

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhagwan Singh and others v. Bhagwan Singh (minor) and others, from the High Court of Judicature for the North-Western Provinces, Allahabad ; delivered 11th March 1899.

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*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 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. Par. 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 Par. 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 affi- “ liated 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 Mimansa, 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. (Sec. II., Articles 74, 107, 108; Sec. 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 Mimansa 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* Lord Kingsdown says: “ they enjoy as we understand
“ the highest reputation throughout India,” IV. Moore, p. 97. In XII. 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 Mimansa

is held to be an infallible guide in the Provinces of Mithela 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 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 Mirzapore 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 Brahmins 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. 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.”

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. Mootoo Ramalinga*. It is as follows "The duty " therefore of a European judge who is under " the obligation to administer Hindoo law is not " so much to enquire whether a disputed doctrine " is fairly deducible from the earliest authorities " as whether it has been received by the par- " ticular school which governs the district with " which he has to deal, and has there been " sanctioned by usage. For under the Hindoo " 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 conferred on her by the school of law dominant in the Dravada 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 Hindoo 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 Hindoos 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 Hindoo 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 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 Hindoo law, and to disregard the broad foundations which are common to all schools though divergencies have grown out of them.

Their Lordships do not enquire 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.

