
(1878) 02 CAL CK 0012

Calcutta High Court

Case No: None

Manick Chunder Dutt

APPELLANT

Vs

Bhuggobutty Dossee

RESPONDENT

Date of Decision: Feb. 11, 1878

Hon'ble Judges: Richard Garth, C.J; Markby, J

Bench: Division Bench

Judgement

Markby, J.

In this case the plaintiff, appellant, claims to have been adopted by the late Rajkrishna Dutt in his lifetime, and he brings this suit to have it declared that this adoption is valid, and that as such adopted son he is sole heir to his adoptive father. Mr. Justice Kennedy held upon the authority of the case of Upendra Lal Roy v. Rani Prasannamayi 1 B.L.R. A.C. 221 (i) that the adoption, if made, was invalid, because the plaintiff, at the date of the alleged adoption, was the only son of his father, and (ii) that no adoption had in fact taken place.

2. The case comes before us upon appeal from this decision, and the first question for consideration is, whether the adoption of an only son is invalid under the Hindu law. If this question is answered in the affirmative, there will be no necessity for deciding the second, which is one of fact.

3. I have gone carefully through all the authorities that we were referred to and that I have discovered, and I am surprised to find, how much less decisive authority there is upon the point than would appear from some of the modern text-writers. Many of the decisions commonly referred to have no bearing at all upon the question; in others the point is referred to, but it is extremely difficult to ascertain whether it was really considered.

4. The earliest decision of the late Sudder Dewany Adawlut usually quoted on this point is that of Ranee Bhudorun v. Hemunchul Sing 2 Sel. Rep. 59, which was decided in 1813, but no question of adoption was really decided in that case at all.

The respondent, in a suit brought against him to account for the profits of certain property, only alleged that he had been "merely" adopted by a previous owner, and what he really relied on was a temporary settlement made by Government with himself. The appellant, no doubt, objected that the respondent as an only son could not be adopted; and from a statement made in another case reported in the same volume, to which I am next about to refer, it is probable that the opinion of the pundits was taken upon this point, and that they thought such an adoption invalid (see p. 221). But no opinion whatever was expressed upon this point either by the Provincial Court or by the Rudder Dewany Adawlut; the suit being decided in favour of the respondent upon the other ground.

5. In *Rajah Shamshere Mull v. Ranee Dilraj Konwur* 2 Sel. Rep. 169 there was, when the suit was brought, only one adoption in dispute, that of the plaintiff's father by a widow of Rajah Bheem Mull. But on the death of the original defendant, his widow, Dilraj Konwar, adopted Tej Mull, the grandson of her husband's uncle, and continued the suit. The Zillah Court held that the adoption of the plaintiff's father was bad, not because he was an only son, which he was not, but because Rajah Bheem Mull had not authorized it; that consequently the plaintiff had no claim to be heir of Rajah Bheem Mull, and on this account the Zillah Judge dismissed the suit. On appeal to the Provincial Court of Benares, this decree was affirmed. On further appeal to the Sudder Dewany Adawlut, the pundits were asked as to the validity of both adoptions. They considered the adoption of the plaintiff's father illegal for the reason assigned; and the adoption of Tej Mull they also declared to be illegal he being the only son of his father, unless it could be supported as a *dwayamushyayana* adoption. But ultimately nothing was decided upon this point, because the Court agreed in the view that the adoption of the plaintiff's father was bad, and that therefore the plaintiff had failed to make out his title.

6. The next case is that of *Nundram v. Kashee Pandey* 3 Sel. Rep. 232 which is dated June 30th, 1824, but was really decided on June 30th, 1823. In that case the plaintiff claimed property which had belonged to Pullut Pandey by two titles, (i) as his heir by adoption, (ii) under a deed of gift. The adoption was disputed on the ground that the plaintiff was an only son; and the gift was disputed on the ground that the property was inalienable. The Zillah Court held that both the adoption and gift were valid. This judgment was reversed, on appeal, by the Provincial Court, where it was held that both the adoption and the deed of gift were invalid: the adoption upon the ground that the plaintiff was the only son, and the gift upon the ground that the property was inalienable. A special appeal was then admitted by the Sudder Court, and the pundits were asked whether it is allowable, according to the law current in Tirhoot, to adopt an only son. A question was asked also as to the validity of the gift. The pundits declared both the adoption and the gift to be invalid, and after perusing this opinion the Court (Leycester and Dorin) dismissed the appeal.

