

(1880) 05 CAL CK 0017

Calcutta High Court

Case No: None

Haran Chunder
Banerji and Others

APPELLANT

Vs

Hurro Mohun
Chuokerbutty

RESPONDENT

Date of Decision: May 21, 1880

Citation: (1881) ILR (Cal) 41

Hon'ble Judges: Tottenham, J; Jackson, J

Bench: Division Bench

Judgement

Tottenham, J.

(who, after shortly stating the facts, proceeded as follows:-- The material issues on the merits were, whether the will of Nobokishore, of which probate had been granted, could be questioned in this suit; whether the ceremonies enjoined by the Shasters had been duly performed at the defendant's adoption; whether the adoption of Bissesshur was valid or not; and whether, if defendant's adoption be invalid, he is entitled under the will to retain the property.

2. The Subordinate Judge disposed shortly of all the issues except that which raises the question of the validity of the adoption of Bissesshur. If that adoption was valid, the defendant Kedarnath was not a legally adopted son; if Bissesshur was not legally adopted, then Kedarnath's title cannot be assailed: for that all the proper forms and ceremonies were Observed in regard to him was found by the lower Court, and has not been denied before us, though a denial of it was set out in the memorandum of appeal. The lower Court discussed at great length the issue touching the validity of Bissesshur by adoption, and came to the conclusion that it was invalid. It considered that, upon the correct interpretation of certain passages of the Dattaka Chandrika and Dattaka Minlansa, it must be held that a boy cannot be adopted by a Brahmin, unless he be of the same generation as the intending adopter's son would be. The Subordinate Judge relied much upon what he considers to be the true meaning of

the somewhat vague phrase "the boy bearing the reflection of a son," which occurs in one of the verses in which the ceremonial rites of adoption are prescribed, as showing that an adopted son cannot be chosen from a generation more than one degree below the adopter. He observes that a grandnephew bears the reflection of a grandson rather than that of a son. In coming to the conclusion which he did upon this point, the Subordinate Judge has been chiefly guided by considerations as to whether there, could be an appointment (in the technical sense of Hindu Law) as between the person wishing to adopt and the mother of the boy to be adopted. This he considers to be the only test, because the meaning of the phrase "reflection of a son" is explained by the commentators to be "the capability to have been begotten by the adopter through appointment and so forth.

3. The generally accepted rule deduced from this explanation is that the adopted son's natural mother must be one with whom the adoptive father might have lawfully intermarried while he was yet unmarried, and this rule has been thought to receive support from the prohibition contained in books from adopting a "daughter's son," a "sister's son," and the "son of the mother's sister." There are, no doubt, exceptions to this rule, expressly provided in the prohibition to adopt paternal and maternal uncles, for the "uncle" may be the step-uncle, and therefore the son of one who might lawfully have been married to the man desiring to adopt. But because of these exceptions, the Subordinate Judge rejects the generally accepted rule which has been judicially affirmed by the High Courts of Madras (vide I. L. R. 1 Mad. 62: 2 Mad. H. C. Rep. 462), and Bombay (vide I. L. R. 3 Bom. 273) in several reported cases; and for the rejection of which no authority exists in any case decided by this Court or by the Judicial Committee of the Privy Council.

4. The Subordinate Judge did not overlook the fact that, in deciding that a brother's or cousin's grandson could not legally be adopted, he was acting in direct opposition to a decision of three former Judges of this Court in the case of *Morun Moe Debea v. Bejoy Eishto Gossamee* (W. R., Sp. No., 121). He considered himself not bound to follow this decision, because, independently of that question, that case was disposed of upon another point which rendered it unnecessary to determine whether the adoption was valid or not; and also, because, as he notes, the case was not a Full Bench case properly so called. Whether necessarily or not, however, the question was decided and the three Judges were unanimous in their opinion. We cannot doubt that they came to that opinion after careful deliberation, for the point was one upon which the two Courts below had differed, and upon which the opinion of the Pundits, accepted as correct by the first Court, was not in accordance with the view adopted in this Court. The decision, therefore, even if it has no more legal force than an expression of opinion, is entitled to very great weight, more especially as one of the Judges was Mr. Justice SUMBOONATH PUNDIT. We think that the Subordinate Judge would have done well to follow this opinion and the general course of decisions as to who is eligible for adoption, and that his contrary view must be overruled in this case. We think it by no means clear that the phrase "the

reflection of a son" was intended to bear the limited signification which he has put upon it; and looking to the place in which it is found, we think it is very questionable, whether it was intended to limit the generation from which a son might be adopted, or is anything more than a descriptive epithet applied to the child adopted. The phrase, as has been said, occurs only in the portion of the books which prescribes the ceremonial, and not in the part which lays down rules as to the selection of a son. Had the lawgiver intended to limit the choice to the one generation next below the intending adopter, he would surely have laid it down distinctly, and not have left it to be doubtfully, and with much dispute, evolved from an epithet applied to the child in the verses describing the ceremonies to be performed, and as to whom, those ceremonies have, been nearly completed. The passage has no doubt provoked discussion and difference of opinion amongst the Pundits, but so far as either common sense or any judicial authority goes, there is no ground for holding that a grand-nephew or a cousin's grandson, when adopted, does not equally with a nephew bear the reflection of a son. We prefer, therefore, to follow in the course pursued by the Courts hitherto, and to hold that the adoption by Nobokishore Banerjee of Bissesshur was valid. So far, therefore, as the Subordinate Judge's decision in this suit is based upon the finding that Bissesshur was not legally adopted, and that the defendant Kedarnath was, it must be set aside, and the plaintiffs being admittedly the heirs, will have a decree for all the property subject to the rights of Kedarnath, if any, under the will of Nobokishore. (The learned Judge then proceeded to discuss other points in the case not relevant to this report.)