APPELLATE JURISDICTION (a)

Special Appeal No. 139 *of* 1863.

NARASAMMÁL .....*Appellant.*

BALARÁMÁCHÁRLU.....*Respondent.*

A custom which has never been judicially recognised cannot be permitted to prevail against distinct authority.

The theory of an adoption is a complete change of paternity : the son is to be considered as one actually begotten by the adoptive father, and he is so in all respects save an incapacity to contract marriages in the family from which he was taken.

In the Andhra country, as in Bengal, a Brâhman cannot adopt his sister's son.

1863. *October* 31. *S. A. No.* 139 *of* 1863.

THIS was a Special Appeal from the decision of T. J. Knox, Civil Judge of Chicacole, in Special Appeal No. 118 of 1860, affirming the decree of C. R. Pelly, Judge of the Subordinate Court of Chicacole, holden at Vizagapatam, Original Suit No. 112 of 1859. This suit was brought by the appellant, a Hindu widow, to obtain a house and land belonging to her deceased husband. The defendant Venkatammál as mother and guardian of the respondent a minor, contended that he was entitled as having been adopted by the deceased. The plaintiff replied that such adoption was void, the minor being the son of a sister of the deceased. The Subordinate Judge, however, dismissed the suit ; and, on appeal, the Civil Judge affirmed his decision in the following judgment :—

"Plaintiff sued to obtain possession of her deceased husband's property, denying that her husband either did adopt a son or could have adopted his sister's son.

"The defendant on behalf of the minor answered that the adoption was made and was valid.

"The Lower Court was of opinion that two points were at stake ; one of the fact, whether the adoption was made, and one of law, whether it was or was not invalid according to Hindu law.

"The Lower Court was of opinion that the evidence as to the fact of adoption was conclusive, and that the necessary ceremony to constitute a valid adoption had been performed.

(a) Present : Frere and Holloway, JJ.

1863. October 31 S. A. No. 139 of 1863.

"Regarding the legality of this adoption, the Court observed that the pandits of the Sadr Court differed in their opinion; one said that among Bráhmans, a sister's son could not be adopted, while the other said that in the Drávida country the adoption of a sister's son is both sanctioned by law and recognized by custom, and this pandit, being the senior pandit, affirmed that the text quoted by the junior pandit did not apply to the Drávida country.

"The Lower Court after a reference to Strange's *Hindu Law*, and Sutherland on *Adoption* was of opinion that the junior pandit's opinion rested on a single text, not pointedly prohibitory, and that the adoption of a sister's son in this case must be upheld and decreed against plaintiff's claim.

"Plaintiff appealed, because the fact of the adoption was not proved, and the dying state her husband was in afforded strong presumption, he had not strength to go through the long ceremony necessary to render an adoption valid; because the law applicable to the Drávida country is not in force in Vizagapatam district, which lies in the Andhra country, and plaintiff refers to various authorities in support of his opinion.

"The Civil Judge agrees with the Lower Court that the evidence is conclusive; that a sister's son was duly adopted, and as this boy had lived always with his adopting fathers, it was a very natural and very proper act.

"The important question is, accordingly to Hindu law, is it a valid adoption?

"It is found that the pandits of the Sadr Court have given different opinions, one pandit declaring that among Bráhmans, a sister's son cannot be adopted, and the other, that custom sanctions the practice in the Drávida country.

"Strange's *Hindu Law* in Section 91 says, emergency will justify this adoption among *all* classes; in Section 92 that custom sanctions it in South India, or the Drávida country even without emergency, and from Section 94 the Civil Judge concludes that such usage, that is, such a practice where no emergency exists, does not prevail in the northern part of the Presidency, and from Section 97 it is clear that among all castes emergency will render valid such an adoption; the question then remains for the Court to decide

1863. October 31. S. A. No. 139 of 1863.

whether in this instance, emergency, that is circumstances arising above the ordinary course of things, justified the deceased husband in the course he took.

"The object of adoption is to secure the fullest and most meritorious performances of the funeral obsequies of the adopter; those celebrated by a son being in some spiritual sense more efficacious than by any other heir, and in this instance no doubt the adopter's second object was to confer a right of inheritance to considerable property on a sister's son, who since childhood had lived in his house, and for whom evidently his wife entertained no affection, the adopter was at the time in a critical position, and on his death-bed when this act was done, and as far as this record goes, he had no near male heirs, and it is evident he could not trust his widow to adopt this boy after his decease.

"He had by Hindu law power in his life-time to alienate his property to the exclusion of his widow, provided she had maintenance.

"As to the rules current in the Drávida country not applying to these parts, the Civil Judge is of opinion, that the parties who allege this are bound to show to what school of law they would refer. The vakil states that this is the Andhra country, and so it may be called in antiquated maps framed 300 years ago, but the name in the map does not show that it has any separate law applicable and peculiar to itself; on the contrary, be its name what it may, it must be regulated by one of the five great law-schools, and if the Madras law will not apply, the Bengal school, to which alone the so-called Andhra country could belong, would at once decide the matter on its principle, that a fact cannot be altered by a thousand texts: this alienation of property, though prohibited by law, would nevertheless when actually effected be left undisturbed; and no doubt the great principle that what ought not to have taken place once done is valid is often applied in cases of Hindu law in Southern India.