7. This, it will be observed, is the earliest judicial authority upon the question in Bengal. It was necessary to determine the point, because the two titles, that by gift and that by adoption, were wholly independent, and the determination was against the validity of both titles. But the litigation in this suit was subsequently re-opened by an application for review, applied for on the ground that the vyavastha, upon the strength of which the appeal was dismissed by the Sudder Dewany Adawlut, had been obtained by bribery. The further report of the case is in 4 Sel. Rep. p. 89 (edn. 1870). The review was admitted, and fresh pundits were consulted by the Sudder Court upon the same two points as before. The same answers were given. Upon this Mr. Smith expressed the opinion that the plaintiff ought to get a decree. He considered that he was at liberty, on the re-hearing, to go into entirely new facts; and he thought it proved that the plaintiff was not an only son; he also thought that the gift was valid and he further said that "probably" the adoption even of an only son was valid. But Mr. J.H. Harrington and Mr. Martin held otherwise. They thought that the question as to whether plaintiff was an only son could not be re-opened, and taking him to be so, they held that his adoption was illegal: that the gift was also illegal: and they confirmed the decision originally passed by the Sudder Court.

8. It appears, therefore, that, in this case, which was twice heard, and in which the point expressly arose, four Judges, against the doubtful opinion of one, held that the adoption of an only son was invalid. There could not be a stronger authority against the validity of the adoption. How it is possible that Mr. Morley could have so far misunderstood this case as to represent it as a decision that the adoption of an only son once made could not be set aside, I cannot understand. This misstatement of this important decision has no doubt led to considerable misconception.

9. In *Debee Deal v. Hur Hursing* 4 Sel. Rep. 320 the question was as to the validity of the adoption of the defendant. The defendant was the grandson of the paternal uncle of his adoptive father, and only son of his natural father. The adoption was established in the City Court of Benares, the objection that the defendant was the only son apparently not having been taken. On appeal to the Provincial Court it was objected that the plaintiff was the only son of his father, and the Court pundits signified their opinion that the adoption of an only son was invalid. But the respondent filed an opinion to the effect that a mother might give her son upon the special condition that he should be the son of two fathers (*dwaymushyaycana*). The Court pundits were thereupon again consulted, and they agreed that the adoption as stated by the defendants was legal. The Judge of the Provincial Court, evidently proceeding upon this view, assumed the adoption to have been in this form, and dismissed the appeal. The plaintiff then appealed to the Sudder Court, Mr. Smith (who had apparently therefore seen reason to doubt his former opinion) admitted the appeal and the pundits were again consulted. They thought that the adoption could not be supported, even as a *dwaymushyayana* one, because the natural father had not consented to it. On the authority of this opinion, Mr. Sealy and Mr. Leycester concurred in holding the adoption to be invalid, and they reversed the decree of

both the lower Courts. There is no judgment given in the report, and we cannot, therefore, be quite sure what the opinion of the Judges was. It is most probable that they entirely agreed with the pundits; but it is also just possible that they may have considered the adoption invalid, simply on the ground that the natural father's consent had not been given. I do not, therefore, reckon this as a decisive authority on the question.

10. In the case of *Dullabh De v. Manu Bibi* 5 Sel. Rep. 50 the statement of the plaintiff was, that she and her husband were asked by the defendant to give their only son to her to be adopted, but they refused. The plaintiff was, however, then pregnant, and she and her husband promised that, if she were delivered of a male child, they would give that child to the defendant. A son was born to the plaintiff, and was accordingly given to the defendant, but owing to its tender age the child was returned to its natural mother. Some years afterwards, and after the child's elder brother had died, the defendant with due solemnities, including a sacrifice for male issue, "publicly constituted him her adopted son." The Judge of the Provincial Court of Dacca, after consulting the pundit of that Court, held the adoption valid. One of the Judges of the Sudder Court (Rattery) thought an appeal ought to be admitted, upon the ground that the suit was improperly framed; but two other Judges (Rose and Turnbull) thought otherwise; and "concurring in the facts and law as found and laid down by the lower Court," dismissed the appeal.

