

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaulal.

RAMCHANDRA KRISHNA JOSHI AND OTHERS (ORIGINAL DEFENDANTS Nos. 1-5), APPELLANTS, v. GOPAL DHONDO JOSHI AND OTHERS (ORIGINAL PLAINTIFFS Nos. 1 AND 2 AND ORIGINAL DEFENDANT No. 7), RESPONDENTS.*

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July 20.

Hindu law—Adoption—Community of pravaras between the adoptive father and the natural mother of the adopted son—Difference in gotra—Limits to the rule that no one could be validly adopted whose mother the adopter could not have married in her maiden state—Nanda Pandita, authority of.

There were two pravaras out of three common between the natural mother of the adopted boy and the adopting father, though they belonged to different gotras. The parties were Chitpavan Brahmins of the Thána District. The validity of the adoption was impugned on the ground that there could be no legal marriage between the adoptive father and the natural mother of the adopted son in her maiden state.

Held, upholding the adoption that the rule that "no one can be adopted whose mother the adopter could not have legally married" is confined to the specific instances of a daughter's son, a sister's son and the mother's sister's son.

Per BATCHELOR, J.—The authority of Nanda Pandita must be accepted except where it can be shown that he deviates from, or adds to the Smritis, or where his version of the law is opposed to such established custom as the Court recognise.

SECOND appeal from the decision of O. C. Dutt, Joint Judge of Thána, confirming the decree passed by J. N. Bhatt, Subordinate Judge at Bhiwandi.

Suit for a declaration that plaintiff No. 1 was the adopted son of one Dhondo Gopal Joshi.

Dhondo Gopal Joshi died in 1878. After his death, his widow Laxmibai (plaintiff No. 2) was in possession and enjoyment of his property. She adopted the plaintiff No. 1 on the 9th November 1902.

The defendants were *bhaubandhs* of Dhondo. They resisted the plaintiff's claim on the ground that the adoption was not valid

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according to law. The parties were Chitpavan Brahmins of the Thana District.

The Subordinate Judge decreed the plaintiff's claim, holding that the adoption was valid. The following were his reasons:—

“It is contended, however, that the adoption is invalid, because a legal marriage of the adoptive father with the natural mother of the adopted boy was not possible. Why? Not because they stand within the prohibited degrees of relationship or because they belong to the same gotras, but because they belong to two different gotras, amongst the members of which intermarriage is not allowed by Shastras..... No doubt some writers on Hindu law have favoured the theory of antagonistic gotras, but the same has not obtained any uniform approval amongst ancient writers and has not been accepted by Hindu law as prevailing at present, under which marriage between members of the same gotra also is legal, provided they are not sapinda relations and provided they do not stand within prohibited affinities. Though Sagotraship is laid down as a bar to intermarriage in *Minakshi v. Ramnada*, 11 Mad. 49, the prohibition does not apply to this Presidency. Had it applied the decision in *Vyas Chimanlal v. Vyas Ramchandra* I. L. R. 24 Bom. 473, would have been otherwise. There Asharam and Bai Mahakore whose son he adopted were Sagotras as appears from the pedigree at p. 474. The parties were Brahmins as in this case. Sapinda-ship and not Sagotraship was the test there applied to determine the validity of marriage and adoption. This ruling is, therefore, an authority for the proposition that a marriage between Sagotras is valid, provided the parties do not bear Sapinda relationship and provided they do not stand within prohibited affinities. The doctrine of antagonistic gotras cannot, therefore, be relied on when we see that Sagotraship even is not in itself a bar to intermarriage. The adoption in the present case is, therefore, not invalid.”

