Abhiraj Kuer

Vs

Debendra Singh

Civil Appeal No. 379 of 1958

(K. N. Wanchoo, K. C. Das Gupta, J. C. Shah JJ)

15.09.1961

JUDGMENT

DAS GUPTA, J. –

Can a wife's sister's daughter's son be validly adopted to a person governed by the Benaras School of the Mitakshara Hindu Law ? That is the main question raised in this appeal brought on a certificate granted by the High Court at Patna. The plaintiffs who would succeed to the properties left by Babu Ram Singh on the death of his widow but the adoption of Devendra Singh which this widow made on June 9, 1935, brought the present suit for a declaration that Devendra Singh was not adopted by the second defendant, Babu Ram Singh's widow and that in any case, the adoption is invalid in law and so Devendra Singh acquired no right in the properties left by Babu Ram Singh.

The main ground on which the adoption is attacked as invalid is based on the fact that Devendra Singh is Babu Ram Singh's widow's sister's daughter's son. The other ground raised in the plaint based on the plaintiff's allegation that Babu Ram Singh was governed by Mithila School of Hindu Law Was negatived by the courts below and has been abandoned before us. No dispute is also raised now as regards the factum of adoption. The only question the arises in this appeal therefore is whether the adoption of a wife's sister's daughter's son is valid in law. The High Court answered this question in the affirmative and dismissed the suit. It is against that decision that the present appeal has been preferred.

In support of his contention that such an adoption is invalid in Hindu Law reliance is placed by the learned counsel on the following passage of Nanda Pandit's Dattak Mimansa :-

> (see Whitley Stokes's Hindu Law Books at pp. 590 and 591).
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> 17. Accordingly, the brother, paternal and maternal uncles, the daughter's son, and that of the sister, are excluded : for they bear no resemblance to a son.
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> 18. Intending this very position, it is declared in the sequel, by the same author : "The daughter's son, and the sister's son, are declared to be the sons of Cudras. For the three superior tribes, a sister's son, is nowhere mentioned as a son. Here even the term "sister's son" is illustrative of the whole not resembling a son, for prohibited connection is common to them all. Now, prohibited connection is the unfitness of the son proposed to be adopted to have been begotten by the individual himself through appointment to raise issue on the wife of another.

> 19. The mutual relation between a couple, being analogous to the one, being the father or mother of the other, connection is forbiden : as for instance - the daughter of the wife's sister, and the sister of the paternal uncle's wife". The meaning of the text is this. Where, the relation of the couple, that is of the bride and bridegroom, bears analogy to that of father or mother; if the bridegroom be, as it were, father of the bride, or the bride stand in the light of mother, to the bridegroom, such a marriage is a prohibited connection. The two examples illustrate these cases in their order.
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> 20. In the same manner as in the above text, of the Grihaparisistha, on marriage, prohibited connection, in the case of marriage, is excepted and so in the case in question, one who if begotten by the adopter, would have been the son of a prohibited connection, must be excepted; in other words, such person is to be adopted, as with the mother of whom, the adopter might have carnal knowledge.

It is urged that in view of this specific exclusion of a wife's sister's daughter's son from the list of those who are fit for adoption there is no escape from the conclusion that such an adoption would be invalid in law. Learned Counsel has emphasised that great authority attaches to all statements of law as regards adoption that are contained in Dattak Mimansa. There is no doubt that for many years now the Dattak Chandrika of Kuvera and Dattak Mimansa of Nanda Pandit have been recognised to be of great authority on all questions of adoption. It is true that Prof. Jolly in his Tagore Law Lectures had in no uncertain terms characterised the latter to be of little value; and eminent scholars like Dr. Mandlik and Golap Chandra Sarkar while writing in the latter part of the last century subjected many of Nanda Pandit's views to unfavourable criticism. In spite of all this the Privy Council in Bhagwan Singh v. Bhagwan Singh ((1899) L. R. 26 I. A. 153, 161) did recognise that both the Dattak Mimansa and Dattak Chandrika had been received in courts of law including the Privy Council as high authorities and after drawing attention to Lord Kingsdown's statements as regards these in Rungama v. Atchama ((1846) I. A. 1, 97) and Sir James Colvile's statement in Collector of Madura v. Moottoo Ramlinga Sathupathy ((1868) 12 M. I. A. 397, 437), stated thus :- "To call it (i. e., Dattak Mimansa) infallible is too strong an expression, and the estimates of Sutherland and of West and Buhler, 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". While saying this mention must also be made of the observations of the Privy Council in Sri Balusu Gurulingaswami v. Sri Balasu Ramalakshmamma ((1899) L. R. 26 I. A. 113, 136) decided on the same date (March 11, 1899) but immediately before Bhagwan Singh's Case, was decided, expressing their concurrence with the view that caution was required in accepting the glosses in Dattak Mimansa and Dattak Chandrika where they deviate from or added to the Smirities.

