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been discussed by this and other Courts. For we have here to consider the particular words of section 14 of the Limitation Act. Those words refer expressly to civil proceedings whether in a Court of first instance or in a Court of appeal and appear to me to point particularly to regular civil proceedings in the ordinary Civil Courts under the Civil Procedure Code. There is moreover a ruling upon this very section in the case of *Muhammad Subhan-ullah* v. *The Secretary of State for India in Council*[1] which appears to me very similar to this case in which it was held that proceedings for mutation of names in the Record of Rights were not civil proceedings in a Court within the meaning of section 14 of the Limitation Act.

I concur, therefore, for these reasons that this appeal ought to be allowed and the suit dismissed with costs throughout.

Appeal allowed.

R. R.

[1] (1904) 26 All. 382.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1918. *July* 17.

MALLAPPA PARAPPA HOSPETI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2 AND 5), APPELLANTS *v.* GANGAVA KOM GANGAPPA HOSPETI, MINOR, BY HIS GUARDIAN FATHER DANAPPA BASLINGAPPA GONDHALI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption—Adoption of father's first cousin.

The adoption of father's first cousin is not invalid under Hindu Law.

SECOND appeal against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by K. G. Kulkarni, Second Class Subordinate Judge at Athni.

* Second Appeal No. 106 of 1916.

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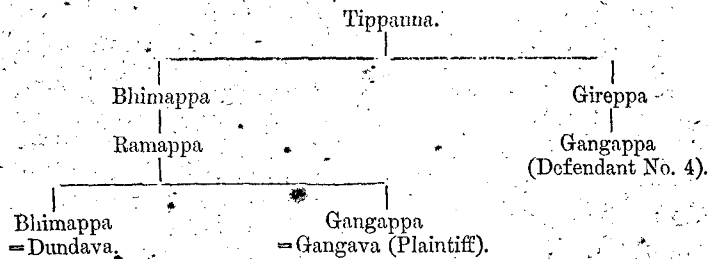
Suit to recover possession of property.

The property in suit originally belonged to one Bhimappa, who died in 1903, leaving him surviving his widow Dundava.

Dundava remarried in 1910 but before her remarriage she had adopted Gangappa (defendant No. 4) as son to her husband. The adopted son was the first cousin of Bhimappa's father, as shown in the following genealogical tree :—



After his adoption, Gangappa (defendant No. 4) sold the lands in dispute to Mallappa and others (defendants Nos. 1 to 3).

In 1913, the plaintiff Gangava, who was Bhimappa's brother's widow, sued to recover possession of the lands.

The Subordinate Judge found the factum of adoption proved but held that the adoption was illegal and invalid under Hindu law. He, therefore, decreed the plaintiff's claim.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

The defendants appealed to the High Court.

Jayakar with *A. G. Desai* and *S. G. Abhyankar*, for the appellant.—We submit that the adoption of father's first cousin is not invalid under Hindu law though it may be opposed to the sentiment

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of Hindu community. There is no text which prohibits such an adoption and in view of the decisions of our Court, all detailed rules evolved from the doctrine of *putrachchhayavaham* (reflection of a son) are now confined to three cases only, viz., (1) daughter's son, (2) sister's son and (3) mother's sister's son: see *Ramchandra* v. *Gopal*[1]; *Yamnava* v. *Laxman Bhimrao*[2] and Mayne's Hindu Law, 8th edition, para. 135.

The Dattaka Mimansa, section 2, deals with persons to be adopted and in pl. 107 of the section, the author enumerates persons among whom "one born in the same general family" is mentioned. This, we submit, would include even agnates and persons in the ascending line. The text is recommendatory only and the effect of it is that any one can be adopted except the persons mentioned in the three specified cases.

The Dattaka Mimansa deals with the mode of adoption in section 5. The latter section is controlled by section 2 for reasons given by Batchelor J. in *Ramchandra* v. *Gopal*[1]. In pll. 16-20 of the section, certain prohibited cases are mentioned and in pl. 17 पितृव्य—meaning paternal or maternal uncle—is expressly stated as a person excluded from adoption. We submit, however, the whole of that placitum is treated as recommendatory: see *Sriramulu* v. *Ramayya*[3].

The observations in *Gajanan Balkrishna* v. *Kashinath Narayan*[4] go to show that any one in the family can be adopted provided he is not one of the three specified persons.

