
(1870) 05 CAL CK 0001

Calcutta High Court

Case No: None

Sayamalal Dutt

APPELLANT

Vs

Saudamini Dasi and
Others

RESPONDENT

Date of Decision: May 31, 1870

Judgement

Norman, J.

One Iswarchandra Dutt died, leaving Thakomani, his widow, and a daughter named Saudamini. By his will he had empowered his widow, Thakomani, to adopt a son. After the death of Iswarchandra, Thakomani left the family dwelling house, and cohabited with Nilmani Kar, at a house in Simla; from thence, at the end of Magh, or the beginning of Falgun 1275 (February 1869), she went to a garden at Synthea, where she remained two months, when her pregnancy being very apparent, Nilmani Kar asked Anno, the servant who attended Thakomani, if she knew any one who could cause abortion. In Bysak (April) Thakomani left the garden at Synthea, and went to the house of Nilmani Kar, at Sindarine, near Nuddea, where, at the end of a month, she died. After her death, a child fell from her. The Police made an investigation, the result of which was that Nilmani Kar was charged before the Magistrate at Nuddea, and again at the instance of Halodhar Ruder, the uncle of Thakomani, before a Magistrate in Calcutta, with having caused the death of Thakomani, by administering medicine to procure abortion. He was, however, released. Nilmani Kar then, as guardian of his infant son, Sayamachand, whom he calls Sayamachand Dutt, brought this suit, alleging that Sayamachand had been adopted by Thakomani, in pursuance of the direction in her husband's will, on the 3rd Falgun (13th February). There is not the slightest evidence of an adoption on the 3rd Falgun. But the plaintiff has given evidence to prove an adoption on the sangkranti, or last day, of Falgun (12th March). There are circumstances in the case to which I adverted in giving judgment on the facts, which led me to say that the adoption was not proved to my satisfaction, because I saw reasons for distrusting the evidence of the two principal witnesses for the plaintiff. The defendant's witnesses, Halodhar Ruder and Anno, have stated that no such meeting did take place at the garden as that at which the adoption is said to have been

made. I cannot, however, feel quite certain that I am right in supposing that no adoption did in fact take place. And it, therefore, becomes important to determine whether if an adoption did take place, it operates to confer any rights on the infant plaintiff Sayamachand. The question is this,--a widow having a power to adopt becomes unchaste; can she, while yet pregnant by the man with whom she is living in a state of concubinage, not having performed any expiation, adopt a son under the power given her by her deceased husband? The ceremonies used in adoption are given at length in the Dattaka Mimansa, Section 5; the Dattaka Chandrika, section 2; and Baboo Shama Churn Sircar's Vyavastha Darpana, pages 866 to 871. The ceremonies of acceptance are as follows. When the child is given, the person receiving him in adoption takes him by both hands, with the recitation of the prayer commencing "Deva Syatwa," &c., and must next offer a burnt offering of milk and curds with the recitation of the mystical invocation "Yastwa Vridha;" and the portion of the Rik Veda, commencing "Tubhya magne," and the five prayers of which the initial words of the first are "Somadadat, &c."

2. In order to constitute a valid adoption even among Sudras, the mere giving and receiving of a child are not sufficient. In the case of Bhairab Nath Sye v. Mohes Chandra Bhaduri 4 B.L.R., A.C., 169, decided on the Appellate Side of this Court, Loch, J., adopting the opinion of Baboo Shama Churn Sircar in the Vyavastha Darpana, page 876, says: "according to the Dharma Shastra as current in this country a Sudra should also act in like manner."

3. I entirely assent to the ruling in that case, which seems to me in entire accordance with the passage in the Dattaka Mimansa, Section 5, verse 56. "The filial relation of adopted sons is occasioned only by the proper ceremonies of gift, acceptance, or burnt sacrifice, and so forth; should either be wanting, the filial relation fails" The author, in verse 45, cites a passage from Menu: "He who adopts a son without observing the rites ordained should mate him a participator of the rites of marriage, not a sharer of wealth." This he explains in verse 46, by showing that the person so adopted does not become a son: see further, 3 Colebrooke's Digest, page 320, Calcutta Folio Edition, and the Commentary of Jagannatha Tarkapanchanana on the text of Vashishta, pages 323 to 325. The question then is, can a widow living in concubinage offer up the prayer and take part in the sacrifice necessary to be performed by a person adopting a child. Vrihat Menu, in a passage cited both in the Mitakshara and the Dayabhaga, declaring the widow's right of inheritance, says: "The widow of a childless man keeping unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation, and obtain his "entire share" ¹ Now, remembering that the notion of offering oblations is the key to the whole system of inheritance amongst Hindus, it would seem to follow by implication that the reason why a widow forfeits her right of inheritance by unchastity is because she becomes incapable by her own act of performing religious observances, and offering the oblations for her deceased husband. In Strange's Hindu Law, Volume I, page 45, it is said "adultery subjects a woman to degradation from caste." Even though the adultery be such as to be a crime in the third degree, it causes degradation, and exclusion from

inheritance, if repeated. The effect of degradation is to exclude the party degraded from all social intercourse, to suspend in her every civil function, to disqualify her from all the offices and all the charities of life."--1 Strange's Hindu Law, page 160. The degraded person is thus disqualified from performing religious offices.

