
(1874) 02 CAL CK 0002

Calcutta High Court

Case No: Regular Appeal No. 88 of 1872

Indramani Chowdhrair

APPELLANT

Vs

Behari Lal Mullick

RESPONDENT

Date of Decision: Feb. 23, 1874

Judgement

Sir Richard Couch, Kt., C.J.

The question referred to us for decision is whether, amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption, and if any ceremonies are necessary, at what time they must be performed? We are not asked to decide whether, according to the received law in Bengal, proof of the performance of the datta homam is essential to establish a valid adoption in a Brahmin family. It has been held by the High Court at Madras in *Singamma v. Vinjamuri Venkata Charta*: 4 Mad. H.C. Rep., 165 not to be essential, but a Division Court of this Court held in the case of *Bhairabnath Sye v. Makes Chandra Bhadury* 4 B.L.R., A.C., 162 that it was. The Madras decision was not noticed either in the argument or the judgment. It not being necessary to decide this question in the appeal in which this reference is made, we do not propose to do so, and shall only consider what is the law of Bengal in the case of Sudras.

2. We refer first to the *Dattaka Mimansa*. In s. 1 the author treats of by whom adoption may be made. Having stated in v. 15 and the following verses when a woman may adopt, he says in v. 24:--"It must not be argued that since, under a text of Saunakha, the employment of a priest is according to the approved doctrine, the homa may be completed by his intervention, for although that were completed, still would the adoption (by the woman) be imperfect, since she is not competent to perform the prayers requisite for the same;" and in v. 25 the prayers are specified. This is an assertion that, notwithstanding the incompetency of a woman to perform the requisite prayers, there may be a complete adoption by her, and that this is not by reason of the intervention of a priest. The Sudras being also incompetent to perform the prayers specified, the author notices their case, and in v. 26 says:--"Nor does thus the want of power of Sudras follow;

for their ability (to adopt) is obtained from an indication (of law) conclusive to that effect in this passage,--"Of Sudras from amongst those of the Sudra class." By this Vachaspati is refuted, who says,--"Sudras are incompetent to affiliate a son, from their incapacity to perform the sacrament of the homa and prayers prescribed for adoption." The text of Saunakha thus referred to is given in s. 2, v. 74. When the author says Vachaspati is refuted, he plainly affirms that the incapacity of Sudras to perform the homa and the prescribed prayers does not make them incompetent to adopt. He then in v. 27 states in what manner the competency is produced. It treats of adoption by women and concludes:--"Therefore, since by this passage ("of women and Sudras without prayers") a dispensation with respect to prayers is established, the adoption (of the women in question) would be valid without prayers; like their acceptance of any chattel.""

3. Thus we have it distinctly laid down that Sudras may adopt, and that an adoption by a Sudra without prayers is valid, because there is a dispensation with respect to prayers. It would be surprising if any passage from this author could be produced which would be an authority for saying that an adoption by a Sudra without the ceremonies is invalid.

4. In s. 5 the author treats of the mode of adoption. A Sudra is expressly mentioned only in v. 29, where it is said that he ought to bestow as a gratuity on the officiating priest "the whole even of his property, if indigent to the extent of his means." In order to make the author consistent, the rules prescribed in this section must be understood as subject to the qualification that the person adopting is capable of observing them. It is not to be supposed that the author intended to contradict what he had before laid down about women and Sudras, and the concluding v. 56,--"It is therefore established that the filial relation of adopted is occasioned only by the proper ceremonies. Of gift, acceptance, a burnt sacrifice, and so forth; should either be wanting, the filial relation even fails,"--must be understood as only applying where there is a capacity to perform the ceremonies. To give any other meaning to it would make the author absolutely contradictory. In one part of his work he would be saying that a Sudra can adopt, and in another that an adoption by a Sudra is invalid, because ceremonies have not been performed which he was incapable of performing, and which the author had said he was exempted from performing. The doctrine in the Dattaka Chandrika, which is preferred in Bengal, does not differ from this; on the contrary, vv. 29 and 32 of s. 2 support it.

5. The text of Menu, quoted in s. 5, v. 3, must be understood as applying to those who are capable of observing the ordained rules, and not to Sudras. The decision in *Bhairabnath Sye v. Makes Chandra Bhadury* 4 B.L.R., A.C., 162, which made this reference necessary, is based upon a passage in the *Vyavastha Darpana*, 2nd edition, p. 875, where the author quotes as an authority for what he lays down a passage from the *Dattaka Nirnaya*, but it appears that the whole of the sentence is not given. After "a Sudra also should act in like manner" are the words, and "even without the performance of homa" & c., the adoption is valid. Thus the authority given by Shama Charan Sirkar for his position proves to be no authority for it, but the contrary. The decision appears to us to be unsupported by any authority, 2 Strange, p. 89, may be cited as a contrary authority. The

notoriety alluded to at p. 170, if the practice had a modern origin, as is probable, would not be a sufficient foundation for a rule of law. We think we ought to overrule that decision, and answer the question put to us by saying, that, amongst Sudras in Bengal, no ceremonies are necessary in addition to the giving and taking of the child in adoption.