

1876.  
July 10.  
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REDDI.

take this contract? I think he has not. The point is, not whether the land has become his, but whether the right of *usus* subject to payment of rent, has become his. There is an absolute want of evidence of an *actus interveniens* on the part of the Official Assignee, and we are able to decide according to the right and justice of the case and not compelled to give assent to this supposed *jus tertii*, which according to the case of the special appellant himself never existed.

INNES, J.—Concurred.

*Special appeal dismissed with costs.*

### [APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 522 of 1875.*

1875.  
Dec. 22.

CHINNA NAGAYYA, SPECIAL APPELLANT (PLAINTIFF), v. PEDDA NAGAYYA, SPECIAL RESPONDENT (DEFENDANT).

*Adoption—Mother's Sister's Son—Sudras.*

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 intermarried, is not binding on Sudras.

THE plaintiff sued for a declaration that he was the adopted son of one M. Venkayya, to whom he stood in the relationship of mother's sister's son.

The District Munsif (of Masulipatam), who first heard the case, decided that the adoption was an illegal one. His decision was reversed by another Munsif, who heard the case on review. The decision of the latter Munsif was, in its turn, reversed by the Subordinate Judge (of Masulipatam), who held the adoption to be invalid.

The following is an extract from the Subordinate Judge's Judgment:—"It is obvious from the foregoing texts" (Dattaka Chandrika II., 1, and I., 17; Dattaka Mimamsa II., 74, 107, 108) "that whilst the daughter's son, sister's son, and the son of the mother's sister are expressly excepted from adoption among the regenerate classes, the two former only, *i. e.*, a daughter's son and sister's son, are expressly declared to be affiliated by Sudras, whilst the two authors are silent about the third exception as applicable to Sudras. The District Munsif from whose decision

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the present appeal has been preferred thinks that if the distinction between Sudras and the three regenerate castes were to be taken into consideration, it would be manifest that the adoption of mother's sister's son is quite legal, and he quotes text 108, Section II. of Dattaka Mimamsa, to show that a laxity is allowed in the general principle 'that one with whose mother the adopter could not legally have married must not be adopted.' This text points out that Cakala clearly establishes in the\* previous text, that the expression 'sister's son,' (in the last sentence of text 74) is illustrative of the daughter's son and mother's sister's son; and he adds the propriety of it:—'For prohibited connection is common to all three.' The last sentence in text 74, which Cakala illustrates, is this:—'For the three superior tribes, a sister's son is nowhere mentioned as a son;' hence it does not distinctly apply to the permission just preceding that sentence, that a daughter's son and a sister's son are affiliated by Sudras.

From the judgment of the Subordinate Judge the plaintiff preferred a Special Appeal to the High Court.

*O'Sullivan* and *Michell* for the Special Appellant\* :—The passages in the books sanction the adoption of the mother's sister's son, among Sudras. The words "in the last sentence of text 74," in Dattaka Mimamsa II., 108, are a parenthesis inserted by the editor, and not to be found in the original text, and this reference to "the expression sister's son" ought not to be restricted, as it has been by the editor, to the mention of the sister's son in the last sentence of text 74, but ought to be taken as a general reference. Text 108 will then, taken with text 74, clearly sanction the adoption in question; for in text 74 it is said: "But a daughter's son and a sister's son are affiliated by Sudras," and then comes the statement in text 108, that "the expression sister's son is illustrative of the daughter's son and the mother's sister's son;" it follows that the mother's sister's son may also be affiliated by Sudras. But, whether this reference in text 108 to text 74 be taken as general, or restricted as the words in the parenthesis make it, these texts and the similar passage at Dattaka-Mimamsa V., 18, clearly *imply* that the

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\* Present Sir W. MORGAN, Kt., C. J., and KERNAN, J.