On appeal this decree was confirmed by the District Judge for reasons which he stated as follows:—

“In disputing the legality of the adoption the appellants are unable to put forward any authoritative decision. I am asked to draw an analogy from *Minakshi's* case, I. L. R. 11 Mad. 49 and hold that the adoption cannot be valid unless the gotras and relationship are such that the adoptive father could have married the natural mother of the boy if she had been a maiden. This I am unable to hold as it is a general proposition which has not the sanction of authority in any way. The Madras High Court in 11 Mad. 49 quoted above held the adoption of the son of the daughter of an agnate as invalid. But even on this point the different High Courts do not agree. Even the Madras High Court in I. L. R. 9 Mad. 44 held otherwise. In Bombay this prohibition did not obtain till 1879 when 3 Bom. 273 held the adoption by a Brahmin of his daughter's son as invalid. For the United Provinces, 14 All. 53 held the adoption by a Bohra Brahmin of his sister's son as valid. In the Full Bench cases

of *Bhagwansingh*, 17 All. 294, it was held by Edge, C. J., and most of the Judges, that the adoption of the daughter's son and the like is valid amongst the twice born castes. They also held that the rule of Nanda Pandita in Dattaka Mimansa to that effect ought not to be enforced and that it is at most recommendatory. Nanda Pandita himself does not clearly declare adoption of daughter's son, sister's son and mother's sister's son invalid. The earlier texts do not justify the rule laid down by Nanda Pandita. The rule is deduced from two texts of Saunaka and Sakala which are of doubtful meaning. It would be difficult to justify the rule from the Shastric point of view for the fiction of adoption is not that the boy is begotten by the adoptive father on the boy's natural mother. From laws of inheritance, laws as to offering pindas in ceremonies, it is easy to see that the fiction is that the adoptive father has begotten the boy on the adoptive mother. Otherwise it is not easy to account for cutting off of all connections with the natural mother.

To sum up these—

(1) It has not been held uniformly that the adoption even of a daughter's son or a sister's son amongst Brahmins is invalid.

(2) Even if it had been so, it would be impossible to generalize and hold that the gotras, &c., should be such that the adoptive father could have validly begotten the boy on the natural mother, in her maidenhood.

In the absence of any such general rule the adoption in the present case cannot be held invalid merely because a Shastri differs from the Nirnaya Sindhu that the two gotras (that of the adoptive father and natural mother when a maiden) are antagonistic. The gotras are Kashyapa and Shandilya. It has not been shown to me that there are any rulings to show that a marriage between antagonistic gotras is invalid. The mandates of the Nirnaya Sindhu most probably are recommendatory. In any case the marriage between Sagotras in the view of Hindu legislators must have been more objectionable than between antagonistic gotras. The High Courts have not taken a serious objection to the marriages between Sagotras. It cannot be said that such a marriage is not valid, even apart from the principal of *factum valet*. A marriage between Sagotras merely tends to reduce the social position and importance of the family concerned, and nothing more. I am, therefore, not in a position to think so seriously of the objection of antagonistic gotras as to hold that a marriage would be invalid or anything near it."

The defendant appealed to the High Court.

M. V. Bhat, for the appellant :—We base our objection to the validity of the adoption of plaintiff No. 1 in this case, on the ground that no valid marriage could take place between the adoptive father and the natural mother of the adopted son in her maiden state. These two though belonging to different *gotras* had

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two out of three *pravaras* common. Their marriage would have been invalid according to the Mitakshara the bride and bridegroom differ from each other in *pindas*, *gotras* and *pravaras*. See also Nirnaya Sindhu, Ch. III, p. 26; Dharma Sindhu, p. 364; and Sarkar's Hindu Law (2nd Edn.), pp. 51—52. These commandments are positive; for it is a rule of Mimansa that where a text assigns no reason for a positive direction, it must be strictly obeyed.

To the procreation of a legitimate son, the existence of a prior legal marriage is necessary. Equally so, should be the possibility of a valid marriage between the adoptive father and the natural mother of the adopted son in her unmarried state, before a valid adoption could be made.

P. P. Khare, for the respondents:—The rule of law contended for by the other side is based on what Nanda Pandita has said in his Dattaka Mimansa and it has to be seen whether what he has said has been correctly translated, and whether it is mandatory or directory.

First, the words of Nanda Pandita are not correctly translated by Mr. Southerland and, secondly, even accepting what Nanda Pandita has said in the original, he has exemplified his meaning by speaking of *viruddha sambandha* in the case of marriage. At the most, he can be said to have confined the restriction to a connection that would be incestuous; and he could not have meant to lay down the general proposition that is ascribed to him. Further, the rules of marriage are not imported into the law of adoption, and Nanda Pandita has not addressed his mind to what would be the effect if an adoption like this were to take place. The directions given by Nanda Pandita are at best only recom-mendatory.

