PETITIONER:
GOSWAMI SHREE VALLABHALALJI

Vs.

RESPONDENT:
GOSWAMINI SHREE MAHALAXMI BAHUJI MAHARAJ

DATE OF JUDGMENT:
13/09/1961

BENCH:
GUPTA, K.C. DAS
BENCH:
GUPTA, K.C. DAS
WANCHOO, K.N.

CITATION:
1962 AIR 356 1962 SCR (3) 641

ACT:
Adoption-Goda Dattak Customs-Widow's sister's husband-If can be adopted as son.

HEADNOTE:
The first respondent on the death of her husband who was a descendant of the famous Vaishnava teacher Vallabhacharyaji and was possessed of certain Devattar properties belong to the Thakur of which be was the Shebait, adopted her sister's husband as a son under the Goda Dattak Custom of adoption which prevailed amongst the Vallabhacharya community. The appellant who was the own brother of the deceased adoptive father contended inter alia that under the Goda Dattak custom a widow could not adopt her sister's husband as a son to her husband, that the adoptee should belong to the family of the adopter and that the widow should obtain the ,consent of her husband's sapindas for the adoption.
Held, that the rule in Dattaka Mimansa against the adoption of the son of a woman who could not be married because of Viruddha Samandha relationship is recommendatory and even if the limitation of the orthodox Dattak adoption apply to Goda adoption there is no bar to the adoption of the wife's sister's husband.
Mst. Abhiraj Kuer v. Devendra Singh, C. A. No. 379 of 1961 decided on 15-9-61, referred to.
In the present case it has not been proved that under the Goda Dattak customs a custom existed barring the adoption of members of other Vallabhachari families if it were possible to adopt members from the adoptive father's family. As in the present case there was authority from the husband to adopt the question of the consent of the sapindas of the' husband did not arise even if he was governed by the Madras School of Mitakshara.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 143 of 1956.
Appeal by special leave from the judgment and decree dated September 23, 1952, of the Bombay High Court in First Appeal No. 57 of 1949.
S. P. Desai and I. N. Shroff for the appellant.

A. V. Viswanatha Sastri, J. B. Dadachanji, S.N. Andley, Rameshwar Nath and P.L. Vohra, for the respondents.

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1961. September 13. The Judgment of the Court was delivered by

DAS GUPTA, J.-The appellant and the Second respondent are both descendants of Vallabhacharyaji, a great Vaishnava teacher who flourished more than 400 years ago. Vallabhacharyaji left his native place near Champaranya in South India, and coming to Gujarat and other parts of India established shrines for the worship of Vishnu at several places. His descendants became the priests and Shebaits of such shrines and also of other shrines established thereafter. These came to be known as Gadis. While each of these Gadis had a temple for the worship of Vishnu, considerable properties, movable and immovable were acquired for them from time to time by gift or otherwise. One such shrine was established more than 100 years ago at Nadiad and about the year 1899 A. D. a descendant of Vallabhacharyaji who on adoption took the name of Anniruddhalalji Murlidharji became the head of the Nadiad shrine and was thus possessed of the movable and immovable properties appertaining to the Gadi. This gentleman also became by, adoption head of another shrine known as the Moti Haveli at Jamnagar in the year 1913 and then took a slightly different name Annirudhalalj'i Brijeshji. Both these adoptions were in accordance with the Goda Dattak custom of adoption which prevailed among the members of the Vallabhacharya community. Aniruddhalalji Murlidharji (alias Aniruddhalalji Brijeshji) died on December 17, 1935 leaving a widow Mahalaksbmi Bahuji Maharaj, who is the first respondent before Us.

The question of adopting an heir to him assumed importance immediately on his death and it appears there was some talk. of adopting by the Goda Dattak custom one of the sons of the present appellant, who it is necessary to mention. was the natural brother of Aniruddhalalji. The talks however proved fruitless and ultimately on June 1, 1946,

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the second respondent who as already stated was also a descendant of Vallabhacharya was adopted. The present suit was brought by the appellant in respect of the Haveli and other properties left by Anniruddhalalji at Nadiad. In this he, challenges the validity of the adoption of the second respondent by the first respondent, Mahalakshmi Bahuji Maharaj.

