

Haridas Chatterjee and ors. Vs. Manmatha Nath Mullick and ors.

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Court : Kolkata

Decided On : Aug-07-1935

Reported in : AIR1936Cal1

Appellant : Haridas Chatterjee and ors.

Respondent : Manmatha Nath Mullick and ors.

Judgement :

Ameer Ali, J.

1. Having received so much assistance from counsel on both sides in this case, from Mr. H.D. Bose, the most experienced Hindu lawyer at the Bar, for the plaintiffs, and counsel, both senior and junior for the various defendants I would have liked to consider my judgment. I do not do so because in the circumstances of this case, it is desirable that parties should have my decision before my impending departure. I state the facts only so far as may be necessary to explain the points of law which have been discussed before me This case and the two cases which follow in the list turn on the effect of an adoption made somewhere about 1850. There was a man called Ramgopal who died in 1860 leaving a very valuable estate. He had a brother Shib Kisen married to a lady Annapurna. Ramgopal had only daughters. One daughter married Shib Nath Chatterjee, and they had a son Noni Mohan. Shib Kristo and Annapurna had no male child. They therefore adopted or purported to adopt Noni Mohan. In the course of the

arguments and discussing the points of law involved I used the following symbols. Shib Kristo Banerjee the adopting father is A. His wife Annapurna, the adopting mother X. Shib Nath Chatterjee, the natural father, B, and his wife Y. Noni Mohan is Z, and as adopted son ZI. Ramgopal left a widow Jaikali. The widow's interest lasted for a long period of time, that is until 1920. During that period there were very extensive alienations, alienations by the widow either of her widow's interest or of absolute interest on the ground of necessity, which alienations were in point of fact to X (Annapurna). There were also extensive alienations by X (Annapurna) as transferee in respect of the transactions I have mentioned, and by ZI (Noni Mohan qua adopted son) and his successors in interest.

2. The defendants are such alienees, and the plaintiffs seek to dispossess them as reversioners to the estate of Ramgopal on the death of Jaikali. In this case the position is somewhat peculiar, because Noni Mohan would be the heir to Ramgopal's estate, firstly as Z, i.e., in his capacity of natural son of B (Shib Nath Chatterjee), and alternatively as ZI (adopted son of A Shib Kristo) to the exclusion of any other person. The persons therefore claiming to be reversioners, i.e., the plaintiffs and certain of the defendants in this suit, and the plaintiffs in the other two suits, can establish no right in respect of the estate of Ramgopal unless it can be shown that Noni Mohan was neither the natural son of Shib Nath nor the adopted son of Shib Kristo. Now this is the essential point. I considered that it should be determined first. The point made is quite shortly as follows:

3. The plaintiffs seek to get rid of Z and ZI by: (1) setting up an adoption; (2) asserting that the adoption was bad; (3) denying that the adoption was too bad, i.e., had the effect of cutting him off from his own family without introducing him to the new family. I am purposely using non-legal language. In point of fact, as we shall see, that what they actually seek to do is to get him quite out of his own family and half into the new family. These contentions are the subject matter of the first three issues which were raised and which I have tried. The plaintiffs are entitled to give further evidence on the other issues of which there are two classes, issues which are essential to establish that the plaintiffs would be, if the point of law succeeds, the reversioners, a matter depending upon pedigree and dates of death; and another class of issues appropriate to the various defendants in

connection with their respective transfers. Neither of those matters have been dealt with. I only purport to deal with the point of law.

4. 1. Adoption.--The defendants as they were quite entitled to do did not admit the adoption. I speak of the fact. The result was that some evidence had to be given. A good deal of evidence was objected to and in some cases the objections were upheld. I may yet have to explain the extent to which that evidence has been admitted. I do not propose to do so at the moment. There was also an attempt to give expert evidence as to Hindu law. I ruled against its admissibility. For the purpose of discussing the point of law I will only say at the moment that from the documents which have been tendered, and from the oral evidence to the limited extent to which it is admitted I think this Court should infer that there was an adoption,--I am using that word at this stage in a perfectly neutral sense. I have not forgotten that reliance was placed upon one particular document, the pedigree in a book produced on behalf of the plaintiff in which Noni Mohan is described as 'palan putra'. This point was taken and was elaborated by Mr. Mukherjee for one of the defendants, who has shown me certain authorities, which indicate that 'palan putra' is a more ungrammatical form of 'palak putra' (itself ungrammatical), the primary sense of which is a son brought up or maintained in the house without being the legally adopted son. The common word used for legally adopted, son in Bengal is Poshya Putra. But I do not think this fact of itself out--Weighs the evidence in the aggregate to be drawn from the other documents and the surrounding circumstances. In my view (and upon this basis is the judgment I propose to give), this Court should infer that an adoption took place. I conclude further (although how far I consider this matter to have been satisfactorily established by evidence I may have to state later) that Noni Mohan was adopted at an early age and that the ceremonies appropriate such as Upanayana ceremony and others were performed in the house of Shib Kristo. Noni Mohan was married there as a Banerjee and his daughter was married there as a Banerjee and I think it is legitimate to infer, whatever the effect may be, that Noni Mohan performed the ceremonies of his adoptive father and gave Pinda to his soul and the souls of his adoptive father's ancestors.

