APPELLATE JURISDICTION (*a*)

Special Appeal No. 412 *of* 1862

CHINNA GAUNDAN and another.....*Appellants.*

KUMÁRA GAUNDAN.....*Respondent.*

The adoption of an only son is, when made, valid according to Hindu law.

1862.
November 10.
S. A. No. 412
of 1862.

THIS was an appeal from the judgment of Shaikh 'Abd-ul Ráhemán Sáhib, the Principal Sadr Amin of Coimbatore, in Appeal Suit No. 197 of 1861.

The question raised in this appeal was whether the adoption of an only son, was, when made, valid according to Hindu law?

Branson, for the appellants, cited and relied on the following passages from Mr. Justice Strange's *Manual of Hindu Law*, pp. 18, 19. :

"98. The adoption of an eldest or only son is prohibited.

"99. This prohibition has, however, been considered only directory, and however blameable in the giver to have parted with his eldest or only son, the adoption of such a one if made has been held to be valid. (I. 87 ; Pro. of S. U. 31st July 1824, and 28th July 1825.)

"It has also been laid down that the prohibition in question does not extend to the adoption of the eldest or only son of a brother, who would stand as *Dvyámushyáyana*(*b*), or son to both parents, the natural and the adoptive father.

"There appear to be serious objections to these limitations of the prohibition under consideration. As the very birth of a son delivers the father from danger of *Put*, the eldest or only son, as he comes into the world, secures this deliverance to his parents. The son can, however, secure no more. The

(*a*) Present Scotland C. J. and Frere, J.

(*b*) From *dvi* 'two' and *amushya* 'an individual person.' Here, as in the case of the Roman *adoptio minus plena*, the adoptive son remains in the family of his natural father, but gains a right of succession to his adoptive father.

1862. November 10. S. A. No. 412 of 1862.

efficacy of his birth has been expended on his natural father, and it is not available for another. He cannot effect a second deliverance from *Put* in behalf of another. Neither can the benefit, already insured, be withdrawn from the natural father and conferred upon another. The adoption of an eldest or an only son would hence avail nothing to deliver the adoptive father from *Put*. The adoption would fail in its essential use and be for this cause void. And as respects the exception in favour of the adoption of the eldest or only son of a brother on the ground that he is *dvyámushyáyana* or son to both parents, this form of son, however constituted, belongs, it must be observed, to the obsolete law (*a*.) Neither has the adoption of an eldest or only son prevailed to such an extent as to establish the practice as a recognized usage. It is of rare occurrance. The conclusion hence is that the prohibition against the adoption of an eldest or an only son is absolute and that such adoption, under whatsoever circumstances made, is void."

He also cited *Rajah Shumshere Mull* v. *Ranee Dilraj Konvur*(*b*), in which it was held that, according to the law as current in Benares, the adoption of an only son is invalid unless the natural father deliver his son to the adoptive father on the condition that he should belong to both of them as a son, and the latter accept and adopt him on that condition.

SCOTLAND C. J. :—But the case of *Sreemutty Joymoney Dossee* v. *Sreemutty Sibosoondree Dossee* (*c*) shews that such a condition will be inferred after the adoption has been performed; and according to *Veerapermall Pillay* v. *Narrain Pillay* (*d*), and the case of the *Rajah of Tanjore* (*e*), such an adoption, though improper or sinful, is not invalid.

Branson: Would your Lordship like to take the opinion of the pandits ?

SCOTLAND C. J :—No, I am content in this matter to hold by decided cases.

(*a*) There seems to be no authority for this statement. On the contrary Mr. Sutherland lays down (Synopsis II) that an only son of a whole brother, if no other nephew exist for selection, *must* be adopted by his uncle requiring male issue, and is a son of two fathers.

(*b*) 2 S. D. A. Rep. 169 : 1 Morley Dig. 17.

(*c*) Fulton, 75. 1 Morley Dig. 17.

(*d*) 1 Sir T. Strange, N. C. 78.

(*e*) Cited in 1 Sir T. Strange, N. C. 107.

1862. November 10. S. A. No. 412 of 1862.

Tirumalàchàriyàr, for the respondent, referred to *Arunachalam Pillai* v. *Ayyàsvàmi Pillai* and to the close of the pandits' opinion given in that case (*a*) : "it is not lawful for a man to give his only son in adoption to another.....But if such an adoption as aforesaid should take place, although the giver and the receiver in adoption have thereby committed sin, the adoption is valid." He also referred to *Perumàl Nàykkan* v. *Potti Ammál* (*b*).

Branson replied.

