedly the absolute properties of Chinnathambia Pillai himself and therefore there could be absolutely no bar for him to make bequests, such as gift, will, etc., in favour of any person he chooses. We find that the will is perfectly valid in entirety.

xxx xxx xxx xxx

(Paragraphs 48 to 53 - Discussions on facts - omitted. - Ed.)

54. Though we have found that the adoption of the fourth defendant Rajendran by Chinnathambia Pillai has not been proved, since the custom pleaded has not been established as required by law yet the contents of Ex. B-9 will, clearly show that the intention of Chinnathambia Pillai is to give properties to the fourth defendant.

The suit items 18, 36 to 38, 46 to 48, 50 to 55 and 67 to 73 of the Plaint 'A' Schedule properties thus become the absolute properties of the fourth defendant. The finding given under issue No.8 by the trial Court that the fourth defendant has become the absolute owner of these items of properties in which the plaintiff could have absolutely no right, title or interest or even possession is correct and we confirm the same.

55. The trial Court has come to the correct conclusion by appreciating the contents of Exs. B-8, B-10 and B-26 than the properties comprised in R.S. Nos. 179/1B, 179/4 and R.S. No. 162, have now ceased to be the properties of Chinnathambia Pillai and the property in R.S. No. 127/17 is not the property of Chinnathambia Pillai, but the property of the first defendant herself and therefore these properties are not available for partition.

56. The evidence of the fourth defendant as D.W.-9 is that the deceased first plaintiff Nagammal had taken away during her lifetime all her movables immediately after the death of Chinnathambia Pillai and the articles found in the house of Chinnathambia Pillai now belong to himself as a residuary legatee under, the Will. The will itself contemplates that as a residuary legatee, the fourth defendant shall take all the remaining properties both movables and immovables of Chinnathambia Pillai. Therefore, neither the deceased plaintiff nor the present plaintiff has any right or interest or even possession of any of the movable properties stated to be found in the house of Chinnathambia Pillai on his death. We have also already seen that Chinnathambia Pillai was an absolute owner of his entire estate both movables and immovables and died testate by leaving Ex. B-9 which is found to be true and valid. So, the plaintiff has absolutely no right in the movables as given in the plaint B schedule. The finding of the trial court in this regard is correct. No other argument had been advanced on behalf of the appellant herein. Under these circumstances apart from reversing the finding of the trial Court regarding the validity of the alleged adoption of the fourth defendant by Chinnathambia Pillai, in other respects, we confirm the judgment and decree of the trial court.

57. In the result, the appeal is dismissed in view of the close relationship between the parties herein, we direct the parties to bear their respective costs in this appeal.

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