

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Srimati Uma Deyi v. Gokoolanund Das Mahapatra, from the High Court of Judicature at Fort William, in Bengal; delivered 5th February, 1878.

Present :

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE general question raised by this Appeal is who was entitled to succeed to the estate of one Hulodhur Dass Mahapatra, an Oorya Brahman, who died in December 1870. He left by his wife Jumona, who predeceased him some four years before that date, two daughters—Uma Deyi, the Plaintiff in the cause, and Parbutti Deyi. Both had been married, but Uma Deyi was a childless widow, dependent upon and living with her father at the time of his death, whilst Parbutti was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the Defendant, Gokoolanund Das, who claimed to be his son by adoption.

In January 1871, the last-named person applied to the Judge of Cuttack for a certificate under Act 27 of 1860. His claim was resisted by Parbutti, who disputed the adoption, and also by Hurrihur Persad Dass, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an

objector; and as between Parbutti and Gokoolanund, decided that the latter had *prima facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Uma Deyi was no party to this proceeding, of which the effect was at most to confirm or put Gokoolanund in the possession of the property as the heir of Hullodhur, until displaced by a Decree in a regular suit.

In June 1872, Uma Deyi instituted the present suit against Gokoolanund and Parbutti, seeking, as between herself and the latter, to be declared the preferential heir of their father, and, impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the Benares School.

That law, in so far as it supports the claim of the Plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir William MacNaghten. ("Principles and Precedents of Hindoo Law," p. 22.) After stating the rule of the Bengal School, he says, "But there is a difference in the law as it obtains in Benares on this point, that School holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; *but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.* Nothing addressed to their Lordships at the bar induces them to think that this is an incorrect exposition of the law. Mr. Arathoon, indeed, in support of his contention that the Plaintiff had lost whatever right to inherit her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the "Smrúti Chandrika" (Chapter xi, section 21, paragraphs 21 and 28), in which the author of that treatise adopts and affirms the rule of the Bengal School in respect of the disqualification of a barren daughter. But on these it is sufficient to observe that, according to Mr. Colebroke and other high authorities, the "Smrúti Chandrika" contains only an authoritative exposition of the law as it prevails

in the South of India, and consequently that the passages in question are of no weight when set against the propositions which Sir William MacNaghten has deduced from the text of the Mitakshára and other authorities recognized by the Benares School. That the Plaintiff, as compared with her sister, is an indigent, or, in the words of the Mitakshára, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shown a sufficient title to maintain this suit against the defendant Gokoolanund, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption:—1. Whether it was ever made in fact; 2, whether, if so made, it is good in law. And as to the first issue it is to be remarked that the Plaintiff has not been content to rely on any deficiency in the proof of the Defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the Defendant is, that he was by birth the second son of Nath Das, a distant kinsman of Hullodhur Das; that at a very tender age he was taken into the house of Hullodhur with a view to his being adopted; that when about 5 years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father, in adoption with the requisite ceremonies; that he was brought up and educated by Hullodhur as his adopted son, receiving from him at the proper age the investiture of the Brahminical thread, and being on a subsequent occasion given in marriage by him; that after he reached man's estate he continued to be recognized in the family as the adopted son, and took part in the management of its affairs; and that in the character of adopted son he performed the funeral ceremonies of Jumoona, and afterwards of Hullodhur himself.

On the other hand, the case of the Plaintiff is that the Defendant is not the son of Nath Das, that he was by birth a Kanouj Brahman, or other native of the North Western Provinces; that when young he was brought by other pilgrims to Juggunnath, and left at first in a sort of hospice

attached to the temple which belonged to the elder brother of Hullodhur; that he afterwards lived in the house of one Hira, who is stated to have been a concubine of Hullodhur; that he was never on terms of commensality with Hullodhur; that he never was, and, being the son of an unknown father, never could have been adopted by Hullodhur; that it was only as a gomashtha or dewan that he ever took part in the management of Hullodhur's affairs; that Hullodhur, some years after the alleged adoption, really adopted one Radakrishna, a son of one Bhika Das, who subsequently died; and that Hullodhur's funeral rites were performed by the Plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the Plaintiff's statement, whilst the other Court had pronounced in favour of the Defendant. But that is not the way in which the case comes before them. The subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original *status* and subsequent history of the Defendant were what the Plaintiff's witnesses represented them to have been; he did not find that Radakrishna (as to whose adoption the evidence is of the most loose and general character) was ever adopted by Hullodhur; he did not find that the Plaintiff, and not the Defendant, performed the funeral rites of Hullodhur. It cannot therefore be said that the Judge before whom they were examined has pronounced the Plaintiff's witnesses to be worthy, and the Defendant's witnesses to be unworthy, of credit. On the contrary (giving, perhaps, a little more weight to some supposed admissions by two of the Plaintiff's witnesses than their words warrant), he expressed his belief "that the Defendant Gokoolanund had for years lived with, and been brought up, and treated as a son, and married by Hullodhur." He held "it also to be clear from the evidence tendered for the defence that the Defendant had frequently been acknowledged by others as the