Secondly, the rules of prohibition being of Brahmanical origin, they have no binding force in the case of Lingayats, who are held to be Sudras: see *Gopal Narher Safray* v. *Hanmant Ganesh Safray*[5]. Even

(1) (1908) 32 Bom. 619.
(2) (1912) 36 Bom. 533.
(3) (1881) 3 Mad. 15.
(4) (1915) 39 Bom. 410 at p. 419.
(5) (1879) 3 Bom. 273.

in the three specified cases, the prohibition does not apply in the case of Lingayats, *a fortiori*, there would be no prohibition in the case of an uncle. The cases of *Asharfi Kunwar* v. *Rup Chand*[1] and *Bhagwan Singh* v. *Bhagwan Singh*[2] were referred to.

Coyajee with *P. B. Shingne*, for the respondent.— It is material to note in what relationship Bhimappa (the adoptive father) and Gangappa (the adopted son) stood to one another before the adoption. If we consider the degree of descent from their common ancestor, the adopted son is in the same rank as the adoptive father's father. To adopt such a person is a position repugnant to all Hindu notions on the subject: see Mandlik's Hindu Law, pp. 474 and 485. It would have been quite natural and congruous for Gangappa to have adopted Bhimappa. We do not base our contention so much on the applicability of the doctrine of *viruddha sambandha*—marriage theory—as on *incongruity of relationship* as explained in Sarkar's Law of Adoption, 2nd Edition, p. 317.

It is true that the Smriti writers do not expressly prohibit the adoption of a paternal uncle but they do not also expressly prohibit adoption of any other person, e.g., there is no express prohibition against a man adopting his own father. It does not, therefore, follow that what is not expressly prohibited is impliedly allowed. Nanda Pandita, who is a high authority on the subject of adoption, does mention some cases as expressly excluded: see Dattaka Mimansa, section 2, pll. 29-30. In this there is a clear prohibition re. adopting in the same family. Placitums 107-108 mention prohibition of certain other persons outside the family: see also section 5, placitums 15, 16 and 17. Placitum 17 is important. There the word used is पितृव्य, which

(1) (1908) 30 All. 197.

(2) (1899) L. R. 26 I. A. 153.

according to Monier Williams means an elderly male member of the family, that is, we must not confine the prohibition to the paternal uncle alone but to every other agnatic ancestor, and not to curtail it or confine it. To do otherwise is to disregard the test that the adopted boy must be the reflection of a son. Up to now there has been no instance of an adoption of a boy who belongs to the higher rank in the family. All persons in the higher line should be regarded as in the position of the father: see Steele on Law and Customs of Hindu Castes, page 44, para. 38, last part; West and Buhler, pages 38-39.

The cases of *Ramchandra* v. *Gopal*[1] and *Yamnava* v. *Laxman Bhimrao*[2] relate to the prohibition on the ground of *viruddha sambandha*: and there the point was one of incestuous intercourse. The point of incongruity of relationship which I am advancing did not arise in those cases. Therefore those cases do not apply here.

The case of *Gajanan Balkrishna* v. *Kashinath Narayan*[3] was not that of an uncle.

Secondly, on the point of the parties being Sudras we submit that the point has no importance. If there is a prohibition, it applies to all the four classes. Nanda Pandita specifically states that the prohibition as regards sister's son and daughter's son does not apply to Sudras. That suggests that the law is applicable to all the four classes and if there is any provision not applying to Sudras it is so stated, vide Stokes Hindu Law Books, Dattaka Mimansa, section 2, pl. 14.

S. Y. Abhyankar in reply:—The authorities in this Presidency since *Bai Nani* v. *Chunilal*[4] have

(1) (1908) 32 Bom. 619.
(2) (1912) 36 Bom. 533.
(3) (1915) 39 Bom. 410 at p. 419.
(4) (1897) 22 Bom. 973 at p. 975.

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consistently held that the restrictions laid down by Nanda Pandita are recommendatory, and it is now too late to go back upon the theory of sentiment.

It is true that Sarkar says that the boy to be adopted should be in the degree next below the adoptive father, that is, he should be in the same degree as a son and that neither a paternal uncle nor a grand-nephew can be adopted. But the adoption of a grand-nephew was upheld in *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty*[1] and there is no reason why the same principle should not be applied to the adoption of a boy standing one degree higher: see *Gajanan Balkrishna* v. *Kashinath Narayan*[2].

The argument based on the word पितृव्य does not help the case of the respondent. That word cannot be given the wider meaning—an elderly male member—as defined by Monier Williams but is to be limited in meaning to a full uncle: see Dattaka Mimansa, section 11, pl. 31.

The observations in West and Buhler and Steele are vague and it is not possible to say if in that particular case the uncle was a full one or not.

C. A. V.

SHAH, J.:—The plaintiff in this case sued to recover possession of certain land as the next reversioner of the deceased Bhimappa.

The defence was that Bhimappa's widow had adopted Gangappa, and that Gangappa had alienated the property to the other defendants.

