PRIVY COUNCIL.

P. C.
1898
November
18*th*, 22*nd*.
1899.
March 11*th*.

BHAGWAN SINGH AND OTHERS (PLAINTIFFS) *v.* BHAGWAN SINGH, MINOR, AND OTHERS (DEFENDANTS).*

On Appeal from the High Court for the North-Western Provinces.

Hindu law—Invalidity of the adoption of a sister's son, mother's sister's son, and of a daughter's son.

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.

The judgment in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) gives no countenance to the conclusion that in order to bring a case under any rule of law, laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it.

APPEAL from a decree (27th June 1895) of the High Court, reversing a decree (23rd September 1892) of the Subordinate Judge of Cawnpore, and remanding the suit under section 562, Civil Procedure, for trial on the merits.

The suit out of which this appeal arose was brought by the appellants, zamindars of zilla Cawnpore, on the 3rd May 1892. They claimed as reversioners entitled to the estate of Madho Singh, who died childless on the 27th July 1890, leaving the second defendant his widow, and having on the 23rd June of that year adopted the first defendant, a minor. Their claim was for a declaration that the alleged adoption of the appellant by Madho Singh was void and ineffectual on the ground that the boy, first defendant and now first respondent, was the son of the sister of Madho Singh's mother.

The parties were Thakurs, members of the regenerate class of Kshatriyas. It was not alleged that this adoption was valid by any custom prevailing in the caste or in the locality to which the

Present:—LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR RICHARD COUCH.

(1) (1868) 12 Moo., I. A., 437.

parties belonged. The question on this appeal was whether with reference to the Hindu law governing adoption it was valid; and it was not disputed, but conceded in the appellate court below, that the principles which applied to the question of the adoption of a daughter's son, or of a sister's son, or of a mother's sister's son, applied equally to the adoption of a son of any of the three. As regarded the above there was no divergence between the Mitakshara school and the other schools of Hindu law, the rules affecting the present question being alike applicable in the different schools. This was stated in the judgment of Banerji, J.; and also that there was no difference as regarded the application of these rules between Brahmans, Kshatriyas, and Vaisiyas. The material defence was that the prohibition in the Hindu law was "merely directory." Its breach was reprehensible, but it was not such that the adoption would be invalidated when once made.

The Subordinate Judge decreed in favour of the plaintiffs on the ground that the adoption was altogether illegal. He referred to *Parbati* v. *Sundar* (1).

In appeal the question was referred by the Division Bench (Tyrrell and Knox, JJ.) for the opinion of the Full Bench (Edge, C.J., Knox, Blair, Banerji, Burkitt, and Aikman, JJ.),—whether the adoption, by a Hindu, a Kshatriya, of one of the three regenerate classes, subject to the law of the Mitakshara, of the son of his mother's sister, was, according to that law, valid or invalid. The referring order stated that it was not alleged that the adoption was valid according to any special custom prevailing in the caste, or in the locality, to which the parties belonged.

The Full Bench delivered their judgments on the 27th June 1895. Edge, C.J., and Knox, Blair, and Burkitt, JJ., were of opinion that the adoption in question was not shown to be "prohibited or illegal by the law of the Benares school, which applies in these Provinces and to the parties," and held that the adoption was not prohibited in the sense of its being illegal and void.

(1) (1885) I. L. R., 8 All., 1.

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On the other hand, Banerji and Aikman, JJ., considered that the adoption of a mother's sister's son was contrary to the Hindu law applicable to the case, and had not been shown to be sanctioned by any special usage of the caste to which that son belonged. The two principal judgments were those of the Chief Justice and of Banerji, J., and all the judgments are reported in the Indian Law Reports, 17 All., 294.

All were agreed that amongst Sudras such an adoption was permissible. But that in regard to its prohibition, if that were absolute, Brahmans, Kshatriyas and Vaisiyas, or the three twice-born classes, were subject to it. And that the Dattaka Mimamsa and the Dattaka Chandrika, both contained the injunction against it.