SCOTLAND, C. J.:—This is a short point on which we may clearly come to a conclusion. Two questions are raised—first, did this adoption in point of fact take place?—secondly, if so, was it valid in point of law? It is admitted that the first question must be answered in the affirmative. Then as to the second, the only authority produced is a passage from Mr. Justice Strange's *Manual of Hindu Law*. Everything found in that book is undoubtedly deserving of much respect; but it must be observed that the passage in question is not supported by any cited authority. And on perusing it attentively it is, I think, clear that the learned author must have been dealing with religious considerations strictly; and that when he says the adoption of an only son is 'void,' he means void from the orthodox theological point of view of the cástras and commentaries, and as being likely in Hindu belief to entail painful consequences in *Put*. But we are here to decide on temporal rights, not to consider such spiritual liabilities; and the application of the maxim *factum valet* to such a point as the present is wise, I think, and justified by many authorities which quite preclude our giving effect to the conclusion stated in Mr. Justice Strange's Manual.

"The result of all the authorities," says Sir Thomas Strange, (*c*) "is that the selection is finally a matter of conscience and discretion with the adopter; not of absolute prescription, rendering invalid an adoption of one, not being precisely him who on spiritual considerations ought to have been preferred." And again: "with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply they are *directory* only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of

(*a*) 1 Mad. Sel. Dec. 156.
(*b*) S. A. No. 11 of 1849 M. S. D. 1851, pp. 234, 239.
(*c*) *Hindu law* i. 85.

1862. November 10. S. A. No. 41 of 1862.

the civil law, prevailing, perhaps, in no code more than in that of the Hindus, *factum valet, quod fieri non debuit*" (*a*). Then there is a case of *Veerapermall Pillay* v. *Narrain Pillay*, with those of the *Rajah of Tanjore*, *Arunachalam Pillai* v. *Ayyasami Pillai*, *Nundram* v. *Kashee Pande* (*b*), *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee*, all of which are noted in the first volume of Morley's Digest, p. 17, and all of which support Sir Thomas Strange's doctrine.

Referring to Mr. Justice Strange's argument, I may observe that it rests on the assumption that it is the birth or adoption of the son that delivers the natural or adoptive father from the danger of *Put*. But surely this is erroneous. It is the son's performance of his father's exequial rites, not his birth or adoption, that relieves the father from the danger in question. Would the father, after the birth or adoption of a son, be considered safe from *Put* if those rites were not performed owing to the son's death, his loss of caste, or for any other reason? If the mere birth of a son were all that was required, it would hardly be laid down, as it is (*c*), that on the death of such son the affiliation of another is indispensable. Adoption takes place according to Atri(*d*)" for the sake of the funeral cake, water and solemn rites," and according to Manu (*e*), for these objects and also for the celebrity of the adoptive father's name. But not for the sake of the supposed efficacy of the mere act of adoption. If, then, the saving virtue lies solely in the performance of the exequial rites, Mr. Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of his son's birth, does not seem to warrant his conclusion. The adopted son may well perform his adoptive father's rites, and in certain cases it appears, when he is a *dvyamushyayana*, those of his natural father also. It cannot, then, be said that the adoption "fails in its essential use," and is for this cause void. I may remark that the hostility shewn in the cástras to the adoption of an only son arose, probably, from other than mere religious considerations. The true reason, perhaps,

(*a*) *Hindu Law*, i. 87.
(*b*) 3 S. D. A. 70. 1 Mord. Dig. 17.
(*c*) Dattaka Chandriká I, 5.
(*d*) Ibid I 3.
(*e*) Ibid. and Dattaka Mimánsá, I. 9.

1862. *November* 10. *S. A. No.* 41 *of* 1862.

is furnished by Jagannátha(*a*), who lays down the law thus: "Let no man accept as only son, because he should not do that whereby the family of the natural father becomes extinct;" but this, he goes on to say, "does not invalidate the adoption of such a son actually given to him."

On the whole, the case is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way.

FREERE, J. concurred.

Appeal dismissed.

(*a*) 3 Coleb. Dig. 243. So Vasishtha ordains "Let no man give or accept as only son, for he is destined to continue the line of his ancestors." Dattaka Chandriká. I. 27. "In the gift of an only son of the offence of, extinction of lineage is implied." Dattaka Mimánsá IV. 4. The natural father's lineage is not extingnished when one brother adopts the only son of another. Hence, perhaps, the exception in this case. See Dattaka Mimánsá II. 38.

The Hindu Law, as laid down in the case now reported, varies remarkably from the Roman rule that the last of his gens could not enter a new family, lest the sacra of the gens should be sold.

As to the validity of the adoption of an eldest son, see *R. A. No.* 49 *of* 1853, M. S. D. 1854, p. 31 and *Abajee Dinkur* v. *Gungadhur Wasdeo Gosavee* 3 Morris' Bom. S. D. A. Rep. 420, 424.