The main prayer in the suit is for a declaration that respondent No. 2 was not the legally adopted son of Aniruddhalalji and did not acquire any right or shares in his property by the alleged adoption. The other prayers included one for a declaration that he the appellant was the nearest heir of the deceased, that the first respondent had no other right in the property except as a Hindu widow, for an injunction restraining her from frittering away the property or any part thereof, for an order on her to produce the balance of the sale proceeds of Maharaja's Bag which she had sold off and for an order on both these respondents , to render accounts of the properties of Goswami Anniruddhalalji which might have come into their hands.

It is no longer in dispute that the plaintiff would be the nearest heir on the death of the widow if there has been no valid adoption of the second respondent to Aniruddhalalji. The appellant challenged the validity of the adoption on three main grounds. The first was that under the custom' of the Vallabharcharya community under which Goda Dattak adoption is made, the adoptee (using that word to denote the

boy taken in adoption) must be only from the family of the adoptive father if this be possible and in the present case even though the plaintiff himself as well as his two sons were available for adoption the second respondent was adopted in preference to them. The second ground was that under the Goda Dattak custom the wife's sister's husband cannot be validly adopted. The third around was that Aniruddhalalji
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had expressed his desire in this matter of adoption in such a manner that there was an implied prohibition by him from taking in adoption anybody except the present appellant or one of his sons.

The first two grounds were raised in Issue No. 8 of the 19 Issues that were framed by the Trial Court while the third ground was raised in Issue No. 12. These Issues are in the following words :--

Issue No 8 Does the. plaintiff prove the custom that in Goda adoption:--

(i) a widow cannot adopt her sister's husband as a son to her husband ?

(ii) the adoptee should belong to the family of the adopter ?

Issue No. 12: Does the plaintiff prove that the Defendant No. 1 was prohibited by Anniruddhalalji from adopting in the Goda form any one except the plaintiff or one of his sons ?

It may be mentioned that an Issue was framed as, regards the factum of adoption in Issue, No. 6, viz., whether Defendant No. 2's adoption is proved, in view of what was said in paragraph 14 of the plaint that he was not aware whether Defendant No. 1 and Defendant No. 2 had performed any ceremonies or rites according to the Goda Dattak form of adoption or as required by Hindu Law. This issue was answered in the affirmative and the correctness of that answer has not been challenged before us.

The Trial Court held that the plaintiff had riot been able to establish the alleged custom for Goda Dattak that a widow could not adopt her sister's husband as a son to her husband nor that the adoptee should belong to the family of the adopter and accordingly answered Issue No. 8 in the negative. As regards Issue No. 12 the plaintiff relied on a letter which was marked Ex. 115, apart from his own evidence and evidence of some of his witnesses. The Trial Court accepted Defendant No.-- 1's contention that this letter had
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been inspired by the plaintiff himself and so no. reliance could be placed on' it. The oral testimony given by the plaintiff and other witnesses in support of the story that Aniruddhalalji had in his life time given certain directions in the matter of adoption of a son to him was also found not reliable. Accordingly, Issue ,No. 12 was also answered in the negative.

One other argument addressed to the Trial Court was that Defendant No. 1 had not obtained the consent of her husband's sapindas for this adoption and so under the Madras School of Mitakshara Law, which it is said governed the parties, the adoption was invalid. The Trial Court considered this argument even though the, question whether the Madras School of Mitakshara governed the parties and so the adoption was invalid without the consent of the husband's, sapindas had not been specifically raised in the pleadings nor had any issue been framed on ,-,his. The learned Judge however rejected the argument, being of opinion that "the ordinary law of adoption which puts restrictions on the widow's right to adopt in Madras cannot

be taken to be prevailing in the case of customary adoption in the Goda form by widow in the Goswami families."

