APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

MÍNAKSHI AND ANOTHER (DEFENDANTS), APPELLANTS,

and

RÁMANÁDÁ (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

1886. Sept. 3. 1887. April 29.

Hindú Law—Adoption—Dattaka Mímánsá, s. V, slokas 16-20—*Dattaka Chandriká, s. II, sloka* 7—*Yájñavalkya, chap. II, verse* 128—*Mitákshará, chap. I, s. XI, paragraph* 1—*Smriti Chandriká*, 152.

It is a general rule of Hindú 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.

SECOND appeal against the decree of J. Hope, District Judge of Chingleput, in Appeal Suit No. 98 of 1879, reversing the decree of the District Múnsif of Trivellore, in Original Suit No. 677 of 1878.

This was a suit to set aside an adoption.

A widow acting under the authority of her deceased husband adopted a boy with whose mother he could not have contracted a legal marriage.

The father of the deceased man brought this suit against the widow and the adoptive son to have the adoption set aside as invalid, on the ground of affinity between the natural mother and the adoptive father. The District Múnsif dismissed the suit on the ground that the adoption contravened no rule of Hindú Law, but his decree was reversed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Shephard* for appellants.

Bháshyam Ayyangár for respondent.

The second appeal came on for hearing before (Kernan and Muttusámi Ayyar, JJ.), who made the following

ORDER:—Mr. Shephard maintains that there has been a mistranslation of some of the important texts, and that the cases in this Court adopting the general rule, viz., "that a boy cannot be legally adopted whose mother the adopter could not have married,"

* Second Appeal No. 267 of 1882.

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is not only not absolute but has no legal foundation. We refer the decision of this appeal to a Full Bench.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

The *Acting Advocate-General* (Hon. *J. H. Spring Branson*), *Ánandacharlu* and *Rámasámi Ayyangár* for appellants.

Bháshyam Ayyangár and *Subba Ráu* for respondent.

JUDGMENT.—The suit, which is the subject of this second appeal, 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 the 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 authorized his wife to adopt, that the plaintiff gave his sanction to the adoption, and that defendant No. 2 was accordingly adopted by defendant No. 1. The plaintiff's case was that, as no legal marriage was possible between Krishna Sastri and the mother of defendant No. 2 in her maiden state, the adoption was invalid. The District Múnsif held that the Hindú 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 defendants preferred this second appeal, and the question referred to the Full Bench is whether it is a rule of Hindú 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. It is conceded that among Brahmans marriage is prohibited between persons of the same gotram. In Caunaka's text cited in Dattaka Mímánsá, sec. V, sloka 16(1), and in Dattaka Chandriká, sec. II, sloka 7(2), it is stated that, in order that one may be eligible for adoption, one should bear "the reflection of a son." This phrase was interpreted by both commentators to denote the capability to have been begotten by the adopter through appointment and so forth; Dattaka Mímánsá, sec. V, verse 16, and Dattaka Chandriká, sec. II, sloka 8. In

(1) Stokes' Hindú Law Books, p. 590. (2) *Id.*, p. 638.

sloka 17, the author of the Dattaka Mímánsá observes that the brother, paternal and maternal uncles, the daughter's son and the sister's son are excluded, and in sloka 18, he states that prohibited connection is common to them all, and reiterates the proposition that prohibited connection exists whenever there is unfitness to be begotten by the individual himself by appointment. In the next paragraph he says that when the mutual relation between a bride and a bridegroom bears analogy to that of father or mother, such marriage is a prohibited connection; and in support of that proposition, he cites a passage from Grihyaparisishta describing prohibited connection in the case of marriage. That passage is as follows:—"The mutual relation between a couple being analogous to the one being the father or mother of the other, connection is forbidden; as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife." In sloka 20, the commentator states that, "in "the same manner as in the above text of the Grihyaparisishta "prohibited connection is excepted in the case of marriage, so in the "case in question (one who, if begotten by the adopter, would "have been the son of) a prohibited connection must be excepted, in "other words, such person is to be adopted as with the mother of "whom the adopter might have carnal knowledge." The Sanskrit words which are rendered carnal knowledge are "Patiyogam."

The contention in support of this second appeal is that these words are not correctly translated and that the original Smriti contain no allusion to the possibility of a legal marriage or to fitness to be begotten through appointment.

There is a learned criticism on this point in Mandlik's translation of Yájñavalkya, pages 478–486; and the arguments adduced by the appellants' pleader were similar to those to be found in that book. The first contention is that the interpretation placed by the commentators on the original Smritis is not warranted. The words in those Smritis are "Putra Sadrisa" and "Putra Cháyávaham," and their literal meaning is that the child taken in adoption should be one that is like a son born, or that is the reflection of such son. The authors of those Smritis, Caunaka and Manu, did not explain in what respect there should be a likeness or resemblance, and the commentators supplied the omission by analogy. In doing so, they took as a guide the ancient Hindú Law which regulated "niyoga" or the practice of begetting a child

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by appointment, and considered that the likeness or resemblance consisted in "fitness to be begotten by self through niyoga." There is this justification for the analogy, viz., that the object in permitting niyoga to the extent to which it was recognized by the ancient law, was to provide a substitute for the son of the body and thereby to prevent the extinction of that spiritual benefit which was believed to arise from the performance by a son of funeral and annual obsequies. It cannot be denied that niyoga, howmuchsoever it was censured by Manu and others, prevailed in former times and was recognized by ancient Hindú Law as a cause of filiation, though it was considerably restricted. Of the twelve descriptions of sons, Kshétraja was one and such a son ranked in the ancient law above the given son. See Mitákshará, chaps. I, XI, paragraph 1(1) and Smriti Chandriká, chap. X, s. 4(2).

