1915.

MOTABHOY MULLA ESSABHOY v. MULJI HARIDAS.

Solicitors for the appellant: Messrs. *Ranken, Ford, Ford and Chester.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915.
January 18.

GAJANAN BALKRISHNA DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* KASHINATH NARAYAN DESHPANDE (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Half-brother—Mitakshara.

The adoption of a half-brother is not invalid under Hindu Law.

SECOND appeal from the decision of J. D. Dikshit, District Judge of Thana, reversing the decree passed by R. B. Khangaonkar, Subordinate Judge at Mahad.

Suit to recover a share in certain cash allowance.

The cash allowance belonged originally to one Yeshvant. He had two wives. By one of them, he had a son Venkatesh; and by the other, he had three more sons, Ganpat, Madhav and Narayan.

Venkatesh being childless adopted his half-brother Narayan. After the adoption, a son (Kashinath, defendant) was born to Narayan.

Madhav had a son Balkrishna, who had a son named Gajanan (plaintiff).

Ganpat died issueless. At his death, a dispute arose between Gajanan and Kashinath as to who was entitled to Ganpat's share in the cash allowance.

* Second appeal No. 652 of 1913.

Gajanan filed the present suit to recover his share in the cash allowance appertaining to Ganpat's share. He alleged that as Narayan was adopted by Venkatesh, both he (Gajanan) and Kashinath (defendant) were equally related to Ganpat and entitled to his share in equal moieties.

Kashinath contended in his written statement that Narayan's adoption by Venkatesh was invalid; that he was consequently a near relation of Ganpat than Gajanan; and that he was entitled as such to the whole of Ganpat's share.

The Subordinate Judge held that Narayan's adoption was valid; and that plaintiff and defendant were entitled to Ganpat's share in equal moieties.

On appeal, the lower appellate Court held that the adoption was invalid. The decree was therefore reversed, and the suit remanded to the first Court for trial on the following issues:

1. Is defendant estopped from raising the plea about the invalidity of his father's adoption by Venkatesh?

2. Is the defence barred by limitation?

Against this order of remand, the plaintiff appealed to the High Court.

On the 30th January 1911, the High Court (Russell and Batchelor, JJ.) delivered the following judgment:

The Court thinks that the course adopted by the Judge in the lower appellate Court, so far as it goes, has been correct and that issues should be remanded to the first Court as stated by him in his judgment at p. 2 of the print; but the Court thinks that these issues must be supplemented by another issue which will be numbered 1A to this effect:—

"If the defendant is not so estopped was Narayan's adoption valid in law?"

Costs costs in the cause.

The Court adds that the opinion of Mr. Dikshit on the question of adoption is not to be taken as binding on the first Court which will find on the issues sent down as of first impression.

1915.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

The Subordinate Judge found the first issue in the affirmative; and the third in the negative. He held on the second issue, that the adoption was valid, for the following reasons:

As regards validity of adoption again, I find that the difficulties have arisen owing to the theory of *Niyoga* having no real basis in Sanskrit texts but having sprung from words like *putrachhyayavaham* or *virundhasambandh* in Shonnaka's text or Nand Pundit's gloss. From these words deductions came to be introduced that the natural mother in her maiden state must be such as could be married by the adoptive father or that the son to be adopted could be begotten on his natural mother by the adoptive father. I need not and dare not add to the learned judgment of Chaubal J., from pages 958 to 964 of 10 Bom. L. R. on this point, nor can I find anything that should enable any one to assail the broad proposition on this point by Ranade J. in 24 Bom. 473, at page 476. The Madras case (11 Mad. 49) relied on by defendant's pleader has been sufficiently discussed at page 963 of 10 Bom. L. R. and found to be not acceptable in its entirety as good law inasmuch as even in 20 Mad. 283 the Madras High Court had to give the principle on which 11 Mad. 49 was based a different direction. The Bombay authorities interpret the texts as directory only in respect of sons of daughter, sister and mother's sister and recommendatory as regards sons of other relatives and, therefore, the authority in 11 Mad. 49, not strictly followed even in 20 Mad. 283, cannot be followed by me.