Holding that the Defendant No.2's adoption could not be held to be invalid the Trial Court dismissed the suit with costs.

The plaintiff's appeal to the High Court of Bombay met a similar fate. The learned Judges of High Court agreed with the Trial Court that the plaintiff had not been able to prove either that the wife's sister's husband was not eligible for adoption under- the Goda Custom or that the son to be adopted must if possible come from the family of-their adoptive father. On the question whether there was an implied prohibition to adopt anybody other than the plaintiff or his sons, .also, they agreed with, the Trial Court even though they were not prepared to

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say that the letter (Ex. 115) was written by the Defendant No., 1 under undue influence of the plaintiff.,

The learned Judges of the High Court refused to consider the further question raised on behalf of the appellant that the adoption was invalid in the absence of consent of the Sapindas as the proper. pleading on which, such a question could have been raised had not been made in the plaint and no issue had been framed. The High Court refused to frame an issue then, but Rave time to the plaintiff to make an application for amendment of the plaint. An application for amendment was duly made but was rejected by the learned judges who were of opinion that the application had not been made in good faith. The-appeal was dismissed with costs.

The plaintiff has filed the present appeal against the decision of the High Court after obtaining special leave from this Court.

The appellant contends that the Courts below were wrong in holding, firstly. that a custom which barred the adopted of the wife's sister's husband in the Goda form of adoption had not been proved. secondly that a custom that if possible the adoptee must be from the family of the adoptive father had not been proved; and lastly that the alleged implied prohibition against adopting anybody excepting the plaintiff and one of his sons had not been established.

It was also urged that the High Court was wrong in refusing to entertain the plea that the adoption was invalid in the absence of the consent of the husband's sapindas and in any case totally wrong in allowing the application for amendment of the plaint seeking to raise such a plea.

Before coming to the several grounds urged on behalf of the appellant we have to consider a preliminary objection raised on behalf of the respondent. It is urged that this appeal has become infructuous by reason of, the operation of section 14 of the Hindu Succession Act, It is said that, as

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admittedly respondent No. 1, Mahalakshmi Bahuji Maharaj, was in possession of the properties in suit at the date of the commencement of the Hindu Succession Act, she became the full owner of the properties in question in case the adoption by her of respondent No. 2 is invalid. There maybe some force in this argument if the properties in question are the private secular properties of Anniruddhalalji. The position may well however be different if these properties were the Devattar properties belonging to the Thakur of which Anniruadhalalji was a Shabeit.

It appears that a suit has actually been brought by certain Vaisnavas seeking a declaration that these properties are all Devattar-properties of the Thakur. In view of this position we are of opinion that it would not proper for us to decide in the present case whether under section 14 of

the Hindu Succession Act Defendant No. 1 had become the full owner of the properties in suit if the adoption by her was invalid. We shall therefore decide this appeal on merits leaving it open to the 1st respondent to pursue her claim under section 14 of the Hindu Succession Act if that becomes necessary.

Coming now to the merits of the appeal it is necessary to consider first the question of the alleged limitation on the power to adopt by Goda practice as regards the wife's sister's husband or a member from another Vallabhacharya family even though members of the adoptive father's family be available. It will be helpful to consider in this connection first the objects of Goda adoption. These objects have been mentioned by plaintiff's own witness Chandras Shankar Laxmishakar Upadhyaya who appears to have a fair amount of knowledge of Goda Dattaka adoptions, to be three fold. The primary object was mentioned by him to be that 1-& "person going in "Goda" adoption can perform "several (worship) etc., of the Thakorji (idol) and that tradition of "sewa" (worship etc.,) can be' continued". The second object mentioned by him is "that, after. the death of the
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person taking in adoption, the person going in adoption can perform his "shraddha" ceremonies etc "' The third object according to him is "to continue the line of the person taking in adoption." Other witnesses who have given evidence on this point have said more or less the same thing. It is obvious that if the above be the objects of Goda adoption it must be implicit In the nature of Goda adoption that anybody who would be incapable of accomplishing any of these objects would be ineligible for adoption. It is on this basis that it was urged that wife's sister's husband's son was not eligible. The argument is that the wife's sister's husband would be unable to perform the Shradha of the adoptive father because the adoptee would not cease to be the Shadu of the person to whom the adoption is made,- it was further said that the adoptee would the incapable of performing the Sradh of the adoptive maternal grand father as the latter would be the adoptee's father-in-law.

