

Factum Valet & Caste Disabilities in Bangladesh: A Review of *Polash Chandra Saha v. Shimul Rani Saha and Others*

Md. Tariq Monawer

Student of LL.B. (Hon's) 2nd Year,
Department of Law, University of Chittagong

Abstract

While the courts around the globe are restricting disabilities due to the caste system, the recognition of caste disabilities is a setback for progressive society in Bangladesh. The modern era of secularism doesn't recognize disability due to religion, caste, and ethnicity. These kinds of disabilities are regarded as a setback for society. Sometimes, following the law strictly actually doesn't lead the court of law to justice. That's why the discretionary power of the judges always needs to play a role morally and circumstantially to provide justice in the court of law. This article will try to provide some counter-arguments and show some probable aftermath of recognizing caste disabilities by the Supreme Court of Bangladesh. This article will also raise a question regarding the morality, constitutionality, and secularity of this judgment.

Keywords: *Factum Valet, Caste, Obiter*

1. Introduction

The case at hand¹ is a recently dismissed appeal from the Appellate Division of the Supreme Court of Bangladesh, which will likely to have some long-term impacts among Hindu communities of Bangladesh. It also gave birth to several bones of contention regarding Adoption, Caste system, and doctrine of Factum Valet in Hindu family law jurisprudence of Bangladesh. Generally defining Factum Valet is what ought not to be done, is valid when done.² The doctrine is only applicable in the Hindu community. The caste system among Hindus creates disabilities in inter-caste proceedings like marriage, adoption. However, the evil side of this caste system can lead society towards various kinds of discrimination, division of labor, and inability to access quality education. Under the Caste Disabilities Removal Act, 1850,³ the then British government removed the restrictions of the caste system in inter-caste proceedings among Hindus in this subcontinent. From then to till now, we can see lots of restrictions among Hindus due to their caste is lifted. But, how far the doctrine⁴ and caste disabilities removal act is applicable in Bangladesh remains a question. In the history of the rule of law, the law could never cope with the progress of society. For the law to cope with the community, the judges need to be more progressive than the existing law while deciding any matter taking account of the current situation worldwide. Furthermore, the constitution is the pole-star for the judges while giving any judgment. So, any judgment which doesn't accompany the spirit of the constitution is

¹ Palash Chandra Saha v. Shimul Rani saha& ors.14SCOB[2020]AD pp.88-95

² Nirranjan B, "Effect of Hindu Adoptions and Maintenance Act on the Doctrine of Factum Valet"; available at: <<https://www.shareyouressays.com/knowledge/effect-of-hindu-adoptions-and-maintenance-act-on-the-doctrine-of-factum-valet/117337>> last accessed on January 21, 2021.

³ Act no. XXI of 1850

⁴ *Supra* Note 2

not a good sign for constitutional supremacy, asserting that the Supreme Court of Bangladesh is the protector of the constitution.

2. Facts of the Case

Polash Chandra Saha (hereinafter referred to as Polash) was born on 3rd Bhadra, 1375 B.S. (1968EN). His natural mother died when he was six months old. Late Khitish Chandra Saha, a rich man with vast property, including a sweetmeat shop, and his wife had no child then, decided to adopt Polash. Polash's natural father accepted the adoption proposal, and the ceremony was held in 15th Falgun, 1375 B.S. Since then, Polash had been living with his adoptive father and had no relation with his natural father. Later, Polash was admitted to school, and Khitish Chandra Saha wrote his name as the father in Polash's school documents and voters list. While Polash was growing up, a daughter of Khitish Chandra Saha was born, who was later named Shimul Rani Saha. In 1993, Khitish Chandra Saha filed a title suit against Polash while Polash was trying to dispose of Benami properties of Khitish Chandra Saha, which was bought in Polash's name. In that title suit, Khitish Chandra Saha admitted Polash as his adopted son. After the death of Khitish Chandra Saha, Polash performed all the rituals as his son and allowed Khitish Chandra Saha's daughter and her family, including husband and two sons, to stay home for a temporary period. From then, Shimul Rani Saha promulgating that Polash was never adopted and he was merely a cashier in Khitish Chandra Saha's sweet shop and two sons of her are the actual owners of the properties inherited from Khithish Chandra Saha.