"The Civil Judge is of opinion that plaintiff as widow is not in a position to destroy the validity of her husband's act; it was rendered emergent both by his approaching death and her want of a son, and her dislike to the boy.

1853.
October 31
S. A. No. 139
of 1853

her husband wished for ; and if she has a sufficient maintenance, the Civil Judge is of opinion that the adopted son's claim as heir is superior to her indefinite position as a childless widow ; it is the duty of the Civil Court to support the evident and just intentions of parties, and advance substantial justice ; the deceased may have erred in adopting his sister's son and injured himself, but he has done plaintiff no wrong, for she had no certain right of inheritance to property which her husband at any time during his life-time could alienate, and in fact did so.

" The decree of the Lower Court is confirmed and appeal dismissed with costs."

Srinivasachariyar, for the special appellant, the plaintiff. The person to be adopted by a Bráhman must be one whose mother the adopter could legally marry, Sutherland, *Synopsis*, p. 223.

Mayne, for the special respondent, the second defendant relied on Strange's *Manual*, 2d ed., p. 22 : " Cudras...may adopt daughter's or sister's sons.

" 87. All classes may make such adoption in emergency (Pro. of Sadr Court, 4th and 25th June 1836.)

" 88. The custom of making such adoption, even without emergency, prevails in the Presidency of Madras (Pro. of Sadr Court, 4th and 25th June 1836.)

" 89. This usage is upheld by the Vyavahára Maynkha (Sadr Pandits, 25th Feb. 1839) and the Vaidyanátha Dikshitiyam (Senior Sadr Pandit, 16th May 1855.)

The Judgment of the Court was delivered by

HOLLOWAY, J. :—This was a suit brought by the widow of a deceased Bráhman to recover from the person alleging himself to be his adopted son the property left by that Bráhman.

The defence was that the defendant, son of the sister of the deceased, was legally adopted by him.

Both the Lower Courts have found that a ceremony took place which, if the boy could be legally adopted, would constitute him an adopted son ; and this finding is, in point of law, impugned upon this appeal upon the ground of the absence of the father, who had, however, expressed his assent.

1863. *October* 31. S. A. *No.* 139 *of* 1863.

The Lower Courts have followed an opinion of the late Mr. Ellis, (2, Strange's *Hindu Law*, 101.) "In practice, the adoption of a sister's son by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions." On this opinion and that of the senior pandit of the late Sadr Court that in the Drávida country the prohibition was not binding, the judgment of the Lower Court has gone.

It is admitted on both sides that there is no judicial authority upon the subject, so that the case is one of first impression and must be decided upon the principles of Hindu law, unless it be shown that in the country of the parties that law has been modified by customs which have received judicial recognition. A very short experience will suffice to satisfy any Judge that a pandit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom; and in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority.

Now the passage quoted at page 101 distinctly forbids the adoption of a sister's son by one of the three higher classes, and the weight of the prohibition is increased by the addition of the doctrine that the sister's son may be adopted by a Cudra. Mr. Sutherland, the greatest English authority on the subject (P. 223.) lays it down as a fundamental principle that the person to be adopted must be one with the mother of whom the adopter could legally have intermarried.

Nanda Pandita lays it down in distinct terms that the daughter's son is not such a reflection of a son as can legally be taken in adoption, and the commentator, *Dattaka Chandrika*, Section II, para. 8, defines the reflection of a son, as "the capability to be gotten by the adopter through appointment, and so forth." It is manifest that the sister's son is not such an one: Section V, para. 18 of the *Dattaka Mimansa*: "For the three superior tribes a sister's son is nowhere [mentioned] as a son," and again, "prohibited connexion is the unfitness [of the son proposed to be adopted] to have been begotten by the individual himself through ap-

1863.
October 31.
S. A. *No.* 139 *of* 1863.

pointment [to raise issue on the wife of another]." There exist, therefore, the very highest opinions in favour of the illegality of such an adoption, and to these is to be opposed the extrajudicial opinion of a gentleman, doubtless of great eminence, but still a mere opinion.

Mr. Justice Strange in the second edition of his *Manual* lays it down "that usage has sanctioned the departure from the rule to the extent that there(the Madras Presidency) a daughter's or a sister's son may be adopted." In the former edition at page 17, Section 92, it was said, on the authority of extrajudicial proceedings of the Sadr Court, to prevail as an usage in South India, that is, the Drávida country, and in Section 94, quoting the opinion of a pandit of the Provincial Court of the northern division, it was stated that the usage did not prevail there. This passage has been altogether omitted in the later edition, perhaps on the authority of the opinion given by the senior pandit in this very case. The Civil Judge was shown by an old map that the country in which he was administering this supposed custom was not the Dravida country ; and there seems to us no doubt whatever that this is the case, and that the opinion of a pandit of the northern division, as to the non-existence of the custom there, was certainly of much greater weight than a vague statement such as that contained in the opinion of the Sadr Pandit. Drávida is the Tamil country, and Andhra is the name for Telingana : it is true that the family of languages spoken in the Presidency is called the Drávidian family, but this does not affect the meaning of geographical terms.

