security under section 549 (now Order XLI, rule 10). The section contained the direction

"If such security be not furnished within such time as the Court orders, the Court shall reject the appeal."

Purely upon a construction of the section, their Lordships say that

"the application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so."

I can discover no reason for construing section 43 (1) of the Provincial Insolvency Act in any different manner.

N.R.

PALANI GOUNDAN *v.* OFFICIAL RECEIVER, COIMBATORE.

CURGENVEN, J.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Pakenham Walsh.

1929, December 5.

RAJAH SOMASEKHARA ROYAL AND TWO OTHERS (DEFENDANTS 4, 6 AND 2), APPELLANTS,

v.

RAJAH SUGUTOOR IMMADI MAHADEVA ROYAL YESWANTHA BAHADUR AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 3 AND 5), RESPONDENTS.*

Lingayats—Custom of adoption of a married man—Lingayats of North Kanara, not governed by Mayukha Law of adoption.

Under the Hindu Law obtaining in the Madras Presidency, the adoption of a married man is invalid; this rule applies also to Lingayats, who are only a sect of Hindus, in the absence of a custom to the contrary.

As the district of North Kanara formed part of the Madras Presidency till 1861 and was then transferred to the Bombay

* Appeal No. 354 of 1926.

SOMASEKHARA v. MAHADEVA.

Presidency only for administrative purposes, the Lingayats of that district are governed by the above rule and not by the law of Mayukha, prevailing in the Bombay Presidency, which expressly allows such adoption.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 14 of 1919.

The parties to the suit who belong to the Lingayat community are members of the Punganur Zamindar's family. Punganur was permanently settled in 1861. It is an impartible estate governed by the law of primogeniture. On the 22nd of December 1896, the then zamindar of Punganur executed a will by which he directed that his eldest son should be the zamindar, and that after him, his eldest son should succeed to the zamindari and so on in succession. The will further directed that his eldest son should give his (testator's) second and third sons Rs. 100 each, and his wife Rs. 40, a month, as allowances and bequeathed some landed property to the second and third sons. The second son filed a suit in 1901 against his elder brother, the then zamindar, for partition of the zamindari and in the alternative for maintenance. The zamindar pleaded that the estate was impartible and that the plaintiff was entitled only to what was bequeathed under the will. A compromise was effected pending an appeal to the High Court, by which the zamindar agreed to give the second son and his descendants Rs. 100 a month as allowance and Rs. 125 a month in lieu of the lands bequeathed to him under the will. This compromise was at the end of 1906. In September 1907, this second son and his mother went to North Kanara and the allegation in the present suit is that he was then adopted there by a lady, a relation of his mother. He returned in 1908 to Punganur and filed a suit in 1912 for Rs. 6,695, arrears of maintenance as per compromise against the then

zamindar, the son of his brother who had died by that time. The zamindar pleaded that the compromise was not binding on him and though he raised various other defences he did not plead that the plaintiff was not entitled to any maintenance by reason of his alleged adoption to another family. A decree for arrears of maintenance according to the terms of the above compromise was made by the trial Court and confirmed by the High Court. The decree was executed and the plaintiff got the money. He filed the present suit, Original Suit No. 14 of 1919, for arrears of maintenance subsequent to the above decree, on the basis of the above compromise. Various defences were raised but the main defence was that the plaintiff was not entitled to claim anything from the zamindar as he had been adopted into another family. To this, the answer was that there was no adoption as a matter of fact and, secondly, that the adoption, even if true, was invalid because the plaintiff was, at the date of the adoption, a married man about 23 years of age. The plaintiff pleaded that the adoption not having been pleaded in the previous suit was *res judicata*. Defendants pleaded that they were not aware of the adoption at that time. The suit was originally laid against the first defendant only, the zamindar, but pending the suit, he died, and defendants 2 to 6 were brought on record as his legal representatives, and they adopted the written statement of the first defendant. The Subordinate Judge decreed the suit holding that the plaintiff was in fact adopted, but that his adoption was invalid, as he was then a married man.

The defendants 4, 6 and 2 preferred this appeal.

S. Varadachari and *E. Krishnamurthy* for the appellant. —Lingayats differ in many respects from other Hindus; among them the religious basis for an adoption is utterly absent; they do not acknowledge the caste system or Brahman supremacy and

SOMASEKHARA v. MAHADEVA.

they have no Upanayanam; hence the onus of proving that among them the adoption of a married boy is legally valid is very slight; *Sooratha Singa* v. *Kanaka Singa*(1). Moreover the parties to the adoption in this case must be held to be governed by the Mayukha Law which expressly allows such adoption, as they lived in North Kanara, which belongs to the Bombay Presidency. *Basava* v. *Lingangouda*(2), *Chenava* v. *Basavangauda*(3). Prohibition of such adoption even among Sudras is wrong. The custom validating such adoptions among the Lingayats, in whatever Presidency they are, has been proved.

