

S.S.Sv. Kasiviswanathan Chettiar, since deceased, now  
represented by Lakshmi Achi - - - - - Appellant

v.

S.S.S.Sv. Somasundaram Chettiar and others - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER, 1946

*Present at the Hearing:*

LORD SIMONDS  
LORD DU PARCQ  
MR. M. R. JAYAKAR  
SIR MADHAVAN NAIR  
SIR JOHN BEAUMONT

[Delivered by SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Madras dated 10th December, 1942, which affirmed with a slight modification the decree of the Subordinate Judge of Sivaganga dated 21st November, 1940, in O.S. 11, of 1939.

The appeal arises out of a suit instituted by the plaintiff (the first respondent) for partition and recovery of a half share of the properties in the possession of the first defendant, the appellant before the Board, now dead, who is represented by Lakshmi Achi. The first defendant was the contesting defendant and will be referred to hereafter as "the defendant".

The plaintiff claimed the properties as the duly adopted son of the elder brother of the defendant. At the time of the adoption the adoptive parents of the plaintiff, that is, the elder brother of the defendant and his wife, were dead, and the adoption was brought about by the adoptive grandfather. It appears that it was done with the consent of the defendant also. Under the ordinary Hindu law which governs the parties such an adoption would be invalid, as the only person who can make an adoption is the adoptive father, if he is alive, and after his death, his widow. But it is claimed that according to the special custom prevailing amongst the Nattukottai Chetti community to which the parties belong, an adoption can be validly made to a person after his death, and even after the death of his widow, by the father or other *pangalis* (agnates) of the adoptive father. It was pleaded in paragraph 3 of the plaint that ". . . after the death of the first defendant's elder brother, the first defendant's father had the plaintiff adopted on the . . . 20th April, 1923, in due form according to the caste custom prevalent amongst the Nattukottai Chettis for a long time. The first defendant accepted the adoption, had the adoption (ceremony) performed along with his father and he has himself written the said adoption deed . . ." The defendant denied that there was a special custom and stated that even if the custom alleged should be proved it is not valid under the Hindu law as the adoption was made after the death of both the adoptive father and mother and should not be given effect to. Some other defects comparatively of a minor nature were also mentioned by him, but these have not been pressed before their Lordships.

The question for the Board to decide is whether the custom set up by the plaintiff has been made out by the evidence.

After full consideration of the evidence the Subordinate Judge found in favour of the custom, and his finding has been upheld by the learned judges of the High Court.

It was argued before the Board that the custom set up by the plaintiff has not been sufficiently defined and set out in his pleadings; but it should be noticed that the question arose in the course of a suit for partition and not for declaration and establishment of a special custom *as such*, and the plaintiff was expected to state succinctly no more than what was necessary to justify his claim for a share of the properties, and this he has done in paragraph 3 of the plaint by saying that after the death of the elder brother of the defendant he was adopted to him as his son by the adoptive grandfather according to the custom prevailing amongst the Nattukottai Chettis. It is clear from paragraphs 3 and 4 of the written statement that the defendant well understood in reference to the facts of the case why the adoption should be held invalid according to the strict rules of the Hindu law. Issues 3 and 4 raised in the case relate to the existence and binding nature of the custom and a perusal of the evidence shows that both the parties adduced whatever evidence they had with reference to those issues. In the circumstances, it appears to their Lordships that there is no substance in the argument that the custom set up has not been sufficiently defined in the pleadings and that the defendant has been prejudiced thereby.

The real question for decision is whether the evidence that has been adduced is sufficient to prove the custom. It may be stated at once that the evidence is meagre consisting as it does, as noticed by the learned judges of the High Court, "of 4 witnesses and 9 instances, two of which alone can be said to relate to old adoptions". It may be added that the defendant's 4th witness gave two more instances. The learned counsel for the appellant points out that out of these 11 instances only two are of adoptions made by an adoptive grandfather to his deceased son—the case set up in the plaint—that they are not ancient, and that the others are instances of adoptions made by persons other than the grandfather and cannot form evidence in support of the custom pleaded by the plaintiff. It should be noticed in this connection that the making of an adoption after the death of the adoptive parents, which is the essential feature of the custom set up by the plaintiff, is common to all instances, though the instances of adoption by the grandfather are limited to only two. These no doubt are not ancient, but the evidence shows that adoptions after the death of the adoptive parents have been made by the father or the other *pangalis* of the deceased adoptive father. These other instances, together with the two instances, particularly illustrative of the plaintiff's case, form evidence of the custom regarded as a whole, i.e. adoption when the adoptive parents are dead by the adoptive grandfather or other *pangalis*, and would thus support the case set up in the plaint. In this case it is of great significance that there is ample evidence to show that the appellant himself and the other relations of the parties have acted on the footing that the plaintiff's adoption is valid. No evidence has been called to show that such adoptions are looked upon with any disfavour by the community; nor can it be said, however secular the motives for adoption may be, that the religious element is absent, as the adoptions are also intended to secure the performance of various religious rites.

Considering the evidence as a whole, their Lordships are not prepared to set aside the concurrent finding of the Courts in India that the custom of adoption set up by the plaintiff has been proved. However, having regard to the scanty nature of the evidence and the limited number of instances of a comparatively recent date in support of the custom, their Lordships would add, following the precedent established by the decision of the Board in *Chiman v. Hari Chand* (1913) (L.R. 40.I.A. 156) that this decision would bind only the parties to the suit and those claiming through them, and that it should not be considered a satisfactory precedent if in

any future instances among other members of the community fuller evidence regarding the existence or non-existence of the alleged custom should be forthcoming.

For the foregoing reasons their Lordships would humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the plaintiff (the first respondent).

In the Privy Council

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DELIVERED BY SIR MADHAVAN NAIR

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