Mr. H. Cowell for the appellant, argued that the judgments of the minority of the Full Bench were right. The prohibition of the adoption of a sister's son, and of the sons of other female relations of the adopter admitted to be in the like case had been established, as applicable to three regenerate classes, under early texts in the written Hindu law, repeated by the Commentators, and accepted by the Courts of law. The prohibition was acknowledged by all the different schools. The approval of the Judicial Committee had been intimated. The exceptions were in regard to proved custom to the contrary. The general rule had been enforced ever since 1815, when such an adoption had been contested. In Bengal the first decision to that effect was in *Kora Shunko Takoor* v. *Beebee Munnee* (1). Afterwards in the North-West came *Shib Lall* v. *Bishumber* (2); *Musammat Battas Kuar* v. *Lachman Singh* (3); *Parbati* v. *Sundar* (4). The following cases appeared to be contrary, but their effect could be explained away. The first was *Ramchunder Chatterjea* v. *Sumboo Chunder Chatterjea* (5), a case in which the doctrine laid down was soon overruled, as shown in Sir F. Macnaghten's Consid. on Hind. L. 166, 168. The next was in 1808, case No. 12 in Sir W. Macnaghten's 2 Hind. L. 85, regarded as a case in which the

(1) (1815) 1 Morley Dig. No. 59, 18.
(2) (1866) S. D. A. N.-W. P., 25.
(3) (1875) 7 N.-W. P., H. C. Rep., 117.
(4) (1885) I. L. R., 8 All., 1.
(5) (1810) 1 Morley Dig. No. 58, 18.

parties were Sudras. The third was in 1837, the case of an adopted son in the Kritrima form, who was the son of the adopter's sister (1).

In Madras there were *Narasammal* v. *Bala Rama Charlu patia* (2); *Jivani Bhai* v. *Jivu Bhai* (3); *Gopalayyan* v. *Raghupatiayyan* (4); *Minakshi* v. *Ramanada* (5); the decision of a Full Bench. Two cases allowing the adoption in question, *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (6) and *Vayidinada* v. *Appu* (7) were decided upon proof of a special custom in favour of it. The cases in Bombay were *Haebut Rao Mankur* v. *Gobind Rao Mankur* (8); *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (9); *Bhargirthi Bai* v. *Radha Bai* (10). Afterwards came the Full Bench decision in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (11). Looking tot he Calcutta decisions would be found *Rajendro Narain Lahoree* v. *Saroda Soonduree Debee* (12); and *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (13); showing the two Mimamsas to be highly esteemed.

No judgment upon the question, raised directly on appeal, had been passed by the Judicial Committee yet; but there was a distinct intimation of their opinion upon the point in *Sundar* v. *Parbati* (14), where the Committee, had it been necessary to determine it, would have had "probably little difficulty in accept-"ing the opinion that a Brahman cannot lawfully adopt his "sister's son." This point was treated as settled in *Lala Narain Das* v. *Lala Ramanuj Dayal* (15). He showed that in *Ramalinga Pillai* v. *Sadasiva Pillai* (16), where the adoption had been admitted, the question had arisen among Sudras, and not, as the report stated, among Vaisyas, and referred to *Jivani Bhai* v. *Jiva Bhai* (17).

(1) (1837) 1 Morley Dig. No. 61, 19.
(2) (1863) 1 Mad., H. C., Rep., 420.
(3) (1865) 2 Mad., H. C., Rep., 462.
(4) (1869) 7 Mad., H. C., Rep., 250.
(5) (1886) I. L. R., 11 Mad., 49.
(6) (1883) I. L. R., 7 Mad., 3.
(7) (1885) I. L. R., 9 Mad., 44.
(8) (1821) 2 Borrodaile Rep., 106.
(9) (1879) I. L. R., 3 Bom., 273.
(10) (1879) I. L. R., 3 Bom., 298.
(11) (1889) I. L. R., 14 Bom., 249.
(12) (1871) 15 W. R., 548.
(13) (1880) I. L. R., 6 Calc., 256.
(14) (1889) L. R., 16, I. A., 186; I. L. R., 12 All., 51.
(15) (1897) L. R., 25, I. A. 46, 52; I. L. R., 20 All., 209.
(16) (1864) 9 Moo., I. A., 510.
(17) (1822) 3 Select Ca., 144, 150.

