APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI NANI (ORIGINAL DEFENDANT), APPELLANT, *v.* CHUNILAL (ORIGINAL PLAINTIFF), RESPONDENT.* 1897. *November* 22.

Hindu law—Adoption—Adoption of her brother's son by a Hindu widow—Validity of such adoption.

Under the Hindu law a widow may adopt her brother's son.

SECOND appeal from the decision of T. D. Fry, Joint Judge of Ahmedabad.

The plaintiff sued as the adopted son of Jeyshankar Utamram to establish his title to a certain cash allowance annually received from the Government treasury of Daskroi.

Jeyshankar, the original recipient of the cash allowance, was a Bráhmin. He died in 1881, leaving two widows and a daughter, the child of the senior widow, who was the defendant in the present suit.

On Jeyshankar's death the allowance was transferred to the name of his elder widow.

On 9th October, 1892, the elder widow died. Thereupon the allowance was entered in the name of the younger widow and was paid to her.

On the 29th May, 1894, the younger widow adopted the plaintiff, who was her brother's son.

The younger widow died on 17th February, 1895. Thereupon the allowance was entered in the name of the defendant (the daughter of the elder widow) and was paid to her. This led to the present suit.

The defendant pleaded (*inter alia*) that the plaintiff's adoption was illegal and invalid (1) because he was the brother's son of his adoptive mother, and (2) because the adoption was made from corrupt and capricious motives with the object of defeating the defendant's rights of succession and inheritance to her father's estate.

The Court of first instance rejected the plaintiff's claim, holding that the adoption was made from improper motives for the

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purpose of injuring and defrauding the defendant, and that the plaintiff's adoption (being the adoption by a sister of her brother's son) was invalid under the law of the Mayukha, which was the paramount authority in Gujarát.

This decision was reversed, on appeal, by the Joint Judge of Ahmedabad. He held, on the authority of *Sriramulu* v. *Ramayya*[1], that the plaintiff's adoption was not invalid under the Hindu law. He allowed the plaintiff's claim.

Against this decree the defendant appealed to the High Court.

Ganpat Sadashiv Rao for appellant :—The question is, whether an adoption by a sister of her brother's son is valid under the Hindu law. The Dattaka Mimansa (sec. 4, pl. 33 and 34) lays down that such an adoption is invalid for the same reason that a sister's son cannot be adopted by a brother. The principle of adoption is that the son adopted should be the "reflection of a son." The rule originally laid down was accordingly that a legal marriage must be possible between the adopter and the mother of the adoptee. This rule was afterwards extended so as to cover a case like the present. And it was laid down that a legal marriage should also be possible between the adoptive mother and the natural father of the adopted son. See West and Bühler's Digest, p. 1032. The responses of the Shástris quoted at page 1033 of the Digest show that a Brahmin widow is not allowed by the Vyavahar Mayuka to adopt a brother's son. In *Giriowa* v. *Bhimaji*[2], West, J., refers to the objection that might be taken to the validity of such an objection. *Battas Kuar* v. *Lachmen Singh*[3] is a direct authority. It lays down that a widow cannot affiliate a brother's son. See also *Dagumbaree* v. *Taramonee* referred to in F. MacNaughten's Hindu Law, p. 170. The lower Court relies on *Sriramulu* v. *Ramayya*[1], but that case is not in point, as there the adoption was made not by a widow, but by the adoptive father.

[PARSONS, J. :—Suppose the plaintiff had been adopted by Jeyshankar, would the adoption have been illegal ?]

(1) I. L. R., 3 Mad., 15. (2) I. L. R., 9 Bom., 58.
(3) 7 N.-W. P. 117.

No. Jeyshankar was competent to adopt the plaintiff, because he could have legally married plaintiff's natural mother.

[PARSONS, J.:—Suppose the adoption had been made by Jeyshankar's senior widow. Would the adoption have been valid?]

I admit that in that case also the adoption would have been valid, and for the same reason, namely, that a legal marriage was possible between the senior widow and the real father of the adopted son. But no legal marriage could possibly take place between the junior widow and her own brother. It is on this ground we contend that the plaintiff's adoption by the junior widow is illegal.