11. If it was intended in this case to lay down, as a general rule, that the adoption of an only son is valid, it is certainly very remarkable that no reference was made to the pundits of the Sudder Court, or to the previous decisions, one at least of which is a very strong one and distinctly contrary. But Mr. Morley (Digest, p. 18) does not understand this case as deciding anything more than that where the gift and acceptance of a second son preceded the death of an elder son given in adoption, then the full completion (i.e., after the death of the elder son) is legal." Possibly it may be so. It may have been thought that the gift, at the time there was an elder son living, being valid, the completion of the adoption by a performance of ceremonies was not illegal. Whether or no this would be a correct opinion I do not say. I am disposed to think it would not; but it seems to me more reasonable to suppose that this case was somehow distinguished than to suppose that the previous decision in *Nundram v. Kashee Pandey* 4 Sel. Rep. 70 which was so fully and carefully considered, was overruled.

12. No case bearing upon this subject in the Sudder Adawlut was produced, nor have I found any between this, which was decided in 1830 and 1859. In the latter year a suit came up on appeal from Cuttack, in which one of the plaintiff's made title as an adopted son. Both this Court and the Court below held that the plaintiff had failed to prove his adoption, and this is expressly made the ground of the judgment in the Sudder Court. But the Court (Trevor, Samuells and Bayley) thought fit also to express the opinion that the plaintiff as the eldest, not the only son of the adoptive

father's brother, could not be adopted. If this wore good law, of course, a fortiori, an only son could not be adopted. But it is, I believe, the first and only time that it has been held by any Court of Justice that an eldest son cannot be adopted; and the contrary has been laid down in two succeeding cases--Sheetaram v. Dhunnook Dharee Sahye 1 Hay 260 and Janokee Debea v. Gopaul Acharjea ILR 2 Calc. 365. I think, therefore, that this case also ought not to be accepted as an authority.

13. These are all the cases I am aware of in the late Sudder Court. In the late Supreme Court, there is one case only--Joymony Dassee v. Sibosoondry Dassee Fulton 75--decided in 1837. There the adoption of an only son was held valid; but the report, which is exceedingly brief, leaves it very doubtful whether the ground of the decision was not that the adoption was a *dwaymushyayana*; and if so, it is, of course, not in point.

14. There are two cases in this Court, The first is that of Mussamat Tikday v. Hurreelall W.R. 1864 Gap. No. 133. I shall have to discuss that case very fully upon another point which arises in this case. It is sufficient to say now that there the adoption was in the *kurta* or *kritima* form. But a son adopted in the *kritima* form does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law, pp. 668, 669, 676, 677, and 678). The cardinal reason, therefore, why an only son cannot be adopted,--namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed which are necessary for the salvation of his ancestors,--does not apply. There cannot be a more complete case for the application of the maxim *cessante ratione cessat et ipsa lex*. It is, I think, clear that no decision as to the validity of an adoption, where there is no extinction of lineage, can be used as an authority to support an adoption where such extinction takes place.

15. The other decision of this Court is that of Mr. Justice L. Section JACKSON and Mr. Justice D.N. Mitter in the case of Raja Upendra Lal Roy v. Rani Prasannamayi 1 B.L.R. A.C. 221. Most of the authorities were considered in that case, and it was expressly held that the adoption of an only son was invalid. The suit was dismissed upon that ground; and a decision of the Madras Court to the contrary, which I am about to notice, was expressly dissented from.

16. In the Madras Courts there are two decisions. In Pillay v. Pillay 1 Str. Notes of Mad. Cases 78, decided by Sir Thomas Strange whilst he was Recorder, the complainant, whose adoption was disputed, had an elder brother by a former marriage living at the time of the adoption (p. 106). No question therefore arose in this case as to the validity of the adoption of an only son. But Sir Thomas Strange thought fit, nevertheless, to express an opinion that the adoption of an only son was valid. But, as the learned Judge has elsewhere told us (Strange's Hindu Law, Vol. 1, p. 102,) he based this decision "upon comparatively imperfect materials;" and the decision has been criticized by Sir Francis Macnaghten (see Considerations of Hindu Law, pp. 147, 187). Its chief importance depends on the relation it contains of the

case of the Raja of Tanjore (see p. 107 of the Report), from which it would appear that the pundits of Bengal (including Benares) and Madras had given an opinion that the adoption of an only son was valid. But it does not appear that those opinions were ever submitted to any Court, nor is it said upon what texts they are based, and I believe it to be a clear principle, understood and acted upon ever since our Courts have been established, not to accept as authority the opinions of pundits unconfirmed by judicial decision and unsupported by texts. Nor can I account for this unanimity of the Bengal pundits in favour of the adoption of an only son. They were very frequently consulted upon this point by the Sudder Dewany Adawlut and the Provincial Courts, and so far as appears from the Sudder Dewany Adawlut Reports, their opinions were unanimous the other way, except in one solitary instance, that of the Court pundit of Dacca, *Musst. Dullobh De v. Manu Bibi* 5 Sel. Rep. 52 and this pundit gives no authorities.