There can be no doubt that in laying down the rule that the adoption of the son of a woman who could not have been married by the adoptive father because of incongruous relationship (Viruddha Sambandha) Nanda Pandit was adding to the existing state of law. It is interesting to notice here that commenting on what Saunaka had said in describing the ritual of adoption that a son should be adopted the Dattaka Chandrika observed at p. 14 :-

> (Reflection of a son - The resemblance of a son, - or in other words the capability to have been begotten, by the adopter, through appointment, and of forth). (Sutherland's translation). The Dattak Mimansa adopts this view, and introduces the further doctrine of (Viruddha Sambandha) relationship as a bar to adoption.

It is unnecessary for us to examine what authority should be attached the this serious addition to the

texts for determining who can be adopted, as for reasons to be presently mentioned we are of opinion that assuming that this rule should be accepted as of authority Nanda Pandit has stated this merely as a recommendation and not as a mandatory prohibition. For many years now courts have recognised the position that not only the Dharma Sutras and Grihya Sutras but also the commentaries thereon and digests mingle without hesitation statements of law which are intended to be recommendations merely with statements which are intended to be mandatory. In Balu Gurulingaswami's case to which reference has just been made the Privy Council pointed out that recent extension of the study of Sanskrit has strengthened the view of Sir William Macnaughten that "it by no means follows that because an act has been prohibited it should therefore be considered illegal. The distinction between the vinculum juris and the vinculum pudoris is not always discernible, " and adding to the previous statement of the Board in Rao Balwant Singh v. Rani Kishori ((1898) L. R. 25 I. A. 69) decided in the previous year the Privy Council observed these words of caution in Balusu Gurulingaswami's case :-

> "They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers, accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law givers. "

The importance of this caution has by no means decreased in the years that have gone by.

It is therefore necessary to examine the words used by Nanda Pandit himself in laying down this rule against Viruddha Sambandha adoption. It has to be noticed that while he says (One who if begotten by the adopted would have been the son of a prohibited connection must be excepted - Sutherland's translation), he does not say anything about what would happen if Viruddha Sambandha Putra was adopted. If the rule was intended to be mandatory it is reasonable to expect that the author who as the treatise itself shows was a master of logic and well acquainted with the rules of logic and other rules which deal with the question of mandatory injunctions would give clear indication of that view. This was all the more reasonable to expect as he was introducing a new rule. But he contents himself with saying that We do not think this language that adoption of a son of a Viruddha Sambandha girl should be avoided, can properly be taken as mandatory so that the rule must be obeyed on pain of the adoption being otherwise invalid in law.

Notice has necessarily to be taken in this connection of the fact that the only authority mentioned by Nanda Pandit himself against Viruddha Sambandha marriage from which he deduces his rule of Viruddha Sambandha in matters of adoption is to be found in the text of Ashvalayana :

> (The bridegroom duly qualified should marry a duly qualified maiden who is younger in years, is not a sapinda, is not of the same gotra, and whose marriage does not involve a viruddha sambandha) (contrary relationship).

It is followed a little later by this comment :

> (Viruddha Sambandha is that Sambandha (relation) which is viruddha (contrary or improper) owing to the relationship (existing) between the bride and the bridegroom

> (before their marriage) being similar to that of a father or mother. As for instance the daughter of the wife's sister (and) the sister of the maternal uncle's wife).

