
(1875) 03 CAL CK 0003

Calcutta High Court

Case No: Regular Appeal No. 1 of 1874

Gocoolanund Dass

APPELLANT

Vs

Wooma Daee

RESPONDENT

Date of Decision: March 9, 1875

Judgement

Macpherson, Offg. C.J.

1. We agree with the Subordinate Judge in thinking it proved that the defendant Gocoolanund for years (probably forty years or more) lived with and was brought up and treated by Hullodhur as his son also that he was given in marriage by Hullodhur as his son. Moreover, we agree with the Subordinate Judge in deeming it clear from the documents which are in evidence that Gocoolanund was constantly acknowledged by others as the adopted son of Hullodhur, and was so styled by Hullodhur himself in a written statement filed in Court in October 1848. In short we have no manner of doubt that no one disputed the fact that Gocoolanund was Hullodhur's adopted son, until after Hullodhur's death. That being so, it is hardly necessary for us to consider whether it is likely that Hullodhur would have wished to adopt under the circumstances in which he was placed. As the subordinate Judge has however laid much stress on the supposed improbability of his having so wished, we feel bound to say that we can see nothing which makes it in any degree improbable that the adoption took place as alleged. It is objected, first that there is no proof of the necessary ceremonies having been performed; and second even if the adoption did in fact take place, it must be considered void because one Denobundhoo, the only son of a brother of Hullodhur, was alive, and, being alive, Gocoolanund could not lawfully be adopted.

2. As regards the performance of the ceremonies, the evidence seems to us sufficient. There is evidence of homa and putreshjug. It is said that this evidence is bad and unreliable, but it seems as good as we could expect to be produced to prove the performance of such ceremonies forty years ago, and we are satisfied with it. We, therefore, find as a fact that Hullodhur did adopt Gocoolanund.

3. Assuming the fact of the adoption, there is some difficulty as to its validity, Denobundhoo the son of a brother having been alive at the time, as there is something in the nature of authority to support the objection. But we have no evidence as to this Denobndhoo, what his age was at the time of Gocoolanund's adoption, whether he was married or unmarried, Ac. Nor do we know whether his father would have permitted his adoption by Hullodhur. This, however, we do know that Denobundhoo's father never considered that Denobundhoo's being in existence rendered the adoption of Gocoolanund invalid: for Denobndhoo's father himself treated Gocoolanund as the adopted son of Hullodhur. Moreover, it is clear that none of the parties to this suit, when this litigation commenced, considered the adoption assailable on this ground; for they set up another adoption, that of one Radhakishen since deceased, whom they alleged Hullodhur adopted about thirty years ago. If Denobundhoo's existence invalidated the adoption of Gocoolanund, it would have equally invalidated that of Radhakishen. But so far as the parties themselves are concerned, Denobundhoo's existence was never dreamed of as forming any obstacle. No doubt it is said by Mr. Sutherland: (see his Synopsis, Stoke's Edition, p. 665), that the only son of a whole brother, if no other nephew exist for adoption, must be adopted by his uncle requiring male issue and is dwyamushayana, or son of two fathers. It is said that no man having a brother's son alive who can be taken as dwyamushayana, can adopt any other person.

4. According to the rules laid down in the Hindu law books, it is wrong to adopt an only son; but an exception is made in the case of an only son being adopted by his father's brother, when he becomes dwyamushayana, the son of both the brothers. And a special adoption of this kind is said to be proper, and one which ought to be made. But we do not think that the mere fact of the existence of a brother's son deprives the uncle of the right to adopt any one save that son, if the son's father refuse to give him in adoption. And even if the brother was willing, we incline to the opinion that the provisions of the Hindu law really go no farther than to sanction the adoption of an only son (such an adoption being ordinarily bad) if the adoption is made by his father's brother, when he can become dwyamushayana. In all cases of adoption, and especially in a case such as this, where the adoption has been deemed good and apparently acquiesced in for many years by all the parties, we think that the rule which ought to be applied is that which is in fact usually followed, and is well indicated by Sir Thomas Strange in his work on Hindu Law, Vol. i, p. 85, where he says:--"The result of all the authorities 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 on spiritual considerations ought to have been preferred." Whatever may be the strict rule laid down by the texts of the old Hindu writers, and even supposing it to be what Mr. Sutherland states it is, there is no doubt that in practice Hindus are not in the habit of restricting their adoption in the manner now contended for.

5. As we uphold the adoption, it is not necessary for us to decide another question which has been raised, viz., whether the plaintiff has any right to maintain this suit at all. As at

present advised, we are of opinion that the plaintiff could not in default of adoption be entitled to more than half of what she claims; that is to say, supposing she had any right at all, she could have only an eight anna's share, her sister Parbutti taking the other eight annas. But we are inclined to think that the plaintiff would have no title whatever, being a sonless widow; and we think that the law is correctly laid down by Mr. Justice Strange in his Manual, paras. 328, 329, p. 80, from which it appears that Parbutti would take in preference to the plaintiff. But it is not necessary to go into that point, as we find that the adoption was made in fact and is valid in law. The result is that the decision of the Subordinate Judge is reversed, and the plaintiff's suit dismissed with costs in this Court and in the lower Court.