The suggestion made by the appellants' pleader that we should now see whether the commentator's interpretation by analogy was justifiable cannot be adopted. It should be remembered that in several instances the commentaries themselves have become new law-sources, owing to the adoption of the opinion expressed therein by the people as part of the customary law. It is not possible to say beforehand, except by reference to actual usage, whether the opinion of the commentator on any particular point is part of the Hindú Law as received by the people; and the only course open to Courts of Justice is, as pointed out by Muttusámi Ayyar, J., in the Sivaganga case—*Muttu Vaduganádha Tévar* v. *Dora Singha Tévar*(3) to take the commentaries which are accepted generally as authoritative as containing the law applicable to the parties, unless they show by clear evidence that in some special matter the usage of the people is not in accord with them.

Another argument is that in Dattaka Mímánsá, sec. II, sloka 20, there is mistranslation. Though the correct translation is as suggested by Mandlik, and though the Sanskrit words in the original mean no doubt "with the mother with whom niyoga is "possible" instead of "with the mother of whom the adopter might have had carnal knowledge," we do not consider that the rule as laid down by Sutherland(4) has led to any substantial error. According to the commentaries, the rule is that niyoga must be

(1) Stokes' Hindú Law Books, p. 410.
(2) Edition by Kristnasawmy Iyer, pp. 139-140. (3) I.L.R., 3 Mad., 339.
(4) Sutherland's Law of Adoption, p. 223 (Synopsis).

possible between the adoptive father and the mother of the child taken in adoption; but according to the inference drawn by Sutherland, it is equivalent to saying that legal marriage must be possible. Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand irrespective of marriage and when the girl selected for marriage is a maiden. But prohibited connection in the case of niyoga has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. In comparing the law of prohibited connection in the one case with that in the other, it is necessary to bear in mind the theory that by marriage a woman passes into her husband's family, or, as the writers on Hindú Law say, her gotram becomes that of her husband. It should also be remembered that the rules of prohibited connection had a common object in both cases, viz., the prevention of incest.

In the case of marriage, there are three prohibitions, viz.—

(i) The couple between whom marriage is proposed should not be sapindas;

(ii) They should not be sagotras; and

(iii) There should be no Viruddha Sambandha or contrary relationship, that is, such relationship as would render sexual connection between them incestuous.

This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife. Now the rules as to the person eligible for appointment to beget a child are to the following effect:—According to Manu, chap. IX, verse 59(1), a brother or a sapinda relation can alone be appointed. The brother or sapinda mentioned is the brother or sapinda of the woman's husband who by reason of marriage is in law her own brother or sapinda. As a sapinda his gotram must be the same as that of her husband, and as the marriage between her and her husband must be taken to have been in accordance with the law as to prohibited relationship, she could not have been in her maiden state a sapinda of the person declared eligible for appointment. There is, therefore, no conflict between the law of marriage and

(1) Institutes of Manu by Jones, Ed. 4, p. 238.

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the rule prescribed by Manu as to niyoga. Yájñavalkya declares in chap. II, verse 128(1), that a sapinda or sagotra or some other person may be appointed to beget issue. In Mitákshará, chap. I, sec. XI, verse 1(2), the son of the wife is defined to be one begotten on a wife by a kinsman of her husband or some other relative. In Dattaka Mimánsá, sec. V, verse 16(3), the commentator says the person appointed may be a brother, a near or distant kinsman and so forth, and, as a justification for introducing the words "so forth," he observes as follows:—"Nor is such appointment of one unconnected impossible, for the invitation of such may take place under this text." "For the sake of seed, let some Bráhmana be invited by wealth." As to the sapinda or sagotra of her husband, he could not have been her sapinda or sagotra when she was a maiden, as already explained. As to some other person, the proper construction is, some person like the others previously specified, in the sense that sexual intercourse with him would not be incestuous under the marriage law. Thus, there is no conflict between the law of appointment as to the person eligible for appointment and the law of marriage as to the person eligible for marriage. The object in both was that the sexual intercourse authorized by law should not be incestuous, and the religious foundation for the rule is that the offspring of incest is outcaste and not competent to offer funeral or annual oblations with efficacy. The point in the analogy consists in securing a son competent to perform those oblations and the analogy holds good whether it is considered in connection with the law of appointment or the law of marriage. Marriage, niyoga and adoption were alike ordained from a religious point of view by ancient writers on Hindú 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 other, provided special cases of

(1) Mandlik pp. 218-219. (2) Stokes' Hindú Law Books, p. 410. (3) *Ib.*, p. 590.

deviation from the rule referable to other ancient practices are recognized as exceptions to the general rule when they are proved by usage. As to the argument that the expression "Viruddha Sambandha" or contrary relationship or prohibited connection is applied by writers on Hindú 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 authorized ancient practice or text; nor was there any plea or evidence of a special usage. We are therefore of opinion that this second appeal cannot be supported and that it must be dismissed with costs.