Unfortunately however for the plaintiff's case 'his witnesses were unable to quote any authority except their own ipso dixit for this proposition that the adoptee would be incapable of performing the Sradh of his adoptive father or adoptee maternal grand father. The plaintiff's witness Anantkrishna Sastri a Mahamahopadhyaya, made a statement that according to Dharmashastras a wife's sister's husband cannot be adopted. As authority for this proposition he relied on a passage in Dattak Mimanea which prohibits the adoption of a daughter's son, a sister's son and a mother's sister's son and adds thus:-"This clearly proves that a daughter's son and a mother's sister's son are (in this respect) equal to a sister's son. This is just proper because there is in these three, the same degree of (prohibited) marriageship (Viruddha Sambandha)."

It is true that Dattak Mimansa has in a later passage gone further and said that son of a woman who-could not be married because of Virudha Sambsndhar relationship should be excepted from adoption
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We have however held in Mrs. Abhiraj Kuer v. Debendra Singh(1) in which judgment has been delivered to-day that this rule in Dattaka Mimansa against Viruddha Sambandha putra is only recommendatory and not mandatory. Apart from that it is difficult to see how the wife's sister's husband can be considered to be ViruddhaSambandha-putra. It is thus

clear that even if the limitations of the orthodox Dattak adoption apply to Goda adoption there is no bar to the adoption of, the wife's sister's husband.

On the materials on the record we are also satisfied that there is no custom barring the adoption of the wife, is sister's husband in Goda Dattak form.

On the question whether in Goda Dattak adoptions the adoptee must if possible be from the family of the adoptive father, it is important to notice that the several objects for which Goda Dattak adoptions are made may well be satisfied even if the adoptee be from some other Vallabhacharya family. Practically the only evidence given in support of the case that there is a custom as alleged that if possible the adoptee must be from the adoptive father's family is by the plaintiff himself. His witness Lakshmi Shankar Upadhaya, who, as al. ready stated, appears to have considerable ex-perience of Goda Dattaka adoptions does not speak of any such custom. Even his witness Hari Krishna Virji Sastri who appears rather partial to him--it may be mentioned that he admits having read even the plaint on being sent for by the plaintiff-does not speak of any such custom. Against the plaintiff's own evidence that there is such a custom we, find defendant No. 2 giving three instances where boys from other families were adopted in Goda Dattak even though members in the adoptive father's family were present. It is true that the evidence does not show whether such adoptions from other family

(1) C.A. No. 379 of 1958 decided on 15.9,61,

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took, place only after members in the adoptive father's family who might have been available for adoption declined to be adopted. It will be unreasonable however to expect such evidence as to the exact circumstances under which adoptions were made from other families even in the presence of members in the adoptive father's family. But even if it be correct to say that the defendant has not established clearly that members from other families were adopted even though members in the adoptive father's family were willing to be adopted, the fact remains that the plaintiff has not been able to establish by either any authoritative texts or from the opinion of some person well learned about the Goda Dattaka customs that a custom exists barring the adoption of members from other Vallabhacharya families if it were possible to adopt members from the adoptive father's family. This brings us to the contention most vehemently urged before us that the evidence establishes an implied prohibition by Anniruddhalalji of the adoption of any person other than the plaintiff or one of his two sons. Reliance is placed first on the letter Ex. 115. We are inclined to agree with the High Court that this letter was written by Mahalakahmi Bahuji Maharaj of her own accord and cannot be brushed aside as having been written under the influence of the plaintiff. All that the letter shows however is that Anniruddhalalji had expressed a desire that Gokul Nath (who is plaintiff's son) should be taken in adoption to him. While a reasonable reading of this letter would show that Anniruddhalalji authorized Mabalakshmi Bahuji Maharaj to make an adoption and that he expressed his preference for the adoption of Gokal Nath, the letter does not show even remotely that Anniruddhalalji indicated any wish that no body except Gokul Nath should be adopted. It is interesting to remember in this connection that plaintiff's own in the Plaint is not that Anniruddhalalji had