Is this rule mandatory ? In other words, would a marriage of a girl standing in the Viruddha Sambandha relationship to the bridegroom be invalid. We are not satisfied that this is the position in law. It is striking that though the numerous Dharma Sutras and Grihya Sutras, deal at great length with the question of the girl who can be taken in marriage not one of them with the solitary exception of Ashvalayana has anything to say about Viruddha Sambandha.

Coming to more recent times the only Digest in which any reference to this Virudha Sambandha of Ashvalayana can be traced is in Nirnaya Sindhu (late 16th century). There is no reference to this however in Raghunandana's exhaustive treatise on marriage udhvahatattva which was written in the early 16th century. In Nirnaya Sindhu there is only a bald reference to this in these words :-

> (There is also the bar to marriage by sayings (of sages). As in the Grihyaparishistha "should not marry a girl of Viruddha Sambandha (incongruous relationship) " - Viruddha Sambandha was illustrated thus :
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> "As in the case of wife's sister's daughter; father's brother's wife's sister. "

without any comments whatsoever. It is reasonable to think that the numerous Smritikars and commentators who have dealt with the subject of marriage were acquainted with Ashvalayana's text but did not think it necessary to refer to it as it was a recommendatory rule not considered to be of much importance.

Mr. Jha argues that when a positive statement is followed by a negative statement, the negative statement should always be held to contain a prohibitory mandate. Thus he says that as after saying says next the rule contained in this later portion should be held to be mandatory. We can find no justification either in the modern rules of interpretation or in the rules of interpretation of the old Hindu Shastras for such a view. One instance where a negative rule following a positive direction on this very subject of marriage cannot possibly be considered to be mandatory can be found in Yajnavalkaya's text :-

> " (Let him, whose life as bachelor is unsullied, marry a wife who possesses good qualities, who has not been enjoyed by another, who is beautiful, who is not his sapinda, who is younger than himself, who is not suffering from any complaints, who has brothers, and who does not belong to the family descended from the same primitive guide. "

Quite clearly the rule that a girl suffering from disease should not be married is not a mandatory rule even though it follows some positive rules about marriage. That this is the position has been pointed by Vigyaneshwar. It is interesting to notice in this connection Ashvalayana's own statement about marriage rules in the fourth section of the first Chapter of his Grihaya Sutra. After saying (a daughter should be given to a man of understanding) he says in the next text (that one should marry a girl of understanding, good looks, good conduct and good qualities) and one who is not suffering from any disease. This also is a case of a positive statement that a person should marry a girl of understanding, good looks, good conduct and good qualities, followed by a rule that a person should not marry a girl suffering from disease. Even so, it cannot be imagined for a moment that this rule that one should not marry a girl suffering from disease is a mandatory rule, implying that marriage

with such a girl would be invalid.

In any case, argues the learned counsel, when we find the three rules against marriage to a sapinda girl and sagotra girl and Viruddha Sambandha girl in the same text as here and admittedly the first two are mandatory and marriage to a sapinda girl or a sagotra girl would be invalid there is no reason why the same result should not follow on breach of the third rule against marrying a Viruddha Sambandha girl. The reasons why marriage to a sapinda girl or a sagotra girl has always been held to be invalid are succinctly stated by Raghunandana in his Udhvahatattva in a passage which has been translated thus by Dr. Jogendra Nath Bhattacharyya in his Commentaries on Hindu Law; Third Edition, Vol. I, at p. 188 :-

> "The negative ordinances prohibiting marriage with girls of the same gotra, pravara etc., are parudasa (exceptional clauses) having reference to a vidhi; they are also prohibitions proper, like the prohibitory rule about the sexual union on parva days, because they forbid such marriages by the accompaniment of condemnatory and penance clauses, (See Texts of Apastamba and Sumantu), (cited on p. 187) and in view also of the fact that such marriages may spring from natural inclination.
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> The term wife is like the terms yupa (sacrificial post) ahavaniya (sacrificial fire), and denotes a female taken in marriage with occult ceremonies. Therefore, where a sapinda or a sagotra girl is taken in marriage, she does not become a wife. "

It is a clear that none of the reasons which justify the view that a breach of the first two rules in Ashvalayana's text viz., the rules against marriage of a sapinda girl, or a sagotra girl, should have the consequence that the marriage should be invalid are present in the case of a breach of the third rule, which is against marrying a Viruddha Sambandha girl.