5. 2. Adoption bad.--The plaintiffs having established that an adoption in fact took place have now to establish that the adoption was bad in law. The actual pleading is as follows: The issues follow the pleading using the words 'valid' and 'invalid.' The pleading is not as I shall show quite appropriate to the case finally made. The points of law therefore are: (a) Is the adoption unexceptionable? I use this word intentionally in order to avoid the difficulties of 'perfect' and 'imperfect,' 'valid' and 'invalid.' (b) If not unexceptionable, what is the effect of the adoption? It has become apparent during the course of the argument that in order to decide the ultimate question involved in this suit it is not enough merely to say 'valid' or 'invalid,' 'perfect' or 'imperfect.' It is not suggested (a) that there is any inherent incapacity to adopt in A (Shib Kristo Banerjee). Nor any (b) inherent incapacity to give in adoption in B. (c). The obstacle setup in this case is the alleged prohibition against adopting the son of a brother's daughter.

6. The materials put before me in respect of this prohibition can be classified as follows:

(1) Original texts; (2) the deductions, argument, or as it has been called 'gloss' of recognised original commentators, such as the authors of the Dattaka Chandrika and Dattaka Mimamsha; (3) 'gloss' of later translators and commentators; (such as Sutherland) on the text, or the gloss of original commentators; (4) decided cases; (5) text books and opinion of modern authors. In dealing with this material, of whatever class it should be borne in mind that there are two questions to be considered (a) whether a prohibition exists; (b) if so whether it is mandatory or recommendatory.

7. 1. Original text.--There is no express prohibition against adopting a brother's daughter's son in the original text. The texts of both Shaunaka and Shakala contain a prohibition against adoption in three specific cases, daughter's son, sister's son and mother's sister's son. I will refer hereafter to this prohibition as the 'three specific cases.' Both these texts also in describing the actual adoption refer to the adoptee as 'this shadow of a son.' (2) The author of the Dattaka Chandrika attaches to the phrase just quoted the following gloss, 'that is to say, the capacity to be begotten by Nioga and so forth.' The author of the Dattaka Mimamsha in

chapter 5 expands this idea of 'capacity to be begotten by Nioga' in a manner which I may have to state in greater detail. Speaking generally he connects the 'three specific cases' with the 'shadow' and 'Niyoga' of the earlier commentator and builds on this foundation a theory of 'incongruous relationships' and the rule that no one can adopt a child with whose mother under Nioga would have involved the penalties of incest. ('The Niyoga rule') (3) Sutherland translated 'incongruous relationship' as 'prohibited degrees', in this manner automatically expanded the idea from 'Nyoga' to marriage. Hence the rule that no one can adopt one with whose mother he could not have contracted a valid marriage. ('The marriage rule.')

8. For the purpose of this case it is not necessary to go into the question whether Sutherland was justified in interpreting Nanda Pundit's view as above stated because the adoption in this case would be hit by the Niyoga law whether, there being no actual text of the original rishis, the view of the authors of these two commentaries is to be accepted or not? That is the whole question and on that question, it seems to me, I have to consider the following points. (1) Is this Court bound by the direct authority as to the Niyoga bar? (2) If not, are there authorities in its support which I should nevertheless follow; (3) if not, whether there are opinions expressed either in cases or in text books which I should follow; and (4) what is my own opinion with regard to the Nyoga law.

9. As the matter has been fully discussed before me I think it desirable that I should first state my own view and then see how far I am bound by or should follow authority. Apart from authorities there are two questions to be considered: (a) what is the sense of the analogy on which it is based; (b) how far were the commentators justified in applying it having regard to the text on which they were commenting. I understand Niyoga to be this: A husband who for some reason or other cannot himself fertilize his wife is allowed by law to produce a son by appointment or as we should probably say by attorney: the persons to be appointed are to be chosen from a very limited class. As is quite natural i.e., upon elementary principles of physiology or exogamy it was understood that the person to be appointed to fertilize should not be closely related by blood to the prospective mother. Speaking for myself (except for one explanation given to me

by the Advocate--General to which I shall refer again) I have been unable to appreciate how the two things, adoption and Niyoga, are in any way similar except that 'there is a son in both'. To me the so--called analogy is utterly incongruous. The reasons why it appears to be incongruous are as follows: I quite appreciate that in primitive no less than modern society fictions have to be maintained, but there is a sense even in fantasy. I can well appreciate any amount of fiction in a case of adoption directed to create the impression that the adopted son is a son born of the adoptive parents.

10. I could understand for instance if (using the symbols above indicated) B were notionally appointed under Niyoga to produce a son by X for A. That would be congruous with Z being the real son of A and X. On the other hand if the fiction is the idea of A being appointed under Niyoga to Y, wife of B, it is congruous to the idea of Z being a son born of A and X. If A has fertilized Y under Niyoga it means that Z has been born, the natural son of B and Y not of A and X. Hence I am unable to follow the explanation of Mayne at p. 133, Edn. 9.

