

**Anandi Lal Vs. Onkar**

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**Court :** Rajasthan

**Decided On :** Oct-06-1959

**Reported in :** AIR1960Raj251

**Judge :** D.S. Dave, J.

**Acts :** Hindu Law

**Appeal No. :** First Appeal No. 10 of 1954

**Appellant :** Anandi Lal

**Respondent :** Onkar

**Advocate for Def. :** C.L. Agarwal, Adv.

**Advocate for Pet/Ap. :** P.C. Bhandari, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**D.S. Dave, J.**

1. This is a first appeal by the plaintiff in a suit for partition and possession of immovable property situated at Jaipur in a locality which SS called Chowkri Ghat Darwaza, Rasta Bhaironji Kundigaran, Gali Naiyan.

2. The plaintiff's case was that the houses whose description has been given in the plaint, belonged to his father Manak. About 45 years prior to the date of the institution of the suit (which was filed on 30.10.48 in the court of Civil Judge, Jaipur City), his father had adopted the defendant as his son, because he had no natural son of his own by that time from his first wife. After the death of his first wife, he married another wife, who gave birth to the plaintiff. A few years after, the plaintiff's father got angry with the defendant on account of some undesirable activities on his part and so he turned him out of his house.

The defendant then began residing in another house. The plaintiff's father died on 15-6-37 and after his demise, the defendant took forcible possession of certain movable and immovable properties of the deceased and started harassing the plaintiff in several ways. It was, therefore, prayed by the plaintiff that he, being the legitimate son of his father, should be declared heir to 3/4th of his property and should be put in possession thereof.

3. The defendant admitted in his written statement that the property in dispute belonged to Manak deceased and that he was his adopted son, but he denied that the plaintiff was the legitimate son of deceased Manak. According to the defendant, Manak was not legally married to the plaintiff's mother, but she lived with him only as his keep.

It was further averred that the plaintiff was adopted by one Ganesh and, therefore, he lost all his rights if any, in Manak's property. He also challenged the plaintiff's right to receive 3/4th share of the property of deceased Manak, even in case he was found to be his legitimate son. From the pleadings of the parties, the trial court framed the following 4 issues:

(1) Whether the defendant is a natural son of Manak?

(2) What share the plaintiff is entitled to?

(3) Whether the plaintiff was adopted by Ganesh?

(4) Relief?

After recording evidence of both the parties, the trial court decided issue No. 1 in plaintiffs favour. Issue No. 3 was also decided against the defendant. Regarding issue No. 2, it was held by the learned Civil Judge that the parties being Sudras by caste, the defendant, even though an adopted son of deceased Manak, was entitled to receive one-half share of the property left by him and, therefore, he declared the plaintiff entitled to receive only one-half share of the disputed property and passed a preliminary decree to that effect on 13-10-1953. He also directed the appointment of a commissioner to partition the disputed property half and half. It is against this decree that the present appeal has been filed by the plaintiff.

4. The only point which has been raised by the appellant in this Court is that the trial Court has committed an error of law in following the view prevalent in the States of Bengal and Madras which is based on Dattakachandrika and in not relying upon Dattakamjansa which is followed in the Benares School of law (which applies to Rajasthan) and according to which an adopted son gets only one-fourth share in the presence of a natural son who gets three-fourth share in the father's property.

The defendant's cross-objection is to the effect that the lower court has erred in holding the plaintiff as a legitimate son of Mauak deceased. It is also mentioned in the cross-objection that the lower court has wrongly arrived at the conclusion that the plaintiff was not adopted by Ganesh, but this objection has not been pressed at the time of arguments.

5. Before deciding the appeal, it would be proper to decide the cross-objection, because unless the plaintiff-appellant is found to be a natural son of deceased Manak, there would be no force in his appeal.

6. Therefore, to begin with the cross-objection, it is urged by respondent's learned counsel that the burden of proving that the plaintiff's mother was lawfully wedded to deceased Manak was on the plaintiff, that the evidence produced by the plaintiff on this issue (No. 1) was discrepant and unreliable, that the trial court has not scrutinized and discussed the evidence and, therefore, its finding should be set aside.