I, therefore, proceed to see if it can be contended that a step-brother should not be adopted on the ground of absence of *putrachhayavaham* or presence of *virudhasambandha* even though the text be recommendatory: At p. 474 (Mandlik on Vyavahara Mayukha) it has been set out that a younger brother is like a son *Jyeshtho bhrata pitus samah*, at page 495, he says that adoption by a younger brother of an elder brother is against law and usage but adoption by an elder brother of a younger brother is quite proper, and agreeable to law and usage of the country. Here, in this case, we have a step-brother *bhinnodara* and not a full brother *sahodara*; when maiden, Narayan's mother could have been married by Venkatesh. I do not think that Hindu notions disapprove of adoption of younger step-brothers. It is not disputed, nay, it has been admitted by defendant in his deposition that Venkatesh was the eldest of the brothers and the step-brother of Narayan the youngest. The perfect belief of all concerned, as stated above, for over sixty-five years in the validity of adoption, is itself the best indication of Hindu mind as to Narayan having been capable of being taken in adoption as being *putrachhaya-vaham* and not a son by *virudhasambandha*. The adoption is legal. Since the rulings in 24 Bom. and 10 Bom. L. R. cited above the theories of *Niyoga* and marriage in maiden state have lost much of their force though I dare not

say they have been exploded inasmuch as the rulings allow and admit of exceptions in addition to the three specifically mentioned on the ground of absence of *putrachhayavaham* and presence of *virudhasambandha* such as adoption by a nephew of his uncle. No Hindu requires to be told how younger brothers are regarded as sons or elder sisters as mothers. I also add that if the gloss of Nand Pundit under the words *virudhāsambandha* is to be interpreted as referring to marriage or *Niyoga* the step-mother could not have been married by Venkatesh and that, to this extent, this case differs from that in 10 Bom. L. R. before his Lordship Chaubal J., who, however, seems to treat the gloss as only recommendatory following the opinion of Ranade J., in 24 Bom. 24 Bom. 473 shows that the boy should only have "semblance" of a son from the standpoint of his age and circumstances and not from that of possibility of marriage of his mother with the person who adopts the boy or on the possibility of *Niyoga*.

On appeal, the District Judge found all the issues in the negative. He held that the adoption was invalid on the following grounds :—

I adhere to my original view of law as regards the invalidity of the adoption. I do not think that the Subordinate Judge has properly applied the rulings in 10 Bom. L. R. 948 and 24 Bom. 473. At p. 957 of the report of the first cited case, Batchelor J., has observed : "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." Then His Lordship proceeds and observes : "From the author's own explanation and from the words themselves, I am of opinion that 'prohibited connection' is confined to that particular illicit relation which, in English law, is known as incest. . . , 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 *Niyoga* and incest so that they shall embrace and include all complicated restrictions applicable to marriage." Chaubal J., at p. 961, exposes the mistaken translation of the text by English writer on Hindu Law and observes : "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 Dattak Mimamsa of Nand Pandit." In my opinion, their Lordships have only set their faces against the extended application of the principle of restrictions to marriages to cases of adoption in the sense that the adoption can be valid only where the adoptive mother could have been legally married by the adoptive father in

1915.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

her maiden state. Their Lordships have affirmed the proposition that prohibition is restricted to cases where *Niyoga* is not possible. The principle quoted by me in my previous judgment from Bhattacharya's book is not touched by their Lordship's judgment. There cannot be any bar of limitation to raise the defence.

The plaintiff appealed to the High Court.

Setlur, with *S. S. Patkar*, for the appellant.—The adoption of a step-brother can be lawfully made. The principle of 'inconsistent relationship' (*viruddha-sambandha*) does not come in its way. For the purposes of the principle the eligibility of the woman for marriage should be considered with reference to her maiden state. So regarded, there is no prohibition to a step-son marrying the step-mother when in her maiden state. But even that principle is held applicable only to the three specified cases of (1) the daughter's son; (2) the sister's son, and (3) the mother's sister's son. See *Ramchandra* v. *Gopal*[1]; *Walbai* v. *Heerbai*[2]; *Yamnava* v. *Laxman Bhimrao*[3]; *Ramkrishna* v. *Chimnaji*[4]; *Bhagwan Singh* v. *Bhagwan Singh*[5]; *Sri Balusu Gurulingaswami* v *Sri Balusu Ramalakshmamma*[6].

The lower Court has further resorted to the doctrine of *Niyoga* in pronouncing against the validity of the adoption. But the doctrine does not carry us further than the principle last mentioned. The persons who are mentioned in 1 Yajnavalkya 68, Mitakshara, Book 1, Chapter IV, are all persons who could have married the widow in her maiden state.

Jayakar, with *W. B. Pradhan*, for the respondent.—It is expressly laid down in the Dattaka Mimansa, s. 5, pl. 16—20, that the brother cannot be adopted. The term 'brother' would include a 'step-brother' as well.

(1) (1908) 32 Bom. 619.
(2) (1909) 34 Bom. 491.
(3) (1912) 36 Bom. 533.
(4) (1913) 15 Bom. L. R. 824.
(5) (1899) L. R. 26 I. A. 153 at pp. 159, 161.
(6) (1899) L. R. 26 I. A. 113.