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Even if the question should be treated as an open one, and his main argument was that it was not, after so many years of decision against such adoptions, the result left was that the whole controversy rested upon the effect of the Dattaka Mimamsa, section II, paras. 2, 74, 91, 94, 107, 108, and section V, paras. 16, 20; and of the Dattaka Chandrika, section I, paras. 11, 17, and section II, paras. 7, 8. The authority of Sakala was there given. On this there were the writings of Mr. Mandlik, pp. 8, 13 and 15; and of West and Bühler, p. 28. For the text of Saunaka, he referred to Manu, Instit. Chapter III, *v.* 16. And on this he cited *Ooman Dutt* v. *Kunhaya Singh* (1). Sakala's text was conclusive, even applying Jaimini's rule that giving a reason in the text was an indication of an admonition not amounting to law. The text of Saunaka had not been shown to have been misconstrued by the authors of the Mimamsas. In regard to the only authority suggested as supporting the disregard of the rule, that of Yama, he referred to that part of the judgment of Banerji J., which stated that the alleged text was not found in the Yama Smriti or Sanhita, or other Dharma Shastra. He referred to the Sarasvati Vilasa, translated by Foulkes, edition of 1881, which, he said, did not contain this text. He referred also to Mandlik, p. 483, and to the Tagore law lectures for 1888, p. 334, by the Shastri, Golap Chandra Sarcar. Their criticisms, he argued, could not be altogether accepted. The two Mimamsas there criticized were considered in all the schools of Hindu law, and all over India, to be of great authority although comparatively modern. The general opinion of the Dattaka Mimamsa might be taken to be the same as that expressed in its favour by Sir F. W., and Sir W. H., Macnaghten, by Colebrooke, Sutherland and Strange, and by many native Judges in their judgments. Eight treatises written by native authors had been produced in the Court below supporting the opinion that the precept in the Shastras was a complete and legal prohibition against adopting a sister's son. And he referred to *Rangama* v. *Atchama* (2); and *The Collector*

(1) (1822) 3 Sel. Rep., 201. (2) (1846) 4 Moo., I. A., 1.

of Madura v. *Moottoo Ramalinga Sathupathy* (1); as showing that the Dantaka Mimamsa was a work to which weight was attributed.

He submitted that no reason had been assigned for disregarding the text of Sakala: that no valid reason had been given for holding the text of Saunaka to have been misconstrued by Nanda Pandita: that the text of Yama, as to the point, had not been cited by any commentator, or shown to have been adopted by any school of Hindu law: and that no sufficient reason had been given for refusing to accept the authority of the Dattaka Mimamsa and the Dattaka Chandrika, which had been hitherto everywhere recognised.

Afterwards, on the 11th March 1899, their Lordships' judgment was delivered by LORD HOBHOUSE.

There are no facts in dispute in this case. The plaintiffs now appellants brought the suit to establish their title as reversionary heirs of Madho Singh as against the first defendant, a boy who was adopted by him in the dattaka form. The boy is the natural son of Madho's mother's sister. The sole question is whether the adoption of such a relation is allowed by Hindu law. The Subordinate Judge held that it is not allowed. A Full Bench of six judges of the High Court has decided that it is allowed. Four judges, viz., Chief Justice Edge, and Justices Knox, Blair and Burkitt being of that opinion against Justices Banerji and Aikman who are of the contrary opinion. Their Lordships are under the disadvantage of hearing the case without any help from the respondents who have not appeared. But this disadvantage is much lessened by the elaborate fulness of the reasons assigned by Chief Justice Edge for the conclusion which he reached in favour of the respondent.

The question is of the same nature as that which has just been disposed of in the preceding cases from Madras and Allahabad. But it depends upon a different set of texts and the course of decision in India has been very different. It is agreed

(1) (1868) 12 Moo., I. A., 397; 437.

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on all hands that the prohibition contended for extends only to the three twice-born classes, and not to the most numerous class of all, the Sudras. The parties here are Kshatriyas governed by the Benares school of law. It is also agreed that, as regards capability to be adopted, the sons of sisters, sons of daughters, and sons of maternal aunts, stand on the same footing, and that the authorities which apply to any of these classes apply to all.

The oldest original texts bearing on the point are contained in the Dattaka Chandrika. In section I, para. 11 of that work the author quotes the ancient sage Sakala to the following effect. After mentioning certain relatives to whom preference should be given in adoption among the regenerate tribes, he says:—"If such exist not, let him adopt one born in another family, except a daughter's son and a sister's son and the son of the mother's sister."

In para. 17 of the same section the same work quotes the sage Saunaka who, after pointing out from what classes adoptions should be made, says:—"But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son."