In the course of circumstances, Polash filed a declaration suit in Feni. Shimul Rani Saha claimed that on the title suit filed in 1993, Polash did not claim himself as an adopted son of Khitish Chandra Saha then. She also claimed that Polash took the chance to file the present suit for declaration while the relation between her and her mother was bitter. On the filing of declaration suit by Polash as plaintiff, the Senior Assistant Judge, Dagonbhuiyan, Feni passed a decree stating that Polash is a legally adopted son of Khitish Chandra Saha. Later, the appeal by Shimul Rani Saha and one of her sons was heard by Joint District Judge, First Court, Feni, who dismissed the appeal affirming the judgment of the Senior Assistant judge. The defendants, being aggrieved, filed a revision on High Court Division and obtained rule in their favour which was made upon hearing the parties absolutely. Then, the contested plaintiff Polash applied for leave to appeal, and it was granted.

3. Analysis of the Judgment

The judgment of *Polash Chandra Saha v. Shimul Rani Saha and ors.*⁵ was on the essence of the positivist school where the judges of the Appellate Division completely ignored the circumstances from where the situation arose. The judgment was made upon two days of hearing. The Judges of the Appellate Division referred to the case named *Pankaj Kumar Saha v. Sub-Divisional Officers, Islampur and Others*,⁶ and found that Polash's birth name was Krishna Chandra Das was from the Sudra caste. His adoptive father, Khitish Chandra Saha, was of the Vaishya caste. Hindu law requires that the father and the son belong from the same caste in adoption, but it is not necessary to belong from the same sub-caste.⁷ Other requirements are that

⁵ *Palash Chandra Saha v. Shimul Rani saha & ors.* 14SCOB[2020]AD pp.88-95

⁶ [1996] 8SCC 264

⁷ D.F. Molla, "*Molla's Principles of Hindu Law*", 18th Edition, p. 92 para 12

the children must be a boy⁸ and the adoptive father of the boy and the natural mother of the boy have to be able to be legally married.⁹ Thus, judges found that the son and adoptive father must be from the same caste irrelevance of sub-caste.

Caste is the hereditary social class in Hinduism that restricts the occupation of their members and their association with the members of other castes.¹⁰ Hence, the plaintiff's advocate argued that the restriction of caste was lifted by the Caste disabilities Removal Act, 1850.¹¹ Also, the ritual of adoption was complete, and from then, Polash lived with his adoptive father and had no relation with his natural father. The doctrine of *factum valet* will be applicable here. Henceforth, the judges of the Appellate Division said that the Act is not applicable in Bangladesh.¹² Mr. Justice Muhammad Imman Ali stated, "According to Hindu Law, any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet*. Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts. Even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste."¹³ The judges also found that the decision of the title suit of 1993, where Polash was declared as a legally adopted son of Kshitish Chandra Saha, is a mere *obiter* and finding of the court of facts was from the decision that title suit of 1993.¹⁴ Part of a judgment not necessary for the decision of the case, but a judicial opinion is referred to as *obiter*.¹⁵ After all, the Appellate Division of the Supreme Court of Bangladesh stayed with the decision of the High Court Division, where Polash was declared that he is not legally adopted son of Kshitish Chandra Saha. By taking accounts of some historical retrospective and following the law strictly while ignoring the current circumstances worldwide, the judges took a positivist approach to decide the legitimacy of that adoption. Also, they took a conservative approach to this matter while the worldwide approach to these kind of issues is liberal. The judges ignored the fact that Polash lived with his adoptive family since he was six months old, and both of his natural parents passed away already.