It is pointed out by him that according to the plaintiff's witness No. 1 Chhaju Ram, plaintiff's mother Janki alias Jana's marriage with Mfanak took place at about 9 or 10 P. M., while according to P. W. 6 Moolchand, the marriage ceremony was performed at 2 O' clock in the afternoon, that this is a glaring discrepancy which has been wrongly overlooked by the trial court and it clearly shows that neither of the two witnesses were present at the ceremony,

I agree with learned counsel to the extent that the discrepancy pointed out by him in the statements of the above two witnesses cannot be easily reconciled, but, at the same time, one should not lose sight of the fact that they were examined about an event which took place more than 3 decades earlier and it is too much to expect them to remember the details thereof. (His Lordship discussed the evidence and concluded;)

Thus, the defendant's evidence itself corroborates the fact that the plaintiff's mother was throughout treated in their community as a lawfully wedded wife of deceased Manak and the plaintiff was also treated as his legitimate natural son. It is proved by their evidence that Manak and Janki were living as lawfully married husband and wife. 'In Mohabbat AH Khan v. Muhammad Ibrahim Khan, AIR 1929 PC 135 it was held by their Lordships of the Privy Council that

'the law presumes in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years'.

There are number of authorities to support the view that such a presumption can be repelled only by strong and conclusive evidence and the mere fact that direct evidence of marriage, which took place many years ago, is unsatisfactory cannot displace the presumption. This presumption also applies to marriage's in Hindu Community. (See Inder Singh v. Thakar Singh, AIR 1921 Lah 20 which was referred with approval by their Lordships in the above case).

As pointed out above, even if the direct evidence about Janki's marriage with Manak led by the plaintiff may not be considered quite satisfactory, it certainly raised a very strong presumption in favour of their lawful marriage and a heavy burden lay on the defendant to prove that Mst. Janki was living only as a, keep or

concubine. Instead of weakening the said presumption in any manner, the defendant's evidence has only corroborated it.

It may also be remarked that generally a man keeps a concubine either when a lawfully married wife is living and he cannot take another wife on account of the restrictions imposed by law or customs or when the woman belongs to a caste in which the said person cannot marry without incurring displeasure of the people of his own community, or when that person is a profligate or a debauch. In the present case, Manak had no wife living, when he took Mst. Janki in marriage. Mst. Janki was of the same community as that of Manak and it is not suggested even by the defendant that Manak was a profligate or a debauch and therefore there was no reason for him not to marry a woman according to the custom of their community and to keep her as a mere concubine.

Looking, therefore, to the evidence which is on record and all the circumstances, referred above, I think the trial court has not committed any error in holding that the plaintiff's mother was lawfully married to Manak and that the plaintiff was his natural legitimate son. There is thus no force in the cross-objections, and they are fit to be dismissed.

7. The next question which arises for determination is as to how much share the appellant is entitled to receive in the property left by his father. It is common ground between the parties that they are barbers by caste and used to be considered as Sudras by the time their father Manak expired and the inheritance devolved upon them. It is urged by appellant's learned counsel that according to Benares School of law which was followed in Jaipur (Rajasthan), a natural legitimate son of a Sudra born subsequent to the adoption of a son gets three-fourth share in the property, while the adopted son gets only one-fourth share and the trial court has committed an error in allowing him (plaintiff-appellant only one-half share.

In support of his argument, learned counsel has referred to Laxman Gadiji v. Mt. Bayabai (S) AIR 1955 Nag 241. Learned counsel for the respondent has, on the other hand, urged that the view taken in the above case is not correct. According to him, Dattaka Mimansa on which reliance has been placed in the above case (S)

AIR 1955 Nag 241 referred only to the general rule which was applicable to the first three regenerate classes amongst Hindus, namely, Brahmins, Kshatriyas and Vaishyas, and that it was silent about the rule applicable to Shudras.

It has been argued that the law applicable to Shudras was mentioned in Dattaka Chandrika, that there was really no conflict between Dattaka Mimansa and Dattaka Chandrika, and that according to Dattaka Chandrika, the adopted son and the natural son both shared the father's property half and half, He has referred to Raja v. Subbaraya, ILR 7 Mad 253; A. Perrazu v. A. Subbarayadu, ILR 44 Mad 656: (AIR 1922 PC 71) and Asita Mohan Ghose v. Nerode Mohan Ghose, (AIR 1917 Cal 292) in support of his argument that the respondent was entitled to one-half and not one-fourth share.

8. I have given due consideration to the arguments advanced from both the sides. It is apparent that there is a sharp cleavage of opinion between the Nagpur High Court on the one side and the Calcutta and Madras High Courts on the other. This difference of opinion has arisen on account of the fact that while the learned Judges of the Nagpur High Court have relied on Dattaka Mimansa, the learned Judges of the Madras and Calcutta High Courts have followed the view taken in Dattaka Chandrika.

In Raja's case, ILR 7 Mad 253 the learned Judges gave a very small judgment and after referring to Dattaka Chandrika, it was held that the adopted son was entitled to take an equal share with a legitimate son born subsequent to that adoption. They did not even refer to Dattaka Mimansa and, therefore, there is no discussion to resolve the different views taken by the learned authors of the said two treatises.