In section II, paras. 7 and 8, after quoting from Saunaka the expression that the adopted boy should bear the reflection of a son, the author adds:—"The resemblance of a son, or in other words the capability to have been begotten by the adopter, through appointment and so forth."

Nanda Pandita, the author of the Dattaka Mimamsa, writing in the early part of the 17th century, some centuries later than the conjectured date of the Dattaka Chandrika, gives the same quotations from Sakala and Saunaka and similar comments upon them. (Section II, Articles 74, 107, 108; Section V, Articles 16 to 20).

Their Lordships have mentioned in the prior adoption cases the views of Mr. Justice Knox as to the authority of the two Dattaka treatises just quoted. In the present case the learned Chief Justice Edge takes even more disparaging views of their

authority; denying, if their Lordships rightly understand him, that these works have been recognised as any authority at all in the Benares school of law. If there were anything to show that in the Benares school of law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on the Smritis as the source from whence all schools of Hindu law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883 that learned writer says:—"The Dattaka Mimamsa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based." Both works have been received in Courts of Law including this Board as high authority. In *Rangama* v. *Atchama* (1) Lord Kingsdown says: "they enjoy, as we understand, the highest reputation throughout India." In 12 Moore, p. 437, Sir James Colvile quotes, with assent, the opinion of Sir William Macnaghten, that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern Jurists, while the Mimamsa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland and of West and Bühler seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law.

The learned Chief Justice then objects that the texts of the two Rishis are detached from their context and so are rendered of no value; and that as regards Sakala there is no information where the writer of the Chandrika obtained his text, and that its genuineness is doubtful. This objection is strengthened by the fact that the greatest of the sages do not mention any such prohibition; neither Manu nor Vashistha nor Yajnavalkya nor Narada; while one ancient sage called the holy Yama, expressly asserts the right to adopt a sister's son. Those objections must

(1) (1846) 4 Moo. I. A., 97.

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receive the same answer. It may be true, though it is impossible now to say, that the Dattaka Chandrika is the sole authority for the texts there quoted and afterwards copied by Nanda Pandita; but it still remains the fact that the texts have been so quoted for several centuries and have so been received into the body of Hindu Law.

Taking then the texts as they are given, and adding to them such weight as the commentators possess, what is enjoined by them? The learned Chief Justice points out that Saunaka may mean a legal prohibition, or a moral admonition, or merely to state a fact, or to indicate a preference for daughters' and sisters' sons among Sudras. Certainly, if the question were new, the learned Judge's argument would have to be very carefully weighed before it could be rejected. Much of the reasoning which has prevailed with their Lordships in the prior cases would apply to this case; and on some points, such as the silence of other great lawgivers and the existence of a sacred text in an opposite sense, with greater force. But their Lordships find an antecedent difficulty; for they have to consider whether the present question can be treated as an open one.

It is not necessary to state in detail the course of decisions in India, because there is hardly any conflict in them and they are fully stated in the judgments below. In 1808 there was a decision on a case from Mirzapur in favour of the validity of these disputed adoptions; but it is probable that the parties were Sudras, as Sir William Macnaghten thought they were. There was a decision in 1810 between Brahmans where an adoption of a sister's son was held valid. But Sir Francis Macnaghten tells us that it was overruled in some subsequent proceeding which is not specified. In every other case that has since occurred, when the question has arisen between members of the three regenerate classes, and the adoption has been in the Dattaka form, the decision has been against its validity. The cases have occurred in all parts of India, and all the High Courts have agreed. In making this general statement their Lordships have not overlooked the case decided

by the Bombay High Court in 1867 (1). Chief Justice Edge considers that, though the parties really were Sudras, the learned Judges thought they belonged to one of the twice-born classes, and so lent their authority to an adoption of a mother's sister's son among one of those classes. But though there was some argument as to the true caste, their Lordships find nothing in the judgment to show that the Judges thought the caste to be other than it really was. Nor was the decision treated as standing in the way of a subsequent decision in 1879 by the same High Court, which affirmed the invalidity of such marriages in the regenerate classes.