Furthermore, he hadn't any relation with his natural family since his adoption, and now he is more than fifty. A man who spent his whole life with a family, considering his own and looked after all his father's properties,¹⁶ found out that he was not adopted according to the Hindu Family Law after fifty years of his adoption, and now the adoption is illegal.¹⁷ Besides, Polash now will have to struggle for a legal identity of his own. Emphatically, did Polash deserve that? Is it moral to say the adoption is illegal and Polash has no right to be the son of Kshitish Chandra

⁸ *ibid*

⁹ *ibid*

¹⁰ "Caste", Merriam-Webster.com, Merriam-Webster, 2021, January 22; available at: <<https://www.merriam-webster.com/dictionary/caste>> last accessed on January 22, 2021

¹¹ Act no. XXI of 1850

¹² *Palash Chandra Saha v. Shimul Rani saha & ors.* 14SCOB[2020]AD pp.88-95

¹³ *ibid*

¹⁴ *ibid*

¹⁵ "Obiter", Britannica.com, Britannica; available at: <<https://www.britannica.com/topic/obiter-dictum>> last accessed on January 21, 2021

¹⁶ *Palash Chandra Saha v. Shimul Rani saha & ors.* 14SCOB[2020]AD pp.88-95

¹⁷ *ibid*

Saha for some historic retrospective? Moreover, such disabilities is violation of the constitution of Bangladesh and is also the Fundamental Human Rights.¹⁸ Is it constitutional to invalidate an adoption due to caste disability?

4. Probable Impacts of the Judgment

According to the jurists of Hindu Law, “a fact is not changed by a hundred texts.” However, the Privy Council considered this doctrine to apply only to directory texts, and it is inapplicable to mandatory texts.¹⁹ We can find many precedents where it was mentioned that the doctrine of factum valet is not applicable in mandatory but in directives of Hindu Law. But the Judgment of Appellate Division is about factum valet and the caste system in Bangladesh. When the Appellate Division judges stated that the Cast Disabilities Removal Act, 1850 is not enforceable in Bangladesh,²⁰ they impliedly asserted and validated the presence of the caste system in Bangladesh among Hindus. The judgment invalidated the applicability of this Act and ignored the impacts of lifting the caste disabilities. The lack of statute regarding the relevant provision of adoption-related law in Bangladesh was felt in this case.

Suppose, we see caste disabilities among Hindus in Bangladesh. In that case, we'll indeed find about several castes of Hindus and how they suffer from the caste system due to lack of legal provision. Dalit is the worst sufferer of the mentionable castes among Bangladeshi Hindus.²¹ People don't even talk with them properly without their needs as they are mostly sweepers.²² People usually don't want to socialize with them. They don't get to admit to good educational institutions for that reason.²³ Eventually, generation after generation, they remain in that particular job as they don't get the proper education.²⁴ The roots of the caste system trace back to ancient ages where undue advantage was taken by the section of the upper community leading to exploitation and discrimination of the section of the weaker community.²⁵ Evil faces of this caste system include untouchability²⁶, discrimination²⁷, division of labor²⁸, and to some extent, slavery^{29,30}. While the government of India is enacting laws to remove untouchability and guaranteeing fundamental human rights to the weaker section of the society through the

¹⁸ The Constitution of the People's Republic of Bangladesh, Article, 28(3)

¹⁹ *Supra Note 2*

²⁰ *Palash Chandra Saha v. Shimul Rani saha & ors.* 14SCOB[2020]AD pp.88-95

²¹ Habiba Sultana & D. B. Subedi, “*Caste System and Resistance: The Case of Untouchable Hindu Sweepers in Bangladesh*”, 2016, 29 Int J Polit Cult Soc; available at: <<https://doi.org/10.1007/s10767-015-9202-6>> last accessed on January 27, 2021

²² *ibid*

²³ *ibid*

²⁴ *ibid*

²⁵ “*Caste system in India*”, Vikaspedia; available at: <<https://vikaspedia.in/social-welfare/social-awareness/all-are-equal>> last accessed on February 10, 2021

²⁶ Untouchability: This practice refers where Villagers are separated by caste and they do not cross the line dividing them from higher castes, they do not use the wells or drink in the same tea stalls as higher castes.