BACHELOR, J.:—The only question raised in this appeal is the pure question of law whether the first plaintiff is the validly adopted son of the deceased Dhondo. The validity of the adoption is impugned on the sole ground that there could be no legal marriage between the adopted boy's mother in her maiden state and the adoptive father, inasmuch as this mother and this father, though belonging to different *gotras*, had two out of three *pravaras* in common.

Pravaras are defined as illustrious *munis* or sages who contribute to the credit of a particular *gotra*. The *gotras* of the parties here are known as the Kashyapa and the Shandilya *gotras*. In the former the *pravaras* are Kashyapa, Avatsar and Naidhruva; and in the latter the *pravaras* are Kashyapa, Avatsar and Shandilya. Thus Kashyapa and Avatsar are *pravaras* common to both *gotras*. The parties are Chitpavan Brahmans of the Thana District.

Now the appellants, if they are to succeed, must establish two distinct propositions, first, that no one can be adopted whose mother, as a maiden, could not have been legally married to the adopter, and, secondly, that in this case no legal marriage was possible between the boy's mother, if unmarried, and the adopter by reason of the community of *pravaras*. These two propositions rest on different authority and must be considered separately. In the view taken in the judgment of my learned colleague, which I have had the advantage of reading, the validity of the first of these two propositions does not fall to be determined, and for the purposes of this case I will assume that the identity of two out of three *pravaras* in the respective *gotras* of the bride and bridegroom would suffice to invalidate a marriage among Chitpavan Brahmans. Mr. Justice Chaulbal has indicated some grounds for the belief that this is the state of the law, but as there is no evidence upon the record to prove that the principle cited from one passage in the *Mitakshara* has made its way into the accepted and approved usage of the people, I prefer to withhold a definite judgment upon the point.

Assuming, then, that the community of *pravaras* would have rendered a legal marriage impossible between the natural mother in her maiden state and the adoptive father, there remains the question whether that circumstance is by itself sufficient to invalidate the adoption. For it is not alleged that the adoption can be impeached on any other ground. In other words, the question is whether we should give effect to the rule ordinarily stated in the text books in the words "no one can be adopted whose mother the adopter could not have legally married," (Mayne, section 135, 6th Edn.). The rule has the authority

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of the Dattaka Mimamsa, and that authority, though it has been vigorously attacked by such writers as Mr. Mandlik and Golap Chandra Sarkar Shastri, has been largely rehabilitated by the Privy Council in *Bhagwan Singh's* case⁽¹⁾. The present position appears to be that the authority of Nanda Pandita must be accepted except where it can be shown that he deviates from, or adds to, the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise. It must be conceded further that as Mr. Mayne points out, the rule under consideration "has been affirmed by a singularly strong series of authorities in all parts of India as forbidding the adoption of the son of a daughter, or of a sister, or of an aunt." And the rule upon the precise point of requiring the possibility of a legal marriage was approved by the High Court of Madras in the Full Bench decision in *Minakshi v. Ramanada*⁽²⁾, though the effect of this decision is somewhat weakened by the subsequent case of *Ragavendra Rau v. Jayaram Rau*⁽³⁾. While, then, the rule now under notice falls strictly outside the decision of the Judicial Committee in *Bhagwan Singh's* case, yet it derives some countenance from the principle of that decision, and receives so much support *aliunde* that if it could be unquestionably ascribed to Nanda Pandita, I for my part should find difficulty in setting it aside. But the argument for the respondents need not go so far as this; and the strength of their case is that, though the Court may perhaps be bound by a real gloss of Nanda Pandita's, it is not bound by a mere mistranslation of his gloss. That, no doubt, is so; and it remains to notice the origin of the rule. This has been done so exhaustively by my learned colleague that I shall content myself with very few words in explanation of my agreement. The important passage occurs in paras. 16 to 20 of section V of the Dattaka Mimamsa. That section purports to be devoted to "The mode of adoption; form; by whom propounded; necessity of observance; effect of omission," and as there is a special section number II, with the title "who is to be adopted?" and section IV with the title "The qualification of the person to be adopted," any authoritative pronouncement

(1) (1899) L. R. 26 I. A. 153.

(2) (1887) 11 Mad. 49.