Goverdhan M. Tripathi for respondent:—It is conceded that the plaintiff's adoption would have been perfectly valid, if it had been made by Jeyshankar himself. If so, why should the adoption be invalid when made by his younger widow? The widow did not adopt to herself, but to him. She acted under an implied authority from him. And if he was competent to adopt the boy, she was equally so. No doubt, it is now a well-established rule of law that the boy to be adopted must be one whose natural mother the adopter could have legally married; and according to this rule the daughter's son or sister's son is not elegible for adoption. But there is no foundation, in law, for the proposition that a legal marriage must also be possible between the adoptive mother and the natural father of the adopted son. The Dattaka Mimansa has been cited in support of this rule. But there is not a single text to support the statement in the Dattaka Mimansa. On the contrary both Mr. Mandlik and Mr. Mayne refuse to accept Nanda Pandita's authority on this point, and pronounce in favour of the validity of the adoption by a sister of her brother's son: see Mandlik's Hindu Law, pp. 479—481, and Mayne's Hindu Law, sec. 125. The case of *Sriramulu* v. *Ramayya*[1] is conclusive on this question. It shows that there is no prohibition, in law, to the adoption of a wife's brother's son. Even if there were any prohibition, it is directory, not mandatory.

RANADE, J.:—The adoption of the respondent-plaintiff in this case was questioned in the lower Courts on various grounds, but,

(1) I. L. R., 3 Mad., 15.

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in the appeal before us, the only ground on which its validity was disputed had reference to the fact that the respondent was the son of the brother of the adoptive mother, Bai Diwali. It was admitted that the adoption was made by the widow to continue the line of her husband Jeyshankar, who could have contracted a valid marriage with the natural mother of the respondent. It was further conceded by Mr. Rao, the appellant's pleader, that if Jeyshankar had adopted the respondent, no valid objection could have been urged on this ground. It was, however, contended that Jeyshankar's widow could not validly receive in adoption her own brother's son, because of her natural relationship to her brother, for the same reason in fact that Jeyshankar could not have validly adopted his own sister's son.

The question thus raised is one which has never been formally decided in this Presidency. There was indeed an incidental reference made to it in the judgment of West, J., in *Giriowa* v. *Bhimaji*[1]. The boy whose adoption was in dispute in that case was the son of the brother of the adopting widow, but no objection was taken on that ground to the validity of the adoption, presumably because the case arose in the Southern Marátha Country, where the prohibition of the adoption of daughter's and sister's son is not universally in force. As the present case comes from Gujarát, this reason does not hold good, and the appellant's pleader contended that Mr. Justice West's *dictum* was an argument in his favour. He also relied upon the ruling in *Batlas Kuar* v. *Lachman Singh*[2] in which the adoption of her brother's son by a widow was held to be invalid. On the other side, much reliance was placed on a ruling of the Madras High Court in which it was laid down that the adoption of a wife's brother's son was not invalid—*Sriramulu* v. *Ramayya*[3]. These were the only decided cases cited on either side in the course of the argument before us, which have a direct bearing on the point more immediately under consideration. Mr. Justice West's opinion is, however, only an *obiter dictum*. As regards the Allahabad case, it appears from the judgment of the Chief

(1) I. L. R., 9 Bom., 58. (2) 7 N.-W. P., 117.

(3) I. L. R., 3 Mad., 15.

Justice of Allahabad in *Bhagwan Singh* v. *Bhagwan Singh*[1], that the adoption referred to in *Battas Kuar* v. *Lachman Singh*[2] was held to be invalid because the widow had adopted the boy without any authority from her husband. In the Madras case above referred to, the adoption was not made by a widow, but by the adoptive father, and it is conceded in this case that if Jeyshankar had adopted the respondent, no objection could properly have been urged. It will be thus seen that the three cases cited are not much in point, and we must decide the present dispute on a general consideration of the nature and force of the alleged prohibitions based on near relationship in the matter of adoption.

There is a general unanimity among the authorities that there is nothing in the Smruti texts, or in the commentaries of Mitákshará and Mayukha, chiefly in force in Gujarát, which suggests any such particular limitation in the matter of adoption.

The prohibitions based on near relationship had their origin chiefly in the Dattaka Mimansa, a work of Nanda Pandita, who relied solely upon the texts of Shaunaka and Sakala. The originals with translations of these texts will be found in Ráo Sáheb Mandlik's work, as also in the elaborate judgments of Banerji, J., one of the dissenting Judges, and of the Chief Justice and a majority of the other Judges, in the Allahabad Full Bench case referred to above. These original texts expressly lay down, among negative prohibitions, the cases of the daughter's son, the sister's son, and the son of the mother's sister, as ineligible for adoption in the case of the three higher castes of Hindu society. Nanda Pandita further enlarged their scope by analogical reasoning, and expressed an opinion that for the same reason that a brother could not adopt his sister's son, a sister could not adopt a brother's son. It is on this latter extension of the prohibitive texts that the contention of the appellant is based, and we have now to see how far this extension can be accepted as legitimate, and allowed weight not merely as directory, but as a mandatory rule.