The rule of *viruddhasambandha* has no reference to the unmarried state of the natural mother but to her *married* state. The principle has been approved of in *Minakshi* v. *Ramanada*[1] ; *Ramkrishna* v. *Chimnaji*[2]. It was followed in *Sriramulu* v. *Ramayya*[3] ; and *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty*[4]. See also Mayne's Hindu Law (7th edn.), paragraph 135, page 174 ; Trevelyan's Hindu Law, page 137.

The doctrine of *Niyoga* may be obsolete, but the cases excepted even in times when *Niyoga* was practised, as being too sacred to be submitted to its operation, *i.e.*, cases where sexual intercourse, by whatever name it was dignified, would be with a person who was either the mother or one equal to her in the domestic circle, were based on the common sentiment of morality. That sentiment is crystallized into the form of a rule in the Dattaka Mimansa. The authority of the Dattaka Mimansa is recognised in *Bhagwan Singh* v. *Bhagwan Singh*[5] ; *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[6] ; and *Ramchandra* v. *Gopal*[7]. See Sarkar's Law of Adoption, pages 321, 324 and 330.

Setlur, in reply.—The term 'brother' in paragraph 17, section 5 of the Dattaka Mimansa does not include 'step-brother,' because the author in an early part of the treatise has expressly said so : see section II, paragraph 31, read with paragraph 30.

C. A. V.

SHAH, J.—Two questions of law have been argued in this appeal—one relating to the validity of an adoption, the other relating to estoppel. The facts which

(1) (1886) 11 Mad. 49 at p. 53.
(2) (1913) 15 Bom. L. R. 824.
(3) (1881) 3 Mad. 15.
(4) (1880) 6 Cal. 41 at p. 47.
(5) (1899) L. R. 26 I. A. 153 at p. 166.
(6) (1899) L. R. 26 I. A. 113 at p. 132.
(7) (1908) 32 Bom. 619.

1915.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

give rise to the question of adoption are not in dispute now and may be briefly stated. One Yeshwant died leaving four sons—Venkatesh by one wife, and Ganpat, Madhav, and Narayan by another wife. Venkatesh died many years ago after adopting his step-brother, Narayan. Narayan died leaving a son—Kashinath, who was the defendant in the trial Court and is the respondent here. There was a division among the brothers, whether during or after the life-time of Venkatesh does not appear to be clear and is not material. Ganpat died sonless, leaving a widow who died in 1903. Madhav had a son Balkrishna, who died leaving a son Gajanan, who was the plaintiff in the Court below and is the appellant here. The dispute relates to Ganpat's share in a certain allowance, which, the plaintiff says, he is entitled to share equally with the defendant, the latter contending that he is the exclusive owner of Ganpat's interest in the allowance. The parties are Prabhus by caste. It is common ground now that if the adoption of Narayan by Venkatesh be valid, the plaintiff must succeed.

In the lower Courts the defendant urged that the adoption by Venkatesh of his younger half-brother Narayan was invalid. The lower Courts have differed as to the validity of the adoption, the trial Court holding it to be valid, the appellate Court holding it to be invalid.

In the Second Appeal before us the same question has been raised. Mr. Setlur, for the appellant, contends that the adoption of a half-brother is not invalid according to Hindu Law, that the long course of decisions of this Court is in favour of the view that the restrictions recommended by Nanda Pandita are not really binding, and that the doctrine of *Niyoga*, upon which the lower appellate Court has relied in deference to the opinion expressed by Dr. Bhattacharya in his treatise on Hindu Law, affords no basis for invalidating an adoption,

which is otherwise valid—at least so far as this Presidency is concerned. Mr. Jayakar, for the respondent, strongly relies upon the opinions of Nanda Pandita expressed in the Dattaka Mimansa in his commentary on the expression 'bearing the reflection of a son' (*putrachhayavaham*) in Caunaka's text in paragraphs 16 to 20, particularly paragraphs 17 and 19 in Chapter V. It is argued that the Mitakshara and the Vyavahara Mayukha do not afford any assistance on this point, and that in matters of adoption the opinions of Nanda Pandita are entitled to great weight and ought to be given effect to. Mr. Jayakar concedes that the restrictions arising out of the necessity of a valid marriage between the natural mother and the adoptive father being possible are merely recommendatory except as to the three specified cases of a daughter's son, sister's son and mother's sister's son mentioned in Cakala's text. But his argument is that the test of a valid marriage being possible between the natural mother and the adoptive father is quite distinct from that based on the doctrine of *Niyoga* or of incestuous connection (*viruddhasambandha*) and that though the restrictions arising from one are held to be recommendatory, the restrictions arising from the other two tests are not so held. He does not lay any stress on the restrictions based upon the rules connected with the practice of *Niyoga*. But he maintains that the restrictions based upon the prohibition of incestuous connection (*viruddhasambandha*) have nowhere been held to be merely recommendatory, and ought to be held mandatory. The adoption in question is vitiated, it is argued, as any connection between the step-mother and the step-son would be incestuous. It is also argued that the sentiment of the community favours such restrictions and that the sentiment is clearly expressed by Nanda Pandita.