(3) (1897) 20 Mad. 233.

upon the subject of fitness for adoption would logically be expected in section II or section IV, and not in section V. This consideration is entitled to some weight, though I do not pretend that an argument from logical arrangement is by any means conclusive when applied to the Dattaka Mimamsa. Then, taking the relevant paragraphs in section V as they stand, we find, first, a deduction from Saunaka's expression that the boy should be, or is become, the reflection (more literally, the shadow) of a son. By virtue of this deduction certain specified relatives are prohibited or excluded, that is, as being incapable of having sprung from the adopter himself through appointment to raise issue on another's wife (*niyoga*) "and so forth." Then the author passes to the connected subject of prohibition by reason of "prohibited connexion." Here he cites the Grihya Parishishta and proceeds (para. 19) himself to define this expression in these words: "Where the relation of the couple, that is, of the bride and bridegroom, bears analogy to that of father or mother; if the bridegroom be, as it were, father of the bride, or the bride stand in the light of mother to the bridegroom, such a marriage is a prohibited connexion." Paragraph 20 lays down that this prohibition, though of direct application to marriage only, must be imported into the law of adoption, so that no one may be adopted who, upon adoption, would become the "son of prohibited connexion"; "in other words," says the author, "such person is to be adopted as with the mother of whom the adopter might have carnal knowledge." From the author's own explanation and from the words themselves I am of opinion that "prohibited connexion" is confined to that particular illicit relation which in English is known as incest. The Sanskrit words are *viruddha sambandha*, and *viruddha* does not mean "prohibited," but "opposed to, contrary to," the *subaudiendum* being, in my judgment, nature or the instinct of morality. Thus, what we are asked to do is to extend certain peculiar and specific restrictions which on their face purport to be limited to cases of *neyoga* and incest so that they shall embrace and include all the complicated restrictions applicable to marriage. In my opinion that cannot be done. The word marriage nowhere appears in the author's treatise but occurs only in the translator's

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note where he suggests expanding the words "through an appointment or so forth" into "by such an appointment, or marriage, and the like." But this rather free process of reasoning by inference or analogy would be somewhat dangerous if applied to the ordered system of English Law, and has, I think, no application to such a treatise as the Dattaka Mimamsa. It may be added that this restriction of the meaning of *viruddha sambandha* to incest was approved by the Full Bench of the High Court of Madras in *Minakshi v. Ramanada*⁽¹⁾.

Moreover, if it had been the intention of Nanda Pandita to import bodily into the law of adoption all existing marriage restrictions, he would presumably have done so in a single sentence, instead of elaborating two particular cases of minor consequence and leaving the general subject to be, as it were surreptitiously, introduced under cover of the mere aside, "and so forth."

For these reasons I am of opinion that the adoption of the first plaintiff was a good adoption and that the decree under appeal should be confirmed.

CHAUBAL, J. :—In so far as any question is raised as to the possibility of a legal marriage in the present case between the mother of the adopted boy in her maiden state, and the adoptive father, I am of opinion, at least in the present state of the record, that the admitted identity of the two Pravaras in the Kashyapa and Shandilya Gotras, was fatal to the validity of such a marriage; and if it had been necessary that a question of this importance should be decided in this case, I should have proposed to send down an issue for a finding as to the usage in the community after formally recording legal evidence as to custom.

On this point I consider it sufficient at present to say that the Mitakshara is quite explicit. For Vijanyaneshwar in his comment on the Smriti of Yajnavalkya says :—

“असनात्तर्ष गोत्रजात् what pertains to a Rishi (ऋषि) is Arsh (ऋष) which in effect means Pravara (प्रवर). Gotra (गोत्र) (family name) what is well-known in the family from generation to

(1) (1887) 11 Mad. 49 at p. 53.

generation. आर्ष and गोत्र (when compounded in the Dvandva (द्वन्द्व) form become 'arshgotre' (आर्ष गोत्रे). He whose Arsh (आर्ष) and Gotra (गोत्र) are the same (as those of another) is 'samanarsh-gotra' समानार्ष गोत्र; a girl born of such a person is 'samanarsha-gotraja' (समानार्ष गोत्रजा); and one not so born is 'asamanarsha-gotraja' (असमानार्ष गोत्रजा). Gotra (गोत्र) and Pravara (प्रवर) are *separate causes of prohibition*. Therefore the girl must be 'asamanagotraja' i. e., of a different Gotra, and 'asamanarshaja' i. e., of a different Pravara."