It appears clear to us that Ashvalayana himself did not intend the rule against marrying a Viruddha Sambandha girl as a mandatory prohibition. This must have been even more clear to Nanda Pandit and so when extending Viruddha Sambandha to adoption on the very basis of Ashvalayana's rule against Viruddha Sambandha marriage, Nanda Pandit could not have but intended his rule against Viruddha Sambandha adoption as a mere recommendation and not a mandatory prohibition.

Our attention was drawn to a decision of the Madras High Court in Minakshi v. Ramanada ((1886) I. L. R. II Mad. 49) where the learned judges observed :-

> "In the case of marriage, there are three prohibitions, viz.,
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> (1) The couple between whom marriage is proposed should not be sapindas;
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> (2) They should not be sagotras; and
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> (3) There should be no Viruddha Sambandha or contrary relationship as would render sexual connection between them incestuous. "

The real question which was before the full Bench was whether there can be valid adoption under the Hindu law if a legal marriage is not possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. In the case before the Full Bench, the adoptee's mother was a sagotra of the adoptive father, and so, there could be no legal marriage between them. It was not necessary therefore for the learned judges in the Minakshi's case to

consider whether the Viruddha Sambandha rule against marriage was mandatory or not.

We are not aware of any decision in any of the High Courts where Nanda Pandit's rule against Viruddha Sambandha adoption has been considered to be a mandatory prohibition. For the reasons discussed above we are of opinion that this rule introduced by Nanda Pandit is only a recommendation and consequently it is of no avail to the appellant to show that the adoption of wife's sister's daughter's son is invalid.

Mr. Jha then tried to take advantage of the rule which has been accepted by almost all the High Courts except Bombay that there can be no valid legal adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state, by urging that there can be co-legal marriage between a person and his wife's sister's daughter. Assuming for the present that it is on longer open to challenge the correctness of this rule at least so far as the Banaras School is concerned, we are still of the opinion that this argument is of no avail, for the simple reason that we see no reason to think that there can be no legally valid marriage between a person and his wife's sister's daughter. For the only argument in support of the contention, that there can be no such legal marriage between persons thus related, the learned counsel had to fall back upon Asvalayana's Viruddha Sambandha rule. That however as we have already shown, is in our opinion only a recommendation and cannot support a proposition that a marriage in breach of the Viruddha Sambandha rule is invalid.

As early as 1878 Dr. Gooroodas Banerjee (whose erudition equalled his orthodoxy) dealing with this question in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan observed thus : (p. 64).

> "The prohibition by reason of affinity, which exists in other systems, has no place in Hindu Law. But the prohibition of marriage with sapindas to some extent supplies its place and so did the prohibition of widow marriage. The Hindu Law, however, does not prohibit marriage with the wife's sister, or even with her niece or her aunt. "

Dr. Jogendra Nath Bhattacharya in his Commentaries on Hindu Law (Third Edition) Vol. I, also stated after referring to what has been mentioned in Nirnaya Sindhu against marriage with the wife's sister's daughter (already quoted above) : "Instances of marriage with wife's sister's daughter, and wife's brother's daughter, and also not unknown in Bengal though, Hindu sentiment is strong against such marriages. " The question was directly raised in Ragavendra Rau v. Jayaram Rau ((1897) I. L. R. 20 Mad. 283). Mr. Justice Subramania Ayyar and Mr. Justice Benson relying on Dr. Gooroodas Banerjee's statement of the law and also on Syama Charan Sarkar's Vyavastha-Darpan, Dr. Bhattacharyya's commentaries on Hindu Law and certain other text books held that marriage between a man and his wife's sister's daughter is valid. The learned judges pointed out that in South India at least there was little to indicate that such marriages are disappoved of "by the members of any section of the community. "

In our opinion a marriage of a Hindu with his wife's sister's daughter is not invalid in law even though it may not be liked by certain people. Mr. Jha's second argument based on the rule which we have assumed to be not open to challenge for the purpose of this case that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted in her maiden state, must therefore fail.

We therefore hold that the High Court was right in its conclusion that the adoption of a wife's sister's

daughter's son is valid in law. The appeal is accordingly dismissed with costs.

Appeal dismissed.

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