²⁷ Discrimination: The lower castes often do not have facility to electricity, sanitation, water pumps, excess to education, medical facilities as the higher castes.

²⁸ Division of Labor: Lower castes often restricted to certain occupation like sanitation work, plantation work, cleaning streets, etc.

²⁹ Slavery: Lower castes are subjected to exploitation in the name of debt, tradition, to work as labourers or perform menial tasks for generations together.

³⁰ *Supra Note 25*

constitution,³¹ the government of Bangladesh is still struggling to enact legal provisions regarding the caste system among Hindus. In addition, the Supreme Court of Bangladesh recognizing caste disabilities instead of restricting them.

From a judgment of the Supreme Court of India, we find that "Inter-caste marriages and adoption are two important social institutions through which secularism would find its fruitful and solid base for an egalitarian social order under the constitution. Therefore, due recognition should be accorded for social mobility and integration and accordingly its recognition must be upheld as valid law".³² The case shows us, for the sake of secularism under the constitution the society needs inter-caste marriage and adoption and the recognition of inter-caste proceeding need to be upheld as valid law. The presiding judges of that case³³ elaborated secularism in a broader perspective, which kenneled within the castes. Secularism is one of the fundamental principles of the constitution,³⁴ and courts should start following the principles of secularism.

Furthermore, an adopted child is to be deemed the child of his adopted parents for all the purposes with effect from the date of adoption.³⁵ So, the question of caste doesn't arise as it becomes *ipso facto*. Just like a woman becomes a part of her husband's family after her marriage, and the question of caste doesn't arise after their marriage even though she used to belong to another caste before her marriage.³⁶ Besides, A caste is a voluntary association of persons for certain purposes. It can't be said that a caste member is determined only by birth but not anything else.³⁷ So, once a person has been adopted, it's no longer necessary to view the matter in its historical retrospect. As there is a lack of statutes regarding Hindu Family Law in Bangladesh, the courts mostly follow the precedents set by upper courts. So, the judgment of *Palash Chandra Saha v. Shimul Rani Saha & ors.*³⁸ could've been the pioneer of removing caste disabilities in Bangladesh. At the same time, it could've been a landmark for bringing constitutional secularism into the practical life of Bangladeshi Hindu societies. But it seems that we, the people of Bangladesh, need to wait a bit longer for that kind of a day.

5. Concluding Remarks

The concerns of caste disabilities among Hindu societies in Bangladesh cannot be denied. The evil face of caste disabilities is sure from the above discussion. The court faced a lack of legal provision regarding adoption in this case. While the case's decision focused on *factum valet*, the riddle of Caste Disabilities, Secularism, and Morality remain in our mind as unsolvable. What we can see is that the law was strictly followed in that case. The moot question remains whether justice has been provided or not. Furthermore, whether the judgment is moral or immoral,

³¹ Constitution of India, Articles, 14, 16 & 17

³² *Mrs. Valsamma Paul vs. Cochin University and Others*, (1996) SC, 2021, January 21; available at: <<https://indiankanoon.org/docfragment/4735043/?formInput=caste%20by%20adoption>> last accessed on January 21, 2021.

³³ *ibid*

³⁴ *Supra Note* 18, Preamble

³⁵ *Dr. Ashok Kumar vs State of U.P. And Others*. (1998) SC; available at: <<https://indiankanoon.org/docfragment/496506/?formInput=caste%20by%20adoption>> last accessed on April 24, 2021.

³⁶ *ibid*

³⁷ *ibid*

³⁸ *Palash Chandra Saha v. Shimul Rani saha & ors.* 14SCOB [2020] AD pp. 88-95

secular or non-secular, will continue to be debated. As late Professor Dr. M. Shah Alam said, “Everything illegal is not immoral, everything immoral is not illegal.”