The explanation is probably to be found in the growth of Brahmanical influence, and the consequent prominence given to the religious principle if the primary object of adoption was to gratify the manes of the ancestors by annual offerings, it was necessary to delude the manes, as it were, into the idea that the offerer really was the descendant. He was to look as much like a real son as possible, and certainly not to be one who could never have been a son. Hence arose that body of rules which were evolved out of the phrase of Saunaka, that he must be 'the reflection of a son.'

11. I do not intend to make capital out of the language which is no doubt illustrative. My point is that the suggestion that A has produced a son by Niyoga to B and Y is not going to 'delude' the manes of the ancestors of A. I should have thought on the contrary that it would alarm them. The only point on which the manes might be deluded is the physical competence of A.

12. Again the relevant passage in the judgment of Banerjee, J., *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294. at p. 322, is in these words:

I am of opinion that the meaning put on the text by Nanda Pandita is its true meaning. It has been fully shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramananda* (1888) 11 Mad 49 (F B)., that the rule of exclusion deduced by Nanda Pandita, founded on propinquity and incongruous relationship, is not an inconsistent rule, and all I need say is that I concur in that judgment and in the reasons given in it for the conclusion at which the learned Judges arrived. The object of marriage among Hindus is to procreate a son able to confer spiritual benefit, and this cannot be done by the issue of an incestuous marriage. Hence the rules for marriage within prohibited degrees. The same being the object of the procreation of a son through the now obsolete practice of Niyoga, rules of prohibited relationship in Niyoga were also provided. As adoption is resorted to for a similar object, similar rules of exclusion founded on the analogy of Niyoga are the necessary consequence of the requirement of Saunaka that the son to be adopted should 'bear the reflection of a son' that is of a son born in wedlock: otherwise the efficacy of adoption would fail, as in 'that case the son to be adopted would bear the resemblance of the 'issue of an incestuous connection.'

13. In the case cited by Banerjee, J. 11 Mad 49 (1888) 11 Mad 49 (F B)., at p. 52, the following is said:

There is this justification for the analogy, viz that the object in permitting niyoga to the extent to which it was recognised by the ancient law, was to provide a substitute for the son of the body and thereby to prevent the extinction of that spiritual benefit which was believed to arise from the performance by a son of funeral and annual obsequies.

14. I do not see that the analogy is 'justified,' nor do I consider it accurate to describe Niyoga as providing a 'substitute for the son of the body.' The Niyoga son is an actual son--the adopted son is a substitute or shadow son the only intelligible explanation of the application of the idea of Niyoga to the idea of adoption is that suggested by the Advocate--General. According to his theory the adoptee is regarded as being actually the issue of A and Y by Niyoga. In other words the adoption is notionally limited to boys engendered under Niyoga by the adoptive father. That I agree does get over the primary incongruity of Niyoga and adoption.

On the other hand this explanation does seem to go far beyond the textual foundation. It is not the explanation either of Mr. Mayne or Banerjee, J., nor I think of other text writer. Therefore, if the matter were open I would say that I cannot understand why Niyoga is at all appropriate. In fact the Niyoga analogy seems to me incongruous to the idea of adoption. I should further have said that its introduction viz., the phrase in the original text 'bearing the reflection of a son' is unwarranted. There has been considerable discussion in this case as in many others as to the meaning of this phrase 'bearing the reflection of a son.' Should this phrase 'bearing the reflection of a son' bring in any analogy at all? Now, again, if that was open before me, I should feel emboldened to say, as was suggested, I don't know when first, but certainly in *Haran Chander v. Hurro Mohun* (1881) 6 Cal 41. towards the end of the judgment, that this is no more than description. That is the view taken by the German translators Buhler and Joly and also by Mandlik. I was told and it was agreed that the phrase should be translated 'son' bearing reflection of a 'son,' rather than 'boy bearing reflection of a son.' This favours the reading of Buhler, Joly and Sir John Edge in *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294. Certainly therefore I should have held both from text and context that the phrase amounts to nothing more than a description of an 'ideal' son created by the prescribed means in the place of a born son. ... 'This son; This image son. . .'

15. I now have to consider the authorities which have or have not established the Niyoga rule as a prohibition in adoption. *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294. How far is the matter covered by the authority which is binding on me? So far as the Privy Council is concerned, there are three cases which have to be referred to *Collector of Madura v. Muthu Ramalinga Sathupathi* (1867-69) 12 M I A 397., especially at p. 441; *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412 both cases and *Pattu Lal v. Mt. Parbate Kunwar* 1915 P C 15., especially at 161. Neither of these decisions directly covers the point at issue, nor directly established or otherwise the Niyoga rule.