"The term 'asamanapravara' implies a prohibition (of marriage with a girl) having the same Pravara, though she may not be a 'sapinda' nor a 'sagotra.' The term 'a sapinda' is applicable to all castes, there being 'sapindya' (सापिण्ड्य) in the case of all persons. The term 'asamanarsha-gotraja' applies only to the three higher castes. Though Khatriyas and Vaishyas have no 'gotra' of their own, the 'gotra' and 'pravara' of their family priests should be considered (as belonging to them)." Then follows the important passage:—

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते ।

रोगिण्यादिषु तु भार्यात्वे उत्पन्नं ऽपि दृष्टविरोध एव ।

i. e., "in the case of marriage with girls who are 'sapinda,' 'samangotra' or 'samanpravara' the condition of wifehood itself does not come into being; while in the case of girls who are afflicted with disease and other like girls, the condition of wifehood does come into being, but there is a conflict in regard to wordly considerations only." Mitakshara, Bapushastri Moghe's Edition, pp. 13-14.

This is the construction put upon Yajnavalkya's text by the Mitakshara, which is the paramount authority in Western India; and so far as I am aware, notwithstanding the observations of the late Rav Saheb Mandlik in his work on Hindu Law at p. 414, these restrictions are respected and observed in practice among the three higher classes. There may be cases of an unconscious infringement of the rule, and the provision for these in the Shastras to my mind only emphasises the binding character of the rule.

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A reference to the Nirnayasindhu, Chapter III, p. 26; and the Dharmasindhu (Nirnaya Sagar Edition, p. 364) (which though a recent publication is entirely based on the former) shows that no distinction can be taken on the score of the sameness or identity obtaining only in one or more Pravaras. Even if one Pravara is common to any two Gotras, intermarriage is forbidden, and there is elaborate mention as to which Gotras are consistent for marriage. In the Dharmasindhu, in the portion of the book treating of this subject at p. 373 it will be found under the information given about Kashyapagana, that persons from these two Gotras, Kashyapa and Shandilya, cannot intermarry; they are strictly not different Gotras at all.

It was indeed urged by Mr. Khare that the Shastras provide for a penance in case such connection happens to be unconsciously formed, and that there is no provision for dissolution of marriage. But dissolution of a completed marriage among the three regenerate classes in the sense of the girl being regarded as fit or eligible for a fresh marriage is, I think, not known to Hindu Law. The girl so married remains in the family—but it is distinctly provided that she must be abandoned as a wife, and has to be maintained as a mother. The penance ordained is nowhere regarded as a process of validating the marriage, and is evidently a religious observance prescribed as an atonement for the religious taint involved in such a connection. Besides, this penance is prescribed alike for infringements of the Sagotra and Sapinda prohibitions and not limited to that of “samanpravaras” only.

I therefore conclude that the validity or invalidity of the marriage tie in cases of this kind must be determined under the original text of Yajnavalkya as authoritatively interpreted by Vijnyaneshwar in the Mitakshara. I can conceive that deviations from any prescribed rule may obtain in practice and that the frequency of such deviations in any particular community may in course of time have established a recognised and binding usage or custom: and where such is established, it would no doubt be the duty of our Courts to give effect to it, if otherwise legal and valid. But the onus of establishing such usage would be heavily upon the party asserting it. In the present case I do

not find that the respondent-plaintiffs set up any such usage—far less can any be held proved.