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declared any wish that nobody other than Gokul, Nath should

be adopted but that his desire was that, "no body other than the 1 plaintiff or any one of hit sons should be adopted." The plaintiff in his own testimony has no doubt said that Anniruddhalalji after asking the plaintiff to give his eldest son in Goda adoption told Mahalakshmi Bahuji Maharaj that ,only his brother's son should be adopted". if, this was true it is difficult to understand why the plaintiff tried to make a case in the plaint that Anniruddhalalji had declared a wish that nobody except the plaintiff himself or one of his sons should be adopted. The plaintiff's witnesses who have spoken as regards the declaration by Anniruddhalalji of his wish in this matter of adoption have not stated that Anniruddhalalji said that only his brother's son should be adopted. His witness Nateswarji the brother of Anniruddhalalji's, first wife says that "during his last illness Anniruddhalalji had spoken in my presence and in the presence of Defendant No. 1 that his desire was to adopt Bhaiya Raja and he had inquired of Defendant No. 1 what her desire was". Defendant No 1 had replied that her desire was the same as his desire. Such a talk had taken place only once in my presence." Accepting that Nateshwarji has stated the full truth here his evidence does not show anything more than was indicated in the letter Ex. 115 itself and does not show that Defendant No. 1 prohibited even by implication the adoption of anybody else excepting Bhaiya Raja (the plaintiff's son). The plaintiff's witness Gobardhan stated in hip, evidence : Anniruddhalalji was speaking to all persons in touch with him that he wanted to take Bhaiya Raja in "Goda Dattak" and later that "he was spoken to by Maharaj that he wanted to take Bhaiya Raja in adoption". Even this witness who goes to the length of saying that a date was actually fixed by Anniruddhalalji for the adoption of Bhaiya Raja-& story which none of the other witnesses give-is not prepared to say that Anniruddhalalji said to Defendant No. 1 or to anybody else that nobody other
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than Bhaiya Raj should be adopted. It is not possible in this state of the evidence to accept as true the plaintiffs uncorroborated testimony that Anniruddhalalji said to defendant No. 1, Mahalakshmi Bahuji Maharaj that only the plaintiff's son should be adopted.

We are therefore of opinion that the High Court is right in its conclusion that no implied prohibition by Anniruddhalalji of adoption of anybody other than the plaintiff or his sons has been proved.

The last argument that the parties being governed by the Madras School of Mitakshara, the adoption is invalid in the absence of consent by the husband's sapindas must be rejected, for the simple reason that the letter Ex. 115 and the evidence of the plaintiffs own witnesses justify the conclusion that in his life time Anniruddhalalji authorised Mahalakshmi Bahuji Maharaj to make an adoption after his death-though at the same time indicating his preference for one particular boy. The necessity of consent of the husband's sapindas would arise if the Madras School of Mitakshara law was applicable-only where there was no authority from the husband.

In the present case there was authority from the husband to adopt and so even if the rule of Orthodox Dattak adoption was applicable and Anniruddhalalji was governed by the Madras School of Mitakshara the question of any consent of husband's sapindas does not arise at all. In the view we have taken of this argument it is unnecessary for us to consider whether the High Court was right in rejecting the application for amendment of the plaint that was made by th

plaintiff in order to induce the High Court to consider this very argument. It is also not necessary for us to enter into the question on which some evidence appears to have been led 1 though no issue was framed, viz. whether Goda Dattak adoption is a mere variant
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of the orthodox Dattak adoption or an affiliation altogether different from Dattak adoption. We therefore express no opinion on this question.
The appeal is dismissed with costs.

Appeal dismissed.