16. I therefore have to consider whether they have done so by implication. Counsel Mr. Bose contends that they impliedly approved it. Some of the modern authorities contend that they have impliedly rejected it. Before coming to a

conclusion on this point it is advisable to consider the direct authorities. (1888) 11 Mad 49 (F B). In Madras there are direct authorities in favour of the rule, 11 Mad 49 (1888) 11 Mad 49 (F B). (which I have already quoted); a later case *Ranganayakamma v. Somasundara Rao* 1920 Mad 451. which accepted as a general rule, the marriage or Niyoga test, and on this basis, in the absence of special custom held that the adoption of a brother's daughter's son is invalid. Bengal: *Haran Chander v. Hurro Mohun* (1881) 6 Cal 41., the difficulty about this case is that while in the concluding portion of the judgment the learned Judges say that the shadow of a son appears 'to have been purely descriptive' in the body of the judgment they refer to the marriage or Niyoga rule as a generally accepted rule of Hindu Law. Allahabad: *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294. In *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294. [the second case dealt with by the Privy Council in *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412] Sir John Edge and the majority of the Court disapproved the Niyoga rule. Banejee, J., in an elaborate judgment, as I have already indicated supported it. Upon the main point at issue (the three specific cases) the dissenting judgment of Banerjee, J., was upheld The Board was not called upon to express an opinion on the Niyoga rule. *Ramchandra v. Gopal* (1908) 32 Bom 619: Bombay has been really the only dissenting voice. In 32 Bombay, while expressing no very great approval of Nanda Pandit's Niyoga rule, the Court proceeded upon the basis that it was not necessary to attack it because the adoption there was valid unless it came under the extension of the Niyoga rule for which Sutherland is considered responsible. It therefore rejected Sutherland's gloss on Nanda Pandit. It was not necessary for it to attack Nanda Pandit's gloss. In the later cases, *Yamnavi v. Laxman Bhimrao* (1912) 36 Bom 533. at 536, the Courts confined the marriage or Niyoga rule to 'the three specific cases' established as to the subject of mandatory prohibition by the Privy Council in 26.1 A 153 *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412 They did not take the unnecessary risk of attacking the rule itself. In *Gajanan v. Kashinath* 1915 Bom 99. the Court took the view that Nanda Pandit's rule of exclusion should only be regarded as mandatory where it coincided with the 'three specific instances' given in the text. That brings us back to the rulings of the Board. Mr. Bose contends that this Niyoga or marriage rule having been brought to its attention both in *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412 and in

Pattu Lal v. Mt. Parbate Kunwar 1915 P C 15. and no adverse comment having been made that it has been inferentially accepted by the Board. The case in Pattu Lal v. Mt. Parbate Kunwar 1915 P C 15. was one in which the adoption was attacked on Nanda Pandit's application by analogy or Niyoga rules to adoption by females, and the passage reads as follows:

17. It was pointed out by Banerji, J., in Jai Singh Pal Singh v. Bijai Pal Singh (1905) 27 All 417. on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own-brother, that Nanda Pandita in the Dattaka Mimamsa extended to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not the base upon the authority of any of the Smritis or institutes of sages.

18. The Board negatived that particular extension; it rejected one 'gloss' of Nanda Pundit. It had already rejected others, e.g., by holding in Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshamma (1899) 21 All 460. that the rule against the adoption of an only son is only monitory. It has in other cases negatived the extensions or rules by analogy of Nanda Pundit, when it considered them not to be warranted by the original text. The question is whether in this case, Pattu Lal v. Mt. Parbate Kunwar 1915 P C 15., while it has negatived the one extension; the Board must be taken to have adopted or approved the main rule. My own view is that no inference can be drawn either way and that the Board upon this particular argument of Nanda Pandit has not committed itself to an option. It appears to me that in the second case in Bhagwan Singh v. Bhagwan Singh (1899) 21 All 412 the Board were very careful to avoid entering upon that subject. With regard to the views of the Board on Nanda Pandit that generally I gather from the passage in Collector of Madura v. Muthu Ramalinga Sathupathi (1867-69) 12 M I A 397. and again in Bhagwan Singh v. Bhagwan Singh (1899) 21 All 412 (the first case) and the passage in Pattu Lal v. Mt. Parbate Kunwar 1915 P C 15., which I have just quoted, that while it is not open to any Court to discuss the reasonableness or the validity of any of the original texts, it is open, other things being equal, to consider whether the special argument of the commentator is to be accepted. On the other hand (i.e., disregarding the rulings of the Board) there is

still left a considerable body of cases where the Niyoga rule has been accepted. Notwithstanding, the observations at the end of the judgment, it must, I think, be taken to be accepted in *Haran Chander v. Hurro Mohun* (1881) 6 Cal 41.. It has been accepted throughout in Madras. Subject to what I have said above, it is accepted in Allahabad. It has not been expressly negatived by the Bombay cases, although it may be said to have been negatived by implication having been limited into 'three specific cases'.