adopted son of Hullodhur, and was even so styled by Hullodhur himself in a written statement filed by him in an Act 4 of 1841 Case before the Magistrate of Balasore." We have therefore the Judge of First Instance affirming, contrary to the general evidence on the part of the Plaintiff, facts most material to the Defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 Hullodhur, who might reasonably hope to beget, would adopt a son; upon the discrepancy between certain of the Defendant's witnesses as to the presence of Nath Das at the ceremony; and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the Appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the Defendant's witnesses rather than to those of the Plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *prima facie* improbability of the adoption on which the subordinate Judge so strongly relies cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of the inference drawn by a Pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that Hullodhur and Jumona had lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships must, therefore, deal with this

case on the assumption that the fact of the Defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their Judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullothur's Sapindas, made in violation of the preferential right of Dinobundhoo, the only son of Juggunnath, who was Hullothur's brother by the whole blood, to be adopted.

The Plaintiff relies mainly upon certain texts of the Dattaka Mimansa, and the Dattaka Chandrika, of which the former is considered by the Benares School to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st and the 67th slokas or paragraphs of the second section of the Dattaka Mimansa; and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first section of the Dattaka Chandrika.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindoo wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a Dvyámushyána, or son of two fathers.

The grave question, however, that arises in this case is whether the injunctions just referred to are merely binding upon the consciences of pious Hindoos as defining what they ought to do, or so imperative as to have the force of laws, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two

propositions just stated, or at least the last of them' may well be qualified by the incontestable fact that Hullodhur was separate in estate from his brother Juggunnath. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators, with what logical sequence it is unnecessary to consider, from a text of Menu, which says:—"If one among brothers of the whole blood be possessed of male issue, Menu pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindoo family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated Hindoo, the right of performing his obsequies, with the consequent right of succession, is in the absence of male issue in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a Dvyámusháyuna there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William Mac-Naghten at p. 71 of his "Principles and Precedents." And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume, that Hullodhur would have been content to receive, or Juggunnath would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the Defendant as the adopted son of Hullodur, is some evidence that Juggunnath recognized that adoption as valid. Moreover, for aught that appears in the cause, Denobundhoo may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt v. Kunhia Singh*, 3 S. D. A. (Select Reports), p. 141. That case arose in a district governed by the Mithila law. The Plaintiff claimed, under an adoption by his maternal grandfather, not in the Dattaka, but in the Kritrima form, which is recognized by the Mithila law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudr Court to another, who consulted different Pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note no doubt says, "According to the Hindoo law, while a brother's son exists, the adoption of any other individual as a son, either in the Dattaka or Kritrima form of adoption, is illegal." But the force of this note is very much weakened by the fact that Sir William MacNaghten, who, being the editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the Kritrima form, which, in its inception and consequences, is very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the Kritrima form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text writers of eminence.

Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the Plaintiff

relies, says:—"But the result of all the authorities upon this point 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 upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shows that Mr. Colebrooke, and, more strongly, Mr. Ellis, were of this opinion.

Again, Sir William MacNaghten, just after referring to the case of Ooman Dutt, deals with the question thus:—"It would appear, however, that according to the law of Bengal and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of 'factum valet' exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and in the places where the Mimansa principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own Sapinda (a brother's son is the first), and failing them to adopt out of one's own Gotra, is not essential so as to invalidate the adoption in the event of a departure from the rule." (Prin. and Prac. of Hindu Law, p. 68).

It may be further observed that even Mr. Sutherland, in his "Synopsis" (see Stokes' Codes, p. 656), says: "But though Nandita Pandita extends this principle (*i.e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger, when a relative may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimansa enjoins

is to be taken as imperative, and having the force of law, the language of the 74th Article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the Articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim "*Quod fieri non debuit factum valet*," though adopted by the Bengal School, is not recognized by other schools, and notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William MacNaghten's work, but by decided cases. The High Court of Madras in *Chinna Gaundar v. Kumara Gaundar*, 1 High Court Rep., p. 54, and the High Court of Bombay, in a case reported in 4 Bombay, H. C. R. A. C. 191, acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta 10 W. R. 347, has refused to give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William MacNaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles.

Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the Defendant, even if it were more clearly proved than it is that Hullothhur Das could have adopted Dinobundhoo, the only son of his brother. They will, therefore, humbly advise Her Majesty to affirm the Judgment of the High Court and to dismiss this appeal with costs