While, therefore, on this point I am of opinion that a legal marriage between the adopting father and the natural mother of the adopted boy would be invalid according to Hindu Law, I am not prepared to accept the position, that the invalidity of such a connection is necessarily a ground for holding the plaintiff's adoption to be invalid. This alleged invalidity is based on the proposition which is roughly and broadly stated in English text-books on Hindu Law, and in some decisions of our Courts, that a boy whose natural mother the adoptive father could not have legally married in her maiden state is ineligible for adoption. It will be presently shown that this broad statement rests purely on an inaccurate rendering by Mr. Sutherland of a passage in the Dattaka Mimansa of Nanda Pandita. I am aware that the objections to the strained logic with which he tries to support the innovations sought to be introduced by him have lost much of their proper force and propriety owing to the decision of their Lordships of the Judicial Committee in the case of *Bhagwan Singh v. Bhagwan Singh*⁽¹⁾. I take it, as the Privy Council observe in *Sri Balusu v. Sri Balusu*⁽²⁾ that its authority is not "open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence." But the ground on which this respect for its authority is based by their Lordships is expressly stated to be that "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs": and they further observe that caution is required in accepting its glosses where they deviate from or add to the Smritis. And in the case of the adoption of an only son, their Lordships held in the case of *Sri Balusu*, noticed above, that the prohibition against the adoption of an only son mentioned in section IV of the Dattaka Mimansa was only to be treated as recommendatory and not mandatory. It is section II of the work which treats about "who is to be adopted": and the prohibition as to the adoption of a mother's sister's son, occurring in that section, along with the sister's son and the daughter's son has been up-

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(1) (1899) L. R. 26 I. A. 153. (2) (1 9) L. R. 26 I. A. 113 at p. 132.

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held as mandatory in *Bhagwan Singh's* case. This case, therefore, does not decide anything as to any implied prohibitions spelt out of Shaunaka's text "putrachhaya-vaham" in section V of the work which relates strictly to the mode of adoption. It is an open question and would be decided, I think, on a consideration of whether Nanda Pandita's written opinion on the point has been long accepted and recognised in social customs.

But in the present case before us, it is not necessary to dispute the binding force of Nanda Pandita's gloss. I am clearly of opinion that he never contemplated any such wide and broad prohibition as is contended for by the appellants. It appears to me that the whole misapprehension of his meaning is due to an unhappy rendering of the expression Virudha Sambandha (विरुद्ध सम्बन्ध) into English as "prohibited connection." Owing to the early translation of this treatise into English, English Judges naturally construed the expression as referring to all the prohibitions for a legal marriage contemplated or prescribed by the Hindu law: and they are thus sought to be forced on a marriage which has to be assumed for the purposes of a legal fiction.

The prohibitions for a legal marriage will be found summarised in Golap Chandra Sarkar's *Hindu Law* (2nd Edn.) at p. 65.

These are shortly stated:—

1st. The rule of exogamy—that a man cannot marry a girl of the same Gotra or Pravara.

2nd. The rule of consanguinity, *i. e.*, a man cannot marry a girl who is a cognate relation of the descriptions given. This may be called the rule of Sapindaship.

3rd. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the step-mother's sister, her brother's daughter, and his daughter's daughter; the paternal uncle's wife's sister, and the wife's sister's daughter, and the preceptor's daughter.

It is this third rule with which we are concerned. Golap Chandra Sarkar has pointed out that this third prohibition appears

to be of moral obligation only, since it is not respected. It is the third prohibition referred to by the Madras High Court in *Minakshi v. Ramanada*⁽¹⁾, and stated to be the rule of Viruddha Sambandha. A later judgment of the same High Court in *Ragavendra Rau v. Jayaram Rau*⁽²⁾ decides that this prohibition of Viruddha Sambandha was only hortatory and the marriage of a Hindu with his wife's sister's daughter was valid.

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Now taking Nanda Pandita's gloss as translated by Mr. Sutherland—but noting that the expression for “prohibited connection” in the original is only “Viruddha Sambandha,” it will be seen that Nanda Pandita himself defines what “Viruddha Sambandha” is. Viruddha Sambandha is “where the relation of the couple, that is of the bride and bridegroom, bears analogy to that of father or mother: if the bridegroom be, as it were, father of the bride, or, the bride stand in the light of mother to the bridegroom, such as the daughter of the wife's sister and the sister of the paternal uncle's wife,” (see section V, para. 19); and this is stated to be from the “Grihya-Parishishta” of Aswalayana. Having so defined Viruddha *Sanibandha*, para. 20 goes on to say that a boy, who if begotten by the adopter would have been the son from a “Viruddha Sambandha” as mentioned above from the text of the Grihya-Parishishta on marriage, should not be adopted: and then come the words

