
(1870) 02 CAL CK 0035

Calcutta High Court

Case No: Special Appeal No. 893 of 1869

Bhairabnath Sye and
Others

APPELLANT

Vs

Mahes Chandra
Bhadury and Others

RESPONDENT

Date of Decision: Feb. 12, 1870

Judgement

Loch, J.

Plaintiff claims the property in suit as being the heir of Beni Chandra, the adopted son of Hari Kumar. The defendant. Kali Chandra, claims the property as purchased by him from Gaddadhar, the heir-at-law of Hari Kumar. He admits, however, that Beni Chandra was adopted, but contends that Gaddadhar is the preferential heir to the plaintiff. After the issues were fixed, Shib Chandra was made a defendant, as he claimed a part of this property, by purchase from Gaddadhar. He contended that Beni Chandra had not been legally adopted.

2. It is necessary to notice that there had been a suit between Shib Chandra and Kali Chandra regarding some property which Shib Chandra claimed to have purchased from Gaddadhar through Kedarnath. In that case the question of Beni Chandra's adoption was tried, and it was held that the adoption of Beni Chandra was not proved. That case appears to have been disposed of by the Subordinate Judge with the present case, in which Bhairabnath is plaintiff, and in which he has tried to prove himself next of kin and heir to Beni Chandra. An appeal to this Court was preferred by Bhairabnath, objecting to the mode in which the lower Court had disposed of this case; and, on 20th February 1867, this case was remanded for the Judge to try the question of adoption on the evidence advanced by the parties in this case, and not with reference to a judgment passed in another case, to which plaintiff was not a party.

3. Shib Chandra, it appears, was made a party to the present case by orders of the lower Court, because he had, in the suit brought by him against Kali Chandra, disputed the adoption of Beni Chandra, and was therefore supposed by the lower Court to be a party

interested in this suit. It is a great pity that Shib Chandra has been made a party, for it has introduced a fresh element of litigation into the case, which could otherwise have been disposed of between the original parties, without injury to the rights of Shib Chandra.

4. On remand, the Judge found that the adoption was invalid not having been made with the proper ceremonies, and consequently the plaintiff's claim to the property as heir of Beni Chandra failed.

5. A special appeal is filed, and it is contended before us---

1st.--That the Judge should have required Shib Chandra, who disputed the validity of the adoption, to prove his allegation, before calling upon the plaintiff to substantiate the adoption of Beni Chandra; and the pleader quotes the decision in *Juggodanund Misser v. Hamid Russool* 10 W.R. 52 in support of his argument.

2nd.--That the Judge is wrong in rejecting the adoption, because he considered that the ceremonies according to the Shastras were not properly performed, because, on the adoption of Sudras, no ceremonies beyond the giving and taking are required.

6. With regard to the first ground taken, it appears to me, that there is a difference between the present case and that of *Juggodanund Misser v. Hamid Russool* 10 W.R. 52. In the present case, Shib Chandra was made a defendant by the Court without any application of his own, and, being called upon to plead, stated his case as he had done in the action brought by him against Kali Chandra, viz., that Beni Chandra had not been legally adopted. In the case quoted, the intervenor volunteered to contest the claim of the plaintiff. Here Shib Chandra was obliged by the Court to contest it, when he had no apparent intention of interfering.

7. The position of Shib Chandra is this-- He, as well as the defendant, Kali Chandra, claims through Gaddadhar; but he says that Gaddadhar, immediately on the death of Han Kumar, succeeded to Hari, Kumar's estate, and sold the property he claims to Kedarnath in 1260 (1853), and Kedarnath sold it to him, Shib Chandra, in Jaishtha, 1269 (May and June 1862); whereas Kali Chandra, admitting the adoption of Beni Chandra to be good, says that Gaddadhar succeeded after the death of Beni Chandra as the next legal heir, and sold him the same property in Sraban 1267 (July and August 1860). It is therefore of the first importance to Shib Chandra to show that there was no adoption, and that Gaddadhar was the party legally in possession when he sold the property to Kedar Nath in 1260 (1853). If he succeeds in doing so, he not only secures his own title by purchase, but extinguishes the title of the plaintiff, who comes in as heir of the adopted son. As the plaintiff seeks to take the property out of the hands of Shib Chandra, who denies his title, it is clearly upon the plaintiff to prove his title, and the Judge finds that he has failed to do so.