19. The question is, should I be justified in disregarding this volume of authority? I am guided in this matter by the course taken by the Judicial Committee itself in *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412 where, whatever its own opinions may have been, the Board appears to have attached great weight to the fact that the Courts in India had proceeded for a considerable time upon one basis. In addition to the decided cases there is the opinion of authorities, such as Mr. Sutherland himself, Mr. Mayne, of the Hindu Judges, Mr. Banerjee in *Bhagwan Singh v. Bhagwan Singh* (1895) 17 All 294., and the Hindu Judges who were parties to the decision in 11 Mad 49 (F B). There are Mr. Strange, M.W. Siromoni, and of moderns, Sir Dinshaw Mulla, all accepting the Niyoga or marriage rule. I feel bound therefore to disregard my own opinion and to proceed upon the basis, that for this Court the Niyoga rule is part of the law of the land.

20. 3. Adoption not too bad.--Assuming the Niyoga rule or law to have been contravened, what is the effect? This aspect of the case has been ably argued both by Mr. Bose on behalf of the plaintiffs, and by Mr. Sanyal from somewhat different points of view. For that reason I make my own analysis of the plaintiff's case. It seems to me that the results of a questionable adoption can be discussed under three heads. (1)What is the effect of questionable adoption qua adoption? (2)what is the effect of the father's power or rights over the son apart from the effect of the adoption itself, a point emphasised by Mr. Sanyal? (3)what is the effect of ceremonial, a point to which Mr. Bose originally attributed great importance?

21. (1) Effect of questionable adoption, qua adoption.--Having regard to the lines on which this aspect of the case was developed by Mr. Bose, it does not seem to

me that the plaintiff's case in its final aspect is covered by the allegation in the plaint, that the adoption is void or illegal, and that the son cannot regain his place in his old family. In the plaint it is specifically alleged that the adoption 'did not confer upon him the status of a son.' In order to succeed, the plaintiffs have got to get him out of his old family and into the new family, but only half in, i.e., the best part of him sticking out into nothingness. In other words the plaintiffs seek to establish that there are three and not two positions: (1)unexceptionable adoption (2)void adoption, and (3) an intermediate stage of quasi adoption. To describe these positions I shall use the phrases (1)adoption (2)no adoption, and (3)quasi adoption.

22. (1) Adoption.--Adoption results where there is no defect or prohibition of any kind and also exists where there is a prohibition, but not a mandatory prohibition, as in the case (now) of the adoption of an only son.

23. (2) No adoption according to the authorities, takes place where the person has no capacity to adopt. The principal example of this class is a widow without the authority of her husband. It appeared to me that if the Niyoga bar is a mandatory prohibition it would in effect cause want of capacity, and therefore there would be no adoption. The plaintiffs do not want that because if no--adoption, X remains in his own family; he does not get into the new family at all.

24. (3) Quasi--adoption.--That brings me to 'quasi--adoption,' that is, an adoption but with the adoptee having only limited or qualified rights, i.e., a status inferior to that of an ordinary adopted son. This idea of quasi--adoption is difficult to one as unfamiliar with Hindu law as myself. It appears that Mr. Sanyal and Mr. Bose are right in their suggestion that there are certain cases of quasi--adoption, e.g., a Vaishya or Brahmin adopting one of the other twice--born castes. According to the texts and commentaries such a one is not entitled to inherit in his new family, nor is he entitled or liable to perform the shradh of his adoptive parents or ancestors. He gets, or may get, certain rights of maintenance. At the same time he is regarded from the point of view of marriage and relationship as belonging to the adopter's family. That is one case. The other case is where everything else is in order, caste, no prohibition, no other hindrance, but the forms of adoption are not

properly gone through. There is a text in the Dattaka Mimansha to the following effect (v. 45).

25. He who adopts a son, without observing the rules ordained, should make him a participator of the rites of marriage, not a sharer of the wealth.

26. One question is whether that, is only a recommendation, I might have so considered it, but that is not the point which I am dealing with at the moment. A question which rather intrigued me is whether such a person that is a person otherwise fit and proper to be adopted, but in respect of whom the proper ceremonies were not gone through, could perform a shradh and offer pinda. Looking through some of the texts yesterday I obtained the impression that if merely the forms were not observed the adopted son would be capable of offering pinda. That would mean 'adoption.' However, unless the defendant's counsel wishes to show me anything on this point I shall assume that Mr. Bose is right in saying that the adoptee cannot do so. I have my misgivings. I shall assume therefore that these are two instances of quasi--adoption of persons becoming, according to Mr. Bose, 'sons' but without the rights or ordinary status of sons. He points to the case of a blind natural son. The question in this case is whether a child, the adoption of which is prohibited by the Niyoga rule, constitutes another example of quasi adoption. Treating as I do the Niyoga bar upon the same basis as the 'three specific instances', I am bound since the decision in *Bhagwan Singh v. Bhagwan Singh* (1899) 21 All 412 to treat the prohibition as mandatory. Mr. H.D. Bose contends, nevertheless, that is, notwithstanding the prohibition that the adoptee becomes the son of the adoptive father. That, as indicated, is not the position originally pleaded, but it is a point of law, and the case has been argued upon that basis.