The arguments by which the learned Chief Justice seeks to withdraw this case from so strong a current of decision rest entirely on the peculiarity which in his opinion attaches to the Benares school of law. He does indeed subject the decided cases to a minute and able examination with a view of ascertaining the precise bearing of each and of attenuating its force. But the general result at which he arrives does not substantially vary from that which is arrived at by the minority of the Court, and which is above stated. That being so he puts the case in this way :—

"The parties in this case are Kshatriyas and are governed by "the Benares school of Hindu law. As Kshatriyas they belong "to one of the three regenerate classes of Hindus. What we have "to ascertain is, does the Hindu law, as accepted by the Benares "school, prohibit the adoption by a Kshatriya of the son of his "mother's sister, in the sense of making such an adoption illegal "and void.

"It has not been suggested that there is any evidence in this "suit of any usage in these provinces by which the adoption in "the Dattaka form of the son of a sister of the mother of the "adopter, or of his sister's son or of his daughter's son, amongst "any of the three regenerate classes is either recognised as valid "or prohibited as illegal. Neither side in this case has pleaded "or relied upon any custom or usage."

(1) (1867) 4 Bom., H. C. Rep., 130.

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The learned Chief Justice then ties the plaintiffs down to the obligation of showing a custom to prohibit the adoptions in question; and on each decided case he puts the test question whether it is founded on proof of such a custom among the regenerate classes governed by the Benares school of law. In this position he considers that he is supported by a passage in the judgment of this Board delivered by Sir James Colvile in the case of the *Collector of Madura* v. *Moottoo Ramalinga* (1). It is as follows:—"The duty, therefore, of a European Judge who is "under the obligation to administer Hindu law is not so much to "inquire whether a disputed doctrine is fairly deducible from "the earliest authorities as whether it has been received by the "particular school which governs the district with which he has "to deal, and has there been sanctioned by usage. For under the "Hindu system of law clear proof of usage will outweigh the "written text of the law." The principle deduced by the learned Chief Justice from this passage and applied to the present case would have very far-reaching consequences; and in their Lordships' opinion it is not a sound principle nor is it properly deducible from the language of this Board.

In that judgment Sir James Colvile was dealing with the question whether a widow could adopt a son to her husband without his express authority. That is a point in the law of adoption on which legal authorities in different parts of India, all starting from the same sacred texts, have branched off into an extraordinary variety of conclusions; each marked enough and prevalent enough in its own sphere to be ascribed to some recognised school of law. Sir James Colvile addresses himself first to show how these schools came into being, and secondly, to specify books of the highest authority in them. It is in the course of this exposition that the sentences just quoted occur, as also the opinion before quoted with reference to the authority of the Dattaka Chandrika and of the work of Nanda Pandita. The decision of the Board was that the power claimed for the widow was

(1) (1868) 12 Moo. I. A., 436.

conferred on her by the school of law dominant in the Dravida country from whence the appeal came. But that law was ascertained by the usual methods of ascertaining general law; by reference to authoritative text books, to judicial decisions, and to the opinions of pandits. These authorities were found to be sufficient proof of the general Hindu law prevailing over large tracts of country and populous communities. Anybody living among them must be taken to fall under those general rules of law unless he could show some valid local, tribal, or family custom to the contrary. It was necessary for this Board to refer to the differences of schools of law, because the authorities of the recognised Bengal school denied the power which those of Southern India affirmed. The whole passage is framed with reference to the fact that different schools were found to take different views of the general law on the point before the Board. But their judgment gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove by evidence of what actually is done. In this case the learned Chief Justice tells us that there is no suggestion of a special custom. That being so he seems to have inverted the processes by which law is ascertained.

The rule of law asserted by the plaintiffs in this case is derived in the first place from the sacred texts which underlie all Hindu law; and, secondly, from books of high authority in the Benares school as well as in others. It has been affirmed by Courts of Justice in all parts of India and in many law suits in which the parties were subject to the law of the Mitakshara, which is of the highest authority in the Benares school. It has been so affirmed and applied in general terms, and not as confined to a particular school. It is not shown or even asserted that there is anything peculiar in the Benares school to make this rule

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inconsistent with its principles. It seems to their Lordships that to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them.

Their Lordships do not inquire whether the views so earnestly maintained by the learned Chief Justice upon the construction of the disputed texts might have been successfully maintained at the beginning of this century. For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one. Their Lordships will humbly advise Her Majesty to reverse the decree appealed from, and to restore that of the Subordinate Judge, with costs in both Courts. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:—Messrs. *Ranken, Ford, Ford, and Chester.*