The plaintiff's claim must fail if the adoption is valid. Both the lower Courts have held the fact of the adoption proved, but they have found it to be invalid according to Hindu law.

(1) (1880) 6 Cal. 41. (2) (1915) 39 Bom. 410 at pp. 415, 416.

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Gangappa, the person adopted, was before adoption the first cousin (father's brother's son) of Bhimappa's father. The lower Courts have held the adoption to be invalid on the ground that Gangappa was in the position of an uncle to the deceased Bhimappa and that his adoption is opposed to the theory, upon which the law of adoption is based. The lower appellate Court has relied upon a passage in Steele's Law and Custom of Hindu Castes at p. 44 and certain observations in Mandlik's Hindu Law at p. 474.

In the appeal before us it has been contended that though the adoption may be opposed to the sentiment of the Hindu community and to the theory of adoption, in the absence of any prohibition based upon any Smriti, such an adoption ought not to be treated as invalid. Mr. Coyaji for the respondent has relied not only upon the passages referred to in the judgment of the lower appellate Court, but also upon the remarks in West and Buhler's Hindu Law at p. 1038, the opinions of Nanda Pandita in Dattaka Mimansa, section V, clause 17 and section II, clauses 29-31, the observations of Golap Chandra Sarkar Sastri relating to incongruity of relationship in Tagore Lectures on the Hindu Law of Adoption in Chapter VIII (2nd Edition), and the necessity of the adopted son bearing the resemblance of a son according to the expression *putrachchhaya-vaham* "पुत्रच्छायावहम्" in Saunaka's text referred to in the Vyavahara Mayukha and the Dattaka Mimansa.

The parties are Lingayats; but I do not think that that circumstance makes any difference on the present question. The ground of invalidity, such as it is, is general and applicable to all those who are governed by the Hindu law. It is not confined to the three regenerate classes. There is no special custom alleged in the present case, and the validity of the adoption

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must be determined with reference to the ordinary Hindu law.

The question that we have to consider is whether the adoption to A (by his widow) of his father's cousin (father's brother's son) is invalid. We are not concerned with the adoption of any nearer senior agnatic relation, and I do not wish to be understood as expressing any opinion as to the validity of such an adoption. That must be considered if and when such an adoption takes place, and the question as to the validity thereof is raised.

There is apparently no reported case on the point which we have to decide and none has been cited to us in the course of the arguments.

There is nothing in the Mitakshara or the Vyavahara Mayukha expressly bearing on this point. I mean there is no express prohibition to adopt the father's first or distant cousin. As to the opinion expressed by Nanda Pandita in the Dattaka Mimansa, section V, clause 17 relating to the paternal uncle, I am by no means clear that the word used there for paternal uncle, viz., pitrivya (पितृव्य) means anything more than father's brother (पितुर्भ्राता); but assuming that it includes an elderly relation in the position of the first cousin of the father, it is clear that the opinions expressed by Nanda Pandita in clauses 16 to 20 have been held in a series of decisions of this Court ending with *Gajanan Balkrishna* v. *Kashinath Narayan*[1] to be recommendatory and not mandatory except as to the three specific cases of daughter's son, sister's son, and mother's sister's son as regards the three regenerate classes. The opinions are based on the ground of *viruddha sambandha* or the rules relating to *Niyoga*. Having

[1] (1915) 39 Bom. 410 at p. 419.

regard to the current of decisions of this Court, Mr. Coyaji has not pressed this part of the argument.

As regards clause 30 in section II of the same book, it is clear that it can apply only to the father's brothers and not to the father's cousins. The text of Manu, upon which the opinions expressed in clauses 30 to 33 are based, makes it clear that Nanda Pandita in clause 30 referred to the incapacity of an uncle (father's brother) and not of a person treated as being in the position of an uncle to be the object of adoption. He could not even mean father's half-brother according to his interpretation of the word *ekajata* (एकजात) used in Manu's verse (IX, 182). Thus Nanda Pandita's opinion expressed in that clause cannot help the respondent. Further with reference to one of Nanda Pandita's opinions based on his reading of the text of Manu, viz., that relating to the wife's brother's son in clause 33, it has been held that it is merely recommendatory and not obligatory: see *Bai Nani* v. *Chunilal*[1]; and *Puttu Lal* v. *Parbati Kunwar*[2].