27. On this point, i.e., 'quasi--adoption' or 'no--adoption' Mr. H.D. Bose is met by certain body of authority. He distinguishes it upon this ground that the cases for the most part are instances of adoption by widows without their husband's authority. The case in *Bawani Shankara Pandit v. Ambaby Ammal* (1863) 1 M H O R 363. at p. 367 was certainly a case of a widow adopting without authority. *Lakshmappa v. Ramava* (1875) 12 Bom H C 364. at p. 365, is a little more difficult.

It was a case of a widow who was assumed to have the general power to give in adoption, but who had purported to give in adoption the eldest son, see pp 393 and 397. It was laid down as a general proposition that if an adoption fails 'upon any ground,' this ground in particular, the status quo is restored, or as I should rather put it, the child never getting into the new family never gets out of the old. There is *Dalpatsingji v. Raisingji Narharsingji* 1915 Bom 93 at p. 533 apparently again a question of invalidity by reason of want of authority, where the general proposition was reiterated. In *Sajanisundari Dasi v. Jogendrachandra Sen* 1931 Cal 591 at p. 749, where, so far as I can see, the objection was not inherent incapacity to adopt, but incapacity by reason of age, etc., of the adoptee, it is accepted as the general rule that an improper adoption does not extract a child from his own family. There is also the opinion of Mr. Sutherland which is referred to in a footnote and adopted by Mr. Strange at p. 83 of his Hindu Law. On the other hand the manner in which Sir Dinshaw Mulla formulates the rule, and its exceptions supports the contention of Mr. Bose. Excep. (b) embodies the first species of quasi adoption that of a boy belonging to another caste. The author cites, however, *Bawani Shankara Pandit v. Ambaby Ammal* (1863) 1 M H O R 363., but as I read it, it is not an unequivocal authority for the proposition in support, of which it is used. Excep. (a) of Mr. Mulla is based on the case in 1 Bullnois 137. I will deal with that under another heading.

28. The question therefore is whether adoption contrary to Niyoga prohibition and adoption by a widow without authority can be logically distinguished. I will deal with the question of gift, but it seems to me that the fact that the incapacity was not a general incapacity to take, but a particular incapacity to take the person whose adoption is challenged, is not logically distinguishable. If the prohibition is mandatory and in the one case there is no adoption, I cannot see why the same consequences do not ensue in the other. There is also the fact that all the cases are not of widows without authority and that it has been assumed that the principle is general. So far therefore as the adoption itself is concerned, my opinion, what it is worth, is on this breach of mandatory prohibition no--adoption, i.e., no extraction from the original family. I have not forgotten the passage upon which Mr. H.D. Bose placed so much reliance, the passage in *Dattaka Chandrika*, containing the phrase 'through the extinction of his filial relation by gift alone', II, 19. I do not read

'gift alone' to mean gift other than a gift in adoption. The chapter in the Dattaka Mimansa (Ch. 4)! makes this perfectly clear, but I think that the author of the Dattaka Chandrika by gift alone' did not intend invalid gift or gift prohibited but gift itself, i.e., without appropriate ceremonial. (1888) 11 Mad 49 (F B). I next come to the effect of the father's power in excess of the actual power to give in adoption.

29. The contention before me is something like this. The adoption may be bad, qua adoption, i.e., in the case of want of capacity to receive. There is no incapacity to give in adoption. Moreover there is in the father, obstacle-capacity to 'give, sell or abandon his son' (Vasistha). Therefore whatever the effect may be, qua adoption, qua patria protestas, or qua powers of the father plus adoption this son can be excluded from his own family, notwithstanding that he is not included in the new family. For the purpose of the discussion I accept Mr. Sanyal and Mr. Bose's view of the text and the authorities. I assume that a father can do all this. I assume also that the son is a chattel. There is nothing remarkable about that. The point made was that being, e.g., an orange, the father can give, discard or destroy the orange. He can expel his son from his own family. (Incidentally it should be noted that in the translation of this text given in Mulla the word 'disown' is used. It should be 'abandon').

30. What struck me at the time and it is the view to which I still adhere, is this: that the child may be an orange, but he is an orange with a status. Mr. Bose has contended throughout that he has no status. That the child may have certain rights, e.g., under the Mitak-shara system of law. I consider the human Hindu child to be both a physical object and also an ideal object, i.e., a son. The father can no doubt destroy in any manner he pleases the physical object. He can also destroy the ideal status (assuming such a thing to exist), but I think only by methods recognized or conceived. I shall assume that he can destroy or annul the status of a son by gift or sale. The view which appeals to me is this. If the father purports to annul the status by one recognized method, e.g., gift in adoption and fails it is not legitimate to say that he could have sold or could have killed the child, i.e., that he could have annulled the status by some other means or could have in any event destroyed the object itself. I think it wrong to import the absolute power to destroy the physical object or right to annul status by an alternative method in order to aid

in establishing an exclusion of the child from his own family.