4. According to Hindu law a woman who, after the death of her husband, leaves her brother or other kinsman whose protection she received, and suffers the caresses of a stranger through carnal desire, is said to be the third sort of disloyal wife; she who is again espoused with solemn rites is a twice married woman, or punerbhu; she who receives the embraces of another man without a formal marriage, is an unchaste woman, or Swarinisi: see 2 Colebrooke's Digest, section 3, slokes 158 and 159, and notes. In Menu, in the Chapter on Diet, Purification, and Women, section 163 relates to the twice married woman; section 164 is as follows: "A married woman who violates the duty which she owes to her lord brings infamy on herself in this life; and in the next, shall enter into the womb of a jackal, or be afflicted with elephantiasis and other diseases which punish crimes. In Colebrooke's Digest, Book IV, slokes 80-83, it is set down that a woman willfully disloyal should be forsaken." It is ordained that an adulterous woman shall be subjected to mortifications, and restricted to such food as is necessary for the bare sustenance of life. Vijayaneswara says, she is so to be treated for the sake of inducing repentance, not for the sake of atonement, since penance is separately mentioned.--Colebrooke's Digest, Book IV, note to sloke 82. Yajayavalkya says, see sloke 77:--"In case of conception by unlawful commerce, desertion is enjoined by "law." Sulapani says, *ibid*, of course expiation is suggested in case of disloyalty, provided she does not conceive."

5. In a passage (for which as well as for the citation from the Mahabharata, I am indebted to Baboo Shama Churn Sircar, the learned interpreter of this Court) from the Prayaschitta Viveka by Sulapani, it appears that an unchaste wife cannot perform the religious acts ordained in the Veda (amongst which, as the Baboo has explained to me, is the act of adopting a son) without having performed the expiatory penance.

6. Note A. Prayaschitta Viveka a treatise on expiation by Sulapani ⁽²⁾.

7. "When a woman is pregnant by adultery, then she is positively to be deserted (ex-communicated). If she continues to commit adultery during that pregnancy, then she must perform the expiatory penance after confinement. Thus Rishnasringa: But a lustful young woman pregnant from a man other than (her) husband cannot perform expiation so long as she is not delivered of the child. She must not exercise any authority over the household, nor must she embellish herself (to mix in society); she must not associate with her husband, nor shall her friends and relatives associate with her at meals; cohabitation with low persons, abortion (and) doing injury to the husband are acts in particular which, as well as others, positively cause degradation of women. The meaning of the term "patita" is explained by Gautama, "degradation," disqualification for the performance of the duties of the twice-born persons and deprivation of happiness in the next world, which

(latter) according to some is damnation to hell. Duties of twice-born persons. The religious acts ordained in the Veda, viz., the presentation of the sacrificial fire, &c., and the performance of the eight ceremonies ordained by the Smriti⁽³⁾, and so forth, which cannot be done without the expiatory penance, and the acts subservient thereto (namely) the repetition of the name of a god a great many times and so forth. Twice-born persons are mentioned by reason of superiority. The degradation of Sudras and others⁽⁴⁾ is also ordained in a different passage:"

8. Mahabharata⁽⁵⁾.--The chapter entitled Haribans, Volume IV, (Narada says to Arundhate) O Arundhate⁽⁶⁾ gifts, fastings, religious acts, and good acts of unchaste women are vain; their religious merits also, O spotless beauty, are fruitless. Those wicked women who by the commission of adultery deceive their husbands, lose for that time the fruits of religious acts, and are "doomed to hell" (slokes 754 and 755).

9. I have not been able to find any decision on the point whether an unchaste widow can receive a son in adoption; but there are two as to the power of lepers to adopt, which throw much light on the subject. Lepers are deemed incompetent to perform religious observances, and incapable of inheriting because they are supposed to be polluted by crime committed in a former stage of existence. In Macnaghten's Hindu Law, Volume II, page 201, is a case, No. xx, in which it seems to have been decided that a person afflicted with leprosy is incompetent to adopt a son. The following case, No. xxi, shows that if the leper has performed the prescribed penance, he may adopt, and in a note a passage from the digest of Jagannatha is referred to as follows: "Raghunandana holds that expiation for a man afflicted with elephantiasis or "other similar disease is ordained for the purpose of enabling him to perform acts of religion ordained in the Veda. By parity of reasoning he becomes competent to inherit property as well as to perform religious ceremonies." In a case before the Privy Council, Ramalinga Pillai v. Sadasiva Pillai 9 Moore's I.A., 506, it seems to have been taken as admitted law that an adoption by a person while under pollution, in consequence of the recent death of a relation, would be invalid. On the whole, I am of opinion that Thakomani, as an unchaste widow, living in concubinage, and being in a state of pregnancy resulting from such concubinage, was incompetent to receive a son in adoption; and, therefore, on the question of law, as well as upon the facts, my judgment is adverse to the plaintiff. The suit will be dismissed in the terms I have already intimated.

¹ Shama Churn's Vayavastha Darpana, 24.

⁽²⁾ The Baboo informs me that this excellent treatise on expiation is of great and almost paramount authority in Bengal, as well as in Mithila, and is cited as authority in all the Modern Digests, including those of Raghunandana, and more frequently in Jagannatha's compilation, the translation whereof is known as "Colebrooke's Digest."

(3) Smriti here means that part of the Hindu law which treats of religious acts and ceremonies.

(4) That is mixed classes.

(5) Published by the Asiatic Society of Bengal.

(6) The wife of the sage Vashishta; she was famous for her virtues, and was transformed into a Star. See Colebrooke's Digest, Vol. II (London edition), p. 455.