17. The other case in Madras is a decision of the late Chief Justice Sir Colley Scotland and Freere in *Chinna Gaundan v. Kumara Gaundan* 1 Mad. H.C. 54. There the adoption of an only son was distinctly held to be valid. The Chief Justice relies on the case of *Pillay v. Pillay* 3 Sel. Rep. 232 just referred to; another case of *Pillay v. Pillay* which I have not been able to see; *Nundram v. Kashee Pandey* 4 Sel. Rep. 70; and *Joymony Dasse v. Sibosoondry Dasse Fulton* 75 all of which he takes to be in favour of the validity of the adoption of an only son. I have already pointed out to what extent three of these cases are really authorities for that proposition. It is clear that the Chief Justice was misled by Morley as to the true result of the case of *Nundram v. Kashee Pandey* 4 Sel. Rep. 70, which, as I have shown, was directly contrary to what the learned Chief Justice supposed.

18. Only one case has been quoted from Bombay. It would be possible to make some observations upon that decision as it appears in the report, which is not a satisfactory one, but it is impossible to deny that the two Judges who decided it (Warden and Gibbs, JJ.) thought that the adoption, which was of an only son, was legal.

19. It was stated in the argument that it had been held that in the Punjab generally an adoption of an only son was legal, but we have not been shown any authority upon which that statement could be made. The only case to which we were referred to does not bear out that statement. In *Ajoodhia Pershaud v. Mussamut Dewan* 5 Punjab Record p. 56 Simson, J. held in special appeal, that the adoption of an only son was valid; it having been found by the lower Court on the evidence "that by the usage in Delhi generally, and in respect of the caste of the litigants in particular, the custom is to receive an only son in adoption." A former decision was referred to, which was also a case from Delhi, in which the adoption of an only son had been upheld. Lindsay, J. differed from Simson, J. but I confess I do not understand upon what grounds, for the adoption was clearly a legal one in Delhi. But the case is no authority as to the general law either of the Punjab or of any other part of India.

20. I now pass to the text-books by English writers.

21. Sir Thomas Strange, at Vol. I, p. 87 of his treatise on Hindu Law (London, 1800), says, "so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good, according to the maxim of the civil law prevailing perhaps in no Code more than in that of the Hindus, *factum valet quod, fieri nan debuit.*" But in the Appendix, p. 107, he quotes the high authority of Mr. Colebrooke to the contrary. A pundit had given his opinion that "if a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother." Upon this opinion, Mr. Colebrooke made the following observations: "If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of a son, both to him and to his adoptive father. See notes to Mitakshara on Inheritance, ch. i, Section x, 1, and Section xi, 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden."

22. The conclusions of Sir F. Macnaghten's Considerations of Hindu Law, p. 147 (Serampore, 1824), are thus stated: "The gift of an only son in adoption is absolutely prohibited; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable piacle. It is indeed said that an only son may be so given; but it might be said in the same sense, that a man may perpetrate any wickedness if he be content to forego all hopes of salvation and be condemned to everlasting punishment."

23. By the gift of an only son, the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned, Nothing in the Hindu law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an eldest son is forbidden as sinful. The crime of giving an eldest has never been considered so heinous, as that of giving an only son. In the one case a Hindu retains, in the other he casts away, the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little less than an apostate from the Hindu religion."

24. Sir W. H. Macnaghten, in his Principles and Precedents of Hindu Law, speaking of the prohibition against adopting an only son, says, at p. 67 of Vol. I (Calcutta, 1829) in a note: "But this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy ipso facto loses all claim to the property of his natural family." There is no doubt sometimes hardship upon the adopted son, if the adoption be held to be invalid; but he does not, as he has stated, in that case lose all claim to the property of his natural father: *Bawani Sankara Pandit v. Ambabay Ammal* 1. Mad.