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mother's sister's son is adoptable by Sudras; for they expressly state that the prohibition, in the case of the three superior classes, against adoption of sister's son, daughter's son, and mother's sister's son,—in all cases alike—rests upon the principle which underlies the whole subject, *viz.*, that the adopted must be one with whose mother the adopter could have legally married; and they also expressly state that adoption of the sister's son and the daughter's son are allowed among Sudras. It is thus clearly implied that the principle being disregarded by Sudras in the cases of the daughter's son and the sister's son, may also be disregarded by them in the case of the mother's sister's son. The cases of the daughter's son and the sister's son are, evidently, given as the most conspicuous ones; it being left to be understood that if adoption is allowed in such cases, which imply incest in the worst form, *a fortiori* it is allowable in a case, like that of the mother's sister's son, which implies incest in a remoter and lesser degree.

*Balaji Row* and *Gurumurthy Iyer* for the Special Respondent: The construction put upon the texts 74 and 108 of Dattaka Mimamsa II., by the Subordinate Judge is the right one. The words of the texts must be taken strictly; and as there is no express mention in them of the mother's sister's son, as being adoptable, among Sudras, such adoption cannot be taken to be authorized by the law.

The case was adjourned for the Special Respondent's Counsel to adduce any authorities which they might be able to find in the Special Respondent's favor.

At the adjourned hearing, \* *Shephard*, for the Special Respondent urged, in addition to the argument previously relied on, that the mother's sister's son is among Hindus regarded and treated as a brother, and that the prohibition against adoption of a brother, therefore, applied to him, (the brother's sister's son). He referred to the cases\* of *Mootia Moodelly v. Uppen Venkatuchary, Moothoosamy Naidoo v. Latchmidavammah*, in which it was held that a Hindu cannot adopt his brother.

JUDGMENT.—The question is whether the adoption by a Sudra of a mother's sister's son is invalid. The argument in favor of

\* Norton's Leading Cases, Part I., pp. 66-7.

the invalidity is based upon the absence of express mention of the mother's sister's son (see Dattaka Mimamsa V. 18).

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The rule of restriction is based as was the similar rule of Roman Law upon the principle that a man cannot adopt one with whose mother he could not legally have intermarried.

In 107 Cākala extends the express words by interpretation to the daughter's son and the son of the mother's sister. The two stronger cases are taken out of the rule as to Sudras by the express words of the text containing the restriction.

It would be contrary to legal logic to apply the restriction to the case not expressly mentioned. We are of opinion that the decree of the Subordinate Judge must be reversed and that of the Munsif restored.

### [APPELLATE CIVIL JURISDICTION.]

Before SIR W. MORGAN, *Kt.*, C. J., and HOLLOWAY, J.

*Regular Appeal No. 97 of 1875.*

SINI THIRUVENGADATHIENGAR AND 6 OTHERS (2ND TO 8TH DEFENDANTS), APPELLANTS, v. SANGILIVEERAPPA PANDYA CHINNATHUMBIAR (PLAINIFF), RESPONDENT.

*Act VIII of 1859, s. 15.—Suit for declaratory decree.—Slander of title.*

1876.  
April 24.

The issuing of proclamations and orders, by B, to the ryots of an estate, to pay rent to him, as rightful owner of the estate, application by him to the Collector to be registered as the owner, and other like acts of pretension to the title, and threats, on B's part, are not, in themselves, sufficient to entitle A, who is in possession and enjoyment of the estate as rightful owner, to a decree declaring him to be the rightful owner.

The plaintiff, who was Zamindār of Shivagiri, brought the suit for a declaration that the right, title, and interest purchased by the 1st defendant, Subramania Moodeliar, at an auction sale for certain debts of the late Zamindār of Shivagiri, extended to no more than the rents and profits due from the zemīn to the plaintiff's father, the said deceased Zamindār, up to the date of his death, and that the purchaser, the 1st defendant, had no right to the zemīn; for an injunction to 1st defendant not to disturb the plaintiff's enjoyment of the same; and for such other relief as the Court might deem proper to grant under the circumstances of the case.