31. My view of course depends on whether there is such a thing as the status of a son. So far as I understand Hindu ideas, whatever the *patria potestas*, a male child is far from being a mere human cub. He is a son and a grandson and a great-grandson. His birth is not regarded as a purely physical or physiological phenomenon but is a spiritual and physical re-birth of the father and the father's ancestors. If that is the underlying idea, the child's status as a son is a matter of prime importance to the family, to the caste, and to everyone. A mechanical figure of speech is probably inadequate, but it suffices for my purpose to describe him as a cog in a certain machine. It appears to me that the effect of adoption is to take this cog out of one machine and to introduce it in its proper place in another machine.

32. Those are my views on the 'second point, the point whether by reason of the inherent powers a father can render, what would otherwise be no-adoption, a quasi-adoption. I was dealing yesterday when I broke off with the second ground upon which the plaintiffs base their contention that notwithstanding the mandatory prohibition against adoption, the child nevertheless is cut off from his natural family, i.e., the inherent right of the father to do what he likes with his own child, I expressed the view that there are two separate things, *patria potestas* and property in the son on the one hand, and status of a son on the other. I have to some extent given reasons for that view. The father can no doubt in the exercise of *patria potestas* destroy his child, the physical object; he can also by certain methods annul the status of son. I did not think that when adoption is attempted and failed, it is right to consider sonship annulled because the father might have exercised his *patria potestas* to destroy the child or resorted to other methods of annulling sonship.

33. There is one matter to be dealt with before I leave this point. It may be suggested that, after all, it is not necessary to resort either to theory of destruction of physical objects or to alternative methods of annulling sonship, because although the adoptor may not have been capable of receiving, the natural father was capable of giving, and therefore as adoption is gift there was in law a gift. That

is based upon the proposition that under Dayabhaga law, acceptance is not necessary to constitute a valid gift. I accept that as a general proposition. In my view however, adoption is a very special form of gift and I am not prepared to accept the view that there can be an adoption without giving and taking. Whether it should be regarded as one form of onerous gift, or as a gift in a category of its own it is not necessary for me to determine. I have not forgotten that particular passage relied upon by Mr. Bose 'by gift alone.' I have already given my view of it.

34. (3) The last ground upon which the plaintiffs contend that there can be, and is in this case, a quasi--adoption, is the ceremonies. It is on this point that certain questions of the law of evidence arise. It is said in the first place that there can be no presumption that the ceremonies appropriate to a Brahmin were gone through after the so--called adoption, because in this case the fact sought to be inferred are intended to be used to nullify or invalidate the adoption. That point was taken both by the standing counsel and Mr. Mukherjee. It occurred to me at the time and at first sight it seemed attractive. Section 114 of our Evidence Act includes but is not limited to the presumption of 'regularity.' Moreover, I do not think that because the fact sought to be presumed will or may affect the validity in law of a certain transaction that is necessarily repugnant to the principle. I do not think that one need do more than consider whether in the normal course of things certain consequences are likely to happen. If they are, it is not material to consider whether they will validate or invalidate a transaction. In this particular case assuming the transaction to be invalid, you may infer that the parties knew it to be invalid, and therefore you may again infer that they would not go through the ceremonies appropriate to a valid adoption. That I think, having considered the matter, is the highest it can be put. I do not think you can say that if all the circumstances indicate that these ceremonies are likely to have been gone through, that you must reject that inference, because some argument will be adduced that by reason of those ceremonies, the antecedent adoption was bad in law.

35. The second point so far as the law of evidence is concerned was that the evidence of hearsay on the question of relationship which is taken from the English law and incorporated in Section 32, Sub-section 5, does not extend to

evidence by hearsay of particular ceremonies or incidents and that so and so was present at such and such an occasion. I think this is a, somewhat difficult matter and largely a question of fact and degree. The English rule is rather wide. I forget the precise expression, but I think it wide enough to include any incident relative to the fact of relationship. It is difficult to draw the line. I think that under the Indian law where the relationship created by adoption is of such importance and specifically included in the Act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed subject of course to careful scrutiny as to value. At any rate that is the basis upon which I propose to decide this point and I assume therefore that the Upanayana ceremony and marriage were performed on Noni Mohan after his alleged adoption or purported adoption in the house of the adoptive father. Mr. Bose from the first attached considerable importance to this aspect of his case. It is certainly borne out in the passage in Mulla's Hindu Law, Section 510, sub-S. (a), already referred to.

36. With regard to authorities there is only this one case in 1. Boulnois. It is obvious that the material portion of this judgment is upon another point and that the opinion quoted did not form any part of the decision. It is merely an opinion of 'a very learned person.' As it is a matter which affects seriously the rights of an individual, unless it was supported by texts or direct authority, or reason, I do not feel inclined to follow it. So far as reason goes in support of the view expressed in Section 510 (a) of Mulla's Hindu Law the point made is this: that being a Brahmin, investing with the sacred thread constitutes a notional new birth. It must be a new birth in the adoptive family. Therefore, it is said, he is attached to the gotra of the adoptive family, and disconnected from the gotra of his own family. This is said to be so notwithstanding that the adoption is no--adoption. It occurs to one that the new birth must be a new birth as a son and a son to somebody. If it is a birth as a son in the gotra of his adoptive parents, one should logically arrive at the position of a son, and the retrospective removal of any blot on, or defect in the original adoption. That is one view.