H.C. Rep. 363. However, in Vol. II, p. 179, the same author expresses a contrary and, what I think must be considered, his final opinion. He quotes an opinion, of the pundits at p. 178 of Vol. II, that a gift of the survivor of two sons is invalid. Upon this he observes in a note; "It will be observed that the answer is not directly in point. The question was, is it legal to adopt a son under such circumstances? and the reply states that it is illegal, under such circumstances, to give away a son in adoption; but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading eternal torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect."

25. Mr. Justice Strange, in his *Manual of Hindu Law*, pp. 18 and 19, contests the position that the adoption of an only son can be held valid. The passage is quoted at length in *Chinna Gaundan v. Kumara Gaundan* 1 Mad. H.C. Rep. 54. It is of little value, as it puts on a par the objection to the adoption of an eldest and an only son, which shows, to say the least, a want of discrimination.

26. Mr. Sutherland, in his *Synopsis* (Stokes' Collection of Hindu Law Books, p. 665), says: "An only son cannot become an absolutely adopted son (*sudha dattaka*), but he may be affiliated as a *dwaymushyayana* or son of two fathers. In this case, the reason of the prohibition,--viz., extinction of lineage to the natural father--would not apply."

27. It remains to notice the Hindu text-writers. The earlier Hindu text-writers are of course the source from which we ought ultimately to derive the law, and are, therefore, the most important authorities of all. But the difficulty is in ascertaining what rule it was intended to lay down. There would indeed be less difficulty if the view of Mr. Justice Dwarkanath Mitter in *Upendra Lal Roy v. Rani Prasannamayi* 1 B.L.R.A.C. 221--224 could be accepted, that in the matter of adoption all distinctions between religious and legal injunctions are inapplicable. That distinction, however, is in my opinion too well established to be entirely put aside. Nor do I see any substantial ground why that distinction should not be applied in cases of adoption as well as in other matters of Hindu law, all of which are in a sense matters of religion. After full consideration Mr. Justice Romesh Chunder Mitter thought it right to apply that distinction in the case of an adoption of an eldest son--*Janokee Debea v. Gopaul Acharjea* ILR 2 Cal 365 and I concurred in that view. No one disputes, however, that the authoritative text-books of Hindu law do, in fact, contain a prohibition against the adoption of an only son, and in order to arrive at a conclusion whether this prohibition invalidates an adoption actually made, I think we ought to consider at one view (1) the language of the prohibition itself, (2) the authoritative commentaries upon it, and (3) the decided cases; and that we ought to see whether, upon the whole, the adoption is, according to modern usage, to be considered as invalid. It was indeed argued that the language of the text-books

themselves countenanced the view that the adoption of an only son, though blameable, was not invalid, because whilst the giving of an only son is forbidden, the receiving him is not; whereas if the adoption were illegal, both would have been forbidden. But this is not so as far as I have seen, It is certainly not so in the Dattaka Mimansa, the Dattaka Chandrika, or the Mitakshara. The authors of these treatises all quote the same text of the sage Vashishtha, which is the foundation of the whole doctrine. This text is quoted at length in Colebrooke's Digest, Vol. III, Book 5, v. 273, and I need not therefore repeat it here. It clearly prohibits both the giving and the receiving of an only son in adoption, and I do not find the slightest attempt to qualify this prohibition in any passage of these three writers. The first and, as far as I am aware, the only Hindu text-writer of authority who has suggested that this prohibition should be qualified is a much more modern one, namely Jagannatha, the author of the work popularly known as Colebrooke's Digest. He says in his note on the passage of Vashishtha above referred to (Colebrooke's Digest ubi. supra) "As an only son should not be given, so he should not be sold or deserted. Sale is a great offence, even though made in a season of calamity, when a maintenance cannot be provided; desertion is a great offence, because the family becomes thereby extinct. Thus the Pracasa--let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct: but this does not invalidate the adoption of such a son actually given to him." Opinions differ as to the precise value of, Jagannatha's authority, but though of course it is far inferior to that of the authors of the three more ancient treatises above referred to, it is certainly entitled to considerable weight.

28. Some attempt was made to show that Srinatha Bhatta, the author of the Dattaka Nirnaya, recognized the adoption of an only son as valid, and there is perhaps some countenance for this in the way this author is quoted by Sir E. Macnaghten at p. 126, but I should be very unwilling to draw any inference as to the opinion of any writer whose language I had not myself seen.