It is to be observed, too, that Mr. Ellis, a Sanscrit scholar, was himself not a Telugu scholar, although profoundly versed in the Tamil language and customs.

This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority, against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of Justice bound to administer the law. More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself a logical deduction from the very nature of the subject to which it applies. The whole theory of an adoption is the complete change of paternity.

1863. October 31. S. A. No. 139 of 1863.

For the purposes of this argument, the son is to be considered as one actually begotten by the adoptive father. He is so in all respects, save an incapacity to contract marriage in the family from which he was taken(*a*). It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman law. Item amitam, licet adoptivam, ducere uxorem non licet(*b*).

We are unable therefore to agree that the text is not pointedly prohibitory ; and even if there had been no such text, we are of opinion that as being a logical consequence of the very nature of an adoption, the Court would be bound to decide that such an adoption is invalid. The Civil Judge is not very correct in the basis of the dilemma in which he has placed the widow. He says, that if not governed by the school which prevails here, he must be governed by the Bengal school which would validate any act done ; and the unmeaning words, "a fact cannot be altered by a thousand text," are supposed to embody a principle which would govern the case. It is clear, however, that by the Bengal school of law, this transaction would as an adoption be absolutely void.

In treating this adoption as an alienation we further think the Civil Judge wholly unfounded. It is true that a philosophical jurist of our own time, has told us that an adoption is in Hindu society a substitute for the will, which is purely of Roman invention(*c*); but to alter the disposition of property made by the law, there must be an adoption. This is not one. The result, therefore, is the same as it would be if a man capable of disposing of property by will, had executed a document, which from some defect was not a will. It could by no possibility be argued that the intent to alienate being clear the attempting testator had actually alienated.

We are clearly of opinion that the decree of the Lower Court should be reversed, and a decree be given for the plaintiff ; but that there should be no costs on either side.

Appeal allowed.

(*a*) And to adopt his own natural brother, *S. A.*, *No* 27 *of* 1858, M. S. D., 1858, p. 117.

(*b*) Inst. Lib., I Tit., X, 5. The natural son was always *cognatus* to his own blood relations, although by emancipation or adoption, he might cease to be *agnatus* to them. Sander's Inst., 127.

(*c*) Maine's *Ancient Law*, 193.

1863.
October 31.
S. A. *No.* 139
of 1863.

NOTE.- For the illegality of a Bráhman's adoption of his sister's son in Bengal, see *Doe* v. *Kora Shunker Takoor* v. *Bebee Munnee*, East's Notes, Case 20, 1, Morl. Dig., 18, and that a sister's son cannot be adopted in the N. W. Provinces, see *Luchmeenauth Rao Naik Keleyah* v. *Mt. Bhina Baee*, 7, N. W. P., 441, 443. The reason given is that it imports incests. So a Bráhman widow cannot adopt her uncle's son, as she could not be his mother unincestuously, *Dagumbaree Dabee* v. *Taramoney Dabee*, Macn. Cons., H. L., 170. In Madras it has been held that there can be no adoption where there is such blood relationship between the adopter and adopted son's mother as would have prohibited marriage with her in her maiden state. *SS. AA. Nos.* 14 of 1857, M. S. D., 1857, pp. 94, 96.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 30 *of* 1863.

ISMÁ'IL SÁHIB.....*Appellant.*

ARUMUGA CHETTI and another..... *Respondents.*

Where a plaint is returned for amendment under Sec. 29 of the Code of Civil Procedure, the order of return should specify a time for such amendment.

Where the plaintiff within three years from the arising of the cause of action presented his plaint, which was returned to him for amendment but without specifying a time for such amendment, and the plaint was reproduced and filed some days beyond the three years, and the defendants pleaded the Statute of Limitation :—*Held* that the date of commencing the action was that of the original presentation of the plaint.

1863.
November 7.
R. A. No. 30
of 1863.

THIS was a Regular Appeal from the decree of W. T. Blair, the Acting Civil Judge of Chittur, in Original Suit No. 3 of 1862.

Ismá'il Sáhib, the appellant, appeared in person.

Rangayya Nayudu, for the first respondent.

The facts sufficiently appear from the following

JUDGMENT :—In this case the plaintiff within three years from the arising of the cause of action presented his plaint, which was returned to him for amendment, but without the assignment of any specified period for such amendment.

It was reproduced and filed by the late Acting Civil Judge, but some days beyond the period of three years from the arising of the cause of action.

The defendants pleaded the Statute, and the successor of the Judge who filed the plaint, dismissed it as barred by the Statute.

(*a*) Present : Phillips and Holloway, JJ.