8. But it is urged in the second place, that the Judge was wrong in considering that any ceremonies other than giving and taking were necessary to render an adoption valid

among Sudras, and certain passages have been quoted for the purpose of proving that such ceremonies are essential only in the case of the higher castes; but we find that evidence has been adduced by the plaintiff in this case to prove that ceremonies which were considered necessary for the due adoption of Beni Chandra did take place, evidently showing that, in the opinion of the parties something more than mere giving and taking is necessary to make an adoption, even among Sudras, valid. The appellant chiefly relies on certain passage from Strange's Hindu Law. In Volume I, page 95, we have this passage: There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary. For, as to the notice to the Raja, and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession. And even with regard to the sacrifice of fire, important as it may be deemed in a spiritual "" point of view, it is so with regard to the Brahmin only according to a constant distinction in the texts and glosses upon matters of ritual observance between those who keep consecrated and holy fire and those who do not keep such fires, i.e., between Brahmins and the other classes; it being by the former only that the datta homam, with holy tests from the Veda, can properly be performed. * * * *

9. "The other classes, and particularly the Sudra, upon this and other like occasions perform an imitation of it, with texts from the Purans. And even with regard to Brahmins, admitting their conception in favour of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rights for civil purposes, but the contrary is to be inferred; "and the conclusion is, that its validity, for these, consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only or the eldest son of the giver, the prescribed ceremonies not being essential."

10. The next passage which was referred to is a case quoted in Strange's Hindu Law, Volume II, page 87. The question put to the Pandit was,-- What are the requisites of adoption among Sudras? The Pandit in answer gives an account of the ceremonies performed at the adoption of a Brahmin, and then observes; the same ceremonies, with the exception of homams, are to be observed in the other castes." Mr. Ellis, in a note on this Vyavastha of the Pandit, at page 89 of Strange's Hindu Law, Volume II, observes: With respect to Sudras, the Datta Mimansa of Madhuyam" (the principal author in Southern India on this point as well as on Mimansa in general) says, that to the Sudra there is no adoption; by which, however, is to be understood only that, in this caste, there exists, strictly speaking, no ceremonial for it, but that public avowal, or general notoriety of the fact, is sufficient with them to establish its validity. Ceremonial adoption cannot be necessary in the case of a Sudra, since by the datta homam the adopted son is converted from the "stock (gotra) of the natural to that of his adoptive father, and Sudras have no gotra. Beside, they cannot perform the datta homam, though they may perform an imitation of in with texts from the Purans. But the proper datta homam can be performed only by those castes which use the texts of the Vedas in their religious ceremonies, and

in Southern India scarcely any caste but that of the Brahmins now use these texts."

11. The above passages would appear to be conclusive on the subject; but it is contended--and, as it appears to me, rightly contended--that the law as laid down by Strange is not quite correct, or at any rate not applicable in its unrestricted terms to this part of India; and the position assumed by Sir Thomas Strange is very boldly, and I think effectually, attacked by Baboo Shamachurn Sirkar in his *Vayavastha Darpana*, page 873, 2nd edition. He first points out how Strange, as well as Colebrooke, has omitted to notice certain passages in the *Dattaka Mimansa* and the *Dattaka Chandrika*; the passages to which he refers appear to be paragraphs 45, 46, 55 and 56, section V, *Dattaka Mimansa*, and paragraph 17, section II, *Dattaka Chandrika*; and it may be as well as to quote the words of paragraph 56 from the former work:

12. "It is therefore established that the filial relation of adopted sons is "occasioned only by the proper ceremonies of gift, acceptance, a burnt; sacrifice, and so forth; should either be wanting, the filial relation fails." And Sutherland, in his digest of the two *Dattakas*, Bays, beading 3rd, paragraph 4--"" Should a son be adopted without the observance of prescribed forms, his filial relation would not be established, but he would be entitled to assets sufficient to defray the expense of his marriage." It may be said that these ceremonies are essential only in the case of the three higher classes. This may be so, but it is not with the object of showing that these ceremonies are essential in all cases that I have quoted the above passages, but to show that the law as laid down by Sir Thomas Strange is not correct, even as regards the higher classes. With regard to them, he says, in the passage I have quoted from Volume I, page 95, speaking of adoption in general--"There must be gift and acceptance" manifested by some overt act; beyond this, legally speaking, it does not appear that anything is absolutely necessary; and again, in the next passage he says--"And even with regard to Brahmins, admitting "their conception in favor of its (the *Datta Homam*'s) spiritual benefit, it by no means follows that it is essential to the efficacy of the rite for "civil purposes; but the contrary is to be inferred;" and he holds, a little further on, that the prescribed ceremonies are not essential; the validity "of the adoption consisting in the consent of the necessary parties, the adopter having at the time no male issue, &c." But the *Dattaka Mimansa*, in the passage I have quoted, unmistakably lays down that the filial relationship of adopted sons in the highest class," if we suppose the author to be speaking particularly of that class, is occasioned only by "the proper ceremonies, viz., gift, acceptance, sacrifice," and so forth, as described in the previous part of section V; and he adds, should either be wanting, the filial relation even fails."

13. Having, as I think, shown that, with regard to the first class the law of adoption, as laid down by Sir Thomas Strange, is not strictly correct, but that something more is required than giving and receiving. I now proceed to quote a passage from page 875, of Baboo Shamachurn Sirkar's *Vayavastha Darpana*, 2nd edition. Referring to what Sir Thomas Strange had said--that the Sudras on occasions of adoption perform an imitation of the *datta homam* from the *Parana*, he observes--"That though no "other class than that of the

Brahmins are allowed personally to repeat the holy words from the Vedas, and perform the rites thereby to be performed, yet all those classes can, and do usually, employ Brahmins to "officiate for them in the performance of such rites. Moreover, according to the Dharma Shastra as current in this country, it being necessary for the inferior classes also to perform the homa like Brahmins; even the Sudras are, for completion of religious ceremonies of great consequence, directed to have the homa performed by Brahmins, as is evident from the following passage of the Dattaka Nirnaya. A person being about to adopt a son, should receive him having convened (his) kinsmen, "announced (his) intention to the king, and having offered a burnt offering with recitation of prayers (denominated Vyahriti) in the middle of his dwelling. Here, it being intimated that a woman may give or "accept (a son), and that homa should be performed in the adoption of a son; let it be known that there is no impropriety in her "" performing the homa through Brahmins, just as she does when completing a voluntary religious ceremony (brata) and so forth. A Sudra also should act in like manner." It appears to me that the contention of the special appellant on this point cannot be supported, for it is notorious that besides giving and taking there are other ceremonies performed by Brahmins on the occasion of an adoption among people of the Sudra caste, which are considered essential to the validity of the adoption. The Judge, therefore, had grounds for coming to the conclusion that the necessary ceremonies were not performed, disbelieving, as he did, the evidence adduced by the plaintiff to prove the performance of those ceremonies.

14. As the appellant has failed on the first and second grounds, he must fail on the third; for having been unable to establish his title, he is not in a position to bring an action against Kali Chandra, though the latter does not deny the adoption of Beni Chandra, and anything that Gaddadhar may have said in a plaint filed subsequently to Shib Chandra's purchase from him, cannot be used as evidence against Shib Chandra, nor is anything which Swarnamayi may have said in a petition to the Court evidence, either for or against the adoption, as she has not been examined as a witness. I think, therefore, for the reasons given above, the special appeal must be dismissed with costs.

Bayley, J.

I concur. The authorities above cited are those recognized specially as prevailing in Bengal; and, in addition, it is clear that both the parties, by the evidence they produced, supposed ceremonies beyond mere giving and taking to be requisite.