Mr. Coyaji has, however, contended that in the expression *putrachchhayavaham* the prohibition to adopt the father's first or any distant cousin who would be in the position of an elderly relation to the adoptive father, is necessarily involved quite independently of the considerations based on *viruddha sambandha* or *Niyoga*. It is a significant fact, however, that no such prohibition is inferred in terms by the author of the Vyavahara Mayukha or even by Nanda Pandita anywhere apart from his inferences in paras. 16 to 20, section V, of the Dattaka Mimansa. Having regard to the tendency of the decisions in this Presidency, it is not safe in my opinion to infer any such prohibition as a rule of law. Even in the case of the adoption of an

(1897) 22 Bom. 973. (2) (1915) L. R. 42 I. A. 155.

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only son, upon which opinions are clearly expressed by the authors of the Mitakshara, Vyavahara Mayukha and Dattaka Mimansa, these opinions are held to be merely recommendatory and not mandatory: see *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[1] and *Vyas Chimanlal* v. *Vyas Ramchandra*[2].

There is no Smriti text laying down such a prohibition expressly, and I am unwilling to infer such a prohibition from the expression *putrachchhayavaham*, firstly, because in the specific cases of daughter's son, sister's son and mother's sister's son, as regards the three regenerate classes the prohibition is accepted as it is referable to the Smriti writers Saunaka and Sakala, and not merely because it can be inferred from the expression according to the opinion of the commentators; and, secondly, because the prohibition, if generally inferred, would apply so extensively and would be so important that Nilkantha and Nanda Pandita would have referred to it. From their omission to refer to this prohibition as inferable from the expression, I think that the expression suggests rather a rule of propriety at least as regards the first cousins and more distant senior relations than a positive prohibition. The adoption of such senior relations would be opposed to the sentiment of the Hindu community, and it may not be easy to dissociate the mandate from the recommendation. But on the whole I do not think that there is any legal prohibition to adopt the father's cousin.

I attach some importance to the consideration that the prohibition, if it is extended to a senior relation more distant than the father's brother, could not be properly restricted to the father's cousin, but would apply to any distant cousin of the father of the adoptive father. Mr. Coyaji contended—in fact he had to

(1) (1899) L. R. 26 I. A. 113. (2) (1899) 24 Bom. 367.

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contend—that not only a first cousin but any distant cousin of the adoptive father's father or any elderly agnatic relation of the adoptive father would be ineligible for adoption as a matter of law. He conceded that the relations in the same degree as the adoptive father from the common ancestor would not be within the rule of ineligibility, though Mr. Mandlik would consider them ineligible for adoption as not being junior in rank to the adoptive father. The adoption of a cousin has been held not to be invalid by the Madras High Court: see *Virayya* v. *Hanumanta*[1]. I think that if the prohibition really exists and is so extensive, it would be supported by far clearer texts than we have, and that it would be in consonance with the general trend of the decisions on this branch of the law of adoption to hold that the expression *putrachchhayavaham* implies a recommendation and not a mandate not to adopt the father's cousin and more distant senior relations.

As regards the observations of Steele, Mandlik, Sarkar, and West and Buhler, I think they are valuable, so far as they are applicable as indicating the sentiment but are insufficient for the purpose of establishing any rule of positive prohibition. In the passage in Steele's book, the reference to the paternal uncle may not be necessarily to the father's cousin; and apart from that it occurs in a passage containing rules of preference which are clearly recommendations and not positive rules of law. As to Mandlik's valuable criticism, it is noteworthy that the test of age has not been accepted in this Presidency as a definite rule of law: see *Gopal* v. *Vishnu*[2]; and the simple rule enunciated by him would apply to so many distant relations, that it rather suggests a counsel of

(1) (1891) 14 Mad. 459. (2) (1898) 23 Bom. 250 at pp. 256, 257.

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propriety than a rule of law prohibiting all such adoptions. West and Buhler refer in a foot-note at p. 1038 of their book to a passage in Steele's Law and Custom of Hindu Castes at p. 184, which shows that it is recommendatory and not obligatory. As to Sarkar's observations based on the incongruity of relationship they stand on no better footing than Mr. Mandlik's criticism with reference to this point.

Assuming, without deciding, that the incongruity of relationship, apart from any consideration of *viruddha sambandha* or of the rules relating to *Niyoga*, may afford a basis for invalidating an adoption, I do not think that it could be properly extended to the first cousin of the father of the adoptive father or to the more distant elderly relations.

I think that there is considerable force in the argument, which has found favour with the lower Courts, that the adoption of a cousin of the adoptive father's father is opposed to the theory of adoption; but on the best consideration that I can give to the point, I have come to the conclusion, not without reluctance, that though such an adoption is opposed to the Hindu sentiment it is not prohibited by law, and cannot be treated as invalid.

The result, therefore, is that this appeal must be allowed and the plaintiff's suit dismissed with costs throughout on her.

SCOTT, C. J. :—I concur.

Decree reversed.

J. G. R.