तथा प्रकृते विरुद्धसंबन्धपुत्रो वर्जनौय इति, यतो रतियोगः

सम्भवति तादृशः कार्य इति यावत्।

i. e., so in the present instance a son born of a connection by Viruddha Sambandha (defined as above) is to be eschewed: that is (such a son) should be made in respect of whose birth carnal knowledge would be allowable (between the natural mother and the adopting father). This clearly brings in the idea of a carnal knowledge contrary to nature, *i. e.* incest. I, therefore, think Nanda Pandita must be taken in his gloss to take exception to the adoption of the persons specifically mentioned by him in para. 17 and to the cases of Viruddha Sambandha mentioned in the subsequent paras. 18 and 19. This interpretation is natural

(1) (1887) 11 Mad. 49 at p. 53.

(2) (1897) 20 Mad. 283.

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and does not violate any of the accepted canons of construction. It accords with the natural human instinct in the act of adoption by which one desires to affiliate a close blood relation. The rule of exogamy mentioned above or of consanguinity and Sapinda-ship as prescribed for marriage have no natural application or relevancy to the law of adoption. On the contrary in the order of selection for adoption the first choice is directed in favour of a Sapinda, failing him a Sagotra, and in default of these a stranger, excepting always the specific instances mentioned, viz, a daughter's son, a sister's son, and the mother's sister's son.

Coming now to the reported cases, I have already stated that the Privy Council Ruling in *Bhagwan Singh v. Bhagwan Singh*⁽¹⁾ refers to the specially excepted case of mother's sister's son and has no application here. The only case in which effect has been given to the rule as broadly stated at the starting is the case of *Minakshi v. Ramanada*⁽²⁾. But as I have noticed above this decision did not preclude the same Court deciding in the subsequent case of *Ragavendra Rau v. Jayaram Rau*⁽³⁾ that the prohibition of Viruddha Sambandha as given in the Grihya-Parishishta, and the Dattaka Mimansa was only hortatory and not mandatory: and that case expressly decided that the adoption of a wife's sister's son was valid. There is further a decision of our Court (*Vyas Chimanlal v. Vyas Ramchandra*⁽⁴⁾) where the objection taken to the adoption as stated in the appellant's pleader's argument was that the natural mother and the adoptive father were Sagotra Sapindas, and the case of *Minakshi v. Ramanada*⁽⁴⁾ was cited, see p. 476. The late Mr. Justice Ranade seems clearly to confine the text of Shakala to the specified instances only, i. e., daughter's son, sister's son and the son of the mother's sister. It is difficult to assume that the fact of the natural mother and adoptive father being Sagotras should not have been present to a Brahman Judge and scholar of Justice Ranade's reputation: and it thus appears to me that the case of *Vyas Chimanlal* goes further than the present case. For Ranade, J., evidently considers the restrictions evolved by Nanda Pandita out of "putrachhaya" to be simply recommenda-

(1) (1899) L. R. 26 I. A. 153.

(2) (1887) 11 Mad. 49.

(3) (1897) 20 Mad. 283.

(4) (1899) 24 Bom. 473.

tory. He says "the essential idea is that the boy should have the resemblance of a son, which really means that he should be of the same class and Gotra, if possible, but, just as more distant and even Asagotra sons may be adopted, the son of Mahakor, who was the daughter of a distant cousin seven degrees removed, was not ineligible for adoption by the widow of Asharam. None of the cases decided have gone the length of prohibiting adoption, except as stated above, in the case of direct relations as daughter's and sister's sons, etc., among the higher castes." Following these cases *Vyas Chimantl v. Vyas Ramchandra*⁽¹⁾ and *Ragavendra v. Jayaram Rau*⁽²⁾ I would hold, if the present case fell under the gloss of Nanda Pandita on the text "Putrachhaya-vahamI," that the restrictions therein were only recommendatory: but I have already stated my reasons for holding that that gloss only contemplates the specific cases of Viruddha Sambandha mentioned, and it is not contended that the connection between plaintiff I's natural mother and the adopting father would have been of that character.

For these reasons I hold the plaintiff No. 1's adoption to be valid according to Hindu Law and concur in confirming the decree under appeal with costs.

Decree confirmed.

R. R.

(1) (1899) 24 Bom. 473 at p. 481.

(2) (1897) 20 Mad. 283.