37. On the other hand if there can be no adoption it can be argued that these ceremonies of re--birth were ineffective and therefore there was no re--birth at all.

In such a case not having been reborn in the new family, the child would remain a son to his natural father. The plaintiffs have to steer clear of both those positions. In doing so Mr. Bose comes back to his position of quasi--sonship, of part affiliation. Unless there is clear authority in support I do not propose to take that view. In point of fact the authorities support the opposite view, namely that if the adoption is no--adoption, the ceremonies performed in the new family are of no effect. Cf. *Bawani Shankara Pandit v. Ambaby Ammal* (1863) 1 M H O R 363 and *Ranganayakamma v. Somasundara Rao* 1920 Mad 451. at 891 and 893. To summarise: Left to myself, I would (1)reject the Dattaka Chandrikas's Niyoga explanation (2)reject the expansion or development, of this represented 'Virudha Sambhandha' of Nanda Pundit, (3)a fortiori, I would have rejected the expansion of that 'Virudha Sambandha' into the 'prohibited degrees' of Sutherland, (4)I would in any event have treated the Niyoga rule as recommendatory except in the 'three specified cases,' (5)I should have taken the view that if on the other hand a mandatory prohibition, adoption is no--adoption, and not quasi--adoption.

38. Having regard to the authority referred to I feel bound: (1)To accept the Niyoga or marriage rule as part of the law and as wider than and including the 'three specified cases'. Those three specified cases having been treated by the Privy Council as mandatory I must treat the whole rule as mandatory. (2)On the other hand the authorities allow me to take the view that assuming the Niyoga rule to operate, the result of its transgression will be no.adoption. In other words I reject, so far as this class of person (brother's daughter's son) is concerned, the quasi--adoption theory. (3)With regard to the result of no adoption I follow both my own inclination and the authorities in deciding that there being no adoption the child will remain affiliated to its own natural father. That is the result.

39. I ought to mention one argument put before me by Mr. H.K. Bose that in the particular circumstances of this case the result would be not the child Z is filius nullius, but that the child is Dyamushan, the son of both A and B. The specific argument addressed to me is this: that the plaintiffs have given evidence of certain ceremonies performed after adoption. They have not alleged nor suggested that the tonsure ceremonies were performed in the adoptive family. Therefore, it is said I should infer that it was performed in the natural family, and in those

circumstances some authority has been shown to me to show that the child might become attached to both. It is an ingenious point, but having regard to my other views, I do not propose to offer an opinion of my own upon it. I am not clear that the state of the evidence would allow me to find that any particular ceremony was performed in the natural family so as to found a double affiliation. I should also say that estoppel in any form does not form one of the issues before me, and has not been argued. After expressing the above conclusions on the point of law involved in the first three issues I have ascertained from the Advocate--General, who appears with Mr. Bose for the plaintiff, that he desires rather than go on and complete his evidence on, the other issues including the issues as to title, as to whether his clients are reversioners in the event of my decision being wrong he would prefer to have the case adjourned and appeal on the point of law. I am perfectly agreeable to this course, and in this case, speaking for myself, I consider it desirable. Counsel for all parties also agree to that course as the most convenient. In those circumstances I will dismiss the suit with costs now on the preliminary points, and should the plaintiffs succeed on the appeal I shall always be ready to put the case back on my list for trial and, to hear further evidence on the other issues. I am taking this course at the request of counsel for all parties.

40. I have heard the Advocate--General on the question of costs. He submits that having won on certain of the issues or on a portion of the case, his clients should not have to pay the entire costs, and he reminded me that there are a large number of defendants, who are separately represented. As regards the last point, I certainly regret that the plaintiffs should have to pay those costs, but in such a case as this the defendants are bound to be represented here and entitled to be separately represented. With regard to the first point although the case has been split up for the purpose of analysis, the point sought to be established in order to destroy the title of the defendants is really one, and I feel I should not be justified in making any other order. There is a special argument addressed to me with regard to the costs of the Receiver, Mr. Khaitan, for whom Mr. Chowdhuri appears. At an early stage of the case counsel for the receiver asked to be dismissed from the action on the ground that no notice under Section 80 had been served upon him. I did not perhaps treat the 'matter with the seriousness which it deserved, but I do remember that counsel for the plaintiff was not prepared to have the suit

against the receiver dismissed upon that ground and did not suggest that he was not a necessary party and should be dismissed. In those circumstances I should think personally whether he was or was not a necessary party; the plaintiffs having made him a party should pay the costs. But without having considered the matter in any detail I assume the plaintiffs were justified in making him a party since this is an ejectment and title suit in which they claim possession of land in the hands of the receiver. It is pointed out to me that in the written statement filed by the receiver the title of the plaintiffs was not specifically denied, but the position appears to me this: the plaintiffs have to prove their title, and on the views which, however wrongly I have given them, they failed to do so.

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