29. If this recapitulation of the authorities be carefully considered, I think it will be seen that there are only four cases in which it is clear that the point properly arose, and was decided: the case of Nundram v. Kashee Pandey in the Sudder Dewany Adawlut the case of Raja Upendra Lal Roy v. Rani prasannamayi in this Court; the case of Goundan v. Gaundan in the High Court of Madras; and the case of Nimballear v. Iiamadim in the High Court of Bombay. Of these, the two Bengal decisions are against the adoption; the decisions of Madras and Bombay support it. Of the English text-writers, Colebrooke, the two Macnaghtens, Sutherland, and Mr. Justice Strange, all think the adoption illegal; there is only one English text-writer, Sir Thomas Strange, on the other side, backed no doubt by the important but solitary opinion of Jagannatha amongst the Hindu text-writers.

30. It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son; and

if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully-considered decision of Jackson and Dwarkanath Mitter, J.J. and the equally careful decision of four Judges of the Sudder Court. This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from those decisions. Having gone through all the cases with great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought, in Bengal, to be held to be invalid, wherever the effect of holding such adoption to be valid, would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation.

31. Of course the question whether this particular case can be taken out of the general rule is a wholly different one; and the appellant before us has contended that, even if, as a general rule, the adoption of an only son be invalid, still the rule does not apply to Sudras. No reason was given for excepting Sudras from the rule, and the principle upon which the rule is based,—namely, that a man shall not be allowed to extinguish his lineage to the detriment, not only of himself, but of his ancestors, apparently applies just as strongly to Sudras as to other Hindus. The only decided case which lends any colour to a distinction in the case of Sudras is that of *Mussamut Tikday v. Hurreelall W.R. 1864* Gap. No. 133 above referred to. But upon an examination of that case, I have come to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt, the parties in that case were Sudras; and no doubt also this fact is noticed in the judgment, but, in my opinion, for another purpose. The case came up upon appeal from the Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nuseebun but no son. The second wife, Mussamut Tikday, was childless. Mussamut Tikday survived her husband; the other wife died in his lifetime. During his lifetime Nowrunghee adopted his grandson, Hurree Lall, the only son of his daughter Nuseebun as a "kurta" or "kritima" son. After Nowrunghee's death, Mussamut Tikday brought a suit against Nuseebun and Hurree Lall to recover, as heiress to her husband, certain property which had belonged to him; and it was in this suit that the question arose whether the adoption of Hurree Lall was valid. In the judgment of this Court, the Zillah Judge is stated to have held that, as the family were "Sudras, no exception could be taken to the selection of an only son as a kurta putro." I have referred to the judgment of the Zillah Judge, and I do not find that he said this. What he did say was, that a Sudra can adopt his sister's son or daughter's son, and for this there is good authority in the *Dattaka Chandrika*, Stokes' Hindu Law, 632, where Sudras are specially exempted from the rule which prohibits members of the other classes from

adopting a daughter's or a sister's son. But the rule as to kritima adoptions is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adopted child does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law in the passages already cited), and is not confined to any particular class. In point of fact, the Zillah Judge appears to have overlooked entirely that this was not a regular adoption, but a kritima one, and relying solely upon the first opinion of Sir. W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the kritima form, and I have no doubt that that was the substantial reason why in this case the adoption of an only son was held to be valid.

32. It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to the other classes of the community: one instance of relaxation has been just now mentioned; but I think we ought to be careful how we extend the list of such exceptions, and draw distinctions between the classes, for which there is no direct authority in the Hindu law. I do not find the slightest authority in any text-book for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of *Mussamut Tikday v. Hurrellall* W.R. 1864 Gap No. 133. But as I have just now stated, I do not think that that decision, so far as it relates to the adoption of an only son, really proceeded upon any distinction between Sudras and other classes, and therefore, upon the ground that this is a general rule from which it is not shown that Sudras are excepted, I think we ought to hold that for all classes of Hindus in Bengal an adoption is invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father, and to deprive the ancestors of the natural son of the means of salvation.

Garth, C.J.

33. I quite agree in the conclusions arrived at in the very learned judgment of my brother Markby. I think the weight of authority in Bengal is decidedly in favour of the invalidity of the adoption of an only son; and I see no sufficient ground for making any distinction in this respect in the case of Sudras.

34. The appeal will be dismissed with costs on scale 2.