1915.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

We have given our best consideration to these arguments, particularly as Mr. Jayakar has insisted that in none of the decided cases has this point been considered and decided, and that in none of the cases except one it was necessary to consider it. We are, however, unable to accept the suggestion that the argument is new or that it has not been considered, or that it was not necessary to consider it, on previous occasions; and quite apart from the previous decisions we are unable to think that the argument is sound.

It has been held by this Court in a number of cases that the opinions of Nanda Pandita, when they are not supported by any text of the Smriti writers are, generally speaking, recommendatory and not mandatory: see *Bai Nani* v. *Chunilal*[1]; *Vyas Chimanlal* v. *Vyas Ramchandra*[2]; *Ramchandra* v. *Gopal*[3]; *Yamnava* v. *Laxman Bhimrao*[4]; and *Ramkrishna* v. *Chimnaji*[5]. Their Lordships of the Privy Council have indicated substantially the same view as to certain opinions of Nanda Pandita in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*[6]; and *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[7]. It is quite true that in some of these cases the opinions of Nanda Pandita that were under consideration were not the same as those with which we are concerned now. But it is difficult to say that of the last three cases of this Court above referred to. In the case of *Yamnava* v. *Laxman Bhimrao*[4] Sir N. Chandavarkar J., after considering these very opinions of Nanda Pandita (in paragraphs 16 to 19 of section V of the Dattaka Mimansa), expressed his conclusion in the following clear and definite

(1) (1897) 22 Bom. 973 at pp. 978, 979.
(2) (1899) 24 Bom. 473 at p. 481.
(3) (1908) 32 Bom. 619 at p. 633.
(4) (1912) 36 Bom. 533.
(5) (1913) 15 Bom. L. R. 824.
(6) (1878) L. R. 5 I. A. 40.
(7) (1898) L. R. 26 I. A. 113.

terms :—"It is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son." This decision was followed in the case of *Ramkrishna* v. *Chimnaji*[1]. It is difficult to see how the argument based on the test of *virudhhasambandha* could have been passed over in *Ramkrishna's case*[1] without consideration when the decision of the District Judge in that case which was reversed by the High Court, was based substantially on that ground. We have heard nothing in the course of an interesting argument from Mr. Jayakar, which can induce us to think that there is anything in the decisions of this Court bearing on this point, which requires to be re-considered.

Apart from the decisions, we would find no serious difficulty in ariving at the same conclusion and in holding that the opinions expressed by Nanda Pandita in his commentary on the expression *putrachhayavaham* are merely recommendatory and not mandatory in the absence of any support from any Smriti writer. It is not suggested that the particular opinions expressed in paragraphs 17 and 19 of section V are supported by any such authority.

We have considered the dictum of Muttusami Ayyar J. in *Sriramulu* v. *Ramayya*[2] that the adoption of a half-brother is invalid and the decision of the Sadar Divani Adalat of Bengal in *Baboo Runjeet Sing* v. *Baboo Obhye Narain Sing*[3] that the adoption of an elder brother by a younger brother is invalid. We are not sure that the Madras High Court would now accept the dictum of

(1) (1913) 15. Bom. L. R. 824. (2) (1881) 3 Mad. 15.
(3) (1817) 2 S. D., 245.

1915.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

the learned Judge as finally decisive of the point. But apart from that, in determining the weight to be attached to the opinions of Nanda Pandita on this point in Western India, we must prefer to be guided by the decisions of our Court.

The learned District Judge might well have paused before setting aside an adoption made more than fifty years ago, acquiesced in by all the parties concerned during this long period and questioned for the first time by the present defendant apparently under the inducement of resisting the plaintiff's claim, and might have scrutinized the opinion of Dr. Bhattacharya more closely, particularly when the learned author himself expresses a doubt as to the applicability of the restrictions based on the rules of *Niyoga* to this Presidency: see Bhattacharya's Hindu Law, 3rd Edition, pages 169-170.

We, therefore, hold that the adoption of Narayan by Venkatesh is valid. Having regard to the view we take of the adoption, it is not necessary to decide the question of estoppel which has been argued in this appeal.

The result is that the decree of the lower appellate Court is reversed and that of the trial Court restored with costs of this and the lower appellate Court on the defendant.

Decree reversed.

R. R.