(1) I. L. R., 17 All., 294. (2) 7 N.-W. P., 117.

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In so far as daughter's and sister's sons are concerned, it is now too late on this side of India to raise the question which has been solemnly settled for the three higher castes by this Court in a series of decisions—*Gopal* v. *Hanmant*[1], *Bhagirthibai* v. *Radhabai*[2], and otherwise for the Shudra caste in *Ganpatrao* v. *Vithoba*[3], *Lakshmappa* v. *Ramara*[4].

These rulings indeed cover not only the case of the sons of daughters and sisters, and mother's sister, but also of any other woman whom the male adopter could not by reason of propinquity marry. This enlargement, however, does not cover the present case which falls under the extension of the analogy of the male adopter to his widow as suggested by Nanda Pandita. As far as sister's son, and daughter's son, and mother's sister's son are concerned, Nanda Pandita had the authority of express texts to support him, and his remarks in respect of them furnished only the reason of the rule. In respect of the further extension of the prohibition to the near relations of the adopting widow, there is no such textual authority, and the commentator cannot legitimately claim the functions of the Smruti writers.

Mr. Justice Muttusami Ayyar, in the Madras case cited above, has very properly observed that there is no foundation in the text of Shaunaka or Sakala, on which Nanda Pandita relies, for the rule he seeks to draw from it, namely, that the adopting mother must also be a person who might have legally married the natural father of the adopted boy. The rule only requires that marriage should be possible between the person for whom the adoption is made, and the natural mother of the adopted boy—*Minakshi* v. *Ramanada*[5]; *Chinna Nagayya* v. *Pedda Nagayya*[6]. The extension sought to be given by Nanda Pandita in the Dattaka Mimansa, and after him by the author of the Dattaka Chandrika, is clearly far beyond the scope of a commentator's functions; and unless such an extension has secured general adherence in the general consciousness or the habits and practices of the people, British Courts of justice, administering Hindu law, are not bound to give effect to it as part of the general law—*Collector of Madura* v. *Mootoo Ramalinga*[7].

(1) I. L. R., 3 Bom., 273; S. C. on review, I. L. R., 6 Bom., 107.
(2) I. L. R., 3 Bom., 298.
(3) 4 Bom. H. C. Rep., A. C. J., 130.
(4) 12 Bom. H. C. Rep., 364.
(5) I. L. R., 11 Mad., 49.
(6) I. L. R., 1 Mad., 62.
(7) 12 Moore's I. A., 397 at p. 436.

The logical unsoundness of the particular reasons assigned by Nanda Pandita for the view enunciated by him, is discussed at great length by the Chief Justice of Allahabad, who has in this matter largely endorsed the comments made by Ráo Sáheb Mandlik in his work.

For the purposes of the present appeal, it seems unnecessary to go into the question of the authority of the two works on adoption, the Dattaka Mimansa and Chandrika. Allowing them the full weight claimed for them, it is clear that they must be treated as only declaring the law, and not making it; and on this basis there is no ground for accepting the extension of the prohibition proposed by them to the widow's relations when it is not supported by express texts of the Smruti writers.

It must also be borne in mind that the adoption in this case was made by the widow to Jeyshankar, and not to herself. She acted under an implied authority from her husband. This husband had two widows, the elder and the younger Diwali. It must be a very far-fetched construction of the law which would permit the husband or the elder widow to make a valid adoption of the respondent, while denying this same validity to the act of the younger widow, solely because the boy's natural father happened to be her brother.

The Calcutta High Court has for similar reasons discouraged an extension of the principle of exclusion in another direction, when it was sought to hold that a grand-nephew could not be adopted as a son, because of the rule requiring the adopted son to be a reflection of a natural born son—*Haran Chunder* v. *Hurro Mohun*[1].

Lastly, it deserves notice that, for the reasons which led their Lordships of the Privy Council to rule in *Srimati Uma* v. *Gokoolanund*[2] that the positive restrictions laid down by Nanda Pandita were only directory and not prohibitive, even if this extension to the widow's near relations were permissible, the restriction would be at best directory only, and not mandatory, proper to be observed, but not obligatory and enforceable as positive law.

For these several reasons, we disallow the contention raised in this appeal and confirm the decree of the District Court with costs.

Decree confirmed.

(1) I. L. R., 6 Cal., 41. (2) L. R., 5 I. A., 40.