Advocate-General (*A. Krishnaswami Ayyar*) and *B. C. Seshachala Ayyar* for respondent.—North Kanara until 1861 was part of this Presidency and was governed by its law and unless it is proved that the people of that district later on adopted the Mayukha Law, which has not been proved, they must be held to be governed only by the law prevailing here; *Prithee Singh* v. *The Court of Wards*(4). Lingayats being Hindus are governed by ordinary Hindu law unless a special custom is proved to the contrary which on the evidence in this case must be held as not proved; compare, *Gettappa* v. *Erramma*(5) and *Vannia Kone* v. *Vannichi Ammal*(6). Though the adoptive mother belonged to Bombay Presidency, as the adopted son belongs to Madras Presidency, the law here as to his status governs, not that of the adoptive mother; vide Wharton's Conflict of Laws, 3rd Edition; Section 251.

JUDGMENT.

After stating the facts, their Lordships proceeded as follows:—

As in our view the adoption even if true is invalid, it is unnecessary to give a finding on this point.

As regards the validity of the adoption, two questions arise, namely, (1) whether the plaintiff was married at the time of the adoption and (2) whether the adoption of a married man among Lingayats is valid.

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(1) (1920) I.L.R., 43 Mad., 867.
(2) (1894) I.L.R., 19 Bom., 428.
(3) (1895) I.L.R., 21 Bom., 105.
(4) (1875) 23 W.R., 272.
(5) (1926) I.L.R., 50 Mad., 228.
(6) (1927) I.L.R., 51 Mad., 1.

It is admitted that the first plaintiff was a married man at the time of the adoption. The parties are Lingayats and the question is whether the adoption of a married man by a Lingayat is valid.

The Subordinate Judge held that as the adoptive mother belongs to North Kanara which was part of the Madras Presidency before it was transferred to the Bombay Presidency in 1861, the law applicable to the parties is the law as applied in the Madras Presidency, that as the adoption of a married man has been held to be invalid, the first plaintiff's adoption was invalid and inoperative and that he therefore remained a member of his natural family and was entitled to the rights conferred on him by the rajinama.

North Kanara originally formed part of the dominions of Hyder Ali and his son Tippu who were the Rulers of Mysore, and in 1799 on the fall of Tippu Sultan, North Kanara and other territories were ceded to the East India Company and formed part of the Madras Presidency till 1861, when for administrative purposes the administration of that district was transferred to the Bombay Presidency.

So far as the Presidency of Madras is concerned, the law has always been that the adoption of a married man is invalid. The latest decision of this Court is *Lingayya Chetty* v. *Chengal Ammal*(1).

Except in the Bombay Presidency where the Mayukha prevails, it has been held by the Courts in all the provinces in India that the adoption of a married man even though he happens to be a Sudra is invalid. The decisions are referred to in *Lingayya Chetty* v. *Chengal Ammal*(1). It is argued for the appellants that the decisions to the effect that in the case of

(1) (1924) I.L.R., 48 Mad., 407.

SOMASEKHARA v. MAHADEVA.

Sudras the adoption of a married man is invalid are wrong. We see no reason to differ from the current of authority which so far as we can see is uniform and is also supported by the Smriti Chandrika and other texts.

So far as the Bombay Presidency is concerned, in places where the Mayukha is followed as the paramount authority, it has been held that the adoption of a married man is valid. We may refer to *Kalgavda Tavanappa* v. *Somappa Tamangavda*(1) and *Manik Bai* v. *Gokuldas*(2). This is not by reason of any custom in derogation of the law but by reason of the express text of the Mayukha to the effect that a married man may be adopted.

It is argued for the appellants that as North Kanara has been incorporated in the Bombay Presidency from 1861, the law as administered in the Bombay Presidency should be the law to be administered to Lingayats in the Bombay Presidency where the adoption of married men has been held to be valid. An alternative ground has been taken that among the Lingayats, wherever they are, whether in the Madras Presidency or the Bombay Presidency, the adoption of a married man is valid by custom, that evidence of such a custom has been adduced in this case and that the Judge was wrong in holding that the custom has not been proved.