9. In Asita Mohan Ghose Moulik's case, AIR 1917 Cal 292 there was a document called Ikrar Patra in which the deceased father had written that his adopted son and the subsequently born natural son would be entitled to share all his movable and immovable properties equally. On the basis of that document and also according to the law as propounded in Dattaka Chandrika, it was held that both of them were entitled to share the property half and half. The learned Judges have discussed the position of law in that case at a considerable length.

The learned Judges have first taken great pains to establish that Dattaka Chandrika is not merely a literary forgery as opined by Golap Chandra Shastri in his Hindu Law for supporting a certain adoption case, but that it was an old treatise which had a very high place in the estimation of Hindus. Thereafter, it has been pointed out that Dattaka Chandrika alone specially refers to the case of Shudras and that the reason given by that treatise for allowing one-half share to an adopted son is quite sound. The main argument, as pointed out by the learned Judges, in Dattaka Chandrika is that if an illegitimate son of a Sudra gets an equal share, the adopted son, who is superior, a fortiori gets such a share. Asita Mohan Ghose Moulik case, AIR 1917 Cal 292 was referred with approval by their Lordships of the Privy Council in, A. Perrazu's case, ILR 44 Mad 656: (AIR 1922 PC 71) in which it was again held that in the case of Sudras in the Madras Presidency an adopted son on partition of the family property shares equally as a son born after the adoption.

It is thus clear that in the States of Bengal and Madras, it was the established law that amongst Sudras, an adopted son shared his father's property equally with a natural son, born after his adoption. It is also clear from the above decisions that this view was based on the reasoning adopted in Dattaka Chandrika which is being followed in the said two States for a number of years. According to learned counsel for the respondent, there is no reason why the same view should not be followed in this State.

In my opinion, this argument is not tenable, because their Lordships of the Privy Council in Arumilli Perrazu's case, AIR 1922 PC 71 were considering a case coming from the Presidency of Madras and it cannot be said what view they would have expressed if they were to consider a case from other parts of India where Dattaka Mimamsa and the Benares School of Law were followed. It is not denied that in Rajasthan it was the Mitakshra law of inheritance and not the Dayabhaga law of inheritance which was followed till the date of Manak's demise.

It is well known that Mitakshara is a running commentary written by Vignyaneshvara on Yajnavalkya Smriti. As, pointed out by the learned Judges in Asita Mohan Ghose Moulik's case, AIR 1917 Cal 292 Dattaka Chandrika itself

cites Manu and Yajnavalkya as authority for the proposition laid down by its author about Shudras. Vignyaneshvara, however, while dealing with the question of the share of an adopted son along with the Natural son born after his adoption simply said on the authority of Vashistha that the adopted son would receive one-fourth share

(See Yagnyavalkya Smriti with the Commentary Mitakshara of Vignyaneshvara edited by Wasudev Laxman Sastri Pansikar at page 214).

Exactly the same words were used by the learned author of Dattaka Mimansa while dealing with this subject (See Dattaka Mimansa by Pt. Dhun-dhiraj Pant at page 43). Even the learned author of the Dattaka Chandrika took the same view while dealing with the case of the three regenerate classes. In other words, there is no difference of opinion between the learned authors of Dattaka Chandrika and Dattaka Mimansa about the fact that so far as Brahmins, Kshatriyas and Vaishyas were concerned, an adopted son on partition did not share equally with the after-born natural son.

Of course, there has been a lot of difference about the interpretation of the term 'one-fourth share', with the result that in Bengal an adopted son gets one-third, in Benares he gets one-fourth, while in Bombay he gets one-fifth of the estate of his father. It is not at all necessary to go into the question of the meaning of the term 'one-fourth', because according to the plaintiff himself, it is the Benares view which is prevalent in Rajasthan and, therefore, the respondent is entitled to get at least one-fourth of his father's estate.

10. The question for determination is whether the respondent can take advantage of the further proposition 'which has been laid down in Dattaka Chandrika as particularly applicable to Shudras and about which there is no mention in Dattaka Mimansa or Vignyaneshvara's commentary on Yajnavalkya Smriti. In *Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 Moo Ind App 397 (PC) it was observed by their Lordships of the Privy Council as follows:

'Again, of the Dattaka Mimansa of Nanda Pandita, and the Dattaka Chandrika of Davanda Bhatta, two Treatises on the particular subject of adoption, Sir William

Macnaghten says that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares'.

It is clear from the above observation that both the treatises Dattaka Chandrika and Dattaka Mimansa were respected all over this country, but when there was a difference of opinion between the two, Dattaka Chandrika was followed in Bengal and South, while Dattaka Mimansa was followed in Benares and those places where Benares School of Law was followed.