When the North Kanara District formed part of the Madras Presidency, the law as administered by the Madras High Court was that the adoption of married men was invalid: and it would have been necessary for a person there who sets up a custom to the contrary to prove it. The transfer of North Kanara to the Bombay

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(1) (1909) I.L.R., 33 Bom., 669. (2) (1924) I.L.R., 49 Bom., 520.

Presidency for administrative purposes would not by itself change the personal law of persons residing in the North Kanara District. Whether it is a case of an individual migrating from one province to another or a case of territory where he resides being transferred from one province to another, the presumption until the contrary is shown is that he carries his personal law with him, and it is difficult to see how the Mayukha can be said to apply to the North Kanara District, simply because it was transferred to the Bombay Presidency. We may in this connexion refer to *Huro Pershad Roy* v. *Shibo Shunkuree Chowdrain*(1), and *Balwant Rao* v. *Baji Rao*(2).

Turning to the custom set up, the custom alleged is a custom among the Lingayat community to which the parties belong, permitting the adoption of married men. It is a general custom that is alleged, that Lingayats, wherever they are, are permitted to make adoptions of married men.

Before dealing with this question, it is necessary to refer shortly to the Lingayat community. The Lingayats who were originally Hindus are a body of dissenters, and the founder of their religion was one Basava who was born about 1100 A.D. Their religion is correctly summarised by Thurston in his Castes and Tribes of Southern India, Vol. IV, at page 236 as follows:—

"Their religion is a simple one. They acknowledge only one God, Siva, and reject the other two persons of the Hindu Triad. They reverence the Vedas, but disregard the later commentaries on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticism. They deny the supremacy of Brahmans, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They

(1) (1870) 13 W.R., 47. (2) (1920) I.L.R., 48 Calc., 30 (P.C.).

SOMASEKHARA v. MAHADEVA.

declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the Image which has always been regarded as symbolical of the God Siva."

Mysore, the Southern Mahratta country, and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their eighth year but as in the case of Upanayanam it is often performed much later. The sacred Mantra is whispered in the ear by their Guru and this ceremony corresponds to Upanayanam among the Brahmans. We may also refer to *Veerasangappa* v. *Rudrappa*(1), where some of the Lingayat tenets are set out.

It is conceded in this case that so far as their religious duties are concerned, the Lingayats have got Agamas or sacred books which are of primary authority. One of such books is Vathulagama which has been filed as Exhibit Q in this case. It deals with adoption. These Agamas are dialogues between Siva, their chief God, and his consort, Parvathi. As regards adoption, this is what it states :

"The wise should take a boy possessing all the limbs, clean, endowed with beauty, born of the same gotra, having a liking to good conduct, aged five years, excluding the eldest, of good conduct, highly intelligent, of sweet speech, tender-hearted."

So far as the age-limit is concerned, this age corresponds with the age given in the Dattaka Chandrika. As regards the ceremonies of adoption which appear after this passage, homam is performed with Vedic Mantras. As regards the age of five years, custom has relaxed that rule and the evidence of the plaintiffs' witnesses in this case is that adoption can be made before the Deeksha ceremony is performed. The question however

(1) (1885) I.L.R., 8 Mad., 440.

is whether custom has relaxed the rule that an adoption cannot be made after a person is married.

In the case of Jains, it is undoubted law that in the absence of any custom to the contrary which has to be set up and proved, they are subject to the rules of Hindu Law. We may refer to *Gattappa* v. *Erramma*(1), where the authorities are collected. The Jains do not worship Siva nor do they recognize the authority of the Vedas. But in the case of Lingayats whose only God is Siva and who acknowledge the authority of the Vedas, they are all the more bound by Hindu Law except in so far as it is modified by custom.

As regards the evidence of custom, the Subordinate Judge is of opinion that the custom has not been made out. The custom pleaded, as said before, is a general custom among the Lingayats and not a special or local custom in North Kanara, or in the family of the adoptive mother. A large number of Lingayats are found in the Mysore Province, Bellary, and the Southern Mahratta country. The zamindari of Punganur is on the borders of the Mysore Province. So far as the Mysore Province is concerned, it has been held by the Chief Court of Mysore that the adoption of a married Lingayat is invalid. The judgment of the Chief Court is marked as Exhibit WW in this suit. The learned Judges of the Chief Court observed:

"It is however desirable to say a few words on the validity of Kariappa's adoption which is referred to in the first and second grounds of appeal. It is found that Kariappa was married but the Courts have held that it was not a disqualification as he was widower at the time of his adoption by the first defendant. The parties are Lingayats. Even if it be held that the law governing Sudras applied to them, according to Mr. Mayne, "as regards Sudras, adoption could be performed effectually till marriage." And in another place he quotes the Pandit's

(1) (1926) I.L.R., 50 Mad., 228.

opinion that the period fixed for adoption is "with respect to Sudras, prior to their contracting marriage," page 178 (6th Edition). See also reference at page 179 to the case of *Pappamma* v. *Appa Rau*(1). Though there is no express authority on the point, having regard to the fact that the questions of age, marriage, etc., are determined in the texts on the consideration of certain rites, such as Upanayanam, marriage, etc., having to be performed to the individual to be adopted in the adopted family, there is strong reason for holding that marriage is a bar, in spite of the fact that the person concerned was a widower at the time of adoption."

So far as Bellary which is part of the Madras Presidency is concerned, we have not been referred to any decision where the adoption of a married man among the Lingayats in Bellary was upheld. As North Kanara was part of Mysore and the Madras Presidency, least for 80 years, the presumption is that the rules as to adoption which are prevalent in the other parts of the Presidency and which are based on the Smritis are current in this Presidency and Mysore.

Though the Lingayats in the Vathulagama which, as the witnesses state, is binding on the Lingayats, fixed the fifth year as the proper age for a boy to be adopted, and though amongst the Lingayats and other communities adoption may by custom take place at a later age, there is no reason to suppose that there is a custom among the Lingayats in the Madras Presidency or in Mysore or in North Kanara which was part of the Madras Presidency and Mysore, to so extend the age as to render valid by custom the adoption of a married man. It has therefore to be proved that in North Kanara where the adoption took place and the adoptive mother was living, there was a custom among the Lingayats by which the adoption of a married man was legal.

(1) (1893) I.L.R., 16 Mad., 384.

So far as the plaintiffs' witnesses are concerned, their evidence is that such an adoption is not valid but the defendants' witnesses speak to instances of adoptions of married men and those witnesses are defendants' 1st, 2nd, 4th, 5th, 8th to 15th and 21st witnesses. The difficulty in the case of some of these witnesses is that there is nothing to test their general statement that the adoption they speak to was that of a married man. There must have been deeds of adoption but no deeds are produced and such deeds, if the adopted boy was a major, would disclose the fact, as there would be no guardian mentioned and generally it may be taken that any boy over 18 would be married. The cross-examination of some of the witnesses when they speak of the man adopted being married shows that they have no conception of the years which they were speaking of.

The Subordinate Judge deals with the evidence of the witnesses in detail in paragraph 33 onwards of his judgment and it is not necessary for us again to refer in detail to it. He observes in conclusion :

> "I have shown that the evidence adduced to establish the custom alleged is not convincing nor clear. The custom has not obtained any judicial recognition so far either in Bombay or in Madras. In Bombay, adoptions of married men have obtained judicial sanction, not because they are customary but because the Mayukha Law approves of their validity. In the Mysore Province, such adoptions have been declared invalid by the Mysore Chief Court."

We agree with the Subordinate Judge that as a custom it has not been proved. In this view, it is unnecessary to consider the argument of the learned Advocate-General that as the adopted son, i.e., the first plaintiff, was a resident of Punganur in the Madras Presidency, it is his personal law that should govern the adoption, and that even if the adoptive mother belonged to North Kanara and the custom as to adoption was

SOMASEKHARA v. MAHADEVA.

proved, the adoption would still be invalid. It is also unnecessary to consider the argument that the defence based on the validity of the adoption is *res judicata* by reason of the fact that it was not set up in the previous suit for recovery of arrears upon the agreement now sued on, as the knowledge of the defendant would not affect the question of *res judicata*, or the further question that even if the adoption is valid, the rights created by the agreement could still be enforced. As regards the questions raised in the Memorandum of Objections as to the amounts payable under the agreement being payable to the plaintiff's descendants also, we think it unnecessary to express any opinion and leave the question open. As regards claims of hunting and forest rights, it is conceded that plaintiff will be entitled to them under the agreement. Plaintiff will be entitled to interest at 6 per cent on the amount claimed from date of suit to date of payment. No order as to costs on Memorandum.

We think the Subordinate Judge was right in holding that the custom as to the validity of the adoption of a married man has not been proved. The first plaintiff therefore continues to be a member of the Punganur family and the agreement entered into is enforceable by him.

We think the decision of the Subordinate Judge is right and dismiss the appeal with costs.

N.R.