11. It is contended by respondent's learned counsel that there is no contradiction between Dattaka Mimansa and Dattaka Chandrika, because Dattaka Chandrika makes special mention of the rule applicable to Shudras, while Dattaka Mimansa is only silent about it. I find it difficult to accept this contention. It is true that Dattaka Mimansa has made no special mention about the law applicable to Shudras in this respect, but if the learned author of that treatise thought that the law was not applicable to Shudras, I do not think that he would have failed to make a mention about it.

There is thus certainly a difference of opinion between the two treatises and it would be proper to follow the view taken in Dattaka Mimansa. It may be further observed that the reasoning adopted in Dattaka Chandrika was that since an illegitimate son of a Shudra took equal share with a natural son, the adopted son who stood higher than the illegitimate son should also get the same equal share. In *Kamulammal v. Visvanathaswami*, 50 Ind App 32: (AIR 1923 PC 8) it has been held by their Lordships of the Privy Council that the share which an illegitimate son of a Shudra takes in the estate of his deceased father is one-half of that which he would have taken had he been, a legitimate son.

It is thus clear that according to the above decision, if a deceased leaves two sons behind him--one legitimate and the other illegitimate,--the legitimate son would take three-fourth share, while the illegitimate would take one-fourth share, because that would be one-half of what he would have received, if he were a legitimate son. If the adopted son also gets one-fourth share, he is not placed on a footing worse than that of an illegitimate son. So the reasoning adopted by the

author of Dattaka Chandrika does not hold good.

12. Learned counsel for the respondent has drawn the attention of this Court to the following, passage appearing in Mayne on Hindu Law and Usage, 11th Edition by N. Chandrasekhara Aiyer at page 247:

'Among Sudras in Madras, Bengal and other provinces except in Bombay, it is settled that the adopted son shares equally with the after-born aurasa son'.

It has been argued on the basis of the above quotation that Bombay being the only exception, this Court should follow the law settled in Madras and Bengal. It would suffice to say that the learned author has not referred to any decision in support of his view while referring to "other provinces". It cannot, therefore, be taken to be settled that the view prevailing in Madras and Bengal also prevailed in Uttar Pradesh, Madhya Pradesh or Rajasthan. On the other hand, it may be pointed out that so far as Bombay is concerned, a different view definitely prevails and the adopted son only takes one-fifth of the estate of his father in the presence of an after-born natural son. See *Giriapa v. Ningapa*, ILR 17 Bom 100 and *Tukaram Mahadu v. Ramachandra Mahadu*, ILR 49 Bom 672: (AIR 1925 Bom 425).

It may also be pointed out that Mahamahopadhyaya Pandurang Vaman Kane in his *History of Dharmasastra Vol III* at page 699 says that in Bengal and Madras it has been decided, relying on a passage in the *Dattakachandrika* that the adopted son and the subsequently born aurasa son of a Sudra share equally, but this learned author is silent about the prevalence of a similar law in other provinces. The quotation therefore referred from Mayne's *Hindu Law regarding Provinces* other than Bengal and Madras cannot be taken to be authoritative. Learned counsel for the respondent has also referred to the following passage appearing in the *Hindu Code* by Sir H. S. Gour at page 259:

'63. (1) Except in the case of a Shudra, the rights of an adopted son are, on the birth of an auras son, limited as follows:

(2) He loses all rights to the performance of religious ceremonies;

(3) He is not entitled to succeed to an impartible estate in preference to the auras son;

(4) His right of inheritance, in other cases, is reduced to a fourth share of the natural son'.

It would suffice to say that the learned author has referred to Arumilli Perrazu's case, ILR 44 Mad 656: (AIR 1922 PC 71) for the remark 'except in the case of a Shudra'. He has only referred to Dattaka Chandrika and not to Dattaka Mimansa. It has already pointed out that this applies only to the States of Bengal and Madras and is therefore of no help in the present case. On the other hand, D. F. Mulla in his Principles of Hindu Law, 12th Edn. has mentioned at page 662 that in Central Provinces where the Benares School prevails an adopted son takes one-fourth of the estate in the presence of an after-born natural son. He has based this observation on (S) AIR 1955 Nag 241. I respectfully agree with the view expressed in the said case for reasons given above.

13. The appeal is, therefore, allowed, the decree of the trial court is amended and it is declared that the plaintiff is entitled to three-fourth share and the defendant to one-fourth share in the property left, by their deceased father Manak. The cross-objections filed by the respondent are dismissed. The appellant will receive his costs from the respondent in this Court.

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